

NO. COA14-264

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

CARSON D. BARNES and wife,
ROMELDA E. BARNES,
Plaintiffs-Appellants,

v.

Wilson County
No. 12 CVS 1086

JUDITH SCULL and husband,
DAVID SCULL; BENJAMIN E.
THOMPSON, JR. and wife,
SANDRA P. THOMPSON; ROGER
THOMPSON BASS and wife,
PHYLLIS KELLAR BASS; MARY
LYNN THOMPSON WHITLEY and
husband, WILLIAM G. WHITLEY,
III; ROBIN BESS PRIDGEN
MERCER, Unmarried; JONATHAN
PRIDGEN and wife, SHARON
PRIDGEN; and any Unknown
Heirs of W. ROBIN PRIDGEN,
Deceased,
Defendants-Appellees.

Appeal by Plaintiffs from judgment entered 17 October 2013
by Judge Walter H. Godwin, Jr. in Superior Court, Wilson County.
Heard in the Court of Appeals 26 August 2014.

Narron & Holford, P.A., by I. Joe Ivey, for Plaintiffs-Appellants.

Broughton Wilkins Sugg & Thompson, PLLC, by Benjamin E. Thompson, III and Blair K. Beddow, for Defendants-Appellees Scull, Thompson, Bass and Whitley.

Farris & Farris, P.A., by Robert A. Farris, Jr. and Rhyon A. Breen; and King & King, LLP, by W. Lewis King, for Defendants-Appellees Mercer and Pridgen.

McGEE, Chief Judge.

John S. Thompson ("Testator") executed his will in 1944. Testator also executed codicils that replaced certain terms of his will. The only codicil relevant to this appeal is the third codicil that was executed in 1955 (along with Testator's will, "the will"). Pursuant to the will, Testator devised to his wife, Maude Thompson ("Maude"), a life estate in real property consisting of 146 acres ("the property"). Upon the death of Maude or Testator, whichever death occurred last, the property was to be placed in a trust ("the trust"). The proceeds of the trust were to provide support to one of Testator's sons, Hubert E. Thompson ("Hubert"), for Hubert's life. According to the will, upon Hubert's death, the property would go to Hubert's lineal descendants, if any. If Hubert died without lineal descendants, the property was to "revert to [Testator's] heirs."

Testator died in 1960, and was survived by Maude and six children: Hubert, W.C. Thompson ("W.C."), Annie T. Weigel ("Annie"), B.E. Thompson ("B.E."), J.W. Thompson ("J.W."), and James G. Thompson ("James"). Maude died in 1969, at which time the trust went into effect, with the property as the corpus, for the benefit of Hubert. Testator's descendants relevant to the

resolution of this appeal are Hubert and the descendants of James.

James died in 1972. James was survived by his son, James G. Thompson, Jr. ("James Jr.") and his daughter, Marjorie T. Pridgen ("Marjorie"). James died testate, and left whatever interest he had in the property to Marjorie and her husband, W. Robin Pridgen ("Robin"), a one-half interest to each. James did not leave any interest he had in the property to James Jr. James Jr. died on 24 April 1980, approximately three months before Hubert, who died on 26 July 1980. James Jr. was survived by three sons: John S. Thompson ("John"), James Guy Thompson, III ("James III"), and Gregory A. Thompson ("Gregory"). James III purported to convey his interest in the property to Gregory by deed executed 30 January 1998. John purported to convey his interest in the property to Carson B. Barnes (together with his wife, Romelda E. Barnes, "Plaintiffs") by deed executed 2 May 2000. Gregory purported to convey his interest in the property to Carson B. Barnes by deed executed 10 May 2000.

