

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000696-MR

TAVNER B. DUNLAP, IN HIS
INDIVIDUAL CAPACITY, AND
PATRICIA D. MEANS, IN HER
INDIVIDUAL CAPACITY

APPELLANTS

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 01-CI-00091

WHITNEY DUNLAP II AND HIS WIFE
SALLY M. DUNLAP

APPELLEES

AND NO. 2003-CA-000710-MR

WOODFORD PROPERTIES, INC., AND
AMSOUTH BANK, EXECUTOR AND TRUSTEE
OF THE ESTATE OF WILLIAM E. DUNLAP

APPELLANTS

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 01-CI-00091

WHITNEY DUNLAP II

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Tavner Dunlap, Jr., Patricia Means, Woodford Properties, Inc., and Amsouth Bank, executor and trustee of the estate of William E. Dunlap, appeal from the judgment of the Woodford Circuit Court which held that the value of a power of appointment assigned to Myrtle Dunlap was equal to \$571,147.53. Appellants argue that the power of appointment was a pecuniary bequest and not a fractional bequest, and that its value was fixed upon Tavner B. Dunlap, Sr.'s death in 1969 at \$53,105.71, or 48.945% of the value of the real estate at the time of Tavner Sr.'s death. On review of the language of the will and the applicable law, we affirm.

Tavner B. Dunlap, Sr. died in 1969, and his will specified that his wife, Myrtle, would have a power of appointment "of an amount equal to fifty percent . . . of the value of my adjusted gross estate as finally determined under the Internal Revenue Code for Federal Estate Tax purposes. . .". The will further specified that "she is authorized . . . to make testamentary disposition of so much of the real estate, the value of which, together with the property herein devised to her outright, will equal said fifty percent . . . of the value of my adjusted gross estate. . .". The balance of the real property, the will said, would then be sold at Myrtle's death and the proceeds divided between his four sons, Tavner Jr., Whitney,

William, and John. Tavner Jr. would receive a 28% share and the others a 24% share each. John assigned his vested share of the remainder to Woodford Properties, Inc.

The circuit court held this bequest to be a fractional bequest giving Myrtle the power to appoint a share of the proceeds of the sale of the real estate to a person of her choosing, in this case Appellee Whitney Dunlap II. The amount of that bequest equaled \$571,766.98, according to the court's order. This appeal followed.

A testator is presumed to know the law at the time of his death. Pitt v. Estate of Gilbert, 672 S.W.2d 70 (Ky.App. 1985). The Appellants argue that the law of the period when this will was drafted would recognize this language as that of a formula pecuniary marital deduction, a method of minimizing the estate tax and maximizing the marital deduction often employed at the time. The appellee argues that the language reflects a fractional bequest, which was also a recognized method of maximizing the marital deduction. The Appellant cites to materials on estate planning by Casner¹, written near the time of the will's drafting, which indicate that this type of language was usually intended to designate a pecuniary bequest, as the value of the adjusted gross estate is a sum certain. The power of appointment, under that interpretation, would be over a

¹ A. James Casner, Estate Planning - Marital Deduction Provisions of Trusts, 64 Harv. L. Rev. 582 (1951).

specific sum determined from the value of the adjusted gross estate for federal estate tax purposes, and not over a percentage of the real estate.

Both parties have extensively argued their positions in their briefs. Ultimately, the intent of the testator must be determined from the will itself. The language of a will must be given its ordinary meaning, in the context of the time it was drafted. The parties agree that Tavner Sr.'s intent was to take maximum advantage of the marital deduction for estate tax purposes. Beyond that, they agree on little: the key question to be resolved is whether the value of the subsequent distribution should be determined at the time of Tavner Sr.'s death or at the time of Mrs. Dunlap's death more than three decades later. The circuit court held that the intent of the testator was not to fix forever the value of the power of appointment as the dollar value at the time of his death, but rather to give her the authority to distribute half of his estate as she saw fit. In support of its holding, the court cited Hurst v. First Kentucky Trust Co., 560 S.W.2d 819 (Ky. 1978). That case dealt with similar language in a will, and, significantly, the Kentucky Supreme Court stated that the testator wanted his wife "to receive a total of one half of his estate, and this purpose can only be accomplished by taking into consideration the appreciated value and depreciated value of all

assets at the time of distribution." Id. at 821. We believe this precedent is applicable and binding. The result urged by the Appellants is not supported by any relevant authority. We believe that it would frustrate the intent of the testator rather than effectuate it to limit the amount of the power of appointment to the percentage of the dollar value of the estate in 1969. The testator must have contemplated that his wife could survive him by many years, and gave her the authority to appoint a share of his whole estate, even if that estate would increase in value substantially. Therefore, we hold that the circuit court's judgment must be affirmed.

For the foregoing reasons, the judgment of the Woodford Circuit Court is affirmed.

ALL CONCUR.

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