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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000171-MR

MARY ANN FISHER; AND
VICKI K. MARTIN — APPELLANTS

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 06-CI-00123

VIRGINIA GRAY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

WINE, JUDGE: The appellants, Mary Ann Fisher ("Mary Ann") and Vicki K. Martin ("Vicki") appeal from a summary judgment order of the Trimble Circuit Court entered in favor of their sister, Virginia Gray ("Virginia"). The trial court found their father had executed a holographic, conditional will, but subsequently

[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

died intestate because the condition had not been realized. Having thoroughly reviewed the written instrument and the record below, finding no error, we affirm the judgment.

Factual and Procedural Background

At the time he wrote his holographic will, Mr. Elmer Quire ("Mr. Quire") was a 73-year-old widower and the father of three adult daughters. On December 15, 1997, Mr. Quire drafted an instrument he labeled "Will of Elmer D. Quire." Although the instrument was wholly in the testator's handwriting and signed at the end, the signatures of two witnesses were affixed, and all signatories acknowledged their signatures before a Notary Public whose jurat was added to the instrument. Two of the testator's three daughters, Mary Ann and Vicki, were named "beneficiaries & administrators of my estate & property." Mr. Quire's third daughter, Virginia, was not mentioned.

The text of the holographic instrument in question is as follows:

Will of Elmer D. Quire

Bedford, Ky.
12/15-97.

In the event something happens to me. The beneficiary's (sic) & administrators of my estate & property will be my daughters

Mary A. Fisher, 2155 Mt. Pleasant Rd.
Bedford Ky. 40006

Vicki K. Martin, 1602 Delmar Ln.
Louisville Ky 40016.

> This is written in case of emergency. I expect to write more in detail at a later date.
>
> Elmer D. Quire 12-15-97

From the evidence, it appears that two days after executing the foregoing instrument, Mr. Quire went to the hospital for an arteriogram to determine why he had a knot in his arm. It was determined that he had a "tortuous brachial artery," a twisting of a blood vessel, but nothing further was required; nor was anything ever done about the condition. Mr. Quire lived for more than eight years after drafting this document. He died on May 1, 2006, at age 81 of lung cancer. After his death, this instrument and other documents were discovered and the will was probated in the district court. Thereafter, an original action pursuant to Kentucky Revised Statute ("KRS") 394.240 was commenced in circuit court asserting that it was a conditional will that was without effect because the condition had not occurred. There is no issue as to testamentary capacity, undue influence, or other typical grounds upon which wills are contested. Cross motions for summary judgment were filed on behalf of the parties.

The circuit court concluded that the instrument was conditional based on the language "In the event something happens to me" and "This is written in case of emergency. I expect to write more in detail at a later date." To reach its conclusion, the court held that it was entitled to look at the circumstances surrounding the making of the will, particularly including the fact that Mr. Quire was about to undergo a potentially serious medical procedure. The court

concluded that the will was conditional in view of the upcoming medical procedure, and as the condition (an emergency) did not occur, the instrument was ineffective to dispose of his estate, resulting in intestacy. The court's final order, granting Virginia's motion for summary judgment, was entered January 14, 2008, and appellants timely appealed to this court.

Standard of Review

Our standard on review of an order granting summary judgment is *de novo,* and is limited to questions of law. *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky. App. 2000). Since the parties agree there are no factual disputes, our *de novo* review will concentrate on whether Virginia was entitled to judgment as a matter of law.

Analysis

The issue before us is whether this holographic instrument was a conditional will that was intended to be effective only in the event of Mr. Quire's death during a particular period of time. As stated in *Walker v. Hibbard*, 185 Ky. 795, 215 S.W. 800, 806 (Ky. App. 1919), the question is "[was] it a temporary disposition, intended to meet a present emergency, and when the emergency it was intended to provide against passed, [did] the paper [cease] to have any force or effect."

As the trial court's order reveals, the first issue we must decide is whether extrinsic evidence was admissible to prove the circumstances surrounding the execution of the will. Without extrinsic evidence, we would have only the

instrument itself as a guide to the testator's intent; evidence concerning his upcoming medical procedure and other relevant extrinsic evidence would be unavailable.

