

RENDERED: JULY 5, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000517-MR

BRYAN GUESS

APPELLANT

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

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Bryan Guess appeals the orders of the Livingston Circuit Court denying Bryan's motion for summary judgment and finding that it was the intent of the testator, Lewis Farris Boyd, to devise a life estate with the power of disposition to the appellee, Charles Fox. At the onset, we note that neither party contests the

propriety of the initial appeal from an order denying summary judgment. Given the fact that upon remand the trial court held a hearing regarding Bryan's interest in Boyd Funeral Home and made findings of fact and conclusions of law supporting its judgment, we believe it is appropriate to review this appeal as arising from an order originating from a bench trial. After a thorough review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lewis Farris Boyd died testate on September 15, 2001. His will, in relevant part provides:

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.

ITEM XII. All the rest, residue and remainder of my estate, both real and personal, wheresoever situate, 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.

Charles Fox later conveyed all property relating to Boyd Funeral Home to Boyd Funeral Directors, Inc. for a total purchase price of \$579,000. It appears that Charles and his son, Andrew Fox, incorporated Boyd Funeral Directors, Inc. solely for the purpose of this transaction and that they are the sole shareholders. Charles provided evidence that Boyd Funeral Directors made regular interest payments on the promissory note given as consideration for the sale and conceded that no principal had been paid.

Bryan instituted this action, arguing that Charles held only a life estate in the funeral home and that the sale violated Charles' fiduciary duties as life tenant and as executor of the estate. Therefore, Bryan requested that the sale be voided, or, alternatively, that he receive one-third of the sale proceeds as the recipient of one-third of the residuary under the will. The circuit court denied summary judgment, finding that Farris devised a life estate in the funeral home with the right of disposition during Charles' lifetime and that Charles was permitted to sell the property for "even nominal or no consideration."

Bryan filed a motion for reconsideration and requested that the circuit court reimburse him for additional funds in the amount of \$33,919.95, which he paid out-of-pocket to satisfy the Kentucky inheritance tax. The circuit court denied Bryan's motion but did not specifically address Bryan's request for recoupment of

these taxes. The parties later entered a final and appealable agreed order resolving all other issues in the litigation but reserving all issues regarding the parties' respective interests in the funeral home.

Bryan appealed the circuit court's determination, and a panel of this Court remanded for findings regarding whether the testator intended to convey a life estate or fee simple to Charles. On remand, a hearing was held at which testimony was elicited that Bryan and Farris had a close relationship and that Farris had communicated to Bryan that he intended to leave the funeral home to those "who made it great" and that Bryan "will be making decisions." Bryan testified that he asked Farris "what about [Charles]," to which Farris responded that he and Charles were simply too close in age. Dennis Brown, friend of Farris, testified that he had communicated at various times over the years that Bryan would be "a part of th[e] funeral home." Neither party disputes that Farris was competent to execute a will and to handle his own affairs.

Evidence was also presented that Farris had communicated to Bryan that he and some "others" were going to have a "nice inheritance." Bryan testified that he had inherited approximately \$650,000 from Farris's estate, not including any interest in the funeral home. Bryan also testified that he never thought he was included as one of the parties who "made [Boyd Funeral Home] great." However, he interpreted Farris's statement to mean that Farris did not intend to leave the funeral home solely to Charles.

On the other hand, Charles testified that Farris and Farris's father told him when he began working for Boyd Funeral Home that if he "stuck with them all of this could be [his]." At the time of Farris's death, Charles had worked for Boyd Funeral Home for over thirty years. Charles' son, Andrew, was also employed at Boyd Funeral Home. Farris had paid for Andrew to go to mortuary school.

Based upon the testimony presented and the language of the will, the circuit court again concluded that Farris intended to devise a life estate with the power of disposition to Charles and that this interest was permitted under Kentucky law. Bryan now appeals.

