

RENDERED: April 9, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-001058-MR

ESTATE OF CORDELL H. MARTIN

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 84-CI-00109

EAST KENTUCKY ENERGY CORPORATION;
WILFORD NIECE; APPLE TREE MINING CO.;
LEWIS KING; ANNA HALL; HUBERT HALL;
OLEN DAVIS; BETTY DAVIS; DONNA DAVIS;
RICKY DAVIS; PAULINE MCCONNELL;
RAYMOND MCCONNELL; BANNER DAVIS;
VIOLETTA DAVIS; REEDITH GIBSON;
PAUL GIBSON; REECE DAVIS; BARCELONA
DAVIS; GREG MOORE; LUCINDA MOORE;
LOCIE BLAIR; HASSEL KING; BERNIECE
HALL; ARCHIE HALL; AND, DOUGLAS HAYES

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: GARDNER, JOHNSON, AND MILLER, JUDGES.

JOHNSON, JUDGE: The estate of Cordell H. Martin has appealed from the judgment of the Knott Circuit Court entered on March 8, 1996, which modified its previous order of December 28, 1989, and ordered the estate to redeposit \$85,049.39 into escrow, the sum

it determined was erroneously allowed to the Honorable Cordell Martin (Attorney Martin) in attorney's fees. We reverse.

This action was commenced on May 18, 1984, by Bethlehem Mines Corporation (Bethlehem), against Wilford Niece (Niece), doing business as Apple Tree Mining Company, and Lewis King, Ethel King, Stumbo Davis, the heirs of Bertha Davis, Hassel King and Della King (collectively, the King heirs). Bethlehem claimed to own the minerals and mining rights to a 340-acre tract of land conveyed to its predecessor in title by James King and his wife, Drucilla King, by two deeds executed in 1903 and 1905. The complaint alleged that beginning in October 1980, Niece had been mining coal on the property under contract with the King heirs. It sought injunctive relief, as well as damages of \$1,500,000 against the defendants, the amount it claimed represented the market value of the coal already mined and removed.

Niece and the King heirs alleged that an 1897 deed from James King to Drucilla King created a mere life estate with a contingent remainder to Drucilla's children by James.¹ It was their contention that the deeds executed by James and Drucilla in the early 1900's were void as the grantors had only a life estate in the property. A hearing was conducted in November 1984 on Bethlehem's motion for a temporary injunction. The trial court refused to enjoin Niece from further mining; however, it ordered

¹James and Drucilla had seven children, three of whom predeceased their parents, intestate and without issue. The remaining four children and their issue are the "Kings heirs."

all royalties to be placed in escrow pending the outcome of the litigation. Evidence at the hearing established that the King heirs had already been paid approximately \$150,000 in royalties. Subsequently, Bethlehem transferred its interest in the property to East Kentucky Energy Corporation (East Kentucky), who was substituted as plaintiff.

The issues of title to the mineral estate and damages were bifurcated. On September 8, 1988, the trial court rendered its findings of fact, conclusions of law and judgment. It dismissed the complaint after determining that the 1903 and 1905 deeds conveyed only life estates in the mineral estate, and that Drucilla's bodily heirs took a contingent remainder interest which vested at her death in 1936. On appeal, this Court agreed that the 1897 conveyance created a life estate in the grantors, but held that the "remainder interests of [James' and Drucilla's] three children who predeceased Drucilla without issue were vested at their birth." East Kentucky Energy Corporation v. Niece, Ky. App., 774 S.W.2d 458, 461 (1989). Since the interest of the three children who died before James and Drucilla descended to their parents, this Court held that the 1903 and 1905 deeds conveyed a 3/7 interest in the mineral. Id.

On remand, the parties resolved all remaining issues as follows: Niece agreed to surrender his coal lease for \$34,451.60 of the funds in the escrow account. East Kentucky negotiated with the King heirs for the lease of their 4/7 interest in the mineral estate. As part of that agreement, East Kentucky agreed

to waive its 3/7 interest in the \$123,062.04 remaining in the escrow account; however, it was also agreed that East Kentucky would recoup its full 3/7 interest of the funds in escrow from future royalties owed the King heirs under the lease.

The King heirs were represented throughout this litigation by Attorney Martin, who had a contract with the King heirs that provided he would be compensated, if the matter were appealed, by a sum equal to 40% of the "property recovered" in the litigation. Attorney Martin moved the trial court to enter an order directing the clerk to disburse to him \$108,000 of the funds in the escrow account. Attorney Martin arrived at this figure by adding the \$124,000 remaining in the escrow account to \$160,000 (the amount received by the King heirs prior to the establishment of the escrow account), multiplying by 40%, and subtracting the \$6,000 retainer already paid. On December 28, 1989, the trial court entered an order directing the clerk of the Knott Circuit Court to pay directly to Attorney Martin the sum of \$108,000 and further provided for the disbursement of the remainder of the funds to the King heirs.

