

RENDERED: DECEMBER 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000670-MR

DAVID J. BERRY; DARYL J. BERRY;
JOY D. BERRY; OLIVIA THOMAS;
AND MICHAEL HAYES

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 98-CI-00853

GLORIA THOMAS

APPELLEE

AND

NO. 2000-CA-002567-MR

GLORIA THOMAS, M.D.;
GAVIN BERRY; AND IAN BERRY

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NOS. 98-CI-00782 AND 98-CI-00853

DAVID J. BERRY; DARYL J. BERRY;
JOY D. BERRY; MICHAEL HAYES;
OLIVIA THOMAS; THEODORE BERRY;
ULYSSES BERRY; JAMES BERRY;
RONALD BERRY; EDNA TAYLOR;
EDWARD BERRY, JR.; GORDON
BERRY; JULIUS BERRY; BARRY
BERRY; BEVERLY BERRY ABDALLA;
TANYA BURTON; MICHAEL BERRY;
JAMES H. TAYLOR, ADMINISTRATOR
OF THE ESTATE OF JACQUELYN
BERRY TAYLOR; AND MICHAEL W.

KEHOE, ADMINISTRATOR OF THE
ESTATE OF DAVID R. BERRY

APPELLEES

AND

NO. 2000-CA-002724-MR

DAVID BERRY; DARYL BERRY;
AND JOY BERRY

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 98-CI-00782

OLIVIA THOMAS; MICHAEL HAYES;
THEODORE BERRY; ULYSSES BERRY;
JAMES BERRY; RONALD BERRY;
EDNA TAYLOR; EDWARD BERRY, JR.;
GORDON BERRY; JULIUS BERRY;
BARRY BERRY; BEVERLY BERRY ABDALLA;
TANYA BURTON; MICHAEL BERRY;
JAMES H. TAYLOR, ADMINISTRATOR OF
THE ESTATE OF JACQUELYN BERRY TAYLOR;
AND MICHAEL W. KEHOE, ADMINISTRATOR
OF THE ESTATE OF DAVID R. BERRY

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: COREY, SPECIAL JUDGE¹; DYCHE AND EMBERTON, JUDGES.

DYCHE, JUDGE: David Rockroth Berry and Gloria Thomas were
married on April 24, 1987, in Cincinnati, Ohio. It was the
second marriage for both parties. Three days prior to the

¹Senior Status Judge Mary Corey sitting as Special Judge by
assignment of the Chief Justice pursuant to Section 110(5)(b) of
the Kentucky Constitution.

wedding, David and Gloria executed an antenuptial agreement drafted by David's attorney. David convinced Gloria that, because of the bitterness of his previous divorce, it would be best to have an agreement in place.

David and Gloria had two sons, Ian and Gavin. Gloria continued to practice medicine (general and cosmetic surgery) throughout the marriage. In 1996 the family moved across the Ohio River to Cold Spring, Kentucky. On December 30, 1998, David died suddenly.

After his death, Gloria learned that, in spite of his representations to the contrary, David had executed a Last Will and Testament in 1972. In that will, he left everything to his brothers, sisters, a nephew, his three children (appellants David J., Daryl J., and Joy D. Berry) from his previous marriage to Joyce Hamilton Berry, and any "future legitimate biological children." The will was denied probate in Kentucky because Kentucky Revised Statute [KRS] 394.090, in effect at the time of David's death, provided that a subsequent marriage revoked a previously executed will. (This statute has since been amended.) The denial of probate was affirmed by the Campbell Circuit Court and the Kentucky Court of Appeals (No. 1999-CA-000564); the Kentucky Supreme Court denied discretionary review.

Gloria also learned that David had been less than truthful in the disclosure of his assets, in his promises to make a will providing for her and to amend the agreement should they have children, and in the number of children actually fathered by him. Gloria brought an action for declaration of rights in the

Campbell Circuit Court wherein she sought to have the 1987 antenuptial agreement invalidated. On February 15, 2000, the Campbell Circuit Court entered its judgment in Gloria's favor. Appellants in No. 2000-CA-000670 are David's three children from his first marriage, and two children allegedly fathered by him out of wedlock.

