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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002271-MR

DRUSCILLA WOOLUM,
LAVETTA HIGGINS MAHAN,
RUFUS DEE HIGGINS, AND
ARLINDA D. HENRY — APPELLANTS

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 06-CI-00372

JEANNETTE BENTLEY, SINGLE;
CLAUDE BENTLEY, AND
CAROL BENTLEY, HIS WIFE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

STUMBO, JUDGE: Druscilla Woolum, et al. (hereinafter collectively referred to

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

as Woolum) appeals from an Order of the Knox Circuit Court quieting title to two parcels of real property in favor of Jeanette Bentley and Claude Bentley, Jr. Woolum contends that the Knox Circuit Court erred in interpreting a 1921 deed as granting a fee simple interest in the realty rather than a life estate. For the reasons stated below, we affirm the Order on appeal.

In 1921, Y.M. Higgins and Emily Higgins executed a deed which transferred to Ben H. Higgins an interest in a parcel of real property located in Knox County, Kentucky. The granting clause of the deed stated in relevant part that Y.M. and Emily Higgins transferred title in the parcel "to Ben H. Higgins & heirs, wife children [sic] etc. parties of the second part."

At the time of the conveyance, grantee Ben H. Higgins had two children, namely Rufus Davis Higgins and Ruth Higgins (later Bentley).[2] Rufus died in 1960, predeceasing his father Ben, and devised all his personal and real property to his wife (and now Appellant) Druscilla Woolum.

Grantee Ben H. Higgins died in 1964, and left a will devising the Knox County property in separate parcels to his daughter, Ruth Bentley, and his grandson, Ben H. Bentley. Ruth died in 1999, and her will left the parcel to her son (and now Appellee), Claude Bentley, Jr. Claude and his predecessors have been in exclusive possession of the parcel since 1921. Ben Bentley devised his parcel to his widow, Jeanette, who is also an appellee herein.

[2] Woolum incorrectly states on page 2 of her written argument that Rufus Higgins and Ruth Higgins (later Bentley) were the children of Y.M. and Emily Higgins.

In 2005, Claude sought legal counsel for the purpose of subdividing the parcel and selling tracts. His counsel, Hon. Patrick Hauser, subsequently filed the instant action in Knox Circuit Court on behalf of Jeanette and Claude which sought to quiet title in the parcels. Their claim stemmed from the 1921 transfer of title to Ben Higgins, who devised the parcel in separate tracts to Ruth Higgins and Ben Bentley, who later devised the tracts to Claude and Jeanette, respectively.

The matter proceeded in Knox Circuit Court, where Woolum argued that the 1921 deed conveyed only a life estate to Ben H. Higgins, with the remainder vesting with his children upon his death. According to Woolum, at the death of Ben H. Higgins, title should have passed to the heirs of Rufus (Rufus having already died) and to Ruth. Conversely, Claude and Jeanette maintained that the 1921 deed granted a fee simple interest to Ben H. Higgins, who then properly devised the title to his heirs upon his death, resulting in title ultimately vesting with Claude and Jeanette.

After proof was heard, the parties filed competing motions for Summary Judgment. On November 13, 2008, the Knox Circuit Court rendered an Order quieting title in favor of Claude and Jeanette. The Court determined that the deed's granting clause was ambiguous because the grantors' usage of the word "heirs" indicated an intent to transfer a fee simple interest, but the use of the word "children" evidenced an intent to convey a life estate. Upon finding the ambiguity, the Court considered all of the circumstances surrounding the transfer, as well as the subsequent acts of the parties, and interpreted the granting clause as

transferring a fee simple interest in the parcel. Having determined that Ben Higgins received a fee simple title, the Court quieted title in favor of Higgins' devisees Ruth Higgins and Ben Bentley, and their successors in interest, Claude and Jeanette. This appeal followed.

Woolum now argues that the Knox Circuit Court erred in quieting title in favor of Claude and Jeanette. She contends that the granting clause is not ambiguous, and that it lends itself to the sole interpretation that Y.M. and Emily Higgins granted a life estate to Ben Higgins. Woolum bases this argument on her contention that Y.M. and Emily Higgins made it abundantly clear in the granting clause that they intended to transfer a property interest to more than one party, i.e., not only to Ben Higgins and his heirs, but also to his children. She directs our attention to case law which she claims stands for the proposition that a grant to a party and his children - as opposed to a party and his heirs - creates a life estate in the party with the remainder to his children. Woolum notes that the grantors' reference throughout the deed to "parties of the second part" is clearly plural and evidences the grantors' intent to transfer an interest to more than one grantee. Ultimately, Woolum argues that since Ben Higgins only received a life estate, his devise to Ruth Higgins Bentley and Ben Bentley failed because he had nothing to devise. As such, Woolum claims entitlement to a one-half interest in the undivided whole of the land arising from Rufus's devise to her upon his death.

