

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001173-DG

STEVEN POTTER

APPELLANT

ON DISCRETIONARY REVIEW FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-XX-00025

MADGE POTTER; GEORGE
HELTON, CO-EXECUTOR;
AND CAROLE M. FRIEND

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

DYCHE, JUDGE: The sole question before us is whether the Pike District Court, Probate Division, correctly applied the ruling of the Pike Circuit Court in a declaratory judgment action (KRS 418) concerning the property of the decedent, Milburn Potter. The Pike Circuit Court, through a different judge, found that the district court had clearly erred. We agree, and affirm.

Appellant, Steven, is Milburn's son; Madge is his second wife, and not Steven's mother. Milburn's will provided:

I give, devise and bequeath all of the remainder of my property, real, personal or mixed, which I may own or have an interest in or the right to dispose of at the time of my decease, and wherever situated, to my wife, Madge Potter, and my son, Steven M. Potter, in equal shares, share and share alike, with the following specific provisions: 1) the real estate and all furnishings therein (except the personal items belonging to my wife, Madge Potter) at Route 97, Elkhorn Creek, Elkhorn City, Pike County, Kentucky, shall be allotted to the share of my son, Steve M. Potter; 2) the Florida property which I presently own in Boca Raton, Florida, or any substitute Florida residence, shall be allocated to the share of my wife, Madge Potter; 3) the share of my said wife hereunder shall also include an automobile of my wife's choice from those owned by me at the time of my death.

The source of this controversy is that prior to his death, Milburn had conveyed the Boca Raton property to Madge; the question is: what effect does that conveyance have on the above quoted portion of Milburn's will? Steven argues that the "home place," his specific bequest, should be removed from the estate prior to the equal distribution, since Madge already has her specific bequest, and to do otherwise would allow her a double portion. Madge, of course, argues the opposite.

The executor filed a declaratory judgment action seeking guidance in the matter. The Pike Circuit Court found, obliquely, that all the Elkhorn Creek properties would be

subject to distribution; in other words, Steven's specific bequest would not be deducted from the estate prior to the equal division. An appeal to this court was dismissed, and that decision became the law of the case. Sand Hill Energy v. Smith, 142 S.W.3d 153, fn. 25, (Ky. 2004).

Following that decision, the Pike District Court ignored the circuit court's findings, and excluded Steven's specific bequest prior to determining the estate subject to equal division. While we might agree with that interpretation, it violates the law of the case doctrine and was therefore clearly erroneous. The Pike Circuit Court, sitting as an appellate court, was correct in reversing the district court, and we affirm its order.

ALL CONCUR.

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