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**OPINION OF NOVEMBER 30, 2012, WITHDRAWN**

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-001055-MR

MAE THOMPSON, AS GUARDIAN AND
NEXT FRIEND OF MICHAEL PORTER — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 10-CI-00626

ESTATE OF GEORGE LESTER PORTER;
DEBORAH SPRINGBORN, EXECUTRIX
OF THE ESTATE OF MARY BERNADETTE
PORTER, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF GEORGE
LESTER PORTER;[1] J. CHESTER PORTER;
AND J. CHESTER PORTER ANDASSOCIATES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

[1] Mary Bernadette Porter died in November 2011. On October 3, 2012, this Court granted the Appellant's motion to substitute Deborah Springborn as executrix of the estate of Mary Bernadette Porter. However, the record is unclear as to who was named the new executor/executrix of the estate of George Lester Porter.

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER,[2] JUDGES.

CLAYTON, JUDGE: Mae Thompson, as guardian and next friend of Michael Porter, appeals from a summary judgment in favor of the Estate of George Lester Porter, Mary Bernadette Porter, Individually and as Executrix of the Estate of George Lester Porter, J. Chester Porter, and J. Chester Porter & Associates (hereinafter the "Estate"). Mae argues that summary judgment was erroneously granted since genuine issues of material fact exist and premature because she was unable to conduct discovery. After our review, and upon a rehearing of the case, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Mae Thompson, formerly known as Mae Porter, gave birth to Michael Anthony Porter on November 15, 1971. At that time, she was married to George Lester Porter (hereinafter "Lester"). As an infant, Michael sustained a head injury that left him permanently disabled. Subsequently, in 1980, Mae and Lester were divorced, and Lester was required to pay child support for Michael. Following the divorce, Lester had no contact with Michael. After Michael reached eighteen years, based on his permanent disability, the Jefferson Circuit Court ordered, on December 4, 1989, that Lester's obligation for child support be extended into Michael's adulthood. Child support benefits were set in the amount of $220 per month.

[2] Judge Michelle M. Keller concurred in this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

J. Chester Porter (hereinafter "Chester") is Lester's twin brother and a Bullitt County, Kentucky banker and lawyer. At about the same time as the court ordered the extension of Lester's child support during Michael's adulthood, Chester, with his own funds, set up an escrow account from which he made monthly payments to Mae in an amount equal to Lester's child support payments. Chester claims that he made this payment to ensure that Michael received the support regardless of whether Lester made the payments.

On July 14, 2009, Lester, while a resident of Nelson County, Kentucky, died. Lester's obituary failed to make any reference or mention of Michael. Mary Bernadette Porter,[3] Lester's surviving spouse, was named executrix in Lester's will. To deal with the probate of the estate, Mary Bernadette sought assistance from Chester's law firm. An attorney, Sharon H. Satterly, who practices law with Chester, represented Mary Bernadette.

In her capacity as Mary Bernadette's attorney, Satterly determined that at the time of Lester's death, his property, subject to probate, had a value of less than $15,000. In addition, she ascertained that the residence, owned by Mary Bernadette and Lester, was legally a tenancy by the entirety, and thus, outside the scope of probate. Accordingly, Satterly concluded that pursuant to Kentucky Revised Statutes (KRS) 395.455(1), formal administration of Lester's estate was not necessary.

[3] Since the instigation of this action, Mary Bernadette Porter has died. (DOD November 18, 2011).

Six days after Lester's death, Satterly filed a petition in Bullitt District Court for the admission to probate Lester's Last Will and Testament and the entry of an order dispensing with administration of the estate. Since Lester at the time of his death was a resident of Nelson County, Mary Bernadette, through counsel, submitted, with the petition to dispense with administration, a written waiver of venue. On that same day, the Bullitt District Court issued orders that admitted Lester's Last Will and Testament to probate, declined the appointment of a personal representative for the estate, and dispensed with administration of the estate. Neither Michael nor Mae was ever notified by anyone of Lester's death or the filing of probate.

Despite Lester's death, Chester continued voluntarily paying his brother's child support for about six (6) months. In the latter-half of 2009 and following Lester's death, Chester made support payments for Michael on July 31, September 23, October 28, November 30, and December 22. Chester says that he stopped making the payments because they were not being "presented for payment." Notwithstanding the continued payment of child support, Chester did not inform Mae of Lester's death or that a petition had been filed in Bullitt District Court to probate the will.

Mae, who lives in Casey County, only became aware of Lester's death when she read the obituary in the newspaper. Mae has never made a claim on Lester's estate for Michael's child support. As such, she did not make a motion

under KRS 395.500 to set aside the order dispensing with administration of the will or file a motion for admission to probate of Lester's estate in Nelson County.

