RENDERED: SEPTEMBER 4, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001319-MR

TERESA D. HOCKENSMITH, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF NANCY RENEE HOCKENSMITH,
DECEASED — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-01359

SHANE MICHEL; ANNE H. NOVY, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF NANCY
RENEE HOCKENSMITH, DECEASED;
ANNE H. NOVY, INDIVIDUALLY;
KEVIN HOCKENSMITH, INDIVIDUALLY;
DEBORAH JEAN H. CONWAY, INDIVIDUALLY;
MARY ANN NOEL HOCKENSMITH, INDIVIDUALLY;
JOHN M. HOCKENSMITH, II, INDIVIDUALLY; AND
GINA HOCKENSMITH GUSTIN, INDIVIDUALLY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: This case comes to us from an order of the Franklin Circuit Court granting Appellee, Shane Michel ("Michel"), summary judgment. The issue before the circuit court was whether Michel or the estate of his deceased mother was entitled to payments on a note. The note in question was given by Anne Hockensmith Novy ("Anne") in favor of Michel's mother, Nancy Renee Hockensmith ("Nancy"), as partial consideration for Nancy's transfer of her future interest in certain real property to Anne. Based on KRS[1] 391.010, which governs the descent of real estate, the circuit court determined that Michel was entitled to summary judgment.

Having reviewed the record, applicable law, and the arguments of the parties, we cannot agree with the circuit court. The note was an item of personal property. Nancy's will included a provision for the distribution of her personal property. Accordingly, the note (and in turn the right to the payment made on it) belongs to Nancy's estate and should be divided as set forth in her will. Because Nancy transferred her real estate interest in the property to Anne in exchange for a written promise to pay money, there was no real estate to pass to Michel under KRS 391.010. For this reason, as more fully explained below, we REVERSE and REMAND.

I. Factual and Procedural Background

[1] Kentucky Revised Statutes.

By deed dated December 30, 1935, J.C. Noel and his wife, Agnes Noel, conveyed a certain tract of land known as the "Taylor Farm" located in Woodford County, Kentucky, to Mary Ann Noel ("Mary Ann"). In relevant part the deed stated:

> [T]he parties of the first part do hereby bargain, sell, alien, and convey unto the party of the second part, Mary Ann Noel, for and during the period of her natural life, and at her death to her issue, if any, if none, then to my son, John O. Noel Jr. and my daughter Johnace Clay Noel or the survivor of them if either should die without issue. . .

Mary Ann, who is still living, had twelve children, including Nancy, Michel's mother. Michel was Nancy's only child.

Together, on January 21, 2011, Nancy and Michel conveyed an undivided 3/44ths contingent remainder interest in the Taylor Farm to Anne, Nancy's sister, by deed for the total consideration amount of $146,045.45.[2] In relevant part, the deed provided as follows:

> That for and in the total consideration of One Hundred Forty Six Thousand Forty Five Dollars and Forty Five Cents (146,045.45), of which amount the PARTY OF THE SECOND PART [Anne Novy] has [paid] in cash the sum of $22,000.00 to the PARTY OF THE FIRST PART, NANCY RENEE HOCKENSMITH; and has paid in cash the sum of $10,000.00 to the PARTY OF THE FIRST PART, SHANE CHRISTOPHER MICHEL; and the balance in the amount of $114,045.45 is to paid by the PARTY OF THE SECOND PART to the PARTY OF THE FIRST PART, NANCY RENEE HOCKENSMITH pursuant to terms of a promissory note which is secured

[2] It is unclear from the record how the parties arrived at the 3/44th division. However, for the purposes of this opinion, the math is not at issue. The only issue is who owns the promissory note that resulted from the sale.

> by a mortgage of even date from the PARTY OF THE SECOND PART to the PARTY OF THE FIRST PART, NANCY RENEE HOCKENSMITH; and for other good and valuable consideration not herein expressed, but the full receipt of said consideration is hereby acknowledged by the PARTIES OF THE FIRST PART; the PARTIES OF THE FIRST PART have bargained and sold and do hereby convey and confirm unto the PARTY OF THE SECOND PART, ANNE NOEL HOCKENSMITH NOVY, her heirs and assigns forever, an undivided three forty-fourths (3/44th) contingent remainder interest in all of the following tracts of land located south of McCracken Turnpike in Woodford County, Kentucky . . .

