

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002097-MR

VIRGINIA MURRELL, AS ADMINISTRATRIX  
AND AS PROPOSED EXECUTRIX OF THE  
WILL OF LOTUS C. HUFFAKER;  
VIRGINIA MURRELL, SEPARATELY AND  
INDIVIDUALLY; AND DOROTHY MURRELL,  
INDIVIDUALLY

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
ACTION NO. 98-CI-01032

GEORGE EDWARDS MCCARLEY ESTATE;  
VIVIAN CLAYPOOL BURKE ESTATE;  
ALBERT BURKE; BETTY CLAYPOOL WHITE;  
JOSEPH CLAYPOOL; MARGORIE MAXINE BURGE;  
LEQUITTA TIMONEY; LINDA FLINT; KENDALL  
CLAYPOOL; AND MARVIN CLAYPOOL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Virginia Murrell, as Administratrix with the Will Annexed of the Estate of Lotus C. Huffaker, and as proposed Executrix of the Will of Lotus C. Huffaker, Virginia Murrell, and Dorothy Murrell (collectively referred to as "the Murrells"), bring this appeal from an August 3, 1999, order of the Pulaski Circuit Court. We affirm.

On December 14, 1998, the Murrells filed the instant litigation against George Edward McCarley Estate, Albert Burke, Vivian Claypool Burke Estate, Betty Claypool White, Joseph Claypool, Margorie Maxine Burge, Lequitta Timoney, Linda Flint, Kendall Claypool, and Marvin Claypool, seeking a declaration of rights under our Declaratory Judgment Act, codified as Kentucky Revised Statutes (KRS) 418.040-090. KRS 418.040 provides:

**418.040. Plaintiff may obtain declaration of rights if actual controversy exists.** – In any action in a court of record of this commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked. (Emphasis added.)

KRS 418.045 provides, in part, as follows:

**418.045. Persons who may obtain declaration of rights – Enumeration not exclusive.** – Any person interested under a deed, will or other instrument of writing, . . ., may apply for and secure a declaration of his right or duties, even though no consequential or other relief be asked. . . .

Specifically, the Murrells sought to be declared owners of certain intangible personal property in "possession" of one, Lotus C. Huffaker, who died in Pulaski County on March 17, 1997.

There were two counts in the declaration by which the Murrells sought to succeed. The first count alleged entitlement to the intangible personal property in the form of savings accounts, certificates of deposit, and stock by virtue of an "unsigned" handwritten document of the late Lotus C. Huffaker. The Murrells sought to have this document probated as the last

will and testament of Lotus or as a codicil to a previously probated holographic will. The previous will only disposed of real property to the benefit of Lotus' two nephews, George E. McCarley and Gene McCarley. It made no disposition of Lotus' personal estate. The handwritten document, which the Murrells sought to have probated, disposed of personal property only. The document bequeathed Lotus' personal estate to the Murrells. That estate largely consisted of the intangibles aforementioned. It was, of course, to the Murrells' interest that the unsigned document be probated as the last will of Lotus or as a codicil to the previously probated holographic instrument.

Count two in the declaration sought to obtain substantially the same intangible personal property under the will of Eliza Huffaker (the Murrells' grandmother) executed in 1939 and probated in Pulaski County in 1945. It was the Murrells' contention that the intangible personal property passed to the Murrells as remaindermen under Eliza's will, and that the same had come into the hands of Lotus during her lifetime whereas it should have come into the hands of the Murrells upon the death of two life tenants. The life tenants died, one in 1963 and the other in 1979. It was at the latter's death that the Murrells were to be entitled to the intangible personal property (if any there remained). We shall discuss the two counts separately.

#### COUNT I

On May 30, 1984, Lotus Huffaker executed a holographic will. On March 17, 1997, she died. On August 6, 1997, the

holographic will was duly entered for probate in the Pulaski District Court.

In this action, the Murrells seek to probate an "unsigned" document dated October 30, 1992. That document, being wholly within the handwriting of Lotus Huffaker, provides as follows:

Will

October 30, 1992

I, Lotus Huffaker make this my last Will and Testament  
I appoint—  
Virginia Murrell Executrix  
To Virginia and Dorothy Murrell I leave my bank savings account with The Citizens  
National Bank—also Mutual Federal Savings and Loan account.  
Certificated Deposit at First and Farmers Bank "Checking account"—First—and  
Farmers Bank "Bank Stock" First and Farmers Bank  
Koger stock, Kentucky Utilities, American Life and Accident, and H. Bond  
U.S. Treasury.

