

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001544-MR

JACKIE AMOS AND
PATRICIA J. SIBLEY

APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 04-CI-00720

JOYCE SUSAN BRUCE CLUBB;
ARICKA LYNN BRUCE; AND
JOHNNY HILTON SIBLEY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Jackie Amos (Jackie) and Patricia Sibley (Patricia)

unsuccessfully challenged the validity of the Last Will and Testament of Terry

Clubb (Terry).¹ They appeal from the trial court's judgment upholding a jury

¹ We note that, although he was named as a defendant below and is an appellee herein, Johnny Hilton Sibley aligned himself with Jackie and Patricia at trial. Therefore, we only refer to Susan

verdict finding that Terry's Will was not the result of undue influence. On appeal, Jackie and Patricia argue that the trial judge improperly questioned two witnesses and improperly admitted evidence. Having reviewed the record, and for the following reasons, we affirm.

FACTS

At the outset, we note that this matter was previously before this Court on appeal from the trial court's summary judgment. *See Amos v. Clubb*, 268 S.W.3d 378 (Ky. App. 2008) (hereinafter referred to as *Amos I*). We summarize the following basic facts as set out in *Amos I*: Jackie and Patricia are sisters and the daughters of John and Ruth Clubb (John and Ruth). Terry, who is Jackie's biological son and Patricia's biological nephew, was legally adopted by John and Ruth. Therefore, Terry is legally the brother of Jackie and Patricia.

Ruth died in 1998. Terry and Joyce Susan Bruce Clubb (Susan) began dating in 1998 and Susan and her daughter, Aricka Lynn Bruce (Aricka), moved in with Terry. In 2000, Terry, Susan, and Aricka moved in with John to care for him while he battled cancer. John lost the battle and died in 2002, leaving his estate equally to Terry, Jackie, and Patricia. The major asset in John's estate was a 154-acre farm in Oldham County (the farm).

On or about March 4, 2004, Terry was diagnosed with esophageal cancer. The cancer progressed quickly and, on March 29, 2004, Terry died. During the intervening 25-day period, a number of events took place, including the

Bruce Clubb and Aricka Lynn Bruce as the appellees herein.

marriage of Terry and Susan, Terry's execution of a Will, Terry's execution of several Powers of Attorney, and Terry's purported execution of a document relinquishing his claim to his portion of the farm (the relinquishment document). The trial court, with no explanation, granted the motion for summary judgment.

We reversed the trial court, noting that undue influence is generally proven by circumstantial evidence. We held that evidence regarding: Terry's pain and medication level; his dependence on Susan and Aricka during his illness; his failure to mention Jackie and Patricia in his Will; as well as evidence that Terry and Susan had a troubled relationship, created issues of fact for jury determination. Furthermore, we noted that, because the testimony from the witnesses was at odds regarding Terry's competence and Susan and Aricka's influence, witness credibility was also an issue for determination by a jury.

The events as briefly outlined above, in particular the marriage of Terry and Susan and Terry's execution of the Will and the relinquishment document, underlie the issues on appeal herein. We summarize below the procedural steps and evidence from the record necessary for our analysis of those issues.

Throughout his life, Terry had an abiding interest and expertise in farm equipment, which he bought for his own collection and for resale. In February 2004, Terry and Dean Clubb (Dean) went on a trip to Mississippi to buy farm equipment. During the trip, Dean noticed that Terry was having difficulty eating and drinking; therefore, when they returned to Kentucky in early March, he

encouraged Terry to see his doctor. Terry went to his doctor who admitted Terry to the hospital for diagnostic testing, which revealed that Terry had advanced esophageal cancer. During his stay in the hospital from March 4 through March 6, Terry executed a power of attorney naming Jackie as his attorney-in-fact and a living Will naming Susan as his health care surrogate. During the course of litigation, Jackie produced the relinquishment document, which she said Terry had asked her to prepare and which Terry allegedly signed. Jackie testified she knew the relinquishment document was not legally binding, but that Terry wanted it to show his intent to keep the farm in the family.

After Terry was discharged from the hospital, he contacted Dean and asked if he knew of any attorneys. Dean suggested attorney Bill Brammel (Brammel), whom Dean described as ethical and “a good Christian man.” Brammel testified that he may have briefly met with Terry and Dean on March 19, 2004, to schedule an appointment and to prepare a revocation of the power of attorney naming Jackie as Terry’s attorney-in-fact. On March 21, Jackie received a copy of the revocation of the power of attorney naming her as attorney-in-fact. She then went to Terry’s, tore up the document, threw it at Terry, and told him that he was no longer part of the family.