As a general rule, where the language of a testamentary instrument leaves doubt as to whether it was intended to be absolute or contingent, the circumstances under which it was executed may be considered. 79 Am. Jur. 2d Wills § 658. In accord is the venerable case of *Walker v. Hibbard, supra* at 806, which articulated the extrinsic evidence rule as follows: "[I]t is always admissible in arriving at his [the testator's] intention for the court to have the aid by extrinsic evidence of the circumstances, situation, and surroundings of the testator at the time the paper was written." Similarly, this rule is well-expressed in *Jennings v. Jennings*, 299 Ky. 779, 782-783, 187 S.W.2d 459, 462 (1945), as follows:

> We have long regarded as competent extrinsic evidence to describe the conditions surrounding the testator that the court as an interpreter might place itself in his position in order the better to appreciate his situation and to discern his intent as expressed by his language.

This rule was applied broadly in *Gresham v. Durham*, 270 S.W.2d 952 (Ky. 1954), to add an unexpressed condition to the testator's will despite a paucity of evidence to support it. However, the Court properly stated the rule as follows:

> When the language of the will is obscure and of doubtful meaning, the courts have the right, and it is their duty to place themselves by extrinsic testimony in the place of the testator at the time he made the will by showing the circumstances and conditions with which he was

> surrounded, and to determine from these the sense and meaning which he intended to convey by the language he employed.

Id. at 954.

Thus, where the language of a will admits of uncertainty, these authorities hold that a trial court has a right to consider a testator's peculiar circumstances in seeking to understand his intention with respect to his holographic instrument. In this regard, we view Mr. Quire's language "In the event something happens to me" as unremarkable because such language is typical of the euphemisms persons often employ when speaking of their own mortality. *Underwood v. Underwood*, 273 Ky. 654, 117 S.W.2d 596 (Ky. App. 1938); *In re Bramlitt's Estate*, 195 Tenn. 471, 260 S.W.2d 181 (1953). More difficult is what Mr. Quire meant with the language "This is written in case of emergency. I expect to write more in detail at a later date." On being confronted with the duty to construe such perplexing language, particularly where disposition of the estate was unnatural, the trial court was well within its discretion to receive extrinsic evidence as to relevant circumstances surrounding execution of the instrument.

Looking back in the annals of Kentucky case law, we find direction in the case of *Likefield v. Likefield*, 6 Ky.L.Rptr. 640, 82 Ky. 589, 1885 WL 5757 (Ky. 1885). In that case, Mr. Likefield wrote the following paper in January 1859:

> "If any accident should happen to me that I die from home, my wife, Julia An Likefield, shall have every thing I possess, the house and lots and the money that is due to me, and for her to hold it as her own.

WM. A. LIKEFIELD."

Several years later, Likefield, in due course, died in his home. He was survived by his wife. The probate of this paper, which was found in his possession after his death, was contested upon the ground it was a contingent will, intended only to be effective in the event the testator should die away from home. The trial court, however, found it was not a contingent instrument, reciting:

> The rule is, that courts will not incline to regard a will as *conditional* if it can be reasonably held that the maker was simply expressing his *inducement* to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be *temporary* or *contingent*, it will be upheld. In this instance, if the testator, by the words he used, referred to the possibility of his accidentally dying from home as a *reason* for making the will, then it must be maintained; but if he intended by them to show that he was then making only a *temporary* or *conditional* disposition of his property, it must fail, because the event named never happened.

The parties concede that when Mr. Quire wrote the instrument in December 1997, he was preparing to undergo a surgical procedure. Concerned that something may occur during the procedure, "[i]n the event something happens to me . . .", Mr. Quire was motivated to prepare his will. Had Mr. Quire not written any more, it is clear that this document should be treated as a final will, as the motivation to write a will does not make it a contingent will. *Holtzclaw v. Arneau*, 638 S.W.2d 704, 705 (Ky. 1982). However, he added the language, "This is written in case of emergency. I expect to write more in detail at a later date." These words diminish any intent to write a final will.