In a related proceeding, Olivia Thomas moved to establish that she was the natural daughter of David R. Berry. After she introduced evidence to support David's paternity, Olivia moved for summary judgment, which was granted in her favor on April 20, 1999. The order was made final and appealable on October 13, 2000. Michael Hayes, however, was not so successful in proving that David was his father; summary judgment was denied him, and he appears to have abandoned his attempt to have paternity established. Gloria and her children² appeal from the summary judgment granted Olivia. Appeal Numbers 2000-CA-002567 and 2000-CA-002724 (which have been consolidated) address this issue.

We shall first address the consolidated appeals. Gloria and her children argue that the trial court granted summary judgment to Olivia prematurely; they insist that the matter of paternity was a jury issue, and thus improperly decided by the Campbell Circuit Court. We disagree.

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled

²Their notice of appeal includes the heirs of David's 1972 will as well as the administrator of his estate. Only Olivia Thomas has filed an appellee's brief.

to judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56.03; Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). In questions of paternity, the party moving to prove same must do so by clear and convincing evidence. KRS 391.105(b)(2); Fykes v. Clark, Ky., 635 S.W.2d 316, 318 (1982); Harris v. Stewart, Ky. App., 981 S.W.2d 122, 127 (1998).

The evidence of record meets this standard. Olivia not only introduced the deposition testimony of herself, her mother, and a disinterested party; she also deposed Gloria Thomas, who stated that Olivia had visited their home; that David had introduced Olivia as his daughter; that Gloria had met Olivia "many times in Kentucky"; that David "mentioned something about paying for college and being disappointed when [Olivia] dropped out"; and that Olivia would be at the annual Berry Christmas gathering "most of the time." In response to being asked how Olivia interacted with the Berry family, Gloria responded that "[t]hey knew she was Olivia Thomas and someone my husband treated as a daughter." Olivia also introduced copies of David's obituary notice and funeral announcement, both of which listed her as David's daughter. In fact, the latter document was prepared by Gloria and one of David's brothers.

Appellants admit that they have not offered and cannot offer any evidence to contradict Olivia's claim that she is the daughter of David Berry. However, they urge that it was not impossible for them to prevail at trial because Olivia continued to bear the risk of nonpersuasion. Hibbs v. Chandler, Ky. App., 684 S.W.2d 310 (1985). We find this argument disingenuous and

decline to discuss it further. We affirm the Campbell Circuit Court's summary judgment in favor of Olivia Thomas.

We now turn to appeal No. 2000-CA-00670 concerning the validity of the antenuptial agreement.³ All parties agree that an antenuptial agreement's validity is judged by the standards enunciated in Gentry v. Gentry, Ky., 798 S.W.2d 928, 936 (1990):

[T]he trial judge should employ basically three criteria in determining whether to enforce such an agreement in a particular case: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or non-disclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable? Scherer v. Scherer, Ga., 249 Ga. 635, 292 S.E.2d 662 (1982).

Should the trier of fact find the answer to any of these three queries to be "yes," it may decline to enforce the agreement.

Id.

The Campbell Circuit Court made fifteen pages of findings of fact. The trial court concluded that "none of the three criteria as set forth in Gentry are met in this case," and "the Court in the exercise of sound discretion will decline to enforce [the agreement]."

The trial court further found that David had breached the agreement by not dividing the couple's assets, by misleading

³Gloria's children have joined her even though they would have inherited more from David's estate had the agreement been upheld. Through their guardian ad litem they have agreed to accept Gloria's offer of a trust established for their benefit. Olivia's separate brief (and appellees' separate response) in this appeal was necessitated by the unexpected death of her prior attorney.

Gloria that he would execute a will, by falsely assuring her that he had provided for her and their sons in the event of his death. The court found the breach to be material, causing the antenuptial agreement to also fail for lack of consideration. The remedy for David's breach, the trial court stated, was to render the agreement unenforceable.

We have examined the record in its entirety and find substantial support for the trial court's judgment. As proponents of the antenuptial agreement, appellants bore the burden of proving its validity before the trial court. Edwardson v. Edwardson, Ky., 798 S.W.2d 941, 945 (1990). Here they have the burden of persuading this Court that the trial court's findings were clearly erroneous (CR 52.01; Lawson v. Loid, Ky., 896 S.W.2d 1, 3 [1995]), and that it abused its discretion in finding the agreement unenforceable (Edwardson, 798 S.W.2d at 946). Appellants neither met their burden in the trial court, nor do they meet it here.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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