

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002350-MR

CECIL HELTON, INDIVIDUALLY, AS
A BENEFICIARY AND HEIR, AND AS
CO-EXECUTOR OF THE ESTATE OF
DEWEY WILLIS HELTON, SR., DECEASED

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 02-CI-01291

BARBARA TUCKER, INDIVIDUALLY,
AS A BENEFICIARY AND HEIR, AND
AS CO-EXECUTRIX OF THE ESTATE
OF DEWEY WILLIS HELTON, SR.; AND
DEWEY WILLIS HELTON, JR., INDIVIDUALLY,
AND AS A BENEFICIARY AND HEIR, AND
AS CO-EXECUTOR OF THE ESTATE OF
DEWEY WILLIS HELTON, SR.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ CHIEF SENIOR JUDGE.

STUMBO, JUDGE: Cecil Helton, Individually, as a Beneficiary and Heir, and as Co-Executor of the Estate of Dewey Willis Helton, Sr., Deceased, appeals from an Order dismissing and subsequent Order Amending Dismissal of the Pulaski Circuit Court in his action seeking an accounting of estate assets. The action was dismissed pursuant to CR 77.02 based on Helton's failure to prosecute the action, and he now contends that the dismissal was in error. As Cecil Helton failed to comply with the circuit court's repeated directives to show good cause why the action should not be dismissed for lack of prosecution, we cannot conclude that the circuit court abused its discretion in dismissing the action. Accordingly, we affirm the orders on appeal.

On September 15, 1997, Dewey Willis Helton, Sr. executed a durable power of attorney in favor of his daughter, Barbara Tucker. Tucker exercised the power of attorney from 1997 until her father's death on January 22, 2002. During that time, Tucker paid her father's bills using his assets, took him to the doctor when required, and had the keys to his house.

When Tucker's father died, she was appointed co-executor of the estate. Dewey Willis Helton, Jr. and appellant Cecil Helton ("Cecil") were also appointed co-executors. On December 18, 2002, Cecil filed, in his capacity as heir

¹ Chief Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and co-executor, a Petition for Settlement of Estate in Pulaski Circuit Court in which he sought an accounting of Tucker's expenditures prior to her father's death.

On February 26, 2003, the circuit court ordered the accounting sought by Cecil, and Tucker filed the accounting on March 13, 2003. The 78-page accounting lists expenditures made by Tucker on behalf of her father from September 1997, through April 2002, and includes specific expenditures and check numbers for each month during that period.

After the March 14, 2003 accounting was filed, the matter languished until August 16, 2004, when the circuit court rendered a show cause order directing Cecil to demonstrate why the action should not be dismissed for lack of prosecution. For reasons not apparent from the record, the action was then continued on the docket by way of order rendered on September 27, 2004. Once again, no action was taken by Cecil for about two years. The record indicates that the circuit court rendered additional show cause orders on September 13, 2006 – to which Cecil did not respond – and on August 11, 2008. A little over a month after the third show cause order, Cecil filed a motion for an additional accounting, in which he alleged that Tucker's prior accounting filed in 2003 was "confusing, incomplete, and not supported by any documentation." Cecil filed no pleading, with affidavit, as required by the August 11, 2008 show cause order, demonstrating good cause as to why the action should not be dismissed.

On September 24, 2008, the circuit court rendered an Order dismissing the action with prejudice. As a basis for the order, the court examined

the various elements supporting involuntary dismissal as set out in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), including the extent of the plaintiff's personal responsibility for the lack of prosecution, the history of dilatoriness, whether the conduct of plaintiff's counsel was willful and in bad faith, etc. Cecil responded on October 3, 2008, with a Memorandum arguing that because the dismissal resulted from a docket call rather than motion of the opposing party, CR 77.02 was operative and required the dismissal to be without prejudice. Cecil went on to argue that Tucker's 2003 accounting was insufficient, thus requiring a continuation of the action. After Tucker's responsive filing in opposition, on November 13, 2008, the circuit court rendered an Order Amending Dismissal of September 24, 2008. The court stated therein that because the dismissal resulted from a docket call and CR 77.02, the dismissal was to be made without prejudice by operation of CR 77.02. The September 24, 2008 dismissal was in all other respects incorporated by reference. This appeal followed.

