RENDERED: November 25, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000100-MR

LEXA CONWAY and BILLY CONWAY — APPELLANTS

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 95-CI-000060

OTIS L. KEARNS, JR.,
Individually and as
Personal Representative
of AILEEN THOMAS, and
NORMA KEARNS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an award of summary judgment in favor of appellees. It presents the question of whether a widow, as devisee under the will of her late husband, can convey certain real property. We believe that the testator intended to give his widow both a power of sale and a power of control over the real property such that her gift of the property was permissible. Accordingly, we affirm.

The will of C.F. Thomas was probated in 1965. It stated, in relevant part:

> ITEM II. I GIVE, DEVISE AND BEQUEATH ALL OF MY PROPERTY, REAL AND PERSONAL, MIXED OR OTHERWISE, INCLUDING ALL AUTOMOBILES, MONEYS IN ANY BANK, AND REGARDLESS OF WHERE SITUATED AND WHETHER ACQUIRED BEFORE OR AFTER THE EXECUTION OF THIS WILL, TO MY BELOVED WIFE, ALLIE THOMAS, TO HAVE AND TO HOLD THE SAME IN HER OWN RIGHT, TO CONTROL THE SAME AND MANAGE IT IN HER OWN WAY DURING THE REMAINDER OF HER NATURAL LIFE, AND SHE IS TO HAVE THE POWER OF SELLING ANY OR ALL OF MY PERSONAL PROPERTY OR ANY OF MY REAL PROPERTY THAT SHE MAY SEE FIT OR DEEM NECESSARY.
>
> BUT AT THE DEATH OF MY WIFE, ALLIE THOMAS, I DESIRE THAT ALL OF MY ESTATE, BOTH PERSONAL AND REAL, THAT SHE MAY THEN HAVE OR BE POSSESSED OF, BE DIVIDED AS SET OUT IN ITEM III, OF THIS MY LAST WILL AND TESTAMENT.
>
> . . . .
>
> ITEM III. I GIVE AND DEVISE TO MY SON, GILBERT THOMAS, THE SUM OF FIVE THOUSAND ($5,000.00) DOLLARS.
>
> I GIVE, DEVISE AND BEQUEATH TO MY SON, H.H. THOMAS AND MY DAUGHTER, LEXIE O. CONWAY, IN TWO EQUAL PARTS, THE HOME PLACE FARM, OF ABOUT 135 ACRES . . . IN FEE SIMPLE AND TO BE THEIRS ABSOLUTELY.
>
> I GIVE, DEVISE AND BEQUEATH TO MY SON, GEORGE THOMAS, ONE FARM, KNOWN AS THE OLD BOYD PLACE, FOR HIS LIFETIME, AND HE IS TO HAVE ALL OF THE RENTS, ISSUES AND PROFITS FROM THIS FARM, DURING HIS LIFETIME, AND THE SOLE RIGHT OF POSSESSION OF ALL HOUSES, BARNS AND OTHER OUT BUILDINGS DURING HIS LIFETIME; AND AT HIS DEATH, THE FARM IS TO BE SOLD AND THE PROCEEDS SHALL BE DIVIDED IN FOUR (4) EQUAL PARTS AMONG THE WIDOW OF GEORGE THOMAS, (AILEEN THOMAS), HER HEIRS AND ASSIGNS; H.H. THOMAS, GILBERT THOMAS AND LEXIE O. CONWAY.

(Emphasis added.)

In 1965, Allie conveyed all of her rights, title, and interest in the Boyd Place farm to her son, George Thomas. The listed consideration was love and affection. Thus, the conveyance was clearly a gift and not a sale. In 1971, George

conveyed the property to his wife, Aileen, and himself as tenants by the entirety. George died in 1989, and in 1991 or 1992, Aileen conveyed the property to her son, Otis and his wife, Norma. Otis was not George's child.

The actual conveyance of the Boyd's Place farm differs from C.F.'s will in that the will would have given George, after Allie's death, a life estate in the farm. Upon George's death, the farm was to be sold with proceeds to be divided equally in four parts among George's widow, Aileen, and C.F.'s remaining three children, H.H., Gilbert, and Lexie (Lexa). Lexa and her husband brought suit, seeking the sale of the farm and her proportionate share of the proceeds.

