

RENDERED: August 1, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001930-MR

CODA WILSON

APPELLANT

v. APPEAL FROM OWSLEY CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 00-CI-00131

NAOMI FROST AND ANNA HOSKINS

APPELLEES

OPINION
REVERSING

** ** * * * ** **

BEFORE: PAISLEY AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

TACKETT, JUDGE: Coda Wilson appeals from the July 6, 2002
judgment of the Owsley Circuit Court, permanently enjoining her
from interfering in any manner with the right of the heirs of
Harden Wilson to use an easement across her property in order to
access the family cemetery. We reverse.

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.

In the early 1930's, Harden Wilson owned a sizeable tract of land located in Owsley County near the Little Sturgeon Creek. On March 28, 1932, Wilson conveyed, in separate deeds, a portion of this land to each of his nine children. Central to the arguments of the parties and the order of the circuit court is the intent of the grantor, Harden Wilson, in his conveyances to daughters, Lula Price and Mary Begley.

The deed to Lula Price conveyed a certain tract described therein, but reserved "the timber and a right-of-way in and out." Record on Appeal (hereinafter Record), pp. 31-32.² Coda Wilson (hereinafter Appellant) is the successor in title to a portion of this property. In the Mary Begley deed, the grantor reserved "the timber and 1 acre for [sic] grave-yard and a right of way in and out."³ Owsley County Deed Book 7, pp. 502-03. As provided in the deed, a family cemetery was established on the reserved tract. Ricky Joe Wilson, who is not a party to this action, is the property owner at this time.

Appellant and Herbert Wilson, her late husband, purchased a portion of the Lula Price tract in August 1943. This deed contained language similar to that in the Price deed, excepting from the conveyance "all the timber on the above described tract of land with right of way in and out. . . ."

² This language also was included in the seven deeds not involved in this dispute.

³ The construction of the Mary Begley deed is not at issue in this case.

Deed to Herbert and Coda Wilson, Owsley County Deed Book 13, p. 32. On numerous occasions, the Wilsons granted permission to the heirs of Harden Wilson to cross their property in order to access the cemetery on the Begley property. It appears that the tract upon which the cemetery sits has no frontage on the county road (Highway 1503). Other points of access to the cemetery were also available nearby.

Eventually, Appellant, for reasons irrelevant to the resolution of this dispute, began refusing to grant permission for the Harden Wilson heirs to use her driveway to access the cemetery. On at least one occasion, Appellant blocked this roadway with her car. This led to the initiation of Frost's and Hoskins' (hereinafter Appellees) action to enjoin Appellant from interfering with their right to use the disputed roadway for the purpose of accessing the cemetery.

The circuit court, on July 6, 2002, entered a judgment on the pleadings enjoining Appellant from "blocking the road. . . [or] from interfering in any manner with the right of the heirs at law of Harden Wilson to use the road, which leads from the county road through her property. . .for access to the Wilson family cemetery." Record, pp. 78-80. In its "Findings of Fact, Conclusions of Law and Judgment," the circuit court, based upon its interpretation of Girtley v. Cowley, Ky., 418 S.W.2d 658 (1967), construed the Price and Begley deeds together in an

attempt to garner the grantor's intent. The court found that an easement over Appellant's property was expressly reserved therein. This appeal followed.

The circuit court tried the case *sub judice* without a jury. Our review of the circuit "court's findings of fact are governed by the rule that such findings shall not be set aside unless clearly erroneous. The [circuit] court's conclusions of law. . .are subject to independent appellate determination." A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky. App., 998 S.W.2d 505, 509 (1999)(citations omitted). "An appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo*." Carroll v. Meredith, Ky. App., 59 S.W.3d 484, 489 (2001). The construction of a deed is a matter of law. Dennis v. Bird, Ky. App., 941 S.W.2d 486, 488 (1997)(citing Phelps v. Sledd, Ky., 479 S.W.2d 894 (1972)).

The circuit court's interpretation and reliance on Girtley was erroneous. Even though the court reviewed both deeds in making its determination, that case does not stand for the proposition that "[w]here a grantor divides a tract of land between two grantees, the deeds must be construed together in order to construe them" as the circuit court held in the case *sub judice*. Instead, the Girtley court examined the two deeds in an attempt to discover any ambiguity and found none. 418 S.W.2d at 659. Here, such examination is unnecessary because we believe

the exceptions in the deeds are unambiguous. Since the circuit court applied the wrong law to the facts, we must undertake a *de novo* review. Carroll, 59 S.W.3d at 489.

Appellant's title finds its source in the Lula B. Price deed. Owsley County Deed Book 8, pp. 621-22. Therein, Hardin Wilson, the grantor, attempted to except "the timber and a right-of-way in and out." We hold this exception to be void for vagueness. Kentucky "is committed to the view that land embraced in an exception must be described with the same definiteness and certainty that is required when describing the property granted." Dotson v. Kentland Coal & Coke Co., Ky., 265 S.W.2d 466, 467 (1954)(citing Justice v. Justice, Ky., 39 S.W.2d 250 (1931)). Failure to describe an exception in such a manner renders the exception void for uncertainty and vagueness and "the grantee has the benefit of the defect and title to the whole tract passes to him; the exception alone being void." Justice, 39 S.W.2d at 252; see also Dotson, 265 S.W.2d at 467 ("[I]f the exception is not described with certainty, the grantee is entitled to the benefit of the defect").