On July 15, 2010, Mae filed a complaint in the Nelson Circuit Court of five (5) counts. Count I alleged that the appellees violated KRS 406.041 which states:

> The obligation of the estate of the father for liabilities under this chapter shall not be terminated by the death of the father obligated to support the child. If a father obligated to support the child dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances.

Employing the private-right-of-action statute, KRS 446.070, Mae sought to impose Lester's posthumous obligation not only on Lester's estate, but also on Lester's widow, brother, and brother's law firm.

Count II alleges that the appellees' violated KRS 394.145 when they failed to notify Michael, as an heir, that his father's estate was being probated. Again employing KRS 446.070, Mae claims damages against the appellees for violating this statute.

Count III asserts a conspiracy among all the appellees to commit fraud against Michael. The facts alleged which support the fraud claim were that the appellees failed to notify Michael of the probate of his father's estate, purposefully and illegally probated the estate in the wrong county, and lulled Michael into inaction by making child support payments until the six-month statute of limitations for making claims expired.

Count IV alleged the appellees' conduct was willful misconduct and gross negligence and justified punitive damages. Count V sought an award of costs and attorney fees.

The Estate filed motions challenging the sufficiency of Mae's complaint. These motions were fully briefed. Oral arguments were presented to the circuit court on February 15, 2011. At the conclusion of the oral arguments, the court instructed Mae that because the statute of limitations had not run, she could still file a motion to set aside the probate in Bullitt District Court and make a motion to have the will probated in Nelson District Court. Further, Mae could then ask for the appointment of a personal representative for Lester's estate. If Mae so proceeded, according to the trial court, she could then make claims against it. Nonetheless, Mae never pursued this suggested course of action.

After withholding the order to allow Mae time to make a motion to set aside probate in Bullitt District Court, the trial court, after the time had run, granted the Estate's motion for summary judgment. Mae now appeals from this order.

Mae's primary contention is that the Nelson Circuit Court's decision to grant summary judgment was improper and premature since genuine issues of material fact exist, and further, she was not allowed to conduct discovery. To counter, the Estate maintains that the trial court's grant of summary judgment was proper, that the conduct alleged by Mae was neither fraudulent nor did it cause injury, and lastly, Mae failed to initiate a legitimate claim to challenge the efficacy of Kentucky's statutory notice to the public in probate cases.

## STANDARD OF REVIEW

On appeal, "[t]he standard of review [of a trial court grant] of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr.*, *Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482. Furthermore, "[t]he trial [court] must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Id*. at 480. Finally, "[b]ecause summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). We apply this standard in our review of this appeal.

## ANALYSIS

1. Probate procedure

Mae is correct that the right to claim child support on Michael's behalf after Lester's death is granted by statute. Support for this proposition is found in KRS 406.041, as set out above, as well as in KRS 403.213. In pertinent part, KRS 403.213(3) says:

> Provisions for the support of the child shall not be terminated by the death of a parent obligated to support the child. If a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances.

Lester was subject to an existing order that he pay $220 per month in child support for his adult, disabled child. And pursuant to KRS 403.213 and KRS 406.041, Lester's death does not alter this responsibility. Likewise the Estate agrees that Michael has a legitimate right to make a claim against Lester's estate. See the Estate's Brief at 7.

Since Michael is entitled to claim child support from the obligor's estate, we examine the facts surrounding the probate of Lester's estate. Because Mary Bernadette was named executrix of Lester's estate, she was the proper person to offer it for probate. Indeed, it is the executors' duty to offer the will if it is in their custody, and, in good faith, to exhaust all legal or equitable remedies to have it admitted. *Phillips' Ex'r v. Phillips' Adm'r*, 81 Ky. 328 (1883).

Certain steps are necessary for submitting an estate for admission to probate. As explained in KRS 394.145,

> When any will is offered for probate, the court shall require a verified application to be filed by the person

> offering the same. Such application shall state the residence of the testator at the time of his death and such other facts as may be necessary to establish the jurisdiction of the court, and the names, ages and post-office addresses of the testator's surviving spouse and, if required by the court, heirs at law, or such as are known. An application for probate and for appointment as executor or administrator with the will annexed may be combined in one (1) application.

For the administration of probate, the Administrative Office of the Courts (hereinafter "AOC") has prepared certain forms for parties and the courts. One form (AOC-805) is the petition for probate, which derives from KRS 394.145 and KRS 395.015. It is designed to cover the petition for the probate of a will and the appointment of an executor (or administrator if there is no will). The form provides for the names of the surviving spouse, heirs at law and next of kin known to the Petitioner.

In the petition submitted by Mary Bernadette and her counsel, on the printed line that says "Petitioner states . . . that the names of the surviving spouse, heirs at law and next of kin known to Petitioner are as follows . . . ," the only name listed by Mary Bernadette was her own. Yet, Michael, as Lester's son, is an heir at law. *See* KRS 391.010(1).