Linda J. Cates  
Oct 31, 1992

D. E. Cates III  
Oct 31, 1992

The question before us is whether the foregoing document may be probated as Huffaker's last will or as a codicil to her theretofore probated will of May 30, 1984. The circuit court held that the document was neither a last will nor a codicil because of the absence of a signature. The court held that it was not "subscribed" as required by statute. KRS 394.040 provides:

**394.040. Requisites of a valid will.**

No will is valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction. If the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two (2) credible witnesses, who shall subscribe the will with their names in the presence of the testator, and in the presence of each other. (Emphasis added.)

KRS 446.060 provides:

**446.060. Writings – Signature must be at end – To be in English.**

- (1) When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing.
- (2) Every writing contemplated by the laws of this state shall be in the English language. (Emphasis added.)

We agree with the circuit court and are of the opinion that holographic wills must nevertheless be subscribed by the testator. It is not sufficient that the testator's name appear in the document. It must be subscribed as a signature. To permit otherwise, would open the door for all sorts of documents being offered as testamentary. It would defeat the purpose underlying the manner of executing wills. It is for this reason that we agree with the circuit court. The document is not valid as either a last will or codicil.

COUNT II

Virginia Murrell and Dorothy Murrell claim as remaindermen under the will of their grandmother, Eliza Huffaker. Under the terms of Eliza's will, her personal property was to be

kept and maintained with the income divided equally between her son, Morris Huffaker, and her daughter, Pearl Murrell. At the death of one, the survivor was to enjoy the income. At the death of both Morris and Pearl, the property was to pass to Virginia and Dorothy. At this point, the facts are somewhat murky. It appears, however, that in 1963 Morris died leaving his entire estate to his widow, Lotus. In all probability, this included all or some of the intangible properties which emanated from Eliza. It further appears that at Morris' death, Pearl Murrell may not have claimed possession of the intangibles. On the other hand, it appears Lotus enjoyed possession of same and the income therefrom. It is claimed that at Pearl's death, the remaindermen, Virginia and Dorothy, allowed Lotus to continue to enjoy the income as a supplement to her living expenses.

In any event, it was only after Lotus' death that Virginia and Dorothy claimed possession of the remainder interest. There is one thing relatively clear, however, that neither Virginia nor Dorothy claimed possession of the personal property until the death of Lotus in 1997.

Because the Murrells had not claimed possession of the personal property after both life tenants were deceased, the circuit court was of the opinion that they are now barred from asserting said claim by virtue of the five-year statute of limitations set forth in KRS 413.120.

The Murrells contend that the statute has no application. The Murrells advance the argument that they permitted Lotus to take possession of the personal property upon

the death of her husband, Morris, such that Lotus would have some income to provide for her living expenses. In other words, they contend that the possession of the intangibles by Lotus at the time of her death was permissive. They further assert that no controversy within the meaning of KRS 418.045 existed until Lotus' death on March 17, 1997. Perforce, they urge that the five-year statute of limitation does not bar the instant action which was filed on December 14, 1998.

We find no Kentucky authority directly on point so as to dispose of the issue presented in Count II. Nevertheless, we are of the opinion that if the Murrells had any claim to intangible properties under Eliza's will, those claims matured upon Pearl's death in 1979, she being the last life tenant. It was at that time incumbent upon Virginia and Dorothy to take action to secure their interests in the intangibles whether or not they were to be directed toward the benefit of Lotus. It was at that time that the statute of limitations began to run.

We are constrained to agree with the circuit court in this matter. Inasmuch as the action is barred by the five-year statute of limitation, there exist no actual controversy within contemplation of KRS 418.040. See Alexander v. Hicks, Ky., 488 S.W.2d 336 (1972). In short, where allegations on the face of a complaint for declaration of rights show that the claims are barred by the statute of limitations, there can be no controversy and the action should be dismissed.

For the foregoing reasons, the order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Michelle Ross Altobella  
Somerset, Kentucky

BRIEF FOR APPELLEES, ALBERT  
BURKE, VIVIAN CLAYPOOL BURKE  
ESTATE, BETTY CLAYPOOL WHITE,  
JOSEPH CLAYPOOL, MARGORIE  
MAXINE BURGE, LEQUITTA  
TIMONEY, LINDA FLINT, KENDALL  
CLAYPOOL, AND MARVIN CLAYPOOL:

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