

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001236-MR

JANET CABLE

APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT  
HONORABLE FRANK FLETCHER, JUDGE  
ACTION NO. 05-CI-00169

IMOGENE STEELY AND  
WADE FIELDS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

THOMPSON, JUDGE: Janet Cable appeals the Wolfe Circuit Court's summary  
judgment in favor of Imogene Steely. For the reasons stated herein, we affirm.

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<sup>1</sup> Senior Judge Joseph E. Lambert 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.

On May 4, 1988, Olzie<sup>2</sup> Fields executed her will. Paragraph three of her will, in pertinent part, provides the following:

I give and devise unto my son, Wade Fields, my house and lot, which is described in a Deed to me by Hiram Fields.... Should Wade Fields at any time decide to sell this property, he shall give the right of first refusal to each of his brothers and sisters.

It appears from the other sections of the will that Wade's siblings were devised and bequeathed other property. Mrs. Fields died on February 19, 2003.

During the course of the following year, Wade executed two quitclaim deeds to his girlfriend, Janet, transferring title of the real property that he inherited from his mother. Each deed specified that the valuable consideration for the transfer was one dollar, but the certificates of consideration provided that the transfers were by gift. At their depositions, both Janet and Wade testified that the property transfer was a gift and that no money was exchanged.

On September 14, 2005, Wade's sister, Imogene Steely, filed a complaint against Janet and Wade, alleging that Wade breached her right of first refusal provided in their mother's will. She argued that the two deeds should be set aside and that "the Defendant, Wade Fields, be ordered to execute a deed to Imogene Steely for \$1.00," the exact amount that he agreed to charge Janet.

On September 6, 2006, the defendants filed a summary judgment motion alleging that Wade's transfer was a gift and, thus, did not violate the "right of first refusal" of a sale provision of his mother's will. After Steely filed a

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<sup>2</sup> Although she is referred to by other names in the record, we will use the name Olzie Fields because it was contained in the trial court's amended judgment.

response, the trial court denied the defendants' motion for summary judgment because "there [was] a question of fact regarding the latent ambiguity of the term 'sell' as it appears in the late Ozzie Fields' will."

On September 24, 2007, Steely filed a motion for summary judgment alleging that Wade sold the disputed property in violation of their mother's will. She attached Wade Fields's affidavit stating that he sold the devised property to Janet in violation of the will.<sup>3</sup> Additionally, she argued that her mother intended that all possible dispositions of the disputed property were encompassed in the right of first refusal provision. Thus, even if Wade gifted the property, she contended that his siblings had a right to be offered the same type of transfer.

In November 2007, Janet hired new counsel and moved for additional time to respond to Steely's motion for summary judgment, which was apparently granted. Five months later, Janet filed a motion for summary judgment. Janet attached an affidavit from Gary C. Rose, the attorney who allegedly drafted Mrs. Fields's will, stating that the testator did not "ask me to include in the right of first refusal any other method by which he could have disposed of the property, including but not limited to, a gift or a devise of his interest in the property."

On April 17, 2008, Steely moved to set the case for trial and, subsequently, filed a response to Janet's summary judgment motion. At the summary judgment hearing, Janet argued in support of her summary judgment motion. Steely countered that the evidence presented a factual question regarding

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<sup>3</sup> During the proceedings below, Wade Fields joined his sister, Imogene, in disputing Janet's claim of ownership in the devised property.

the intent of the testator. After hearing the argument of counsel, the trial court issued summary judgment in favor of Steely.

The trial court's amended judgment was entered on June 5, 2008, containing, in relevant part, the following:

1. That the Will of Olzie Fields contained a right of refusal which provided that Wade Fields would have to offer the property he was devised to his siblings if he sold the subject property.
2. That Wade Fields subsequently conveyed the property as a gift to defendant Janet Cable by two separate deeds, but did not offer it to his siblings.
3. That the right of first refusal contained in the Will of Olzie Fields encompasses a gift of the property as well as any actual sale for valuable consideration.

The trial court then ordered the setting aside of the conveyances to Janet and placed title to the property in the name of Wade Fields. This appeal followed.

Janet argues that the trial court erred by granting summary judgment for Steely because she contends that only her motion for summary judgment was before the court. Citing CR<sup>4</sup> 56.03, Janet contends that she was entitled to ten-days' notice before summary judgment could be issued against her. Because Janet misstates the procedural history of this case, we disagree.

