

RENDERED: March 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1895-MR

MARGARET EVERSOLE EDWARDS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 96-CI-001102

HARKNESS EDWARDS, III, Individually,
and in his Capacity as Administrator
of the Estate of Harkness Edwards, Jr.

APPELLEE

OPINION

AFFIRMING

*** *** *** ***

BEFORE: EMBERTON, GUIDUGLI, and MILLER, Judges.

MILLER, JUDGE: Margaret Eversole Edwards brings this appeal from a June 25, 1996 summary judgment of the Fayette Circuit Court. We affirm.

The facts are these: On June 3, 1995, Harkness Edwards, Jr. (decedent), died testate in Fayette County, Kentucky. His Last Will and Testament (will) was probated in the Fayette District Court, Probate Division, on June 29, 1995. Appellant is the widow of the decedent. The will made certain provisions for

appellant and the testator's surviving children from an earlier marriage, namely Harkness Edwards, III (appellee), Hunt Edwards, and Lela Humes Cason. As part of the administration of the estate, appellant executed a "Receipt and Release" on September 28, 1995. That document stated in relevant part as follows:

I, Margaret E. Edwards, widow of Harkness Edwards, Jr., who died June 3, 1995, acknowledge that pursuant to Item VI of the Will of Harkness Edwards, Jr., probated June 29, 1995, I became entitled to all household furniture and furnishings, automobiles, books, pictures, jewelry and personal effects, other than the Richard Edwards cup, bequeathed to Harkness Edwards, III, by Item IV of the aforesaid Will

Now, Therefore, I hereby acknowledge receipt of the aforementioned properties appraised by James L. Riley and Dana Motors Co., at a total value of \$351,285.00

On December 8, 1995, appellant executed a "Renunciation of Will (renunciation)." The renunciation was filed with the clerk of the district court on December 8, 1995. Thereafter, the renunciation was sent to the county clerk's office and recorded there on December 13, 1995. On March 29, 1996, appellee, as administrator of decedent's estate, initiated in the Fayette Circuit Court a declaratory judgment proceeding. Therein he contended that appellant did not, pursuant to Ky. Rev. Stat. (KRS) 392.080), validly and effectively renounce her right to take under the decedent's will. Thereafter, appellant and appellee filed motions for summary judgment. On June 17, 1996, the circuit court entered an "Opinion and Order" granting

appellee's motion for summary judgment. Therein, the court determined:

Counsel for all parties agree that KRS 392.020 is the successor to Section 1404 of the Kentucky Revised [sic] Statutes. Counsel for the Defendant has cited several cases that were decided around the turn of the century and dealt with Section 1404 of the statutes and its application at the time. The court has reviewed the authority cited by the Plaintiffs' [sic] and finds that the Kentucky Supreme Court case of Hannah v. Hannah, 824 S.W.2d 866 (1992), a unanimous decision of the Court, correctly disposes of the issues pending before this Court.

This Court specifically finds that the statutory language of Section 1404 was changed substantively and effectually by the implementation of KRS 392.020 and other statutes under Chapter 392. Therefore, any decisions relative to Section 1404 have limited application to cases decided under the current statute.

This Court finds that (1) the acceptance of the personalty and (2) the execution of the "Receipt and Release" constituted an election by Ms. Edwards to take under the will. Ms. Edwards could have decided to return that personalty, within the statutory six months, and then elected to renounce, pursuant to this statute. She did not choose that course of action and it is now too late for her to effectively make that election.

On June 25, 1996, the circuit court entered summary judgment in favor of appellee. This appeal followed.

Summary judgment is proper only when there exists no material issue of fact and the movant is entitled to judgment as a matter of law. See Steelvest, Inc. v. Scansteel Serv. Center, Inc., Ky., 807 S.W.2d 476 (1991). In the case sub judice, we perceive no issue of fact but only a question of law.

Appellant contends it was reversible error for the circuit court to conclude that (1) she, in fact, elected to take under the decedent's will and, alternatively, if she did so elect, (2) such election, as a matter of law, barred her from renouncing the will. As to appellant's first issue, we believe the clear terms of the Receipt and Release, executed by appellant, speak for themselves. Therein, appellant acknowledged receipt of certain property to which she became entitled under the terms of decedent's will. We believe the Receipt and Release evinces appellant's election to take under her husband's will.

We now address appellant's second contention--that even if she elected to take under the will, the court erred in concluding that she was barred from nevertheless renouncing her husband's will pursuant to KRS 392.080. In support thereof, appellant relies upon Williams v. Williams, 161 Ky. 55, 170 S.W. 490 (1914); Brown's Ex'r v. Brown, 22 Ky. 840, 58 S.W. 993 (1900); McCallister v. Brand's Heirs, 50 Ky. (11 B.Mon) 370 (1850) (collectively holding that a widow may elect to take under her deceased husband's will and thereafter, within statutory period, nonetheless effectively renounce said will). Upon review of these cases, it is apparent they were based upon Kentucky Statutes (Ky. St.) §1404, the predecessor of KRS 392.080. We think resolution of this issue revolves around the interpretation of these two statutes.

Ky. St. §1404 (relating only to renunciation by a widow) was enacted in 1893 and stated in relevant part as follows:

Renunciation of will by widow; when and how made; effect of.--When a widow claims her dowable and distributable share of her husband's estate, she shall be charged with the value of any devise or bequest to her by his will; or she may, though under full age, relinquish what is given her by the will, and thereupon receive her dower and distributable share as if no will had been made [emphasis added]

For purposes of this appeal, the pivotal language in Ky. St. §1404 was as follows: "When a **widow** claims her dowable and distributable share of her husband's estate, she shall be charged with the value of any devise or bequest to her by his will (emphasis added)." Utilizing that language, the courts of this Commonwealth interpreted Ky. St. §1404 as enabling a "widow" to effectively renounce her deceased husband's will even though she had previously elected to take under it by simply offsetting the value of the devise or bequeath against her statutory share. See Williams, supra, Brown's Ex'r, supra, and McCallister, supra. In sum, under Ky. St. §1404, a "widow" had an unconditional right of revocation during the statutory 12-month period, notwithstanding a prior election to take under the will.

The successor to Ky. St. §1404 was enacted in 1956. This statute, KRS 392.080 (relating to renunciation by either spouse) provides in relevant part as follows:

(1) When a husband or wife dies testate, the surviving spouse may . . . release what is given to him or her by will, if any, and receive his or her share under KRS 392.020 as

if no will had been made Such
relinquishment shall be made within six (6)
months after the probate

Conspicuously absent from the above statute is the language in Ky. St. §1404 enabling a widow to be charged with any devise or bequeath that she accepted under the will prior to renouncing said will. We believe the absence of such language resoundingly signals a change in the legislative course theretofore enunciated in Ky. St. §1404. We are of the opinion that by omitting Section 1404's offsetting language from KRS 392.080, the legislature intended nothing less than a permutation and modernization of the law. The plain and unambiguous language of the statute lends itself to but one tenable interpretation: a surviving spouse must either elect to take under the decedent's spouse's will or renounce the will but cannot, as prior to the KRS 392.080, do both. Simply stated, the surviving widow may no longer initially elect to take under the will and then proceed to renounce it.

In the case sub judice, as hereinbefore stated, we believe appellant's execution of the Receipt and Release evidenced her election to take under the decedent's will. As such, we are of the opinion that she is precluded from thereafter attempting to revoke decedent's will pursuant to KRS 392.080.

As to appellant's remaining contentions, we deem them moot.

For the foregoing reasons, the judgment of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Thomas W. Miller
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