RENDERED: MARCH 20, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000020-MR

KERRIE HOSICK HERRON — APPELLANT

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 12-CI-00217

PATRICIA HOSICK, INDIVIDUALLY,
and PATRICIA HOSICK, EXECUTRIX
OF THE ESTATE OF TERRY HOSICK — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND D. LAMBERT, JUDGES.

JONES, JUDGE: This appeal concerns the interpretation of a will and the devise of real property. Appellant, Kerri Hosick Herron, appeals from the declaratory judgment of the Livingston Circuit Court determining that she has no remaining

interest in the property. For the reasons set forth below, we AFFIRM IN PART, REVERSE IN PART, AND REMAND.

I. Factual and procedural background

The real property at issue is located in Livingston, Kentucky, and was at one time owned entirely by Maurice Jean Hosick ("Maurice"). Hereinafter, we shall refer to the subject property as the "Hosick Estate." During her life, Maurice had a son, Terry Franklin Hosick ("Terry"). Terry is the father of Appellant Kerrie Faye Hosick (now Herron) ("Kerrie").[1]

On April 14, 1993, Maurice signed a handwritten[2] will ("Maurice's Will") before two witnesses. Maurice's Will provides as follows:

> I: Maurice Jean Hosick declare this to be my Last Will and Testament.
>
> Kenny and Dianna Poindexter to receive the property known as Jess Sliney Farm.
>
> ***All other real property (farm land house and lot) in Burna to be in my son's name Terry Hosick. In case of ever sold half would go to my Granddaughter Kerrie Faye Hosick.***
>
> I Give $1000 dollars to each of the following: Doris Belt and Sandra Qutermous for love and kindness shown to me while I was sick.
>
> All the rest of my property I give to my son Terry Hosick.

[1] Kerrie's mother is Karen Nell Curtis who was at one time married to Terry.

[2] There seems to be some dispute regarding who handwrote the will, Maurice or Dianna Poindexter. Since the Will was probated many years ago, this dispute is of no consequence.

> I name Dianna Poindexter as my administer and request that she serves without bond.

(emphasis added).

Maurice died on April 17, 1993, three days after she executed the Will. It was probated in Livingston County and was recorded of record with the Livingston County Clerk. In May 1994, Dianna Poindexter, acting as Maurice's administrator, filed an affidavit with the Livingston Clerk describing the real property subject to transfer under Maurice's Will. The Hosick Estate was made up of portions of five tracts of land totaling over nine-hundred acres.[3] At that time, the Hosick Estate was valued at just under half-a-million dollars.[4]

During his life, Terry maintained possession of the bulk of the Hosick Estate. At some point, however, Terry sold a small portion of the property. In accordance with Maurice's Will, Terry transferred half of the proceeds of this sale to Kerrie.

Terry died testate on March 18, 2012, having executed his Last Will & Testament on November 29, 1988 ("Terry's Will"). At the time of his death,

[3] Our reference to the "Hosick Estate" does not include the "Jess Sliney Farm," which Maurice bequeathed to the Poindexters.

[4] We have considered the Poindexter affidavit only for the purpose of placing this matter in a factual and historical context. We did not rely on the Poindexter affidavit to determine Maurice's intent.

Terry was married to Appellee Patricia Darlene Hosick ("Patricia").[5] Terry's Will was probated by the Livingston District Court by order entered May 22, 2012.

Terry's Will does not specifically reference the Hosick Estate since Terry's Will predated Maurice's Will. Under the terms of Terry's Will, all his property "real, personal and mixed, wherever situated and whenever acquired," was to pass to Patricia provided she survived him. Terry's Will specifically disinherited Kerrie providing: "I specifically leave nothing to my child Kerrie Faye Hosick." He further stated that if Patricia did not survive him all his property was to pass in equal shares to "any surviving children, excepting Kerrie Faye Hosick."

Patricia was still alive at the time of Terry's death. After Terry's Will was probated, she took the position that Kerrie had no remaining interest, contingent or otherwise, in the Hosick Estate. Kerrie, however, maintained that she possessed an interest in the Hosick Estate by virtue of Maurice's Will.

On December 21, 2012, pursuant to KRS[6] 418.040, Kerrie filed a Declaration of Rights action in the Livingston Circuit Court ("circuit court"). Therein, she requested the circuit court "to determine the precise interest which she possesses in and to [the Hosick Estate]." She sought damages "to recover her portion of such sums of money as proceeds as have been received by Terry Hosick,

[5] Terry and Patricia had one son together, William Franklin Hosick; the record does not disclose William's date of birth. However, we presume William was born sometime prior to 1988 because Terry referred to William in his 1988 will. Maurice's 1993 will makes no bequests, conditional or otherwise, to William.

[6] Kentucky Revised Statute.

deceased, and Patricia Hosick, relative to [the Hosick Estate], whether by lease, rental, transfer, sale or other conveyance, and which were not distributed to her at such times." Patricia filed an answer to Kerrie's complaint denying that Kerrie had any remaining interest in the Hosick estate.