Not only did he survive the procedure, but it was not until eight years later that he died from lung cancer, a period of time hardly consistent with an "emergency." Webster's II New College Dictionary (1995) defines emergency as "an unexpected, serious occurrence or situation urgently requiring prompt action." Coupled with the expressed intent to write more later, it is clear Mr. Quire wrote intending the document in question to have only limited applicability; to wit, that period of time during and immediately ensuing the surgical procedure. If he survived this period, he would write more. This can be interpreted as allowing for an opportunity to explain why Virginia was not to inherit or, just as possible, providing for a chance to provide some portion of his estate to her.

Thus the trial court, in considering the circumstances surrounding Mr. Quire's decision to write this holographic document, used the extrinsic evidence not to add words to the document but rather to explicate these two decisive sentences. While our law disfavors the disinheriting of lawful heirs in instances of intestacy or in doubtful cases where there is a will, it nonetheless "secures the right of the testator to dispose of his property as seemeth good to him...." *Youse v. Forman*, 68 Ky. 337, 1869 WL 3982 (Ky. App. 1869); *Carey v. Jaynes*, 265 S.W.3d 801 (Ky. App. 2008). When the intentions are clear, the testator can exclude any heir for no reason or any reason. However, we believe the court did not err when it found as a matter of law that Mr. Quire died intestate, allowing for Virginia to share equally with her two sisters in her father's estate.

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

KELLER, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTING: Respectfully, I dissent.

The majority has not sufficiently observed settled precedent and charted a course of its own with the result being that a man who wrote a will and gave explicit directions for the disposition of his estate has been determined to be intestate. This conclusion is based on speculation from vague language in the will that the testator intended conditional disposition, contrary to the near-universal rule that one who makes a will is presumed not to intend to die intestate.[2] *Chaffin v.*

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[2] The holographic instrument in question is as follows:

Will of Elmer D. Quire

Bedford, Ky.
12/15-97.

In the event something happens to me. The beneficiaries & administrators of my estate & property will be my daughters

Mary A. Fisher, 2155 Mt. Pleasant Rd. Bedford Ky. 40006

Vicki K. Martin, 1602 Delmar Ln. Louisville, Ky 40016.

This is written in case of emergency. I expect to write more in detail at a later date.

Elmer D. Quire 12-15-97

Tina Browning: witness
Denny Long: witness

STATE OF KENTUCKY

Adams, 412 S.W.2d 563 (Ky. 1967). In fact nothing in the language of the will gives a hint that it was conditional or contingent. When one also considers that the testamentary instrument was wholly in the decedent's handwriting, attested by two witnesses who signed at his instance, notarized at the testator's instance, and retained in his possession in a metal box until his death eight years later, it is untenable to conclude that he intended it only as a temporary, short-term, conditional disposition of his estate. Yet that is what the majority has held.

To justify a judicial determination that a will is conditional or contingent and therefore invalid for failure of the condition, the controlling condition must be identified in the instrument. This is the consistent thread running through the conditional will cases. Only where the condition or contingency is identified in the instrument itself may the will be determined to be conditional. And while extrinsic evidence is admissible to explain what may have motivated the testator, extrinsic evidence is not available to supply the undisclosed condition or contingency. The foregoing was the central holding in the leading Kentucky case on conditional wills, *Walker v. Hibbard*, 185 Ky. 795, 215 S.W. 800 (1919), where the Court stated the rule as follows:

> It may also, as we think, be fairly gathered from all the authorities that, if the will is so phrased as to clearly

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COUNTY OF TRIMBLE

THE FOREGOING WAS ACKNOWLEDGED BEFORE ME ON THIS 15TH DAY OF DECEMBER 1997, BY ELMER D. QUIRE, AND TINA BROWNING AND DENNY LONG AS HIS WITNESSES.

Elizabeth J. Wentworth
NOTARY PUBLIC, KY STATE AT LARGE
MY COMMISSION EXPIRES: MAY 31, 1998

> show that it was intended to take effect *only upon the happening of the particular event set forth in the paper as the reason for writing it*; or, putting it in other words, if it was written only to make provision against a death that might occur on account of or as a result of the *specific thing assigned as a reason for writing the will –* it will be a contingent will; but, if the causes assigned for writing it are merely a general statement of the reasons *or a narrative of conditions that induced the testator to make his will, it will not be a contingent will,* although it may set forth probable or anticipated dangers or conditions that induced the testator to write it.

