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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001293-MR

KRISTIE STRATTON AND
KRISTIE STRATTON IN HER CAPACITY
AS THE EXECUTRIX OF THE ESTATE OF MARY
EVELYN THURMAN APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 08-CI-00093

STEVE NEWTON, JEFFREY NEWTON,
AND MARTIN THURMAN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM[1], SENIOR JUDGE.

[1] Senior Judge David C. Buckingham 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.

CAPERTON, JUDGE: The Appellant, Kristie Stratton, appeals the Warren Circuit Court's order affirming Steve Newton's, Jeffrey Newton's, and Martin Thurman's (hereinafter the "Appellees") petition for declaration of rights and the denial of Appellant's summary judgment motion. In said order, the court determined that the Appellant and Appellees were entitled to a one-fourth interest in the farm land in question and denied Appellant's motion for summary judgment. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error and, accordingly, affirm.

The matter came before the Warren Circuit Court after the decedent, Mary Evelyn Thurman, died testate leaving a holographic will as her Last Will and Testament. Appellant and the Appellees disagree about one provision in the will, which states, in pertinent part:

> Farm Land the 78+ acres I own across the road from the 33+ acres of bottom land goes to my one niece and three nephews. The tax bill is to be mailed to Kristie T. Stratton . . . . She may buy them out the [sic] her three first cousins for about $7,000 each. Jeff Newton, Steve Terry Newton, and Martin Wayne Thurman.

The Appellees interpreted the provision to devise the property in fee to both the Appellees and the Appellant. Appellant asserted that the provision provided for the land to go to both the Appellees and the Appellant, with the Appellant having the right to purchase the land, without restriction, for about $7,000 each. The court then proceeded to interpret the will in light of our jurisprudence.

First, the court noted that the sentence, "Farm Land the 78+ acres I own across the road from the 33+ acres of bottom land goes to my one niece and three nephews" was not ambiguous. The court determined that the sentence clearly provides that the decedent left the land at issue to her one niece and three nephews, who were the parties before the court. The court also concluded that the second sentence "The tax bill is to be mailed to Kristie T. Stratton . . . ." was not ambiguous. However, the court determined that the third sentence, "She may buy them out the [sic] her three first cousins for about $7,000 each" was ambiguous.

The court noted that it could not ascertain what the decedent intended to do or meant by the third sentence without speculation, for two reasons. First, the court was unclear as to what price Appellant was to pay because of the phrase "about $7,000." Second, the court was perplexed as to the term "may" and concluded that the decedent's intent in regard to the third sentence was speculative. In light of this ambiguity, the court turned to the applicable jurisprudence, and noted that the law favors the vesting of a fee, citing *Webb v. Maynard*, 32 S.W.3d 502, 508 (Ky.App. 1999). Moreover, the court noted that:

> An estate once given in fee will not be defeated by a subsequent provision in the same instrument limiting it to a smaller estate, unless the language of the instrument or the intention of the testator requires it, and when, upon the consideration of the whole instrument, the mind is in doubt as to what estate was intended to pass, that construction will be adopted which passes the fee.

Clay v. Chorn's Ex'r., 152 Ky. 271, 153 S.W. 425, 426-427 (Ky. 1913)

Thus, the court denied Appellant's motion for summary judgment and concluded that Appellant and the Appellees were each entitled to a one-fourth interest in the subject devised. Thereafter, Appellant filed a motion to alter, amend, or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, 52.03, and 52.04. The trial court denied this motion in its order of June 26, 2009. It is from these orders that Appellant appeals.

On appeal, Appellant presents two main arguments. First, Appellant argues that the court did not apply the law correctly when it ordered the clause in question was ambiguous and should be stricken. Second, the court erred by not giving additional findings of fact after Appellant asked for them in the motion to alter, amend, or vacate. With these arguments in mind we turn to our applicable standard of review.

Wills are interpreted under the same standards as contracts are interpreted. Accordingly, we shall apply the *de novo* standard of review to this case. *Mackey v. Hinson,* --- S.W.3d ----, 2009 WL 4406090 (Ky.App. 2009). As to findings of fact, this Court will not disturb the trial court's findings of fact unless clearly erroneous. "Findings of fact are not clearly erroneous if supported by substantial evidence." *Janakakis-Kostun v. Janakakis,* 6 S.W.3d 843, 852 (Ky.App. 1999). Substantial evidence is that evidence, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *Id.*, citing *Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972). The standard of review of a trial court's

denial of summary judgment is *de novo*. *See Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).[2] With this in mind we turn to Appellant's first argument.

