

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000597-MR

JO ANNE ROBERTS

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 08-CI-00580

HUGH ROBERTS; CARL ROBERTS;  
AND DAN ROBERTS

APPELLEE

OPINION  
REVERSING

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BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Jo Anne Roberts appeals the Calloway Circuit Court's order holding that she was not entitled to a life estate in the subject property and its subsequent denial of her motion to alter, amend, or vacate the judgment. After a careful review of the record, we reverse.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter involves the interpretation of the will of the parties' mother, Heloise Roberts. Heloise died on April 29, 2008. Her will provided, in pertinent part, that:

The real estate which consists of my home and approximately six (6) acres located on North Fourth Street, Murray, Calloway County, Kentucky, I give bequeath and devise as follows:

To my daughter JoAnne Roberts I leave this real estate to her for life for so long as she lives there and is not married. It is my specific intent that my daughter shall have a life estate in this property for so long as she is living on the property and not married. While JoAnne has possession of the life estate she shall be responsible for the maintenance of the property and this shall include insurance and payment of taxes. In the event of my daughter JoAnne's death the property belong[s] to my three (3) sons equally, and if any or all of them shall have predeceased JoAnne, his share shall pass *per stirpes*. In the event JoAnne no longer resides on the property or if and when she marries, the property shall be owned by my four (4) children, in equal shares, and if any or all of them shall have died, his or her share shall pass *per stirpes*.

Heloise appointed Jo Anne and her son, Dan Roberts, as coexecutors of her will.<sup>1</sup> Jo Anne retained an attorney to probate the will. That attorney initially advised Jo Anne that she had a life estate with respect to the property. However, shortly thereafter, he advised Jo Anne that he was mistaken and that she did not have a life estate because she was not residing on the property at the time that her mother passed away. Based upon this advice, Jo Anne and her brothers

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<sup>1</sup> Dan Roberts was a resident of Germany at all times relevant to this appeal.

began to market the property. The property was also rezoned from residential to commercial use, and Jo Anne participated in the rezoning process.

On December 3, 2008, Jo Anne filed a petition for declaratory relief requesting that the court declare that she was entitled to a life estate. After a bench trial, the circuit court determined that Jo Anne was not entitled to a life estate. The court reasoned that the plain language of the will, *i.e.*, that “[i]t is my specific intent that my daughter shall have a life estate in this property for so long as she is living on the property and not married[,]” demonstrated Heloise’s clear intention for Jo Anne to only have a life estate if she was living on the property at Heloise’s death. Therefore, the court held that because Jo Anne was not residing on the Fourth Street property at the time of Heloise’s death, Heloise did not intend for Jo Anne receive a life estate in the property. This appeal followed.

## **II. STANDARD OF REVIEW**

A testator’s intent controls the interpretation of her will. *Clarke v. Kirk*, 795 S.W.2d 936, 938 (Ky. 1990). “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 inquiry need go no further.” *Id.* While canons of construction are available where the testator’s intent is unclear, a court need not resort to canons of construction where a testator uses clear and unambiguous language. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010).

“[I]t is well established that ‘[t]he construction as well as the meaning and legal effect of a written instrument ... is a matter of law for the court.’” *Id.*

(quoting *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992)). We review the trial court's determination as to question of the law *de novo*. *Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky. App. 2009).

### III. ANALYSIS

“A life estate is [a freehold] estate measured by the life of a specified person....” 4 Horner Probate Prac. & Estates § 74:1 (2010). “The owner of a life estate ... has only the right to use the property or its rents, issues, and profits until his death ....” *Miracle v. Miracle*, 260 Ky. 624, 86 S.W.2d 536, 538 (1935).