Id. at 806 (Emphasis added.) Consistent with the holding in *Walker* is *Likefield v. Likefield*, 6 Ky.L.Rptr. 640, 82 Ky. 589, 1885 WL 5757 (1885), where the Court upheld the will and explained the law as follows:

> It will be noticed in all the above cases, and in others not now at hand *where the will has been held to be conditional, that a specific contingency is named*, and it either confined to a *time* certain, or a particular *event.*
>
> In this respect they are clearly distinguishable from the case now presented. The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. No specific time or particular event is named. It refers to no particular expected calamity, and the words are *general* in their character; and this fact leads to the conclusion that the testator, who was evidently not an educated man or an adept in writing such instruments, did not intend the disposition of his estate to depend upon whether he died *at* or *away* from his home.

Id. at *3. (Emphasis added.) From the description given, it is obvious that the will and surrounding circumstances in *Likefield* and Mr. Quire's will and circumstances are virtually indistinguishable. The *Likefield* Court even noted that the testator

> carefully preserved the paper in contest; that he examined it the year prior to his death; and while these facts can not constitute a statutory republication of it, yet they illustrate the intention of the maker of the instrument, as they tend to show that he believed he had disposed of his property by it.

Id. at *4. It should be recalled that Mr. Quire prepared his will eight years before his death and exceeded all legal requirements as to formalities. He preserved the will along with other important documents in a metal box in his home. As in *Likefield*, Mr. Quire's creation and preservation of the instrument tends to show that he believed that he had disposed of his property by it.

These authorities and numerous others recognize that one who puts pen to paper to write a will engages in a solemn, perhaps agonizing, activity and that reasons, inducements, doubts and euphemisms may be used and result in a document that is less than a model of clarity. However, the authorities are unambiguous that when the testator's intention is clear from the four corners of the instrument, courts have no authority to invalidate or remake the instrument as they believe it should have been. *Walker*, 215 S.W. at 806. *See also Ratliff v. Higgins*, 851 S.W.2d 455 (Ky. 1993) ("The terms of the will are clear and *unambiguous* and, therefore, no reason exists to go beyond the four corners of the will and speculate through parol evidence as to testators' intent.")

Mr. Quire was well-aware that he had three daughters. In fact, there was evidence that he was very close with his grandson who was the son of Virginia Gray, the daughter he omitted from his will. Nevertheless, he wrote a holographic

will that specifically gave all of his "estate & property" to his daughters, Mary A. Fisher and Vickie K. Martin. No condition or contingency whatsoever was stated or identified. For whatever reason, Mr. Quire deliberately omitted his daughter Virginia from his testamentary plan, and no court has rightful authority to invalidate his will. *Fischer v. Heckerman*, 772 S.W.2d 642 (Ky. App. 1989) ("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.")

One who writes a will prior to embarking on a journey and states that the will will be effective if he does not return has stated a proper condition and created a limitation upon the duration of the conditional will. Likewise, one who writes a will in stated anticipation of hospitalization or treatment for illness has stated a proper condition with an appropriate limitation on its duration. Such was not the case with Mr. Quire's will. He did not state any condition whatsoever. But despite the absence of any supporting language, the majority has concluded that

> [I]t is clear Mr. Quire wrote intending the document in question to have only limited applicability; to wit, that period of time during and immediately ensuing the surgical procedure. If he survived this period, he would write more. This can be interpreted as allowing for an opportunity to explain why Virginia was not to inherit or, just as possible, providing for a chance to provide some portion of his estate to her.

Not only are these conclusions unsupported by language in the instrument, neither is there supporting evidence in the record. The unfortunate result of the majority opinion is to render Mr. Quire intestate when he undoubtedly intended otherwise.

BRIEFS FOR APPELLANT:

Perry R. Arnold
Bedford, Kentucky

BRIEF FOR APPELLEE:

Homer Parrent, III
Louisville, Kentucky