We have closely examined the record, the law, and the parties' written arguments, and find no error in the Order on appeal. The Knox Circuit Court's

Order centered on the Court's determination that the granting clause at issue created an ambiguity. We have no basis for tampering with this determination. On one hand, a long line of Kentucky case law has held that the transfer of a real property interest to a grantee and his or her heir creates a fee simple grant in favor of the grantee. See generally, *Williams v. Ohio Valley Banking & Trust Co*., 266 S.W. 670, 205 Ky. 807 (Ky. 1924) (" . . . it has generally been held in this court that the phrases 'heirs of the body,' 'heirs lawfully begotten of the body,' and other similar expressions are appropriate words of limitation, and are to be construed as creating an estate tail, which by the statute is converted into a fee-simple estate . . . ."); *Campbell v. Prestonsburg Coal Co.*, 79 S.W.2d 373, 258 Ky. 77 (Ky. 1934); *Sallee v. Warner*, 209 S.W.2d 491, 306 Ky. 846 (Ky. 1948). Conversely, the transfer of an interest in realty to a grantee and his or her children has been interpreted as transferring a life estate to the grantee with a remainder to the children. "[W]here a conveyance is to one and his children, the taker receives only a life estate with remainder to the children, unless it appears from the entire instrument that the grantor used the word 'children' in a technical sense of the word 'heirs'." *Combs v. Combs*, 171 S.W.2d 13, 14, 294 Ky. 89 (Ky. 1943).

In the granting clause at issue, it is uncontroverted that Y.M. and Emily Higgins employed both the term "heirs" (generally evidencing an intent to grant a fee simple interest in the grantor) and the term "children" (usually showing that a life interest with a remainder was intended). The Knox Circuit Court concluded that the use of these conflicting terms in the granting clause created an

ambiguity, and we find no error in that conclusion. The grantor clearly cannot be found to have created both a fee simple interest and a life estate in the same grantee. When such an ambiguity occurs, it is proper for the trial court to consider the whole deed along with the circumstances surrounding it to aid in its interpretation. *Arthur v. Martin*, 705 S.W.2d 940 (Ky. App. 1986). In so doing, the Knox Circuit Court recognized that Ben Higgins believed he received a fee simple interest in the parcel, which was evidenced by his devise of that interest to his daughter, Ruth, and grandson, Ben Bentley. Woolum contends that a grantee's devise of a purported fee simple interest is self-serving, and this argument is not without merit. The Knox Circuit Court, however, only used Ben Higgins' devise of the interest as *some evidence* that he believed he received a fee simple interest. The court went on to note that Ben Higgins and his successors in interest also had enjoyed exclusive possession and control of the realty continuously since the 1921 grant, and that no claim of adverse title was made until Claude filed the instant action to quiet title. Again, none of these facts were held to be dispositive of the underlying issue, but were relied on by the circuit court in the context of all of the facts and law it had before it when the Order was entered.

It is also worth noting the general rule that an ambiguous deed should be interpreted, where possible, as granting a fee simple interest rather than a life estate.

> "To say the least, a doubt would remain as to the character of the estate that was intended to be conveyed, and it is an established rule that, where the terms of a

> deed are susceptible of two constructions, one favoring a fee and the other a lesser estate, it is the duty of the court to adopt the construction favoring a fee."

Campbell at 376.

Having determined that the Knox Circuit Court properly interpreted the 1921 granting clause as being ambiguous, and that the court correctly relied on extrinsic evidence to determine the grantors' intent, we find no error in its determination that Y.M. and Emily Higgins granted a fee simple interest to Ben Higgins. As such, Ben Higgins' successors in interest properly received fee simple title to the divided parcels, ultimately resulting in fee simple title vesting with Jeanette Bentley and Claude Bentley, Jr. The Knox Circuit Court properly so found.

For the foregoing reasons, we affirm the Order of the Knox Circuit Court quieting title in favor of Jeanette Bentley and Claude Bentley, Jr.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kenneth J. Henry
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thor H. Bahrman
Corbin, Kentucky