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JUNE 7, 2006
(2005-SC-0838-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001468-MR

LEBBY C. HUDSON, TRUSTEE OF THE LAURA B. ANDERSON TRUST AND EXECUTOR UNDER THE WILL AND CODICILS OF LAURA B. ANDERSON, DECEASED; AND LISA ANN HUDSON — APPELLANTS

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 03-CI-00162

OLD NATIONAL TRUST, TRUSTEE OF FUND A AND FUND B UNDER THE WILL OF JOHN NATHAN ANDERSON; JON W. ANDERSON; MARGARET W. ANDERSON; AND MEGHANN A. ZOLAN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: By the last will and testament of her late husband, John Nathan Anderson (Nace), Laura B. Anderson (Laura) was the donee of a power of appointment over the corpus of a trust. Laura died testate on January 11, 2003. Laura's will contained the following provision: "I intend by this Will to

dispose of all property which I have the right to dispose of by Will, including any as to which I may have a general power of appointment by will." After Laura's death, Nace's descendants and the trustee of the trust established in Nace's will, Old National Trust, questioned whether this provision in Laura's will effectively exercised her power of appointment. Old National Trust filed a petition for declaratory relief in the Union Circuit Court. On cross motions for summary judgment, the trial court determined that Laura had not properly executed her power of appointment. In this appeal, we are asked to determine whether the trial court was correct in its determination. Because we conclude that Laura validly exercised her power of appointment under Nace's will and Kentucky law, we reverse and remand.

Laura B. Anderson was Nace's second wife. His first wife was Anne Rudy Anderson. Nace and Anne had three children, Jon W. Anderson, Margaret W. Anderson and Janace Anderson Zolan Waller. Janace is deceased and is survived by her only daughter, Meghann A. Zolan.

Nace's will was dated January 4, 1966, at which point he was married to Anne. The will created two testamentary trusts, Trust Fund A and Trust Fund B. Trust Fund A was created for Anne's benefit and was written to qualify for the marital

deduction. Trust Fund B was created for the benefit of Nace and Anne's children; it is not an issue in this appeal.

Anne died on June 1, 1968. Two and a half years after Anne's death, Nace married Laura. Nace and Laura had no children together. Nace died on March 4, 1971, which was a little over three months after the couple married. Prior to his death, however, Nace had properly executed a codicil to his will that operated to substitute Laura for Anne in all respects.

Following Nace's death, Laura moved to California. She received income distributions from Trust Fund A until she died on January 11, 2003. Upon Laura's death, Nace's will provided for the disposition of the remainder of Trust Fund A as follows:

> (a-4) Upon the death of my wife, the Trustee shall pay the entire corpus of Fund A, as it may then exist, to such person or persons, or corporations, including her own estate, and in such amounts, in further trust or otherwise, as she may, by specific reference thereto in her last will and testament, appoint; and in default of such appointment exercised, the corpus of Fund A shall be added to and consolidated with the trust estate designated as Fund B and shall be held, administered and distributed as if it had been an original part thereof.

Laura's will provided, in part, as follows:

> SECOND: Family. I am not married, my husband JOHN N. ANDERSON having predeceased me. I have one (1) adult child now living whose name and date of birth are:
>
> JOHN HILTUNEN – March 3, 1949

> ...
> THIRD: Disposition of Property. I intend by this Will to dispose of all property which I have the right to dispose of by Will, including any as to which I may have a general power of appointment by will.

In the fourth paragraph of her will executed on April 26, 1993, Laura devised her entire estate to a trust that she had created on December 15, 1987. Laura amended the trust on six occasions. Lebby C. Hudson is trustee of that trust. The sixth and final amendment to the trust -- after listing specific bequests of $100 each to Jon Anderson and Margaret W. Anderson -- included the following provision:

> TO: LISA ANNE HUDSON, friend of Settlor, all of the balance of assets of Trustor, of whatsoever kind and wheresoever situate, including all of my Trust Fund A U/W J.N. Anderson, and I instruct the Trustee to make this transfer if she survives Trustor, and if not, then to JOSEPH B. HUDSON II, friend of Trustor.

Old National Trust, as trustee of Trust Fund A created by Nace's will, brought this proceeding seeking a determination of whether Laura validly exercised the power of appointment granted to her by Nace's will. Jon W. Anderson, Margaret W. Anderson and Meghann A. Zolan (Nace's descendants) filed a motion for summary judgment as did Lebby C. Hudson and Lisa Ann Hudson (the Hudsons). After conducting oral arguments on the cross motions for summary judgment, the trial court granted summary judgment in favor of Nace's descendants.

