

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001078-MR

ANN CURTSINGER; SUZANNE ATKINSON
and LUKE JAMES CURTSINGER III

APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 99-CI-00049

THOMAS A. CURTSINGER, JR.
Individually and as Executor
of the Estate of JOSEPH
WALTER CURTSINGER

APPELLEE

OPINION

REVERSING and REMANDING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, JUDGE; AND HUDDLESTON,
SENIOR JUDGE.¹

EMBERTON, CHIEF JUDGE. This case involves the interpretation of
language contained in a holographic will of the testator, Walter
Curtsinger. The issue is whether the will conveys a fee simple
title or a life estate to Thomas A. Curtsinger, Walter's nephew.

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

The will, precisely as it is written, is as follows:

The first and last will of Walter Curtsinger with a sound mind and clear conscience.

I will to Tommie Curtsinger Jr., my entire estate.

The land is not to be sold for fifty (50) years in case of death of you it goes to nearest of kin. To brother and sister if living of Walter Curtsinger. Try to send to Barbara L. Curtsinger some money each year.

On October 19, 1994, Walter died. Surviving him were two brothers, two sisters, and nine nieces and nephews.² The trial court held that Walter devised his property to Tommie in fee simple absolute and this appeal followed.

The "polar star rule" requires the court to look at the entirety of a will to discern the testator's intent. So dominant is the rule, that all other rules of construction are subordinate and will be employed only when the testator's intent cannot be ascertained from the language used. The intent of the testator shall prevail and shall be enforced unless it antagonizes a statute or is against public policy.³

While the terms fee simple absolute, life estate, and remainder may be commonly used in professionally prepared wills,

² One sibling predeceased Walter in death. By the time the action was filed, two more siblings died, Luke James Curtsinger, Jr., survived by his widow and one son, who are appellants. Mary Jeanne (Dorothy) Curtsinger died leaving no children.

³ Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948).

holographic wills prepared by laypersons such as Walter are usually written without appropriate use of the more legally descriptive terms, thereby making it somewhat more difficult to discern the testator's intent.

The first clause of Walter's will states simply, "I will to Tommie my entire estate." Standing alone, the language would appear to convey to Tommie Walter's entire interest in fee simple. Under the polar star rule, however, the clause cannot be read in isolation; the court must interpret the will from the four corners of the instrument.

The second clause of the will appears initially to be a restraint on alienation, which provides that the land is not to be sold for fifty years. Such a restraint on a fee simple is subject to being voided:

The general rule which prevails is that, where the fee simple title to an estate under a deed or will passes to the grantee, any restraint, attempted to be imposed by the grantor upon the grantee to prevent alienation of the property is void and the restraining clause will be rejected; but, in this jurisdiction a reasonable restraint may be imposed and such a provision will be upheld.⁴

⁴ Saffold v. Wright, 228 Ky. 594, 115 S.W.2d 456, 457-58 (1929).

Such restraints on life estates are obviously valid; however, only if Tommie's interest is a fee simple would the rule have application.⁵

It is clear from the language of the second clause of the will that Walter did not intend to convey a fee simple absolute to Tommie. Not only is Tommie precluded from selling the property for fifty years, but if he dies within that time, Walter has provided for remaindermen to take the property. If Walter had intended Tommie to have a fee simple absolute there obviously would be no purpose in designating remaindermen. The first clause alone would have sufficiently expressed his intent. If he intended to impose a restraint on alienation the designation of remaindermen would serve no purpose. There appears to be no logical explanation for the fifty year restriction, other than that Walter devised to Tommie a life estate. In further support, we reiterate, the power of the devisee to dispose of property is, as stated in Handy v. Crain,⁶ an essential element of a fee:

If the power of disposition is limited in any way, either as to devisees or grantees or as to the time of its exercise, the estate created is not a fee. The unlimited and absolute power of disposition is required: and this includes essentially the

⁵ There is no rule against perpetuities problem regardless of the type of such conveyed. Tommie was vested in his estate upon the death of Walter and the remainder interest, if any, would vest upon Tommie's death. KRS 381.215.

⁶ Ky., 270 S.W.2d 956 (1954).

power to give, grant, sell and convey by an inter vivos instrument and devise by a testamentary document.⁷ (Citations omitted).

We believe Walter did not intend to convey Tommie a fee simple absolute. To hold otherwise would ignore the plain meaning of the entire second sentence.

Tommie contends that even if he has only a life estate, the remaindermen are limited to brothers or sisters who survive Tommie. Again, Tommie ignores pertinent language specifically, "in case of death of you it goes to nearest of kin. To brother and sister if living of Walter Curtsinger." The designation of Walter's brothers and sisters, if living, as remaindermen is not ambiguous. Again, we initially inquire as to Walter's intent. If any of his brothers and sisters survive Tommie, Walter intended it to descend to them. Aware of that unlikelihood, he designated the next of kin as a class of remaindermen.⁸ As used in everyday language and in the legal sense, next of kin refers to those who would take under the Kentucky law of descent and distribution.⁹ Since Walter had no surviving spouse or children, the remaindermen are as Walter designated, any living brothers or sisters, if not, to their issue.

⁷ Id. At 958.

⁸ As stated earlier, only Tommie's father, Walter's brother, survived at the time this action was filed.

⁹ Meador v. Williams, Ky. App., 827 S.W.2d 706 (1992).

The parties have spent a considerable amount of time discussing complicated legal principles such as restraints on alienation, anti-lapse statute, fee simple absolutes, life estate, and other terms which, we believe, never occurred to Walter when he wrote his final intent as to the disposition of his property. The will read in its entirety using common sense and applying ordinary meaning to the words used, devised a life estate to Tommie with a remainder to Walter's next of kin.

The judgment of the Graves Circuit Court is reversed and the case remanded for entry of a judgment consistent with this opinion.

ALL CONCUR.

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