RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002355-MR

CAROLYN STRATTON; KENNETH STRATTON; HENRY HENSON; JACQUELINE HENSON; JOANN CAUDILL; JAMES D. CAUDILL; JACKIE HENSON; HANNAH CAMPBELL; HAROLD E. HENSON; AND FRANCES HENSON — APPELLANTS

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 07-CI-00285

BOBBY STEELE HENSON (BEING THE SAME PERSON AS ROBERT STEELE HENSON); NANCY FLETCHER HENSON; TAMMY MAPLES; LARRY MAPLES; MARK HENSON; REGINA A. HENSON; BILLY HENSON; BEN HENSON; WANDA HENSON; JOHNNY MACK HENSON; AND WILMA HENSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Carolyn Stratton, Henry Henson, JoAnn Caudill, Jackie Henson, Hannah Campbell, and Harold E. Henson (Appellants) appeal from a declaratory judgment determining the parties' interests in the devise of real property. Appellants argue that the trial court erred by: (1) determining that the will provision constituted a vested remainder rather than a class gift; and (2) failing to resolve an alleged anomaly in the will provision. We affirm.

Lillie Phillips Henson died testate in Lincoln County, Kentucky, in 1977. At the time of her death, Lillie Henson owned a parcel of real estate containing 107.66 acres, which is the subject of the present controversy. Item #3 of Lillie Henson's will states:

> I give, bequeath, and devise any real estate which I may own at the time of my death to my son, Henry Clay Henson for his life time, and my daughter, Zora Henson for her life time, on the condition that they should choose to remain unmarried. At their deaths or marriages, the remainder of my real estate is to be divided absolutely and in fee simple, share and share alike among my children who are: Henry Clay Henson, Zora Henson, Mack Henson, Luther Henson, Hannah Campbell, Harold E. Henson, and Robert Steele Henson, and in the event the remaining children above set out agree with these unmarried children, the property may be sold and Henry Clay Henson is to have one-third of the proceeds

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

> therefrom plus his child's share of the remaining amount. In the event either of my children are dead at the time my unmarried children shall die or marry, the children of any deceased child is to take the share of the parent.

Henry Clay Henson and Zora Henson were life tenants with purported remainder interests in the property. Henry Clay Henson died testate in 1986 and devised his interest in the property to Zora Henson. Zora Henson died testate in 2007 and devised her interest in equal portions to her brother, Robert (Bobby) Steele Henson, and her niece, Tammy Maples Henson.

Mack Henson died intestate prior to the death of Zora Henson. Mack Henson's interest in the property passed equally to his three children, Ben Henson, Johnny Mack Henson, and Wayne Henson. Wayne Henson died prior to Zora Henson and his interest in the property passed equally to his children, Mark Henson and Billy Henson.

Luther Henson died intestate in 1972. His interest in the property passed equally to his children, Carolyn Stratton, Henry Henson, JoAnn Caudill, and Jackie Henson.

Lillie Henson's remaining children, Hannah Campbell, Harold Henson, and Bobby Steele Henson, are still living.

The Appellants sought a declaratory judgment in Lincoln Circuit Court determining the parties' interests in the property. The trial court found that Lillie Henson's will devised her interest in the property equally among all seven of

her children in fee simple as tenants-in-common. Specifically, the trial court found:

(a) Tammy Maples Henson (undivided 1/7th interest)
(b) Ben Henson (undivided 1/21st interest)
(c) Johnny Mack Henson (undivided 1/21st interest)
(d) Mark Henson (undivided 1/42nd interest)
(e) Billy Henson (undivided 1/42nd interest)
(f) Carolyn Stratton (undivided 1/28th interest)
(g) Henry Henson (undivided 1/28th interest)
(h) JoAnn Caudill (undivided 1/28th interest)
(i) Jackie Henson (undivided 1/28th interest)
(j) Hannah Campbell (undivided 1/7th interest)
(k) Harold Henson (undivided 1/7th interest)
(l) Bobby Steele Henson (undivided 2/7ths interest.

This appeal followed.

Appellants argue that the language of Lillie Henson's will created a class gift to her children or their issue who survived the life tenants, Henry Clay Henson and Zora Henson. Appellants further argue that the estates of the life tenants should have been excluded from any interest in the remainder.

In Kentucky, the fundamental or "polar star" rule governing the interpretation of wills is that the intention of the testator is controlling absent some illegality. The intention of the testator determines whether a testamentary gift to several persons is made to them as a class rather than as individuals. *Hardin v. Crow*, 310 Ky. 814, 222 S.W.2d 842, 844 (1949). A testamentary gift is one to a class where the members of a class are uncertain at the time of gift and the class is capable of future change. *Cromer v. Acton*, 298 S.W.2d 20, 22 (Ky. 1957). Additionally, "[w]here a gift is made to beneficiaries by name, the gift is prima

facie to individuals, even though the persons designated may constitute a natural class, or possess some quality in common." *Church v. Gibson*, 286 S.W.2d 91, 92 (Ky. 1956). The cases of *Combs v. First Security National Bank & Trust Co.*, 431 S.W.2d 719 (Ky. 1968), and *Carroll v. Carroll's Ex'r*, 248 Ky. 386, 58 S.W.2d 670 (1933), address testamentary gifts similarly worded to the language at issue in the present case with contrary results.

> It is rare indeed that courts have identical wills to construe, although the same confusing words may be presented. As bearing on the construction of wills, in *Muir v. Richardson*, 201 Ky. 357, 256 S.W. 727, 730, we borrowed from an opinion of the United States Supreme Court (*Home Tel. & Tel. Co. v. Los Angeles*, 211 U.S. 265, 29 S.Ct. 50, 53 L.Ed. 176) to say: "No case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other."

Jennings v. Jennings, 299 Ky. 779, 187 S.W.2d 459, 465 (1945).

From a review of the entirety of Lillie Henson's will, we find that item 3 devised the property to individuals rather than as a class. The children were set out by name and were fixed at the time of the gift. There was no language indicating an intention to include any possible afterborn children. The sentence "[i]n the event of either of my children are dead at the time my unmarried children shall die or marry, the children of any deceased child is to take the share of the parent" is neither superfluous nor indicative of a class gift. The sentence merely directs that the children of any child who predeceased the life tenants shall take their parent's share. The remainder interest was vested at the time of Lillie

Henson's death. "Vested remainders are those by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to a determinate person after a particular estate is spent." *Carroll,* 58 S.W.2d at 673. The language of the will clearly states that the life tenants, Henry Clay Henson and Zora Henson, were included among the remaindermen. The sentence contemplating the sale of the property supports this intention where it is stated that if the property was sold with the agreement of the life tenants, then Henry Clay Henson would receive both 1/3 of the proceeds of the sale in addition to his 1/7th child's share.

Although Lillie Henson's will may have created an anomalous situation because the life tenants would be able to devise their share of the remainder before the death of the last surviving life tenant while the other remaindermen were precluded from so devising, we find that this situation was the testator's intention and was not unreasonable. Therefore, this factual situation is distinguishable from *Combs,* 431 S.W.2d at 719. The context of Lillie Henson's will as a whole clearly indicated her abiding concern to set apart and provide for her unmarried children, Henry Clay Henson and Zora Henson. By devising these children life estates on the condition that they remain unmarried, Lillie contemplated that they would possibly die without children to substitute in their share of the remainder. Lillie Henson simply chose not to place the same restriction for devising their share of the remainder on Henry Clay Henson and Zora Henson that she placed upon the other children.

Accordingly, the judgment of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

J. Robert Lyons, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEES:

Jeffrey C. Ralston
Stanford, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Jeffrey C. Ralston