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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001693-MR

JENNIFER MCKIM, EXECUTRIX OF
THE ESTATE OF HENRY D. MCKIM — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 16-CI-000999

ZHENG PING FU — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: Jennifer McKim, as executrix of the estate of her late father, Henry D. McKim (the Estate), appeals the Jefferson Circuit Court order which denied the Estate's motion to dismiss for failure to name indispensable parties and entered a judgment in favor of Zheng Ping Fu, the surviving spouse of Henry D. McKim. We affirm.

We begin with a brief recitation of the facts. Henry and Zheng met on an online dating website in May 2012. At the time, Henry had homes in Kentucky and Florida, and Zheng lived in China. The two were married in China on January 10, 2013. They did not enter into a prenuptial or postnuptial agreement. They moved to Louisville, Kentucky, in January 2015 after Zheng was able to obtain a marriage visa for entry into the United States. Meanwhile, in October 2014, Henry (through his attorney-in-fact, Jennifer) had sold his Florida property for $320,694.00 and placed the proceeds, first into his account with Republic Bank, and then into an account with Fidelity Investments. Henry died the following September at the age of 72. He was in Kentucky when he passed away. He had never returned to Florida after his marriage to Zheng.

In October 2015, Henry's daughter Jennifer filed into probate, in Jefferson County, his last will and testament executed in 2009. Henry had been single at the time the instrument was drafted. In the will, Henry's residual estate was left to three of his four children (Michael, Michelle, and Jennifer - Kevin and his children were not listed as beneficiaries per Kevin's request). Zheng was not named as the surviving spouse in the probate action. Jennifer did not list the proceeds of the sale of the Florida condo on the inventory of assets. Also not listed

was an offshore account, established by Henry in the Cook Islands in October 2012, with Southpac Trust Offshore Trustee Services.[1]

On December 16, 2015, Zheng renounced the will and asserted her dower rights. On March 2, 2016, she filed a complaint for fraud on dower in Jefferson Circuit Court. Court-ordered mediation was unsuccessful. On October 9, 2017, an order was entered in probate court holding that Zheng was in fact Henry's surviving spouse, that the parties had married in 2013, and that they remained married on the date of Henry's death.[2] Two days later, Zheng filed for partial summary judgment in the circuit court action on the issue of whether she should be entitled to her statutory share of Henry's estate. The Estate filed its response, and a bench trial was held on July 25, 2018. Both parties filed proposed findings of fact and conclusions of law after the hearing. The circuit court entered its judgment in favor of Zheng on August 15, 2018. The order denying the Estate's motion to alter, amend, or vacate the judgment was entered on October 17, 2018. The Estate appeals.

The Estate first argues that the circuit court erred in denying the motion to dismiss for failure to join indispensable parties, namely, Fidelity

[1] The Southpac Trust, entitled "Hank's Trust #61240," listed the beneficiary class as Henry (grantor/beneficiary) and his four children. The trust was initially funded with $10,000.00.

[2] The Estate did not appeal this finding.

Investments and Southpac Trust. The Estate also contends that Jennifer should have been named as trustee of the trust established in the will for the benefit of the children and grandchildren.

An indispensable party is defined in Kentucky Rule of Civil Procedure (CR) 19.01:

> A person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"The true meaning of 'all necessary parties,' as stated in *Security Trust Co. v. Swope*, [274 Ky. 99, 118 S.W.2d 200 (1938)], is that the term refers to those persons whose interest would be divested by an adverse judgment." *West v. Goldstein*, 830 S.W.2d 379, 382 (Ky. 1992). Stated another way, can "the controversy . . . be resolved between the existing parties without prejudicing" the

rights of Fidelity (and now Morgan Stanley)[3] and Southpac Trust? *Gilland v. Dougherty*, 500 S.W.3d 217, 223 (Ky. App. 2016). As Zheng states, the parties the Estate insists are indispensable to this action do not fit the statutory or case law definition of indispensable. These institutions are merely holding funds to be dispersed per the ultimate ruling in this case. They do not have an "interest [which] would be divested by an adverse judgment." *West*, 830 S.W.2d at 382. Thus, the circuit court did not err in ruling against the Estate in this regard.

Continuing in this vein, the Estate urges that Jennifer should have been named as a party in her capacity as Trustee of the Henry D. McKim Testamentary Trust. The trust was established under Item III of Henry's will. It first bequeathed an immediate $10,000.00 per child. It then created a trust for Henry's grandchildren (excepting Kevin's children) "for the benefit of obtaining an education beyond high school[,] to encourage and assist each beneficiary who may desire and be willing to study to obtain a post secondary education." Jennifer was named as trustee, with her sister Michelle as alternate trustee. Jennifer, although named as a party in her capacity as executrix, was not named in her capacity as trustee, and she considers this omission by Zheng to be a fatal flaw in bringing the claim against the Estate.

[3] Jennifer, after being appointed executrix of the estate, moved the monies from the Fidelity account to an account with Merrill Lynch and then to Morgan Stanley, where it remains. The stipulated value of the account on the date of the bench trial was $375,000.00.