The standard of review of a trial court's grant of summary judgment is whether it correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Amos v. Clubb*, 268 S.W.3d 378, 380-81 (Ky.App. 2008). Summary judgments are reserved for

<sup>4</sup> Kentucky Rules of Civil Procedure (CR).

cases where the moving party demonstrates that the non-moving party cannot prevail at trial under any circumstances. *Price v. Godby*, 263 S.W.3d 598, 601 (Ky.App. 2008). An appellate court reviews grants of summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827, 831 (Ky.App. 2008).

CR 56.03 requires that all summary judgment motions be served on the non-moving party “at least 10 days before the time fixed for the hearing.” This notice requirement is designed to prevent a party’s surprise by last-minute legal maneuvering. *Rexing v. Doug Evans Auto Sales, Inc.*, 703 S.W.2d 491, 494 (Ky.App. 1986). However, if no objection to a ruling is made, the requirement that a party be provided ten-days’ notice can be waived. *Brock v. Pilot Corp.*, 234 S.W.3d 381, 383 (Ky.App. 2007).

After reviewing the record, we note that Steely filed a motion for summary judgment on September 24, 2007, which motion remained pending. Moreover, the trial court granted Janet’s request for additional time to prepare a defense to Steely’s motion, which amounted to six calendar months of preparation. Additionally, the record is devoid of any objection to the trial court’s judgment due to insufficient notice, which constitutes a waiver. Accordingly, the trial court did not commit a procedural error by issuing summary judgment in Steely’s favor.

Janet next argues that the trial court erred when it found a latent ambiguity in Mrs. Fields’s will and set aside her two deeds to the devised property. Janet argues that the express terms of the will clearly limit the right of first refusal to Wade’s selling of the property and not to other forms of disposition. Therefore,

she contends that extrinsic evidence could not be used to determine the intent of Mrs. Fields regarding the disposition of the disputed property. Because there were no ambiguities, we disagree.

The cardinal rule of testamentary construction is to effectuate the intention of the testator. *Carey v. Jaynes*, 265 S.W.3d 801, 803 (Ky.App. 2008). “The right of a testator to make a will according to his own wishes is jealously guarded by the courts, regardless of a court's view of the justice of the chosen disposition.” *Fischer v. Heckerman*, 772 S.W.2d 642, 645 (Ky.App. 1989). In ascertaining the testator’s intent, we must be guided by the plain meaning of her words without consideration for our ideas of what is fair and equitable. *University of Louisville v. Liberty Nat. Bank & Trust Co.*, 499 S.W.2d 288, 290 (Ky. 1973).

“Kentucky law is well settled that extrinsic evidence is not admissible to alter, contradict, subtract or add to the terms of a will.” *Mallory v. Mallory*, 862 S.W.2d 879, 882 (Ky. 1993). “Such evidence is not available to show what the decedent intended to say but did not.” *Id.* However, if there is a latent ambiguity contained in a provision of a will, extrinsic evidence is admissible to show the intention of the testator. *Morrell v. Morrell*, 303 S.W.2d 311, 312 (Ky. 1957). A latent ambiguity arises when the transcription of a will is defective because its terms of disposition apply “equally to two or more persons or things.” *Hall's Administrator v. Compton*, 281 S.W.2d 906, 909 (Ky. 1955).

Having reviewed the will, we agree with the trial court that Mrs. Fields’s intention was for Wade’s siblings to have a preferential right to acquire

her property on the same terms offered to anyone else, including if the property was offered as a gift. Mrs. Fields's will provided that Wade must give the right of first refusal to his siblings should he decide to sell the property. The phrase "right of first refusal" denotes the creation of a preferential right to acquire property. Therefore, it is clear that the will did not contain a latent ambiguity because there was no confusion about what or who the terms of the will referenced. Rather, Mrs. Fields's will expressly provided Wade's siblings with a preferential right to acquire their mother's property.

Accordingly, we conclude that Wade's gift to Janet was in violation of his mother's will and her two deeds were properly set aside. The will provides that Wade's siblings shall have a preferential right to acquire the property on the same terms offered to anyone else. Further, the trial court properly granted Wade ownership of the property subject to his siblings' right of first refusal for all modes of disposition.

For the foregoing reasons, the judgment of the Wolfe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wade Rasner  
Booneville, Kentucky

BRIEF FOR APPELLEE:

Melissa C. Howard  
Jackson, Kentucky