Cecil now argues that the Pulaski Circuit Court erred in dismissing the action for lack of prosecution. He contends that Tucker's March 14, 2003 accounting is wholly inadequate as it failed to make a full accounting of Tucker's expenditures on behalf of her father and his estate during the period when she exercised the durable power of attorney. Cecil maintains that he is seeking from Tucker no more than the law requires of her; *i.e.*, a full accounting of her actions during the time in question. He directs our attention to supportive case law, and maintains that many "expenditures were fictitious and obviously created to hide

some type of wrongdoing.” Cecil blames on his attorney the four years during which this action went unprosecuted, and in sum contends that the trial court improperly focused on his dilatoriness while ignoring that of Tucker in allegedly refusing to give a full accounting as required by law. He seeks an order reversing and remanding with directions requiring Tucker to provide a full accounting.

We have closely studied the record and the law, and find no error. The issue before us is not – as Cecil contends - whether Tucker has provided a thorough accounting of her expenditures while taking care of her father, but whether the Pulaski Circuit Court abused its discretion in terminating the action for failure to prosecute. We must answer that question in the negative. The circuit court dismissed the action based on CR 77.02(2), which states that,

At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

In dismissing the action via the first order, the court examined the elements set out in *Ward, supra*, to conclude that dismissal with prejudice was warranted. These factors include the extent of the plaintiff’s responsibility in failing to prosecute, the history of dilatoriness, whether the attorney’s conduct was willful and in bad faith, the meritoriness of the claim, the prejudice to the other party, and, the availability of alternative sanctions. The court found, for example, that while Cecil indicated

that he had health problems prior to September 2004, he alleged no health issues during the four years of inaction between September 2004, and the September 19, 2008 hearing. The court went on to find that Tucker filed an accounting in March 2003, and that Cecil filed no exceptions or requests for additional information at any time thereafter. The circuit court also found no bad faith on behalf of Cecil's counsel, concluded that Tucker was prejudiced by Cecil's inaction because more than five years had elapsed since she collected the information necessary to file the accounting, and that alternate sanctions were not available.

After Cecil's motion to alter, amend or vacate was filed, the court rendered an amended dismissal on November 13, 2008, noting that the action was dismissed pursuant to CR 77.02. Based on its application of CR 77.02, the court amended the dismissal to "without prejudice" and adopted in all other respects the court's prior *Ward* analysis.

We must note that the *Ward* analysis is properly applied to motions for dismissal with prejudice filed by opposing parties under CR 41.02, but not to so-called "housecleaning" dismissals *without* prejudice brought about on the court's own motion pursuant to CR 77.02. *See Manning v. Wilkinson*, 264 S.W.3d 620 (Ky. App. 2007), holding that as "a dismissal with prejudice deprives a litigant of the opportunity to pursue his or her claim, the trial is obligated to consider all relevant factors and lesser sanctions. We do not believe, however, that the same considerations necessarily precede a dismissal without prejudice under CR 77.02." This is not to say that application of the *Ward* elements to a dismissal analysis

arising under CR 77.02 is improper. Rather, as the panel of this court noted in *Manning*, it is merely unnecessary because dismissal under CR 77.02 is always without prejudice.

As noted above, though, the question before us is whether the Pulaski Circuit Court abused its discretion in dismissing Cecil's action under CR 77.02. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). In the matter at bar, it is uncontroverted that the action lay dormant for approximately four years due to Cecil's inaction. The record reveals no less than three show cause orders directing Cecil to demonstrate why the matter should not be dismissed. While Cecil responded to the first order, the second such order was rendered on September 13, 2006, to which Cecil did not respond and upon which no action was taken by the trial court. After the third show cause order was rendered, this one being entered on August 11, 2008, Cecil failed to comply with the court's directive to file "a pleading, with affidavit, showing good cause why no steps have been taken for more than one year" Though Cecil did file a motion for an accounting – though such an accounting had been filed years earlier – he made no response to the show cause order.

Cecil's failure to comply with the August 11, 2008 show cause order forms a proper basis for our determination that the trial judge's decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton, supra*. This is especially true in light of the record demonstrating that Cecil had

not prosecuted the action for a number of years, that Tucker had in fact filed a comprehensive accounting early in the action, to which no objection was made, and that the dismissal is without prejudice and therefore does not constitute a “death sentence” to Cecil’s claim. Accordingly, we find no error.

For the foregoing reasons, we affirm the Pulaski Circuit Court’s September 24, 2008 Order and subsequent Order Amending Dismissal of September 24, 2008.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John T. Mandt
Somerset, Kentucky

BRIEF FOR APPELLEE:

John G. Prather, Jr.
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