Although we are cognizant that KRS 394.145 requires that the party filing the petition state "the names, ages and post-office addresses of the testator's surviving spouse and, *if required by the court*, heirs at law, or such as are known." (Emphasis added.) Our interpretation of this language is that a party must have good reason for not listing the names of the heirs at law. Our reasoning begins

with the form itself, which without qualification requires the names. In addition, we observe that the very purpose of probate, administration of an estate so that it is correctly apportioned between heirs and creditors, supports the listing of all the names of heirs at law. A petition for probate, which did not ask for the names of all potential parties, is deficient. For instance, a person entitled to a portion of the estate could easily remain unidentified, purposely or not.

The wording of the statute wherein "if required by the court" is nebulous and subject to different interpretations. Further, no reported case has specifically addressed the wording. Our interpretation is supported by the rules of Jefferson District Court regarding probate. (The Bullitt District Court Rules do not specifically address probate administration.) The Jefferson District Court Rules mandate that "[t]he Court requires the names, ages and post-office addresses of heirs at law unless good cause is shown and ordered otherwise by the Court (KRS 394.145)." Kentucky Rules of Jefferson District Court, Rule 404.

Here, nothing in the record indicates that the Bullitt District Court had any knowledge about Michael. Hence, it seems unlikely that good cause existed to allow for his name to remain unlisted. And it is impossible to ascertain whether the district court had good cause to allow Mary Bernadette to not provide it. The record does not show that Mary Bernadette and her counsel were unaware of Michael and his status.

Next, we consider the KRS 394.140. According to this statute, "[w]ills shall be proved before, and admitted to record by, the District Court of the

testator's residence." KRS 394.140. Under this statutory language, a decedent's estate is required to be probated in the county of his residence at the time of his death. No exceptions are allowed.

A will submitted for probate in a county that is not the decedent's residence renders the court's order to probate the will subject to attack. *Ewing v. Ewing*, 255 Ky. 27, 72 S.W.2d 712, 713 (1934). As noted in *Ewing,* if the court is "without jurisdiction to probate the will, the orders so made and entered by that court were void and may be attacked by either a direct or collateral proceeding." *Id*.

While no reason is provided on the face of the waiver for filing it in Bullitt County, the Estate in their brief concede that the filing of the action took place in Bullitt rather than Nelson County purely as a matter of convenience for Mary Bernadette's counsel. The Estate bolsters its rationale for filing in Bullitt District Court by explaining that because of the size of the estate neither administration of the estate nor appointment of a personal representative was necessary. Despite the explanation, we conclude that both the filing of the probate matter in Bullitt District Court rather than Nelson District Court, and also, the failure to list Michael as an heir at law were improper.

Even though a statutory right to claim child support from the obligor's Estate exists, Lester did not have a large enough Estate to provide child support payments after his death. Thus, under the probate laws, there is an abatement of Michael's claim.

2. Opportunity to make a claim

Mae maintains that the Estate deprived Michael of his opportunity to make a claim against the Estate when Mary Bernadette filed the petition in Bullitt District Court rather than Nelson District Court. In contrast, the Estate maintains that even though the estate was probated in the incorrect county, Michael was not harmed. It proposes that since no personal representative was appointed in the filing of Lester's estate, the timing of a claim is governed by KRS 396.011:

> (1) All claims against a decedent's estate which arose before the death of the decedent, excluding claims of the United States, the State of Kentucky and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within six (6) months after the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent's death.

The aforementioned statute is applicable to this situation. Since no personal representative was appointed, Mae had two years from the date of Lester's death to challenge the filing of the petition for probate in Bullitt District Court. Indeed, the Nelson Circuit Court held off its decision about the motion for summary judgment to give Mae time to file a claim on the estate.

Thus, even though Michael's name was not listed on the petition for probate filed in Bullitt County, Mae had sufficient time to file a claim in Nelson District Court pursuant to KRS 396.011. Consequently, the claim in Count II that

the Estate failed to provide notice is harmless. Mae had sufficient time to make a claim on Michael's behalf. Therefore, no genuine issue of material fact was presented that demonstrated a lack of opportunity for Michael's claim to be heard.

3. Damages Including Damages for Fraud

Mae's claim for damages is found in several parts of her Complaint. Initially, in Count I, employing the private-right-of-action statute, KRS 446.070, she seeks to impose Lester's posthumous statutory obligation to provide child support not only on Lester's estate, but also on Lester's widow, brother, and brother's law firm. Regarding Count II, again citing KRS 446.070, Mae claims damages against the appellees for violating the probate statutes, in particular KRS 394.145.

