

RENDERED: OCTOBER 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000885-MR

BRYAN GUESS

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 06-CI-00097

CHARLES FOX, INDIVIDUALLY;
CHARLES FOX AS EXECUTOR OF
THE ESTATE OF LEWIS FARRIS BOYD;
AND BOYD FUNERAL DIRECTORS, INC.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

THOMPSON, JUDGE: This appeal concerns property bequeathed to Charles Fox by his friend, Lewis Farris Boyd. Bryan Guess, who held a residual interest in Boyd's estate, appeals from a Livingston Circuit Court order denying his motion for summary judgment and declining to void the conveyance. Upon careful

review, we remand this case to the Livingston Circuit Court for an evidentiary hearing.

Boyd died testate on September 15, 2001. His will designated Fox as the executor of the estate valued at approximately \$4,000,000 and divided his estate among his friends in varying amounts.

A substantial amount of property was bequeathed to Charles Fox, including an interest in a 100-year-old family business, Boyd Funeral Home. The will provided, in part:

ITEM II. I give, devise and bequeath unto my friend, CHARLES E. FOX, all my real estate located in Salem, Kentucky, consisting of the red brick Lewis Boyd house, my personal residence and lot, and my lot lying between the drug store and Rice's Barber Shop, all my interest in Boyd Funeral Home and land located in Salem, Kentucky, all my interest in all contents of Boyd Funeral Home, and all my interest in the business of Boyd Funeral Home, including the lands appurtenant to and upon which said buildings are located, and all furnishings, furniture and equipment pertaining to or used in connection with said buildings for and during the term of his natural life with the right to mortgage or sell said properties and to keep the proceeds of such mortgages or sales as his own, absolutely. I desire and direct that my friend, CHARLES E. FOX, shall be entitled to and I encourage him to continue to use the business name, Boyd Funeral Home.

Should my friend, CHARLES E. FOX, predecease me, I give, devise, and bequeath all items listed in Item II hereinabove to my friend, ANDREW S. FOX.

In addition to inheriting other assets, Guess, Fox, and Fox's son, Andrew, were given residual interests in the estate. The will provided, in part:

ITEM XII. All the rest, residue and remainder of my estate, both real and personal, wheresoever situated, of which I may die seized or possessed, and any property over which I may have any power of appointment I hereby give, devise, and bequeath to my friend, CHARLES E. FOX, my friend, BRYAN GRIFFIN GUESS, and my friend, ANDREW S. FOX, equally, share and share alike.

Following his inheritance, Fox and Andrew created a corporation, Boyd Funeral Home Directors, Inc., in which they remained the only shareholders. On October 14, 2005, Fox conveyed Boyd Funeral Home and all its equipment and assets to Boyd Funeral Home Directors, Inc. for \$579,000. The conveyance was secured only by a promissory note. The corporation makes monthly interest payments of \$1,930.

Guess filed suit in the Livingston Circuit Court to have the conveyance voided. Guess claimed: (1) Fox was given a life estate in the Boyd Funeral Home and was not permitted to convey the property in fee simple; and (2) Guess possessed a remainder interest in Fox's life estate or the \$579,000 conveyance proceeds.

On January 3, 2008, Guess moved for summary judgment. On February 27, 2008, the trial court rendered a summary judgment to Fox, which is the subject of this appeal. On July 23, 2008, the trial court denied Guess's subsequent motion to reconsider. Our review follows.

When examining the nature of bequests, we must construe Boyd's will according to his intent as gathered from the will in its entirety. *McKee v.*

Hedges, 297 S.W.2d 45, 47 (Ky. 1957). “A life estate is a free hold interest in land where the term continues during the life of the owner or some other person.” *East Kentucky Energy Corp. v. Niece*, 774 S.W.2d 458, 460 (Ky.App. 1989). A life estate is created whenever a will or “deed as a whole expresses the intent of the grantor that the term of the estate conveyed would be measured by the lives of one or more persons.” *Id.* A life estate limits the tenant’s power of disposition. *Knost v. Knost*, 178 Ky. 267, 198 S.W. 917 (1917). The life tenant may not, through any act or declaration of his own, enlarge his life estate. *Gee v. Brown*, 144 S.W.3d 844, 846-47 (Ky.App. 2004).

Therefore, the following clause in the will appears contradictory: “for and during the term of his natural life with the right to mortgage or sell said properties and to keep the proceeds of such mortgages or sales as his own, absolutely.” The phrase “for the term of his natural life” indicates that the testator intended to grant Fox a life estate in the property. However, the clause allowing Fox to sell the property and retain the proceeds in absolute contradicts the designation of a life estate and suggests that the property was bequeathed in fee simple. *See generally Handy v. Crain*, 270 S.W.2d 956-58 (Ky. 1954).¹

Ambiguity or contradictory clauses may require courts to consider the surrounding circumstances of the will’s inception to determine the testator’s intent. *Carroll v. Cave Hill Cemetery Co.*, 172 Ky. 204, 189 S.W. 186, 189 (1916).

¹ A fee simple requires, “unlimited and absolute power of disposition and includes essentially the power to give, grant, sell and convey by *inter vivos* instrument and devise by a testamentary document.” *Id.* at 958.

When there are ambiguous terms or clauses in a will, the motives, which can reasonably be supposed to have actuated the testator, the purpose of making the will, the relations between the testator and devisees, and the nature and extent of the property may be called into assist the language of the will in ascertaining the intentions of the testator.

Id. Given the will's ambiguous and contradictory language, we remand this case to the Livingston Circuit Court for a hearing to determine the testator's intent.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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