The circuit court held a hearing on October 2, 2013, at which time the parties presented oral arguments before the circuit court.[7] On December 12, 2013, the circuit court entered declaratory judgment in favor of Patricia. Specifically, the circuit court determined as follows:

> 1. The Last Will and Testament of Maurice Jean Hosick is unambiguous.
> 2. Plaintiff Kerrie Hosick Herron has no interest in the real estate inherited by Terry Hosick from Maurice Jean Hosick which was still in existence at the time of death of Terry Hosick.
> 3. Terry Hosick owned the real estate which he inherited from his mother Maurice Jean Hosick in fee simple absolute, subject only to a charge against any sale proceeds if he had sold any during his lifetime.
> 4. Plaintiff has no claim against proceeds from the future sale of the subject real estate after the death of Terry Hosick.
> 5. Plaintiff is not entitled to "contribution" from any other person in connection with the subject real estate.
> 6. Plaintiff is entitled to no lease or rent payments which may have been or are received in connection with the subject real estate.
>
> This appeal followed.

II. STANDARD OF REVIEW

[7] Because the circuit court took the position that issues before it were purely "legal," it did not allow the parties to submit any factual proof.

A testator's intent controls the interpretation of her will. *Clarke v. Kirk*, 795 S.W.2d 936, 938 (Ky. 1990). "To ascertain the testator's intention, it is necessary to first examine the language of the instrument. If the language used is a reasonably clear expression of intent, then the inquiry need go no further." *Id.* While canons of construction are available where the testator's intent is unclear, a court need not resort to canons of construction where a testator uses clear and unambiguous language. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010).

"The construction as well as the meaning and legal effect of a written instrument . . . is a matter of law for the court." *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992); *see also Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.,* 238 S.W.3d 644, 647 (Ky. 2007). Therefore, our review is *de novo*. *Cumberland Valley Contractors, Inc.,* 238 S.W.3d at 647.

III. ANALYSIS

"When the interpretation of a will is in dispute, Kentucky follows the 'polar star rule,' which provides that a testator's intention, if not contrary to law, controls." *Reynolds v. Reynolds*, 434 S.W.3d 510, 513 (Ky. App. 2014). "Under the polar star rule, the court must determine the testator's intent from what she said—not from what she might have said. So long as the testator's intent is clear from the four corners of the will, resort to rules of construction and extrinsic evidence is unnecessary." *Strunk v. Lawson*, 447 S.W.3d 641, 646-47 (Ky. App. 2013); *Webb v. Maynard*, 32. S.W.3d 502, 505 (Ky. App. 1999).

To resolve the present dispute, we must first ascertain the nature of the interest in the Hosick Estate that Maurice intended to give Terry. Maurice's Will states: "All other real property . . . *to be in my son's name Terry Hosick*."

Kerrie argues that the plain intent of this language was to give a "life estate" only to Terry and that upon Terry's death the Hosick Estate passed to Kerrie in fee simple. Kerrie places great emphasis on the fact that Maurice used the language "in his name" in this portion of the will, but used the terms "give" and "receive" in other parts of the will.

"No particular term or phraseology is necessary to limit the interest of the devisee to a life estate, and any language which shows the intention of the testator that the devisee is only to have the property during life, will be deemed sufficient to create a life estate rather than a fee." *McKee v. Hedges*, 297 S.W.2d 45, 47 (Ky. 1956). The problem for Kerrie, however, is that we cannot find any language in

Maurice's Will to suggest that she intended Terry have a life estate rather than a fee in the Hosick Estate. *See Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

The fact that Maurice stated that all her real property was "to be in" Terry's "name" is not indicative of a life estate. Generally, the owner of real estate holds title to the property by way of a deed. Thus, we believe that the term was used as a way to denote Terry would receive the property by way of a deed "in his name." Within the four corners of Maurice's Will, we cannot find any language to suggest that Maurice intended Terry to hold the deeds only for the duration of his life. In fact, we agree with the trial court that Maurice's unambiguous intent was for Terry to be able to dispose of the property as he saw fit both during his life and at his death subject only to the limitation that if the property was ever sold, Kerrie was to receive half the proceeds of the sale.

We must next consider whether Maurice intended to give Kerrie any direct interest in the Hosick Estate. We believe that Maurice's Will is unambiguous that she intended to give Kerrie only a share in the proceeds from any sale of the Hosick Estate. We find any other construction illogical. Maurice's Will devised all her real property to Terry. It then stated: "In case of ever sold half would go to my Granddaughter Kerrie Faye Hosick." We believe that in using the past tense "sold" Maurice contemplated that a final sale had already taken place. If Terry sold the entire estate, how would it be possible for Kerrie to then take possession of half of such real estate? The only logical reading of Maurice's Will is that Terry was given all the real estate subject to the condition that Kerrie would obtain half

of the proceeds in the event Terry sold any part of it. A right to proceeds from real estate is not an interest in the real estate. *See Sisk v. Sisk*, 214 Ga. 223 (1958). Thus, we cannot conclude that Maurice intended to give Kerrie any actual interest in the Hosick Estate.