In Count III of her complaint, Mae alleges that the parties who comprise the Estate acted in concert to commit fraud and deprive Michael of an opportunity to make a claim. The last statement of Count III says, again referencing KRS 446.0770, that she is entitled to punitive damages. Then, Mae contends in Count IV of her complaint that she is entitled to punitive damages for the Estate's willful misconduct and gross negligence. In addition, in Count V she also claims the right to attorney's fees for this misconduct.

We begin our analysis by assessing whether KRS 446.070 is applicable to the matter herein. The statute provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for

such violation." KRS 446.070. Thus, "KRS 446.070 . . . creates liability by virtue of the breach of duty" established by any other Kentucky statute. *Collins v. Hudson*, 48 S.W.3d 1, 4 (Ky. 2001).

Mae asserts in Counts I, II, and III that pursuant to KRS 446.070, the Estate is potentially liable in damages, including punitive damages, for violating KRS 406.041 or KRS 403.213(3); KRS 394.145; and, KRS 394.140. Yet, none of the designated statutes authorize any remedy, much less a remedy of punitive damages.

If the statute establishing the duty fails to specify a remedy, we may look only to KRS 446.070 to provide it. *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). KRS 446.070 provides:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

Mae's remedy is thus limited to "such damages as [they] sustained by reason of the violation" of KRS 406.041, KRS 403.213(3), KRS 394.140, or KRS 394.145. As noted above, since Mae still had an opportunity to file a claim, she has not established any damages as the result of the violation of these statutes.

Moreover, no reported Kentucky decision has yet expressly stated whether KRS 446.070 authorizes an award of punitive damages. Our Supreme Court, however, has made it clear that where the legislature failed to provide for the "express inclusion of punitive damages in these statutes[,]" punitive damages were

not available. *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 139-40 (Ky. 2003) (interpreting KRS 344.450). Since no express inclusion of punitive damages is found in KRS 446.070, punitive damages are not available to the extent Mae based the claims on KRS 446.070 and the underlying statutes that establish a duty. *See Jackson v. Tullar*, 285 S.W.3d 290, 298 (Ky. App. 2007).

With regard to damages resulting from the alleged fraud, we must first consider the required elements necessary to establish fraud. As set out in *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999), the proof of fraud requires that:

> [T]he party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury. (Citation omitted.)

Here, it is difficult to discern what statement Mae is alleging represents a material, false representation. To overcome a motion for summary judgment, however, Mae must provide a genuine issue of material fact necessary to establish fraud. She has not done so.

But even if she had established actionable fraud, no damages exist. Under probate laws as currently enacted, Lester's estate was too small to have been the source of any posthumous child support payments to which Michael could lay claim. Consequently, there can be no claim for damages, punitive or otherwise, or for costs and attorney fees, under Count IV and Count V.

4. Propriety of the grant of summary judgment

It has been held that "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). Here, Mae has not met that hurdle.

First, Mae's complaint failed to state a claim upon which the trial court could grant relief. At the time of the oral hearing for the summary judgment motion, she still had an opportunity to file for admission to probate of Lester's estate in Nelson County. The Nelson Circuit Court did not grant the summary judgment motion until that time extinguished. As such, Mae did not act in a way to preserve Michael's claim.

But most significantly, the grant of summary judgment was proper because the size of Lester's estate does not allow for posthumous child support payments. The probate statutes set forth a $15,000 spousal exemption. KRS 391.030(4)(a). Therefore, Lester's entire $13,700 personal estate, being less than the spousal exemption, was "exempt from distribution" to Michael in any form, whether as an heir, beneficiary or creditor of the estate. Further, no language in the spousal exemption makes an exception for child support claims in the exemption.

So, even if Michael, through Mae, had asserted a claim as a creditor for a debt based on the child support order, there would have been no non-exempt estate assets from which to pay it. The statutory scheme is clear that "[n]o distributee

[such as Mary Bernadette] shall be liable to claimants for amounts received as exempt property[,]" *i.e.*, the $13,700 Mary Bernadette received. KRS 396.195.

Finally, even if the estate had been filed properly in Nelson District Court, administration of the estate could still have properly been dispensed. As stated in KRS 395.455(1): "[w]here the exemption of the surviving spouse alone . . . equals or exceeds the amount of probatable assets, the court may order that administration of the estate be dispensed with and such assets be transferred to the surviving spouse . . . ." KRS 395.455(1).

To defeat the Estate's motion for summary judgment, it was incumbent upon Mae to assert genuine issues of material fact that Michael was harmed by the actions that occurred in filing and probating Lester's estate. She has not done so. The trial court's grant of summary judgment was proper.

## CONCLUSION

For the foregoing reasons, the May 18, 2011 summary judgment dismissing plaintiff's complaint is affirmed.

ALL CONCUR.

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