Plaintiffs initiated this action by complaint filed 26 June 2012, and requested a declaratory judgment establishing the legitimacy of their purported interest in the property. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen filed their answer on 27 August 2012, contending

that Plaintiffs had "received deeds from persons who had no interest in the property, [have] no claim whatsoever to any of the property and [have] no standing to bring this action." They requested that the trial court "declare the ownership of the subject property" to reflect the validity of that portion of James' will that conveyed ten percent interest in the property to Marjorie and ten percent interest to Robin, with no interest in the property having gone to James Jr.¹ Defendants Judith Scull, David Scull, Benjamin E. Thompson Jr., Sandra P. Thompson, Roger Thompson Bass and Phyllis Kellar Bass (together with Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen, "Defendants") answered Plaintiffs' complaint on 10 September 2012. These Defendants also contended that the purported deeds from John and Gregory conveyed nothing to Plaintiffs, and requested that Plaintiffs "have and recover nothing of these answering [D]efendants[.]"

Plaintiffs moved for summary judgment on 16 September 2013. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen moved for summary judgment on 19 September 2013. The trial court heard this matter 30 September 2013, and ruled

¹ James Jr.'s will is not included in the record, but the 17 October 2013 judgment indicates this division. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen state in their brief that the property was not mentioned specifically in James Jr.'s will, but passed through the residuary clause of that will.

that Plaintiffs had no ownership interest in and to the subject property, denied Plaintiffs' motion for summary judgment, and granted the motion for summary judgment of Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen. Plaintiffs appeal.

Plaintiffs argue that the trial court erred in granting summary judgment in favor of Defendants. We disagree.

The contested part of the will is a portion of the third codicil to the will, executed by Testator on 23 September 1955. There is no dispute concerning the validity of the third codicil itself. The relevant portion states:

At the death of my wife, I give and devise the above tract of land, containing 146 acres, more or less, to my sons, B.E. Thompson and W.C. Thompson, Trustees, not for their own use and benefit however but in trust to rent out the same or cause the same to be farmed in a husband-like manner, collect the rents, pay the taxes, keep the buildings in reasonable repair and pay the balance annually to my son, Hubert E. Thompson, for and during the term of his natural life and no longer, said trust to terminate upon the death of said Hubert E. Thompson.

At the death of my said son, Hubert E. Thompson, I give and devise the said tract of land to his lineal child or children, in fee simple, representatives of lineal deceased children to stand in the place of and take the share their parent would have taken if living. In the event that my said son shall die without leaving any lineal child or representatives of a lineal

deceased child, then the said tract of land shall *revert to my heirs*. (Emphasis added).

Plaintiffs agree with the trial court that this language created a contingent remainder interest in Testator's children, excluding Hubert, with the contingencies being the death of Maude, and Hubert's death, without Hubert having surviving lineal descendants.

"A vested remainder is an estate which is deprived of the right of immediate possession by the existence of another estate created by the same instrument."

. . . .

"A contingent remainder is merely the possibility or prospect of an estate which exists when what would otherwise be a vested remainder is subject to a condition precedent or as created in favor of an uncertain person or persons."

Mercer v. Downs, 191 N.C. 203, 205, 131 S.E. 575, 576 (1926) (citations omitted). Because Maude died in 1969 and Hubert died without lineal descendants in 1980, the contingencies were satisfied and, pursuant to the will, the property "reverted" to Testator's "heirs" upon Hubert's death.

The dispositive issue on appeal is at what time the class of Testator's "heirs" as referenced in the above portion of the third codicil was determined — upon Testator's death or upon Hubert's death. If the class was set upon Testator's death, James was in possession of a contingent remainder at his death

in 1972, which contingent remainder he devised to his daughter Marjorie and her husband Robin, to the exclusion of his son, James Jr. Assuming the validity of this scenario, upon Hubert's death in 1980, Marjorie and Robin acquired twenty percent of the property in fee simple absolute, and James Jr. acquired nothing. Therefore, James Jr.'s children, Gregory, James III, and John, did not take any interest in the property upon James Jr.'s death, and Gregory and John III had no interest to convey to Plaintiffs in 2000.

