

RENDERED: March 26, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002530-MR

CRAWFORD DWAYNE AKERS
AND ROXANNE AKERS

APPELLANTS

APPEAL FROM JOHNSON CIRCUIT COURT
v. HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 01-CI-00050

HAROLD WILLIAMS,
ADMINISTRATOR OF THE ESTATE
OF DOROTHY LEMASTER

APPELLEE

OPINION
AFFIRMING
* * * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Crawford Dwayne Akers and Roxanne Akers appeal from an order of the Johnson Circuit Court setting aside a deed issued to them by Dorothy and Edgar Arnie Lemaster. They contend that they adequately performed the condition precedent in the deed, and that the trial court erred by finding to the contrary. Because the trial court's conclusion was supported by substantial evidence, we affirm.

On May 11, 2000, Dorothy Lemaster and her husband Edgar Arnie Lemaster executed a deed conveying real property in Johnson County, Kentucky, to Crawford Dwayne Akers and his wife, Roxanne Akers.¹ The deed states:

That in consideration of the love and affection the parties of the first part [Lemaster] have for the parties of the second part [Akers], and on condition that the parties of the second part provide care unto the parties to the first part for the remainder of their lives; such care consisting of day to day assistance with health, personal, and financial affairs with the restriction that the parties of the first part shall not be placed in a nursing home or retirement home unless absolutely medically necessary; all of which are conditions precedent to the transfer of full title to the parties of the second part; the parties of the first part do convey subject to the conditions set forth, unto the parties of the second part, for their joint lives and upon the death of either of them, remainder in fee simple to the survivor of them, their heirs and assigns forever . . .

After Arnie Lemaster died in September of 2000, Dorothy Lemaster became unsatisfied with the Akerses' performance of the conditions set out in the deed and brought this action to declare the deed void. Following a bench trial, the trial court issued findings of fact, conclusions of law, and a judgment on November 7, 2002. The court found that the Akerses had not performed the

¹ The deed was recorded in the office of the Johnson County Clerk, Deed Book 357, Page 89.

conditions precedent required by the deed, and consequently it declared the deed to be void. This appeal followed.²

The Akerses argue that the trial court clearly erred in finding that they had failed to perform the condition precedent. They assert that they took care of the Lemasters' needs on a daily basis from February until December of 2000, when Dorothy Lemaster fired them. The Akerses further contend that the deed is ambiguous concerning the extent of the duties which were required of them, and they attempted to perform those duties as they perceived them to be.

In finding for Lemaster, the trial court correctly stated that the initial devise was subject to the condition that the Akerses would provide day-to-day care to the Lemasters for as long as they both lived. As the persons claiming the devise, the Akerses had the burden to show that the condition had been performed.³ The trial court concluded the Akerses had not sufficiently performed the conditions precedent required to complete the devise.

At trial, Dorothy Lemaster testified that Roxanne and Crawford Akers provided very little care after the deed was

² Dorothy Lemaster died on October 26, 2002. By agreed order, Harold Williams, the administrator of her estate, was substituted as a party to this action.

³ Barrett v. Percival, 197 Ky. 88, 246 S.W. 143, 146-47 (1922); citing Page v. Frazer's Executor, 77 Ky. (14 Bush) 205 (1878).

executed in May of 2000. She also accused the Akerses of stealing her money. Roxanne testified that she and Crawford provided care to the Lemasters on a daily basis until Dorothy Lemaster dismissed them. She admitted that she had taken some money from a box in the Lemasters' home, but she asserted that she only used the money to pay for the Lemasters' expenses.

Although the trial court did not state so expressly, it clearly determined that Dorothy Lemaster's testimony was more credible than the testimony offered by the Akerses. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.⁴ The trial court's implicit conclusion was supported by substantial evidence and therefore was not clearly erroneous.⁵

Accordingly, the judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Robert C. Bishop
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Wesley W. Duke
Paintsville, Kentucky

⁴ CR 52.01.

⁵ See Black Motor Co. v. Greene, Ky., 385 S.W.2d 954, 956 (1964).