Saulsberry v. Saulsberry, 121 F.2d 318 (6th Cir., Ky. 1941), a case cited by Appellees, is instructive on the certainty required in describing property granted in a deed. In Kentucky, "a deed is void in which the description is so uncertain as to be meaningless and the instrument supplies nothing to enable the

premises to be identified." Id. at 322. In Justice, vagueness was found when "[t]he retained right of way was given no situs, and its limits were in no way delineated." 39 S.W.2d at 251.

This is the situation in the case *sub judice*; the right of way excepted was only generally described⁴ and this "description" contained no situs or any other delineated limits. The right of way is void for vagueness and uncertainty.⁵ Therefore, Lula Price, the grantee, succeeded to title of the entire tract, except the timber, which was properly excepted from the deed. Justice, 39 S.W.2d at 252. No general right of way existed. Price held title to the property in fee simple, with the exception of its timber.

A close reading of Appellant's deed⁶ reveals a subtle difference in the language used to except rights from the conveyance than that used in the source deed.⁷ Coda and Herbert Wilson's deed conveyed the described tract in fee simple,⁸ excepting therefrom "all the timber on the above described tract

⁴ In fact, the grantor excepted only "a right-of-way in and out." No other description can be found in the deed.

⁵ Dotson recognizes that a grantor may act to cure the uncertainty, but there is no evidence regarding any curative measure taken by Harden Wilson. 265 S.W.2d at 467-68.

⁶ Deed from Lula Price to Herbert and Coda Wilson, Owsley County Deed Book 13, p. 32.

⁷ The deed conveying title from Harden Wilson to Lula B. Price. Owsley County Deed Book 8, pp. 621-22.

⁸ The tract described is only a portion, or small lot, of that originally conveyed to Lula Price by Harden Wilson.

of land *with* right of way in and out. . . ."⁹ Book 13, p. 32. We hold this to be unambiguous. The grantor, Lula Price, intended to convey title in fee simple, except the right to the timber located on the property¹⁰ and a right of way in and out for the purposes of removing any timber harvested.¹¹ There is no suggestion in any part of the deed that this right of way was also intended for the purpose of accessing the family cemetery. This is unambiguously stated. Furthermore, "the intentions of the parties to a conveyance must be construed from the four corners of the instrument." Bailey v. K.Y.B.C. Land Corp., Ky. App., 39 S.W.3d 29, 31 (2001). Extrinsic evidence as to the grantor's intent is unnecessary and inadmissible. Hosbach v. Head, Ky., 284 S.W.2d 684 (1956). No right of way, with the exception of that for the purpose of removing timber, ever existed on Appellant's property.¹²

⁹ The exception in the source deed, now found to be void in respect to the right of way, was for "the timber and a right-of-way in and out." Owsley County Deed Book 8, p. 622.

¹⁰ In fact, Lula Price had no title to the timber on the described property, it having been excepted properly in the deed conveying title to her.

Incidentally, however, as one of the heirs of Harden Wilson, Price had partial ownership of this timber. Appellant and her husband purchased all the rights to the timber on their property in 1948. Owsley County Deed Book 14, p. 605.

¹¹ The purchase of the timber rights by the owners of the servient estate raises an interesting question of law as to the existence of the right of way for removing the harvested timber. We do not undertake to resolve this tangential issue, but note that it is doubtful the right of way survived the conveyance of the timber rights.

¹² We note that the exception in the Coda Wilson Deed (Book 13, p. 32) may be void for vagueness and uncertainty for reasons similar to those causing the exception for a right of way in the Lula Price Deed (Book 8, pp. 621-22) to be void. Because we hold that the exception in the Coda and Herbert Wilson deed was for a right of way for the sole purpose of removing harvested timber, it is unnecessary for us to determine whether that exception is void.

The Appellees' express concern that "the rights and obligations of persons not parties to the lawsuit" would be adjudicated improperly were we to disagree with their arguments.¹³ In order to alleviate their concern, we are compelled to emphasize that we express no opinion regarding access to the cemetery except to say that they have no right to use Appellant's roadway for that purpose. Appellant holds title to the disputed property in fee simple subject to an illusory right of way for the purpose of removing harvested timber, the rights to which she now owns. We are not concerned with the route the heirs of Harden Wilson use to access the cemetery, so long as that route does not cross Appellant's property, that being the sole issue before us. We refuse to speculate as to Appellees' other rights respecting access to the cemetery.

For the foregoing reasons, the judgment of the Owsley Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kendall Robinson
Booneville, Kentucky

BRIEF FOR APPELLEE:

Elizabeth R. Short
Rose, Short & Hollon
Beattyville, Kentucky

¹³ See Brief for Appellees, p. 6.