However, if the class was not determined until Hubert's death, Gregory, James III, and John would have acquired a shared ten percent interest in the property immediately upon Hubert's death, because their father, James Jr., predeceased Hubert. Marjorie would have acquired the other ten percent of the original twenty percent interest apportioned to the James line of Testator's descendants. Assuming the validity of this scenario, Gregory, James III, and John each possessed one-third of a ten percent fee simple absolute interest in the property following Hubert's death, and were free to convey their shares to Plaintiffs.

Our Supreme Court has addressed the issue before us on multiple occasions.

"It is undoubtedly the general rule of testamentary construction that, in the

absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, an estate limited by way of remainder to a class described as the testator's 'heirs,' 'lawful heirs,' or by similar words descriptive of those persons who would take his estate under the canons of descent, had he died intestate, vests immediately upon the death of the testator, and at which time the members of said class are to be ascertained and determined."

Mercer, 191 N.C. at 205, 131 S.E. at 576 (citation omitted).

However, this rule is subject to the controlling rule of interpretation that the intent of the testator is paramount, provided, of course, that it does not conflict with the settled rules of law. It will be observed that th[e] devise [in *Mercer*] provides that at the death of the life tenant the property should go to "our surviving children or their heirs." This raises the question as to whether or not the remaindermen are to be ascertained as of the death of the testator or as of the death of the life tenant[.]

Id. Our Supreme Court in *Mercer* held that, after examining the language of the will, "the remaindermen could not be ascertained with certainty until the termination of the life estate." *Id.* at 207, 131 S.E. at 577. However, in *Mercer* the language, "our surviving children or their heirs" weighed in favor of this determination, as it could not be determined whether any of "their heirs" would collect unless and until it was ascertained whether any of the testator's children predeceased the life

tenant. In the present case, Testator simply stated that upon the appropriate conditions, the property would "revert to my heirs."

Testator's will was set up so that none of his children would likely inherit any real property in fee simple upon Testator's death. The entirety of Testator's real property was devised to his children and his wife as estates for life. At the end of the estate devised to each of Testator's children, the remainders of each of these estates were to go to testator's grandchildren, or their lineal descendants, in fee simple. Only upon one of Testator's children dying without lineal descendants would the real property constituting that child's estate "revert" to Testator's "heirs." Testator appears to have structured the will to keep all of his property within his family for at least another generation.

Our Supreme Court has decided in different ways the issue of when a class of "heirs" is set. In *Lawson v. Lawson*, 267 N.C. 643, 148 S.E.2d 546 (1966), relied upon by Plaintiffs, a testator devised to his daughter, Opal Lawson Long ("Opal"), certain of his real property "for and during the term of her natural life, and at her death to her children, if any, in fee simple; if none, to the whole brothers and sisters of my daughter, Opal Lawson Long, in fee simple." *Id.* at 643, 148

S.E.2d at 547. When the testator died, Opal had six whole (full-blooded) siblings. When Opal died, two of these siblings had pre-deceased her, but both had surviving children. *Id.* at 643-44, 148 S.E.2d at 547. The children of the deceased siblings argued that Opal's six whole siblings acquired a remainder in the real property at the testator's death and, therefore, the deceased siblings' remainder interest had passed to their children, who then received fee simple interests in the property upon the death of the life tenant. *Id.* at 644, 148 S.E.2d at 547. Our Supreme Court held:

Clearly the interests of the whole brothers and sisters was contingent and could not vest before the death of the life tenant [Opal], for not until then could it be determined that she would leave no issue surviving. "Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted." Respondents' parents, having predeceased the life tenant, could not answer the roll call at her death.

Id. at 645, 148 S.E.2d at 548. Our Supreme Court affirmed the ruling of the trial court, which had ruled that the real property passed at Opal's death only to those "whole brothers and sisters" then living, and that nothing passed to the children or descendants of the whole siblings who pre-deceased Opal. *Id.*

"A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will." N.C. Gen. Stat. § 41-6 (2013); see also *Ellis v. Barnes*, 231 N.C. 543, 57 S.E.2d. 772 (1950). In the case before us, if we interpret Testator's use of the word "heirs" to mean his children, and strictly apply the logic in *Lawson*, then only those children of Testator who survived Hubert acquired fee simple interests in the property. James' and B.E.'s contingent remainders would have terminated when they pre-deceased Hubert. This would mean no descendant nor devisee of either James or B.E. would have any interest in the property. Plaintiffs and several named Defendants would own no portion of the property.