When a life tenant dies, his estate terminates; the remaindermen are then entitled to enjoyment of the property. *Id.* at 539. A life estate may also be created subject to a condition subsequent. *See Hammons*, 327 S.W.3d at 447, 450; Restatement (First) of Property §18 (Comment b) (2010). “[A] condition subsequent operates by way of a defeasance of the title that has once vested.” *Hammons*, 327 S.W.3d at 450. Additionally,

“[o]ne entitled to a life estate may repudiate that right and elect to claim the estate under some other, a different, or an adverse title, and, if he does, the maturity of the remainder is accelerated, and the remainderman becomes just as fully entitled to the immediate possession as if the life tenant has died. When we speak of the renunciation or repudiation of a life estate we mean such an unequivocal act by the life tenant as would destroy his claim as a life tenant, so that he could not thereafter assert it, and would accelerate and mature the remainder.

*Superior Oil Corp., v. Alcorn*, 242 Ky. 814, 47 S.W.2d 973, 986 (1930) (citations omitted).

With these rules in mind, we disagree with the circuit court's interpretation of Heloise's will. We believe that the plain language of this devise shows that it is a life estate with a condition subsequent and a one-fourth contingent remainder interest to Hugh, Dan, Carl, and Jo Anne. Read sequentially, the language of the will unambiguously 1) grants Jo Anne a life estate and 2) conditions her continued use and enjoyment of the life estate upon her using the property as her residence and remaining unmarried. Upon the occurrence of either condition, the remaindermen may take possession. *See Superior Oil Corp.*, 47 S.W.2d at 986; *see also Fewell v. Fewell*, 459 S.W.2d 774, 775 (Ky. 1970); *Miracle*, 86 S.W.2d at 539. Thus, if Jo Anne marries or discontinues use of the property as her residence, Hugh, Dan, Carl, and Jo Anne will each have a one-fourth interest in the property. In the alternative, the will clearly provides that, if Jo Anne dies without having married and while still residing on the property, Hugh, Dan, and Carl each have a vested one-third remainder interest, and, upon Jo Anne's death, they are entitled to enjoyment of the property. *Miracle*, 86 S.W.2d at 539.

A life tenant cannot act in such a way as to violate a condition subsequent without first having the opportunity to take possession of the property. *See Hammons*, 327 S.W.3d at 450 (“[A] condition subsequent operates by way of a defeasance of the title that has once vested.”); 31 C.J.S. *Estates* § 43 (2011) (“Enjoyment of a life estate cannot be had without possession.”). Consequently, Jo Ann could not have acted in such a way as to violate the conditions subsequent

until she was actually in possession of the life estate. While the life estate is conditioned upon Jo Anne's residing on the property, it is evident that Jo Anne did not have an opportunity to take possession of the property immediately upon her mother's death. At that time, both dwellings on the property were occupied by tenants. Neither Jo Anne nor her mother lived on the property at the time of Heloise's death. Thus, at the time Jo Anne had a right to enjoyment of the property at issue via her life estate, she could not take immediate possession because tenants were occupying both dwellings. It also appears that while Heloise's will was being probated and the issues under review were in the process of resolution, both dwellings were re-let upon the termination of the leases that were in effect at the time of Heloise's death.

Jo Anne's actions, including efforts to market and rezone the property, did not constitute an unequivocal act sufficient to repudiate her interest in the property and accelerate the remaindermen's interest.<sup>2</sup> While Jo Anne was aware that she had colorable title to the life estate, her rights to the property were in dispute. After first being advised that she was entitled to a life estate, Jo Anne was advised by her attorney that she was not entitled to a life estate. Based upon her attorney's advice, Jo Anne proceeded with marketing and rezoning the property.<sup>3</sup>

Thus, Jo Anne was unable to exercise her right to the life estate absent violating

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<sup>2</sup> Appellees' argument that Jo Anne's efforts to market the property prior to Heloise's death and in her capacity as power of attorney for Heloise were inconsistent with her rights as a life tenant are unpersuasive. However, Jo Anne's entitlement to a life estate in the property did not arise until Heloise's death.

<sup>3</sup> Jo Anne retained other counsel for the purpose of the declaratory action and this appeal.

the lease agreement(s) and forcing herself onto the property in contravention with the advice of her attorney. Accordingly, we reverse.

CAPERTON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Royce W. Buck  
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Michael M. Pitman  
Murray, Kentucky