Again, we disagree with the Estate. By renouncing the will, Zheng opted to "take her interest as provided by K.R.S. 392.020. *See* K.R.S. 392.080." *Harris v. Rock*, 799 S.W.2d 10, 12 (Ky. 1990). *See also Mathias v. Martin*, 87 S.W.3d 859, 863 (Ky. 2002). Thus, her action was properly taken against Jennifer in her capacity as executrix. The terms of the testamentary trust were only affected insofar as the amount of monies available to fund it. All other aspects remained intact. Therefore, we find no error in the circuit court's denial of the Estate's motion to dismiss for failure to name indispensable parties.

The Estate next argues that the circuit court erred in concluding that a transfer on death account was surplus property. *Harris*, *supra*, holds otherwise insofar as the surviving spouse's right to renounce the will:

> The right of dower is one of long standing. A surviving spouse is entitled to an absolute one-half interest in the surplus personalty of a deceased spouse. K.R.S. 392.020. Surplus personalty as used in the statute means the personalty remaining after the payment of the debts, funeral expenses, charges of administration, and widows exemptions have been deducted from the gross personalty possessed by the decedent at the time of his death. *Mattingly v. Gentry*, Ky.App., 419 S.W.2d 745 (1967); *Talbott's Ex'r v. Goetz*, 286 Ky. 504, 151 S.W.2d 369 (1941). The right to dower vests at the time of marriage or at the time of acquisition of subsequently acquired property. *Kentucky Bank and Trust Co. v. Ashland Oil and Transportation Co.*, Ky. App., 310 S.W.2d 287 (1958); *Wigginton v. Leech's Adm'x.*, 285 Ky. 787, 149 S.W.2d 531 (1941).

Harris, 799 S.W.2d at 11.

> A surviving spouse is generally entitled, by law, to a share of a dead spouse's estate. That share includes a portion of the dead spouse's real estate, the amount of which depends on whether there is a will that the surviving spouse elects against, and, in every case, "an absolute estate in one-half (½) of the surplus personalty left by the decedent." KRS 392.020. At common law, this share, or some version of it, was called dower (for widows) and curtesy (for widowers). That share cannot be defeated even by a will excluding the surviving spouse and disposing of all the decedent's estate. *See* KRS 392.080 (allowing the surviving spouse to renounce the will and claim the statutory share, albeit at a reduced level with respect to real estate).
>
> Nevertheless, dying spouses sometimes attempt to defeat the surviving spouse's statutory share by disposing of property prior to death through *inter vivos* transfer of assets to third parties. The schemes used in such attempts range from simple transfers of cash, *Benge v. Barnett*, 309 Ky. 354, 217 S.W.2d 782, 782 (Ky. 1949); *Martin v. Martin*, 282 Ky. 411, 138 S.W.2d 509, 511 (Ky. 1940), to more complex deals, such as purchasing real estate in the name of another person, *Rowe v. Ratliff*, 268 Ky. 217, 104 S.W.2d 437, 438 (Ky. 1937), or placing cash into joint accounts with third parties, *Harris v. Rock*, 799 S.W.2d 10, 11 (Ky. 1990).
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> **Such attempts, when directed to defeating the surviving spouse's share rather than constituting bona fide gifts, are deemed fraudulent. And this Court and its predecessor have repeatedly stated that such attempts are improper and may be unwound, at least to the extent needed to fund the surviving spouse's share.** *See Harris*, 799 S.W.2d at 11; *Martin*, 138 S.W.2d at 515; *Benge*, 217 S.W.2d at 784; *Rowe*, 104 S.W.2d at 439. The rule, stated simply (and traditionally), is that "a man may not make a voluntary

> transfer of either his real or personal estate with the intent to prevent his wife, or intended wife, from sharing in such property at his death and that the wife, on the husband's death, may assert her marital rights in such property in the hands of the donee." *Martin*, 138 S.W.2d at 515. Although the common-law rights distinguished between husband and wife, the modern statute to which this rule attaches is gender neutral, granting the same rights to both spouses, and thus the same rule applies to a woman who attempts to defeat her husband's spousal rights[.]

Bays v. Kiphart, 486 S.W.3d 283, 286-87 (Ky. 2016) (emphasis added) (footnote omitted). Here, the circuit court properly ruled in Zheng's favor and "unwound" the transfers "to the extent needed to fund the surviving spouse's share." *Id.* *See also Brown v. Sammons*, 743 S.W.2d 23, 26 (Ky. 1988) ("Renunciation of a will does not create intestacy. The provisions of the will are enforceable, insofar as possible, as to all beneficiaries except the surviving spouse.").

We lastly consider the Estate's assertion that the circuit court erred in finding that Henry was a Kentucky resident at the time of his death. We need not spend much discussion on this issue: Henry died in Kentucky; his listed place of residence on his marriage license and death certificate was Kentucky (namely, the address of the condominium he owned in Louisville); and his will was offered for probate in Jefferson District Court. KRS 394.140 ("Wills shall be proved before, and admitted to record by, the District Court of the testator's residence[.]"). Henry was a Kentucky resident, not a resident of Florida.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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