On March 22, Brammel met with Terry for approximately one hour to discuss Terry’s estate. Susan and Aricka were present during the entire meeting. Following the meeting, Brammel prepared a Will for Terry that: named Aricka as executrix; gave one of Terry’s tractors to Johnny Hilton Sibley, Terry’s cousin;

gave his horses to Aricka; and divided the remainder of his estate between Susan and Aricka. Brammel also prepared two powers of attorney, one naming Aricka as Terry's attorney-in-fact and one naming Terry's friend Warren Wheeler (Wheeler) as Terry's attorney-in-fact. Brammel testified that, during the March 22 meeting, Terry knew the extent of his property and how he wanted to dispose of it. Furthermore, Brammel testified that Terry did not appear to be acting under any undue influence.

Magistrate Dave Brown (Brown) testified that, sometime in March 2004, Terry called him to see if he could perform a wedding. Brown advised Terry that he needed to get a marriage license and have two witnesses. On March 23, Brown presided over Susan and Terry's wedding. The only people in attendance at the wedding were Susan, Terry, Aricka, Brown, and two witnesses. Terry did not invite Jackie, Patricia, or any other relatives or close friends. We note that testimony differed concerning when relatives and friends were told that the wedding had taken place; however, it appears that none of them had any advance notice. Furthermore, testimony differed regarding Terry's attitude toward marriage, whether he had ever contemplated marriage to Susan, and the state of the couple's relationship.

On March 25, Terry returned to Brammel's office to execute the Will and two powers of attorney. Because Terry was too weak to walk from his van to Brammel's office, Brammel went to the van to get the documents signed. Both Susan and Aricka were in the van with Terry. Two people from Brammel's office,

Josh Clubb (Clubb), a law clerk, and Toni Hall (Hall), an administrative assistant, witnessed Terry's signature. Brammel, Clubb, and Hall testified that they did not believe that Terry was impaired the day he executed his Will.

Terry died on March 29, 2004, and Aricka was appointed executrix of Terry's Will on May 11, 2004. Jackie and Patricia filed a complaint contesting the Will on October 18, 2004, alleging that Terry lacked the capacity to marry, lacked testamentary capacity, and was unduly influenced by Susan and Aricka.

As previously noted, this matter came before this Court regarding the issue of the propriety of the court's summary judgment in favor of Susan and Aricka. We remanded this matter to the court for further proceedings. Those proceedings included a trial, following which eleven of the twelve jurors found in favor of Susan and Aricka. We note that, although the parties presented a substantial amount of evidence regarding Terry's competence and the legitimacy of his and Susan's marriage, the only issue presented to the jury was whether Terry's Will was the result of undue influence. We set forth additional facts below as necessary to address the issues raised on appeal.

STANDARD OF REVIEW

The standard of review is different for the various issues raised on appeal; therefore, we set forth the appropriate standard in our analysis of each issue.

ANALYSIS

1. Admission of Evidence

We first address the issue of the trial court's admission of evidence regarding the relinquishment document. Prior to trial, Jackie and Patricia relied on the relinquishment document, in part, to support their claim of undue influence. A forensic document examiner, Steven Slyter (Slyter), analyzed Terry's signature on the relinquishment document and opined that the signature was not Terry's but that it had been traced from Terry's signature. However, he could not state who had traced the signature.

In an attempt to exclude Slyter's testimony, counsel for Jackie and Patricia filed a *motion in limine* seeking to exclude any evidence regarding the relinquishment document. In support of the motion, counsel stated that he was not going to present any evidence regarding the relinquishment document, and he argued that doing so would make Slyter's testimony irrelevant. He also argued that Slyter's testimony would amount to an impermissible attack on Jackie's character. Counsel for Susan and Aricka argued that the relinquishment document had been a key part of Jackie and Patricia's evidence regarding undue influence from the beginning of the case. Because Terry's intentions were a significant factor in proving undue influence, counsel argued the relinquishment document and Slyter's testimony were admissible. Furthermore, counsel argued the document and Slyter's testimony would be admissible as impeachment evidence to attack Jackie's credibility. The court overruled the motion, finding that Slyter's testimony and the relinquishment document were admissible because the document was "championed" by Jackie and Patricia and "for impeachment purposes." At

trial, counsel for Susan and Aricka played Slyter's video deposition for the jury; questioned Jackie about the relinquishment document; and discussed the document in his opening statement and closing argument.