Nancy passed away on January 6, 2012. A Petition to Probate her Last Will and Testament was filed in Franklin District Court on May 29, 2012. In her Will, Nancy provided that Michel was to receive $1,000.00. The remainder of her estate, including both real and personal property, was to be distributed to Kevin Hockensmith (brother), Anne (sister), Deborah Jean H. Conway (sister), Teresa D. Hockensmith (sister), Mary Anne (mother), John F.M. Hockensmith (nephew), and Gina Hockensmith Gustin (niece).

On August 9, 2012, Michel filed a claim against the estate of Nancy. In his claim, Michel asserted that he was "substituted as a matter of law for the right and interest which his mother, Nancy Renee Hockensmith, owned from her ownership of the Taylor Farm, including the right to receive any and all proceeds arising from any conveyance of the property or proceeds derived as a result of the Mortgage and Note." Michel's claim was denied by the estate finding "[t]he debt evidence by the note is an asset of the estate of Nancy Renee Hockensmith and is governed by the terms and conditions of the will of the decedent Nancy Renee Hockensmith."

On October 18, 2012, following the denial of his claim, Michel filed an action with the Franklin Circuit Court seeking to enforce his claim. Michel filed a motion for summary judgment on April 26, 2013. The trial court held a hearing on the motion on June 26, 2013. By order rendered July 1, 2013, the trial court granted Michel's motion for summary judgment. Specifically, the trial court found:

> Nancy Renee Hockensmith held a 3/44th contingent remainder interest in Taylor Farm, defeasible by her death prior to the death of her mother, Mary Ann Noel Hockensmith. Upon Nancy Hockensmith's death, the contingent remainder passed not under her Will, but rather descended to her only heir-at-law, her son, [Shane Michel]. *See Saulsberry v. Second National Bank of Ashland*, 400 S.W.2d 506, 507 (Ky. 1966) (standing for the proposition that contingent remainders pass according to the laws of descent and distribution). As such, [Shane Michel] is fully substituted of his mother's contingent remainder interest in Taylor Farm and is entitled to the right to receive and collect proceeds due as a result of the conveyance to Anne Novy.

This appeal followed.

II. Standard of Review

Pursuant to Kentucky Rules of Civil Procedure 56.03, summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest, Inc. v. Scansteel Serv. Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991)).

When reviewing a motion for summary judgment, a trial court must be mindful that its role is to determine whether disputed material facts exist; it is not to decide factual disputes. As our Supreme Court recently reminded us:

> Summary judgment is to be "cautiously applied and should not be used as a substitute for trial." Granting a motion for summary judgment is an extraordinary remedy and should only be used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists.

Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901, 905 (Ky. 2013) (internal citations omitted).

Because summary judgment involves no fact-finding by the trial court, we accord no deference to the trial court's decision; our review is *de novo*. *See Davis v. Scott*, 320 S.W. 3d 87, 90 (Ky. 2010) (citing 3D *Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)).

III. Analysis

At the outset, it is necessary for us to make two vitally important observations regarding what is not at issue in this case. First, the present ownership of Taylor Farm is not in dispute. Unquestionably, Mary Ann Noel has a life estate in the property. *East Kentucky Energy Corp. v. Niece*, 774 S.W.2d 458 (Ky. App. 1989). As a life tenant, Mary Ann Noel is the current owner of the property. This entitles her "to the full use and enjoyment of the property, including the income and profits, though she may not consume any part of the corpus." *Hammons v. Hammons*, 327 S.W.3d 444, 451 (Ky. 2010). Second, and perhaps most important, this action does not require us to resolve any issue regarding the future ownership of Taylor Farm following termination of the life estate. In fact, due to language used in the deed, it is impossible to even identify those individuals until such time as the life estate ends.[3]

While the future ownership of Taylor Farm is not directly at issue, it is necessary to understand, to some degree, the nature of future interests. As first and second generation issue of Mary Ann, Nancy and Michel both had some future interest in Taylor Farm by virtue of the 1935 deed wherein J.C. and Agnes Noel transferred the Taylor Farm to Mary Ann for life with the remainder to her issue upon her death. *See* KRS 381.040 ("Any estate may be made to commence in the future by deed, in like manner as by will, and any estate which would be good as

[3] Generally, "[m]en and women are presumed capable of having children as long as they live, and this presumption in a case like this may not be rebutted by evidence." *Walton v. Lee*, 634 S.W.2d 159, 160 (Ky. 1982) (quoting *Rand v. Smith*, 155 S.W. 1134 (Ky. 1913)). Thus, based on the record, it would be impossible to quantify exactly what interest the "issue" of Mary Anne holds in the Taylor Farm or what issue will be surviving until the time of her death.

an executory devise or bequest shall be good if created by deed."). Moreover, their future interests were alienable. The owner of a future interest "has the right to convey or contract to convey whatever interest it owns in said property, whether vested or contingent." *Carson Park Riding Club v. Friendly Home for Children*, 421 S.W.2d 832, 836 (Ky. 1967). Future interests may be sold, mortgaged, devised, and otherwise transferred. *Caperton v. Smith's Trustee*, 104 S.W.2d 440, 444 (Ky. 1937); *Clay v. Clay*, 250 S.W. 829 (Ky. 1923).

