RENDERED: OCTOBER 27, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002647-MR

DONNA REID MITCHELL,
SHARRON C. STAYTON, and
TERRELL E. HEICK, JR. APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NOS. 98-CI-00095 & 99-CI-00306

MILDRED EDDINGTON, KENNETH EDDINGTON,
and MARTHA LYNN EDDINGTON as Executor
of the Estate of Edith Marie Shields APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE: This is an appeal from an order of the Bullitt Circuit Court interpreting the terms of a will and testamentary trust. We reverse and remand.

Edith Marie Shields died testate on May 16, 1992. Item II of her last will and testament devised and bequeathed the entirety of her estate to her sisters, Jean K. Heick and Mildred S. Eddington, in trust:

> for the use and benefit of my mother, MARY M. SHIELDS, for and during her lifetime with remainder, unto my sisters. . . share and share alike, each to have an undivided one-

half interest in the real estate remaining at my mother's death.

There was no separate residuary clause nor any provision to govern in the event that either of the testator's sisters predeceased their mother, the life tenant. Jean K. Heick died on November 17, 1995. Mary M. Shields, the life tenant, died on October 15, 1997.

The appellants, the heirs of Jean K. Heick, contend that the remainder interest bequeathed to their mother vested on the death of the testator, Edith Marie Shields. The circuit court determined, however, that the gift was contingent upon the remaindermen's surviving the life tenant and that the failure of Heick to meet this condition means that she is to take nothing under the terms of the will. We agree with the position ably advanced by the appellants in this case.

The general rule for interpreting a will is that "the intention of the testator as gathered from the four corners of the instrument must prevail unless it is contrary to some positive provision of law or public policy." Graham v. Jones, Ky., 386 S.W.2d 271, 273 (1965). Where the testator's intentions are not obvious, however, courts resort to certain rules of construction.

Several rules of construction favor vesting of a remainder interest at the testator's death. See Gatewood v. Pickett, 314 Ky. 125, 234 S.W.2d 489 (1950). However, it has been observed that a gift to a named person is indicative of an intention to vest the remainder immediately. 28 Am. Jur. 2d Estates §309 (2000). Moreover, a remainder gift to those related

by blood or marriage to the testator should be construed in a manner to prevent the disinheritance of remaindermen who may happen to die before the termination of the precedent estate. 28 Am. Jur. 2d Estates § 279 (2000).

The appellants cite Aufenkamp v. First Kentucky Trust Co., Ky. App., 705 S.W.2d 943 (1986), in support of the proposition that a beneficiary's interest vests immediately upon the testator's death where there is no language requiring survivorship attached to the provision devising the remainder after termination of the life estate. Aufenkamp holds only the enjoyment of the interest is said to be postponed -- not the actual vesting of the interest.

The appellants also rely upon Fugazzi v. Fugazzi's Committee, 275 Ky. 62, 120 S.W.2d 779 (1938). In that case, the court was faced with the effect of the words "upon the death of my wife" as to the vesting of a remainder interest under a will. The court stated as follows:

> This expression is equivalent to "when my wife dies" or "at the death of my wife," and such similar expressions, which in a will in the absence of anything showing a contrary intention, have been construed as merely deferring the time for enjoyment in possession of the property composing the remainder, and not to defer the vesting of the remainder or creating a condition which, upon its happening, would divest the remaindermen of title.

Id., 120 S.W.2d at 782. Thus, unless some contrary interest is shown, it is clear that vesting occurs upon the death of a testator as to a remainder interest which is to follow a life

estate in a provision using language such as "at" or "after" the death of the life tenant.

We find no clearly expressed desire in the will at issue here for suspending or deferring the time of vesting of the interest created. We agree that the words "at my mother's death" as used by the testator in her will refer simply to the time of distribution or enjoyment of the interest and rather than its actual vesting. Moreover, we are not persuaded that the trustees' power of sale as outlined in the trust instrument is of any consequence. Where a trust provides that the trustee may invade the entire corpus of the estate if necessary to support the life tenant, the persons named have a vested remainder in the corpus of the trust merely subject to defeasance if the entire corpus is consumed. 28 Am. Jur. 2d Estates § 309 (2000).

We believe that the trial court's construction of the will and testamentary trust were clearly erroneous. Therefore, we reverse the judgment of the Bullitt Circuit Court and remand the cause for further proceedings consistent with the appellants' petition.

ALL CONCUR.

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