We must now consider what interest, if any, Kerrie did obtain. We turn to the Restatement (Third) of Trusts § 5, Comment h, (2003). It explains that where a will devises real estate to a person with directions to pay another legatee, it creates an equitable charge upon the real estate so devised. *Id.* "An owner may transfer property inter vivos or by will to another person for the latter's own benefit but subject to the payment of a sum of money (or subject to some other action beneficial) to one or more third persons. In such a case, the third person has an equitable charge or lien upon the property." Such a lien survives a transfer of the property to a third party. *Id.* ("[T]he holder of property subject to an equitable charge may properly transfer the property to a donee or purchaser, provided the purchaser is notified of or otherwise takes subject to the charge."). *Id.*

Kentucky has previously recognized the concept of an "equitable charge" on property created by will. *See Farra v. Adams*, 12 Bush 515, 1877 WL 7607 (Ky. 1877). Thus, we hold that Maurice's Will made Kerrie a conditional beneficiary and that Kerrie's interest is an equitable charge upon the land if it is ever sold.[8]

[8] We believe this case is distinguishable from *Ramsey v. Holder*, 291 S.W.2d 556, 558 (Ky. 1956), wherein a widow was bequeathed property for her benefit with the condition that if she ever married the property would pass to another. There the court held that when the widow died without having ever having remarried the condition dissolved into nothingness. In *Ramsey,*

However, we cannot agree with Kerrie that the language in Maurice's Will would allow her any present benefits from Patricia where the property has passed only by will. Kerrie would like us to hold that the word "sold" in Maurice's Will would include any and all "transfer" of the Hosick Estate, including the recent transfer to Patricia. We simply cannot agree.

"It is necessary in construing a will to keep in mind at all times that the real answer sought after is not to be found in what the testator meant or intended to say but what is meant by what he actually said." *Scheinman v. Marx*, 437 S.W.2d 504, 508 (Ky. 1969). Further, "[a] will maker is presumed always to use the words giving expression to intention according to their common and usually accepted meaning, unless from the context of the will it is apparent that the words were intended to convey a different sense." *Lecompte v. Davis' Ex'r*, 148 S.W.2d 292, 294 (Ky. 1941).

Here, Maurice explicitly used the word "sold." The term "sold or sale" is defined by *Black's Law Dictionary* (9th Edition 2009) as follows:

> 1. The transfer of property or title for a price. 2. The agreement by which such a transfer takes place. The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised.

---

however, the bequest of the property itself was defeasible. Here, nothing that occurred in Terry's life could ever extinguish his fee simple interest in the property. Maurice gave him the property to dispose of as he pleased. She did, however, create an equitable charge in favor of Kerrie were the property ever sold. This was not subject to extinguishment at Terry's death.

Merriam Webster's International Dictionary (2013) defines sell (the present tense of sold) as follows: "(1): to give up (property) to another for something of value (as money) (2): to offer for sale."

There is no evidence that Maurice intended the term “sold” to mean anything other than in its ordinary and plain meaning which would require consideration. Thus, we agree with the circuit court that the Hosick Estate was not "sold" when it passed from Terry to Patricia. In other words, the transfer of the Hosick Estate from Terry to Patricia was not an event that triggered Kerrie's contingency interest in the proceeds. We also cannot agree with Kerrie that she would be entitled to any other profits that might derive from the property such as lease payments. Again, giving the word "sold" its ordinary and plain meaning, we believe that only a permanent transfer of title for consideration triggers Kerrie's contingency.

We must now determine whether Terry's death extinguished all of Kerrie's interest in the Hosick Estate. It is at this point that our opinion diverges from the circuit court. The circuit court concluded that under Maurice's Will it was clear that Kerrie only had an interest in the proceeds of any sale *by* Terry. However, Maurice's Will does not reference a sale by a specific person. Maurice's Will references the Hosick Estate. We believe that had Maurice intended to limit Kerrie's interest to events in Terry's life she would have said "if *he* ever sells it" or "if ever sold during Terry's life" or some other words of similar limitation.

However, Maurice's Will states that her intention is that Kerrie is to receive half if the Hosick Estate "*is ever sold*." There is nothing in Maurice's Will to suggest that the contingency was extinguished at Terry's death. The contingency was tied to the property and not a specific person.

Thus, we believe that while Terry was free to devise the property to Patricia, his bequest was limited by Kerrie's interest in half the proceeds, if the property is ever sold. We further believe that it was clearly Maurice's intent that the property would be "sold" in good faith for a fair market value. Accordingly, we believe that Kerrie has a present equitable lien on the property, but no right to any immediate proceeds because the condition of sale has yet to be realized.

IV. CONCLUSION

For the above stated reasons, the declaratory judgment of the Livingston Circuit Court is AFFIRMED IN PART and REVERSED IN PART. This matter is REMANDED for entry of appropriate orders consistent with this Opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF FOR APPELLEE:
William C. Adams, III Murray, Kentucky	William F. McGee, Jr. Smithland, Kentucky