The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

We first address the admission of the relinquishment document. Jackie and Patricia argue that the relinquishment document and any evidence related to that document were not relevant to the issue before the jury. We disagree. The issue before the jury was whether Terry's Will was the product of undue influence. One of the factors of undue influence is whether a Will contains "unnatural" provisions. *Bye v. Mattingly*, 975 S.W.2d 451, 457 (Ky. 1998). A written expression of Terry's intentions that controverted the terms of his Will is relevant evidence related to that factor. Therefore, the relinquishment document was relevant and admissible. Kentucky Rules of Evidence (KRE) 401 and 402.

Jackie and Patricia argue that they made a conscious choice not to offer the relinquishment document into evidence, and the court could not force them to do so. That is true. However, the converse is also true. Jackie and

Patricia could not, by refusing to offer the relinquishment document into evidence, keep Susan and Aricka from offering it.

Having determined that the relinquishment document was admissible, we turn to the admissibility of Slyter's testimony. Jackie and Patricia argue that Slyter's testimony was an impermissible attack on Jackie's character, citing KRE 404, 405, and 608. KRE 404 generally provides that character evidence is not admissible to prove "action in conformity therewith." KRE 405 sets forth how character evidence should be presented when it is admissible. KRE 608 generally provides for the admission or exclusion of opinion and reputation evidence of character. We agree that Slyter's testimony, if it was offered simply to impugn Jackie's character, was not admissible. However, Slyter's testimony was not offered simply to impugn Jackie's character. It was offered to attack her credibility, which is permissible under KRE 607.

The crux of Jackie and Patricia's case was that Terry's Will went against his express wishes to keep the farm in the family. In support of her position, Jackie testified in her deposition that Terry asked her to prepare the relinquishment document and that he signed it. Once Jackie presented the relinquishment document to show Terry's intentions, questions regarding the authenticity of Terry's signature were inevitable and permissible. Proof that Terry's signature was not authentic is evidence that the document did not express his wishes. Furthermore, proof that Jackie offered the relinquishment document to support her testimony about Terry's wishes goes to her credibility on that issue.

Finally, we note that Susan and Aricka's tactical decision to use the relinquishment document when Jackie and Patricia had forsworn from doing so, could easily have backfired. The jury was as likely to believe Jackie's testimony about the preparation and signing of the document as they were Slyter's testimony about Terry's signature. Based on the foregoing, we discern no error in the trial court's decision to admit the relinquishment document and testimony regarding the document into evidence.

2. Questioning of Witnesses by the Court

A trial judge "is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction, unless there has been an abuse or a most unwise exercise thereof." *Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992). With this standard of review in mind, we next analyze the propriety of the trial court's questioning of Brammel and Hall.

As noted above, Brammel testified about his meetings with Terry and his impression of Terry's capacity. He also testified that he did not believe that Terry was being unduly influenced by Susan and/or Aricka. After the attorneys finished questioning Brammel, the trial judge asked several questions. That questioning and Brammel's responses are set forth *in toto* below.

Ct: Bill, just a quick question. The nature of your practice, obviously you're in a small community, you're in New Castle, you work in Henry County, you've been

there for years, um, so you get all kinds of folks walkin' in your door and uh I - I had a similar practice for years when I was younger in a small community. But you never know what's comin' in the door type thing. So just - this is more of a curiosity question, have you ever had, um, an issue come up in your mind with a person that you felt wasn't capable or that something was - was happening that you were uncomfortable with where you felt it best not to do the Will until you further investigated, anything like that?

Brammel: Uh, I can't recall a specific occasion with a Will separately. I - I can recall instances with um similar type [sic] of documents uh I remember in particular a lady that um uh who was experiencing alzheimer's and uh her husband was desperately trying to get a power of attorney uh because he needed to carry out some real estate transactions and um came to me on a couple of occasions thinking, "Today I think she's having a good day, can she do it?" And I remember uh having to just shake my head and say, "I'm sorry. After talking with her, we just can't do that."