On January 3, 1990, East Kentucky moved the trial court to vacate the December 28 order. East Kentucky alleged that although the parties had negotiated a settlement on the issue of damages, not all of the King heirs had executed the coal lease. It wanted to protect its interest in the escrow account until the lease had been properly executed and delivered. On January 5, 1990, Lewis King and Ethel King (two of the King heirs) also

moved the trial court pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 to alter, amend or vacate the December 28 order. The only ground asserted in their motion was that Attorney Martin was "attempting to calculate fees upon monies which his clients have no interest." Specifically, they did not believe Attorney Martin should receive a percentage of those fees in the escrow account belonging to East Kentucky. Attorney Martin responded to both motions. The trial court's calendar for January 11, 1989, reveals that a hearing was conducted on the CR 59 motions and that all the attorneys were present.

On January 23, 1990, the trial court entered two orders. The first was an agreed order which contained the settlement between the parties resolving all remaining issues in which the King heirs agreed to execute a coal lease in favor of East Kentucky and East Kentucky agreed to waive any interest in the escrow account. The second order entered on January 23, 1990, addressed the issue of Attorney Martin's fee. It recited the terms of Martin's contract and found that the King heirs had "freely and voluntairily [sic]" entered into the contract. It also found that by virtue of Attorney Martin's efforts, the King heirs received \$160,000 and \$125,000, which latter sum included the entire escrow remaining after paying Niece, and concluded that Attorney Martin was entitled to a fee of \$108,000. Finally, it addressed East Kentucky's objection to the disbursement of the funds in escrow and noted that by virtue of the settlement

agreement, the company had released its 3/7 interest in the escrowed funds.

The King heirs did not seek any further relief in the trial court for more than five years. On September 27, 1995, they moved the trial court to vacate its order of December 28, 1989, alleging that the trial court had never disposed of the motion they timely filed on January 5, 1990.² Attorney Martin had died in the interim. On March 1, 1996, the Knott Circuit Court entered the order from which Attorney Martin's estate has appealed. It found that under the contract with the King heirs, Attorney Martin was entitled to only 40% of 4/7 of the royalties held in escrow and ordered that the estate redeposit the sum of \$85,049.39, plus 12% interest from the date of the order allowing Attorney Martin to withdraw \$108,000.00.

We believe it unnecessary to address the issue of the amount Attorney Martin was entitled to receive under the terms of his contingency fee contract with the King heirs, as it is apparent to us that the trial court was without jurisdiction to modify the December 28, 1989 order disbursing the escrow account. The March 8, 1996 order reads in part as follows:

The estate of Cordell Martin was timely named as a party to this action premised upon the fact that certain payments were made from the escrowed funds herein, to Cordell Martin prior to his death, and a timely Motion was filed for and on behalf of certain of the

²The Honorable John David Caudill was appointed Special Judge in this action on August 9, 1995.

Defendant "KING HEIRS", to vacate an Order disbursing a portion of the escrowed funds. However, the Court has not entered any Order regarding that Motion to Vacate the Order disbursing a portion of the escrowed funds to the Honorable Cordell Martin either prior to, after his death, or at any time prior hereto.

This order does not mention the trial court's order of January 23, 1990, rendered a few days after the hearing on the CR 59.05 motions.

We note at the outset that the trial court did not expressly state in its order of January 23, 1990, that it was denying the relief the appellees sought in their CR 59.05 motions. Nevertheless, that order clearly addressed the arguments raised in the post-judgment motions and resolved those issues in Attorney Martin's favor, reiterating the attorney's entitlement to a fee of \$108,000. The only pending matter for the court's resolution on January 23, 1990, was the disposition of the two motions to alter, amend or vacate the December 28 order. There was no conceivable purpose for the order except to address and decide the CR 59.05 motions. Under these circumstances, it is our opinion that the CR 59.05 motions were necessarily disposed of by implication, thereby depriving the Knott Circuit Court of jurisdiction to revisit the issues raised in the motions. See Toms v. Holmes, 294 Ky. 233, 236-237, 171 S.W.2d 245 (1943), and the cases cited therein at pp. 247-248.

Accordingly, that portion of the March 8, 1996 order modifying the December 28, 1989 order is reversed.

MILLER, JUDGE, CONCURS.

GARDNER, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

GARDNER, JUDGE DISSENTING. I respectfully dissent.

The lower court properly exercised its jurisdiction in considering the issues at bar, and justice demands that the matter on appeal receive the full and fair appellate review of this Court. In reversing the March 8, 1996 order on jurisdictional grounds, the majority by implication concludes that the Martin estate is entitled to a fee of \$108,000. The facts and the law do not support this conclusion.

Attorney Martin clearly was entitled to 40% of the King heirs' 4/7 interest in the escrow account, or a sum equaling \$22,950.51 plus interest. By no stretch of the imagination could Martin be entitled to 40% of the remaining 3/7 interest, since these funds are merely an advance which will be repaid to East Kentucky by the King heirs from future royalties. The 3/7 interest does not represent a recovery by the King heirs from Martin's efforts, and accordingly the Martin estate is not entitled to a percentage thereof. I would affirm Special Judge Caudill's order modifying the December 28, 1989 order.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Hon. Del Kerwyn Martin
Hindman, KY

BRIEF FOR APPELLEE, East
Kentucky Energy Corp.:

Hon. Steven D. Combs
Pikeville, KY

ORAL ARGUMENT FOR APPELLEE,
East Kentucky Energy Corp.:

Hon. Scott Kreutzer
Pikeville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEES, King Heirs:

Hon. J. Thomas Hardin
Inez, KY