The trial court relied upon the cases of Melton v. Wyatt, Ky., 517 S.W.2d 242 (1974) and Mitchell v. Mitchell, Ky., 276 S.W.2d 470 (1955) to conclude that C.F. gave "unlimited power and control to his surviving wife regarding all transactions that **she saw fit or deemed necessary**." The court added that Allie's death was essentially a condition precedent to the property's passing under Item III of C.F.'s will. Accordingly, the court granted appellees summary judgment.

In Melton, 517 S.W.2d 242, 243, the testator devised to his wife all of his estate "for and during her lifetime, with the power to use, sell, mortgage, lease or otherwise dispose of as she sees fit." The Court held that this language must be construed to "mean what it says and that such power to use and dispose of during the lifetime of the devisee of the life estate should be unlimited." Id. at 244.

In Mitchell, 276 S.W.2d 470, the Court ruled that the testamentary language, "to have, hold, keep and use, and dispose of as her own" with a gift over, gave the devisee unlimited power to encroach upon the corpus of the estate. The Mitchell Court harkened back to Weakley v. Wealkey, Ky., 237 S.W.2d 524, 525 (1951) (overruled by 517 S.W.2d 242 to the extent it limits the use or disposition of the property except in making a testamentary disposition), wherein the testatrix devised her property to her son "to do with as he sees fit." The Weakley Court held:

> [W]hen a testator uses such words he means that the first donee may use the estate for his own purposes and if any of it is left over, it shall go to the second donee. . . . It is difficult to conceive of a case where a person would write such an expression where he did not intend that the life tenant have broad powers to sell and dispose of the estate.

Id. at 525-26.

Appellants rely on Molloy v. Molloy, Ky., 727 S.W.2d 870 (1987). In that case, the testatrix gave real property to her daughter, Betty, "for and during her natural life, with the remainder in fee simple at her death to her issue per stirpes. . . ." Id. at 872. She further provided that Betty, as a life tenant:

> shall have the right at any time, and from time to time, to sell, assign, transfer and convey the whole or any part of [her] respective share[] upon such terms and conditions as [she] in [her] sole discretion shall determine and to invest and reinvest the proceeds of any sale or sales in such property, either real or personal, as [she] may select . . . .

Id. This Court found it clear that Betty had a life estate "with a remainder over to her issue per stirpes, and that during her life tenancy Betty had a duty to preserve the interests of the remaindermen." Id. The Court distinguished the will in Molloy from the Melton will, which gave the widow "full and unlimited power to dispose of the property in any way she saw fit, and only whatever was left upon her death would pass to the remaindermen." Id. Betty was given a limited power to sell and invest the life estate for the benefit of the remaindermen. "Thus, Betty could not gratuitously convey the acreage . . . for one dollar, love and affection." Id.

The language of C.F.'s will reveals that not only did he give Allie the power to sell any of the property that she may see fit or deem necessary, but also to hold it in her own right and to control and manage it in her own way. The will further states that at Allie's death, the estate "that she may then have or be possessed of" should pass as he set forth. This language infers that the remaindermen are entitled only to so much of the estate as remained in Allie's possession at the time of her death. She, unlike Betty in the Molloy case, was not limited by the will to preserving the corpus of the estate for the remaindermen.

We find persuasive appellants' argument that under C.F.'s vision, the Boyd Place farm would have eventually been sold and the proceeds split among Aileen, H.H., Gilbert, and Lexie, whereas here, Otis and Norma Kearns, neither of whom was related by blood to C.F., are possessed of the property. We also

acknowledge that C.F. may have intended to limit Allie's power in the life estate to selling it and not giving it away because, by selling it, she would be supporting herself but she would receive no monetary gain from a gift. Nonetheless, we agree with the lower court that the language, "to have and to hold the same in her own right, to control the same and manage it in her own way during the remainder of her natural life," coupled with the lack of intent that the land be preserved for the remaindermen, brings the facts of the case closer in line with Melton, 517 S.W.2d 242 and Mitchell, 276 S.W.2d 470 than Molloy, 727 S.W.2d 870. Accordingly, we affirm the opinion of the Lewis Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Donald L. Wood
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BRIEF FOR APPELLEES:

Jeffrey L. Schumacher
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