Defendants cite *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976), as supportive of their position. The relevant testamentary language in *White* is as follows:

"I [Harriet M. Stokes] . . . devise . . . to my son, Samuel Stokes . . . land owned by me . . . to be his to use and enjoy during his lifetime, and if he shall die without heirs of his body, then . . . I hereby direct that at the death of my son, without heirs, if his wife, Emma Stokes, shall be living that she shall use and enjoy the said land during her widowhood, and at her death or remarriage, the same shall go to my heirs."

Id. at 76, 224 S.E.2d at 618. The testatrix died in 1925. She was survived by her son, Sam and his wife, Emma, and her two

daughters, Hattie and Cora. Sam died without issue in 1970, Hattie died testate in 1961, and Cora died intestate in 1971, a few months before the death of Emma, also in 1971. *Id.* at 76, 224 S.E.2d at 619. Our Supreme Court held

that when testatrix devised the contingent remainder "to my heirs" she intended to refer to all who at her death would be her legal heirs in the technical sense with the exception of her son, Sam, for whom and for whose family she had made other provisions [by giving him and Emma life estates]. Thus when [testatrix] died the contingent remainder passed in equal shares to her two daughters, Hattie and Cora. At Hattie White's death her one-half interest was devised to her three children, Sam, Mary and Everette. Everette's share at his death was inherited by his widow, Iva White. . . . Cora Lynch's one-half interest was inherited at her death by her two children, George Lynch and Lucille Lynch Thompson, the other plaintiffs herein, who are each entitled to a one-fourth undivided interest in the land. The other defendant, Billy Roy Alexander, the only heir of Sam Stokes' widow, Emma, is not entitled to any interest in the land.

Id. at 85-86, 224 S.E.2d at 624.

In the present case, if we follow *White*, the roll call of "heirs" was set at Testator's death. *Id.* at 78-79, 224 S.E.2d at 620; see also *Rawls v. Rideout*, 74 N.C. App. 368, 375, 328 S.E.2d 783, 788 (1985) ("The class of the testatrix['s] heirs can be ascertained at her death. Thus, we need not take the Bass Court's approach and postpone the class closing until the life tenant's death."). In addition, the contingent remainders

acquired in the property by Testator's children were "assignable and transmissible." *White*, 290 N.C. at, 78, 224 S.E.2d at 620 (citation omitted). In the present case, pursuant to the rule stated in *White*, all Testator's children, other than Hubert, including James and B.E., obtained a contingent remainder in twenty percent of the property at Testator's death. James' contingent remainder passed through his will to Marjorie and her husband Robin, to the exclusion of James' son James Jr. Upon Hubert's death in 1980, Marjorie and Robin acquired twenty percent of the property in fee simple absolute, and James Jr. acquired nothing. Therefore, James Jr.'s children, Gregory, James III, and John, did not take any interest in the property upon James Jr.'s death, and Gregory and John had no interest to convey to Plaintiffs in 2000.

We hold that *White* controls in this instance and, to the extent, if any, that *White* and *Lawson* are irreconcilable, *White*, as the latest pronouncement by our Supreme Court, controls. However: "This rule of construction is to be followed 'in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances.'" *White*, 290 N.C. at 79, 224 S.E.2d at 620 (citation omitted). Therefore, if the will contains sufficient evidence that it was Testator's intent that the class

should be determined at Hubert's death, Testator's intent would control. Though there is some evidence in the will that would support an argument that Testator intended for the class to be set upon Hubert's death and not Testator's own, namely Testator's apparent desire to maintain family ownership of the property for as long as possible, we do not find this evidence strong enough to overcome the plain language of the instrument and the prevailing rules of testamentary construction. For these reasons we affirm.

Affirmed.

Judges BRYANT and STROUD concur.