I can remember another situation where that there [sic] were some issues and - and a lady who wasn't preparing a Will but was trying to deal with some things in antici - outside of a Will - but in anticipation of the fact that she would probably be passing away - I think she was wanting to execute a deed to get - to give - some property. And uh there were questions surrounding her and on that occasion I - uh because I had questions, after I did talk to her at length, uh even recorded the conversation asking questions about uh current events and (inaudible) just so I was satisfied she knew what she was doing. My - I believe that - that over the years there probably have been other occasions with Wills but I can't call to mind a specific occasion.

Ct.: Alright. Uh - well, thank you. And as - so the point is it comes up sometimes in context of makin' contracts, making deeds, signing legal documents - the attorney has to make a judgment on - on at least one level for your mind and you're talkin' about mental competency and of

course now this – this case involves more than just that I’m sure, but

Brammel: Yes.

Ct.: Okay.

Brammel: Yes.

Ct.: In light of his answers, do either of you feel like you need to ask him anything else? I always think it’s more fair to give you an opportunity if I’ve asked something.

Both counsel declined to ask Brammel any additional questions.

As also noted above, Hall testified regarding her observations of Terry when he came to Brammel’s office and when she witnessed the Will. After the attorneys indicated they were finished questioning Hall, the trial judge questioned her as follows:

Ct.: Toni, let me ask you a couple of things. Uh, you and I have known each other for some time just because I – I, you know, cover her county, where she is. Would you descri – when you say Mr. Clubb – Mr. Clubb - was a “cut-up.”

Hall: Uh-huh.

Ct.: Tell us why you say that. Why are you saying that?

Hall: Um. A lot of people when they call to make an appointment, especially for a Will, um, you know, they’re just to the point and don’t really say a whole lot other than what they’re calling about. Um, he just always seemed to be in a good spirit when he called and when he came in, you know, always made small jokes or had a comment or somethin’ to say. You know, he just didn’t sit out there and wait for Bill to come and get him so - and I sit out front so I do speak to a lot of the people that come in.

Ct.: And would you describe yourself a similar personality?

Hall: Yes. Usually.

Ct.: Well, if I had to say so, I'd say you were, too. So you and he got along is what

Hall (interposing): Yes – yes.

Ct.: You're saying. Um, do you remember how, uh, or when you first heard about Mr. Clubb – or who - was it a phone call? Did somebody – drop - just come in the door? How did that come about?

Hall: To the best of my recollec - recollection, I think he had come in, um, and then we'd made a connection that um - because Dean Clubb was also a client of ours and that he uh, I think, referred Terry to us.

Ct.: Do – When was the first time you remember seeing Mr. Clubb? Was he comin' in with Miss Bruce and Miss – and uh - with Susan and Aricka or was he comin' in with somebody else?

Hall: To the best of my recollection, the first time he came in, he was by himself and I don't remember exactly what date that was.

Ct.: Do you recall if he spoke with, uh, Bill Brammel on that day?

Hall: Yes, that's the appointment he would have come in to speak with Bill that day.

Ct.: Do you remember any of the circumstances about that? Where it was?

Hall: Inaudible

Ct.: Okay. Alright. And that's not unusual for people to stop by, I take it.

Hall: Well, usually they will call for an appointment and I think the day that he come [sic] in, he actually had a scheduled appointment.

Ct.: Okay. Alright, any other questions in light of this?

Counsel for Jackie and Patricia followed up with a question about whether Terry drove himself to Brammel's office on March 19, to which Hall responded that she did not recall. The trial judge then continued questioning Hall as follows:

Ct.: Um, even up to the last time you saw him on the 25th, when he was sittin' in the van,

Hall: (interposing) Uh huh.

Ct.: Um, was he still that type of personality you had mentioned? Was he still cutting up, so to speak?

Hall: Yes, he was. And again, I hate to keep reiterating the fact that he made the comment about fishing, but I mean that was just the kind of personality that he had, and why I think it shocked us that he passed so soon after the time he was in there, or at the office.

Ct.: Alright. Okay, Toni, well thank you very much. Appreciate your comin.'

Neither party asked the court for leave to further question Hall.