In January of 2011, Michel and Nancy sold their future interests in the Taylor Farm to Anne by deed for the total consideration amount of $146,045.45. A review of the deed of conveyance shows that Michel received total consideration of $10,000.00 for his interest in the property and Nancy received $136,045.45 paid by way of $22,000.00 cash and a promissory note in her favor for the balance. The fact that Michel signed the deed and received separate consideration for his future interest appears to have been overlooked by the trial court.

No issue has been presented to call the validity of the sale into question for any reason. By virtue of the January 2011 deed, Anne is the undisputed owner of the future interests once held by Michel and Nancy. Because Nancy sold her future interest in the Taylor Farm before her death, that interest remains with the vendee; it does not pass to her heirs. And, as long as Nancy still owns the interest at the time of Mary Ann's death, the interest will vest in her favor. *See Fulton v. Teager*, 209 S.W. 535, 538 (Ky. 1919) ("The interest being one which would have descended to the heirs of the devisee by inheritance in the event of his death, it

would unquestionably vest in the vendee of the devisee, when the event occurred upon the happening of which the interest vested; the devisee having conveyed it to another.").

Unquestionably, Anne owns Nancy's and Michel's future interests in the Taylor Farm. Indeed, Michel has never challenged this fact. Thus, the question is not whether Michel owns any future interest in Taylor Farm. The question is whether Michel has any claim to the promissory note from Anne to Nancy. In granting Michel summary judgment, the trial court failed to recognize the importance of distinguishing between the property and the note.

Relying on *Saulsberry v. Second Nat. Bank of Ashland*, 400 S.W.2d 506, 508 (Ky. 1966), the trial court concluded that Nancy's future interest in the Taylor Farm would pass to Michel under KRS 391.010. What the trial court overlooked, however, was that Nancy sold her entire future interest in the Taylor Farm, prior to her death. At the time of her death, Nancy had no present or future interest in the Taylor Farm. She held only the right to collect under a note. A note is not real property that passes under KRS 391.010.

To the contrary, a note is an item of intangible personal property. *Hatcher v. Taylor's Adm'x*, 83 S.W.2d 847, 848 (Ky.1935); *Ford's Adm'r v. Wade's Adm'r*, 45 S.W.2d 818, 818 -19 (Ky. 1931) ("The property of the testatrix consisted in a house and lot in Franklin, Ky., of the agreed value of $2,500 and of cash, *notes, bonds, and other intangible personal property* of the value of $24,678.10."); *Bingham's Adm'r v. Commonwealth,* 251 S.W. 936, 937 (Ky. 1923) ("There is, of

course, a marked distinction between what is known as corporal personal property, such as live stock, lumber, or other material, and *intangible personal property, like notes*, bonds, and other securities."); *Gearhart's Ex'r and Ex'x v. Howard*, 196 S.W.2d 113, 114 (Ky. 1946); *Vissman v. Vissman*, 172 S.W.2d 643 (Ky. 1943) ("The notes are personal property belonging to an inhabitant of this state and passed under the will.").

As personal property, the note (and in turn the right to receive the payments on it or foreclosure on the property securing the note) belongs to Nancy's estate; it does not belong to her heirs. *Boughner v. Sharp*, 138 S.W. 375, 376 (Ky. 1911) ("We have held in a long line of cases that the heir at law cannot sue upon a note given to the decedent, but that the right of action is alone in the personal representative."); *Rockford v. Rockford*, 56 S.W. 992, 993 (Ky. 1890) (holding that the right to sue for recovery of purchase money on land sold by a decedent is in the administrator, and not in the heirs). Nancy's will contained a list of persons who were to receive her residual personal property after Michel received his share of $1,000.00. Michel was not among the residual beneficiaries designated by Nancy. Accordingly, he had no right to the note or to the payments under it.

IV. CONCLUSION

For the reasons set forth above, we REVERSE the Franklin Circuit Court and REMAND for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert C. Moore
Frankfort, Kentucky

BRIEF FOR APPELLEE SHANE MICHEL:

Jack W. Flynn
Frankfort, Kentucky