First, Appellant argues that the court did not apply the law correctly when it found that the clause in question was ambiguous and should be stricken. In support thereof, the Appellant further argues that the standard for the interpretation of a will focuses on the intent of the testator. Further, she argues that the devise was not ambiguous, and that if the phrase is held ambiguous the proper rules of construction must be used, and extrinsic evidence should be considered.[3]

> In construing a will the courts:
>
> [G]o first to the most basic of all such rules, the so-called "polar star rule." This rule holds that in the absence of some illegality, the intention of the testator is controlling. *Scheinman v. Marx*, Ky., 437 S.W.2d 504 (1969), and *Combs v. First Security National Bank and Trust Co*., Ky., 431 S.W.2d 719 (1968). For additional authority, see 22 Kentucky Digest, "Wills," § 439 (1985). To ascertain the testator's intention, it is necessary to first examine the language of the instrument. If the language used is a reasonably clear expression of intent, then the

[2] As to Appellant's summary judgment motion, it "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. In light of this standard the trial court did not err in denying Appellant's motion for summary judgment.

[3] As discussed *infra,* we agree with the circuit court that the provision in question was ambiguous. Additionally, the circuit court did not err in its usage of the rules of construction. Appellant cites *Hopson v. Ewing,* 353 S.W.2d 203 (Ky.1962), for the proposition that the circuit court should have considered extrinsic evidence to establish testamentary intent. *Hopson* held "Where a nondescript instrument not in the usual form of a will is of ambiguous import on its face, extrinsic evidence is admissible to establish testamentary intent." *Id.* at 205. However, there is no question before this Court as to whether the holographic will in the case *sub judice* is in fact a will. Thus, we do not find *Hopson* persuasive.

> inquiry need go no further. *Gatewood v. Pickett*, 314 Ky. 125, 234 S.W.2d 489 (1950). If it is not such a clear expression, then it is necessary to construe the language used according to appropriate rules of construction.

Clarke v. Kirk, 795 S.W.2d 936, 938 (Ky. 1990).

We agree with the circuit court that the will provision in the case *sub judice* is ambiguous. The terms "may" and "about" create an uncertain result. Indeed, the Kentucky Supreme Court noted, "Not only have Kentucky courts long construed "may" to be a permissive word, rather than a mandatory word, but our legislature has given guidance in this regard. When considering the construction of statutes, KRS 446.010(20) provides that "may" is permissive, and "shall" is mandatory." *Alexander v. S & M Motors, Inc*., 28 S.W.3d 303, 305 (Ky. 2000). We must determine a testator's intention by what was said in the language of the will rather that what was intended. *Cheuvront v. Haley*, 444 S.W.2d 734, 737 (Ky. 1969). While the testator might have wished the Appellant to have the right to purchase from the Appellees the land in question, such definitive language is not found in the will itself. We are also mindful:

> In the absence of a clear intention to make an unequal distribution, this Court presumes that a testator intends to treat beneficiaries of the same class equally. We have held that the law favors construction of a will which conforms most nearly to the general law of inheritance . . . . The presumption in favor of equality has been held to be one of the most forceful of all presumptions.
>
> Among them [rules of construction], and perhaps the most forceful one (of ascertaining and administering the intention of the testator), is the one that courts favor and will administer equality among descendent

> beneficiaries of a will, unless its language clearly indicates to the contrary; and which is to say, that where the language of the testator is ambiguous and uncertain, calling for two possible interpretations-the one resulting in equality and the other resulting in inequality-the former will be adopted to the exclusion of the latter.

Clarke at 940 (internal citations omitted).

Given that both parties are beneficiaries of the same class, the circuit court correctly applied the presumption of equality to beneficiaries of the same class in light of any ambiguity in the will. Since the law favors the vesting of a fee, we cannot say that the trial court erred in ordering that the parties were each entitled to a one-fourth interest in the land in light of the will provision. *See Chaffin v. Adams,* 412 S.W.2d 563, 564 (Ky. 1967). Accordingly, we find no error in the circuit court's order and judgment. We now turn to Appellant's second argument.

In considering Appellant's second argument that she was entitled to additional findings of fact under the CR 52.04 motion, we must understand that CR 52.04, by its own terms, addresses an additional finding of fact on an issue *essential* to the judgment. In contrast, Appellant presents a legal argument by disputing the ambiguity of the will; there were no facts to be found. Moreover, CR 52.01 specifically provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02." With this in mind we turn to Appellant's own motion.

Appellant's motion stated: "The court should make findings of fact pursuant to the Civil Rules of Procedure, specifically as to Civil Rule 52.01, 52.03, and 52.04, as to why it reached its conclusion. Specifically the distinguishing factors, ambiguities, and why the bequest should not be read as a whole." In light of the court's order, we fail to see what additional facts *essential* to the judgment the court could have found. While the court did not specifically address in the order the entire detailed holographic will, the court specifically addressed the provision in contention and found it ambiguous. Moreover, the court considered the entire will and the parties' arguments pertaining thereto. We agree with the Appellees that the court made adequate findings of fact and has read the bequest as a whole. Based on our Civil Rules, the court did not err in denying Appellant's motion for additional findings of fact.

In light of the aforementioned reasons, we affirm the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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