II. STANDARD OF REVIEW

We review the circuit court's findings of fact for clear error and are mindful that the circuit court is in the better position to assess the credibility of witnesses. CR¹ 52.01. And, after making its findings, the circuit court's conclusions of law are subject to *de novo* review. *Gosney v. Glen*, 163 S.W.3d 894, 898 (Ky. App. 2005).

III. ANALYSIS

On appeal, Bryan argues that 1) Charles is estopped from claiming a fee simple interest because he claimed only a life estate on the inheritance tax returns; 2) the sale of the funeral home was improper because Charles did not have the power to sell, and, even if he did have the power to sell, the transfer was improper because there was insufficient consideration; 3) the circuit court's

¹ Kentucky Rules of Civil Procedure.

holding ignored evidence of Farris's intent that Bryan have an interest in the funeral home; 4) the circuit court erred by not giving Bryan a one-third remainder interest in the funeral home; 5) even if the sale was proper, Bryan is entitled to one-third of the sale proceeds due to his one-third remainder interest; and 6) even if the circuit court was correct in determining that Charles possessed the funeral home in fee simple, he is entitled to reimbursement of inheritance tax paid out-of-pocket in the amount of \$33,919.95.

At the onset, we must clarify the circuit court's findings regarding the parties' respective interests. Bryan mischaracterizes the circuit court's order as having concluded that Farris devised a fee simple interest to Charles in his will. Bryan likewise suggests that Charles claims a fee simple interest. Charles, however, makes no claim that Farris devised a fee simple estate, but rather a life estate with the power to dispose of the property in fee. The circuit court made an identical characterization of Charles' interest with Bryan, Charles, and Andrew each possessing a one-third remainder interest due to their one-third residual interest and no other remainderman being named. Therefore, we find no basis for Bryan's argument that Charles should be estopped from claiming a fee simple interest under the will.

Bryan asserts that the language of the will gives Charles both a life estate and the limited right to dispose of the property. He argues, however, that the devise of both a life estate and the right of disposition are inconsistent with one

another and that the power to sell is inconsistent with Charles' fiduciary duties to the estate as life tenant and executor.

Kentucky law has long recognized a life estate with the power of disposition, or, in other words "with power to convert it into a fee." *Handy v. Crain*, 270 S.W.2d 956, 958 (Ky. 1954); *see also Hoskins v. Beaty*, 343 S.W.3d 639, 641-42 (Ky. App. 2011); *Melton v. Wyatt*, 517 S.W.2d 242, 244 (Ky. 1974); *Mitchell v. Mitchell*, 276 S.W.2d 470, 471 (Ky. 1955); *Scott v. Smith*, 286 Ky. 697, 151 S.W.2d 770, 772 (Ky. 1941); *Maynard v. Raines*, 240 Ky. 614, 42 S.W.2d 873 (Ky. 1931); *Evans v. Leer*, 232 Ky. 358, 23 S.W.2d 553, 555 (Ky. 1930) (overruled by *Melton v. Wyatt*, 517 S.W.2d 242, to the extent that it limits the right of disposition when coupled with a life estate, except in the making of a testamentary disposition). The test for

determining whether a fee or a life estate has been given [to Charles], . . . is: Was [Charles] endowed with such unlimited power of disposition over the property left to [him] . . . that [he] may not only convey it during [his] lifetime but will it at [his] death? If [he] was clothed with the unqualified power of disposition we have just mentioned, [he] was invested with fee. On the other hand if [he] can only execute and deliver inter vivos conveyances, [he] has only a life estate in the property.

Moore v. Morris, 258 S.W.2d 908, 909-10 (Ky. 1953) (also overruled by *Melton v. Wyatt*, 517 S.W.2d 242, but found to still be dispositive as to the rule stated above by *Angel v. McKeegan*, 63 S.W.3d 185, 191 (Ky. App. 2001)).