Jackie and Patricia argue on appeal that the trial judge's questioning of Brammel and Hall unduly enhanced those witnesses' credibility, to the prejudice of Jackie and Patricia's case. Susan and Aricka argue that Jackie and Patricia did not properly preserve this issue for our review. They also argue that the trial

judge's questioning of these witnesses, taken in the context of the entire trial, was not prejudicial. We first address the preservation argument.

As a general rule, if a party does not timely object to an error, that error is not subject to review, absent evidence that the error caused manifest injustice. *See* KRE 103(a)(1). However, objections to conduct by a trial judge during trial are preserved for review if raised in a motion for a new trial. *Collins v. Sparks*, 310 S.W.2d 45, 48 (Ky. 1958). Jackie and Patricia raised this issue in their motion for a new trial; therefore, they properly preserved it for our review.

Next we address whether the trial judge's actions were prejudicial to Jackie and Patricia's case. KRE 614(b) provides that the court may interrogate witnesses. However, because a "trial judge's observations and comments usually carry such weight with the jury. . . they must be subject to safeguards against abuse." *Terry v. Commonwealth*, 153 S.W.3d 794, 802 (Ky. 2005) (citing *Davidson v. Commonwealth*, 394 S.W.2d 911, 912 (Ky. 1965)). A trial judge, when questioning a witness, should avoid imposing her opinion as to the credibility of that witness and must avoid crossing the line between impartial arbiter and advocate. *Id.* at 803; *Transit Authority of River City (TARC)*, 836 S.W.2d at 416. To guide trial judges, the Supreme Court of Kentucky adopted the three-factor test used in Federal courts.

First, in a lengthy, complex trial, judicial intervention is often necessary for clarification. Second, if the attorneys in a case are unprepared or obstreperous or if the facts are becoming muddled and neither side is succeeding at attempts to clear them up, judicial intervention may be

necessary for clarification. Third, *if a witness is difficult*, if a witness' [sic] testimony is unbelievable and counsel fails to adequately probe, or if the witness becomes inadvertently confused, judicial intervention may be needed.

Terry, 153 S.W.3d at 803 (citing *United States v. Slone*, 833 F.2d 595, 597 (6th Cir. 1987)) (emphasis in original). As noted by Jackie and Patricia, none of the three factors applies to this case. The trial was lengthy, but not overly complex. The attorneys were neither unprepared nor obstreperous. In fact, they appeared to be well prepared and fully cooperative with each other and the court. Finally, neither Brammel nor Hall was a difficult witness. Therefore, under *Terry*, it appears the trial judge should have resisted the urge to insert herself into the proceedings.

However, our analysis cannot stop there. We must determine if the trial judge's questioning of Brammel and Hall prejudiced Jackie and Patricia's case. See *Irwin v. Jenkins*, 427 S.W.2d 819, 820 (Ky. 1968); *Transit Authority of River City (Tarc)*, 836 S.W.2d at 416. Having reviewed the trial, we hold that it did not.

At the outset, we note that the trial judge's questioning of Brammel and Hall dealt exclusively with the issue of Terry's competence. That issue, by itself, was not before the jury. The issue before the jury was whether Terry's Will was the product of undue influence and, while competency is a factor in determining undue influence, it is not the only factor. See *Bye*, 975 S.W.2d at 457.

Several witnesses did testify that Terry was weak, had difficulty speaking in his final days, and sometimes repeated himself; testimony that did not necessarily contradict the testimony of Brammel and Hall. None of the witnesses testified that Terry was unaware of what was taking place on March 22 when he discussed the provisions of his Will with Brammel or on March 25 when he executed his Will. Furthermore, we note that it was Terry who asked Dean to recommend an attorney and that Dean recommended Brammel because he was “an ethical man” and “a good Christian man.” Faced with this evidence, and in particular Dean’s testimony regarding Brammel’s character, we conclude that any enhanced credibility that Brammel and Hall received by the trial judge’s questioning was not prejudicial to Jackie and Patricia’s case. Therefore, although unwarranted, we discern no reversible error in the trial judge’s questioning of Brammel and Hall.

CONCLUSION

As set forth above, the trial judge did not abuse her discretion when she admitted into evidence the relinquishment document and testimony regarding its authenticity. Furthermore, although the trial judge’s questioning of Brammel and Hall may have been unwarranted, it did not prejudice Jackie and Patricia’s case. Therefore, we affirm the judgment in favor of Susan and Aricka.

ALL CONCUR.

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