Upon review, the circuit court properly characterized Charles' interest under the will as a life estate with the power of disposition with Bryan, Charles,

and Andrew each possessing a one-third remainder interest. The language of the will unequivocally grants Charles a power of disposition during his lifetime and to keep the proceeds of any disposition “absolutely.” Given the explicit recognition of this type of interest in Kentucky, we cannot conclude that Charles violated his duties as a life tenant or executor when exercising a right that was given to him under the will. In the same vein, we find nothing in the language of the will limiting to whom Charles was permitted to sell the funeral home.

Furthermore, Bryan’s interest is most properly characterized as a defeasible remainder which was divested at the time Charles exercised his power of disposition. The Kentucky Supreme Court evaluated the interest possessed by a remainderman where the life tenant possessed a power of disposition in *Hammons v. Hammons*, 327 S.W.3d 444 (Ky. 2010). The Court concluded that the remainderman’s interest is appropriately characterized as a vested remainder subject to divestment, otherwise known as a defeasible remainder. *Id.* at 450-54. Therefore, if the power of disposition is never exercised, the remaindermen are entitled to possession in fee; whereas, where the life-tenant elects to exercise his power of disposition, the remaindermen’s interest is completely divested. *See Hammons*, 327 S.W.3d at 451; *Angel v. McKeehan*, 63 S.W.3d 185, 192 (Ky. App. 2001).

Bryan also appears to assert that even if Charles possessed the right to sell the funeral home in fee, the consideration that Charles received for selling it to Boyd Funeral Directors, Inc. is somehow inadequate. However, the will provides

Charles with the “right to mortgage or sell said properties and to keep the proceeds of such mortgages or sales as his own, absolutely.” The word “sell” clearly contemplates the exchange of property for something of value. Bryan does not contest Charles’ assertion that a promissory note was executed as security for the sale and that Boyd Funeral Directors has made regular interest payments on the note. Consequently, this argument is without merit.

Bryan next contends that the circuit court’s decision was contrary to the evidence. He asserts that statements made to him by Farris that he “would be making decisions” and would “be a part of the funeral home” contradict the circuit court’s finding that Farris intended to devise a life estate to Charles with the power to dispose of the funeral home. Bryan relies solely upon these statements to refute the circuit court’s conclusion and asserts that this testimony is uncontradicted. However, Bryan’s argument disregards Charles’ testimony regarding the Boyds’ statement that the funeral home could one day belong to Charles; as well as Farris’s statement that Farris would leave the funeral home to the “ones who made it great” and Bryan’s own admission that he never had any involvement in the operation of the funeral home. Thus, we cannot conclude that the circuit court’s findings regarding Farris’s intent were clearly erroneous.

Bryan lastly asserts that even if the sale of the funeral home was proper, he is entitled to one-third of the sale proceeds pursuant to his remainder interest. However, as discussed above, Bryan was divested of any remainder

interest in that regard, as a matter of law, when Charles exercised his right of disposition.

Alternatively, Bryan believes that he is entitled to reimbursement for payment of inheritance taxes in the amount of \$33,919.95 because his payment of the taxes based upon his interest prior to the sale allowed Charles to “have his cake and eat it too.” However, the circuit court summarily denied Bryan’s request for reimbursement when denying his motion for reconsideration of its order denying summary judgment prior to the first appeal of this matter. A panel of this Court remanded the case for further consideration of the parties’ interests, which necessarily contemplated the parties’ respective tax liabilities. On remand, the circuit court made no findings of fact regarding Bryan’s Kentucky inheritance tax liability in light of the parties’ respective interests, but Bryan did not file a motion for additional findings in that respect prior to taking this second appeal. Thus, we are without authority to reverse or remand on this issue because Bryan failed to move the circuit court, pursuant to CR 52.04, to make any additional findings of fact regarding this issue.

Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen M. Arnett
Morganfield, Kentucky

BRIEF FOR APPELLEE:

Robert B. Frazer
Marion, Kentucky