In denying the Hudsons' motion for summary judgment, the trial court characterized Nace's will as providing that Laura's power of appointment under Trust Fund A could only be exercised by "specific reference thereto in her last will and testament." The court concluded that Laura's general reference in her will did not satisfy the donor's requirement of a specific reference. Citing De Charette v. De Charette, 264 Ky. 525, 94 S.W.2d 1018, 1020 (1936), the trial court held that no reasonable definition of "specific reference" would permit a finding of a valid exercise of the power by documents that never mention Nace Anderson, his will or the specific provisions creating the trust and setting forth its requirements. In addition, citing a 1985 case from the North Carolina Court of Appeals, First Citizens Bank & Trust Co. v. Fleming, 335 S.E.2d 515 (N.C.App. 1985), the trial court held that KRS 394.070 was not applicable. The Hudsons appeal from the trial court's order and judgment in favor of Nace's descendants.

We frame the question in this case as follows: did Laura's will comply with the requirements for exercising her power of appointment under Nace's will? The parties agree that Kentucky law decides the issue and that the issue is one of first impression in Kentucky. To answer the question, we consider the language of the two wills, Kentucky case law and

KRS 394.060 -- Kentucky's statute pertaining generally to the execution of powers of appointment.

In deciding that Laura had not validly exercised her power of appointment, the trial court relied on the following language in De Charette v. De Charette, 94 S.W.2d at 1020:

> In exercising the power, the donee . . . is confined to the method or mode of execution provided in the power and must strictly keep within these limitations of performance and duty. If the power be not exercised in good faith and for the purposes created, and in the manner provided, it will be deemed ineffective against the parties entitled to its benefits.

To put this language in context, however, we provide the entire excerpt from one of the cases cited by the De Charette court -- Greenway v. White, 196 Ky. 745, 246 S.W. 137, 139-40 (1922) -- for the rule it purports to follow:

> At the outset it should be said that a power must be executed in strict conformity with its terms--i. e., if the donor required it to be executed by will it must be done so in that way, and vice versa, if it is required to be executed by deed it cannot be done by will--but if no mode of execution is prescribed by the donor the power may be executed in any manner which would legally convey the property, which is the subject-matter of the power, but in either event there must be manifested in legal form an intention on the part of the donee to execute it. 31 Cyc. 1117, 1118, and 1121, and 21 R. C. L. 792-793. At common law a power ordinarily would not be deemed as executed unless in the instrument by which it was attempted some reference was made to the power or to the property, which was the

subject-matter of it, unless the executing paper would otherwise be ineffectual or a mere nullity, and have no operation except as an execution of the power (21 R. C. L. 795; 31 Cyc. 1122, 1123); and under that law it was generally held that a residuary devise or bequest in a will containing no reference to the power, or the subject-matter thereof, would not be a sufficient execution of the power, though some of the courts so holding further held that the power would be deemed executed in the absence of such references where there appeared a plainly manifested intention to do so (Cyc., supra, 1126, 1127). And on page 1128 the writer of the text, still discussing the common-law rules, says: ″Of course a devise or bequest, whether general or specific, or even a general residuary devise or bequest, is sufficient to execute a power of appointment, where there is a clear reference in the will either to the power itself or to the subject-matter thereof.″

All the writers upon the subject, as well as all opinions of the courts, hold that it is competent for the Legislature to change or alter the common-law rule with reference to the execution of powers, and in England and some of the states it has been changed by statute, in which case it is only sufficient to follow the method pointed out by the statute. The statute in England is section 27 of the English Wills Act, and in our state it is section 4845, which says: ″A devise or bequest shall extend to any real or personal estate over which the testator has a discretionary power of appointment, and to which it would apply if the estate was his own property; and shall operate as an execution of such power, unless a contrary intention shall appear by the will.″

Section 4845, to which the Greenway court refers, is the predecessor to KRS 394.060. The Kentucky Legislature amended KRS 394.060 in 1972. As amended, KRS 394.060 is as follows:

> A devise or bequest extends to any real or personal estate over which the testator has any power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution of such power, unless a contrary intention appears in the will.

As Greenway instructs, to come to a conclusion in this case, we must consider KRS 394.060, which has importance as to the intention of our Legislature on the effective execution of a power of appointment. Our state is among the minority of jurisdictions that hold that a conventional residuary clause disposing of the testator's remaining assets exercises a power of appointment even if the will makes no reference to the power. See Lilly v. Citizens Fidelity Bank & Trust Co., 859 S.W.2d 666, 671 (Ky.App. 1993); First Citizens Bank & Trust Co. v. Fleming, 335 S.E.2d at 517 (stating that such approach was the minority rule). Contra Va. Code Ann. § 64.1-67.1 (adopting the common law and majority rule that a donee's disposition of his own estate, without any mention of the power of appointment, is not sufficient to constitute an exercise of the power).

Consistent with the presumption of KRS 394.060 favoring exercise rather than non-exercise, we hold that where a

donor requires some sort of specific reference to a power of appointment to exercise the power, substantial compliance by the donee with the donor's requirements will suffice.

In his will, Nace prescribed that Laura exercise her power of appointment by will, and she did so. Because Laura's will expresses her intention to dispose of all property which she had the right to dispose of by will, including any as to which she may have had a general power of appointment, there can be no other conclusion but that she effectively exercised her power of appointment. Although she did not specifically reference Nace's will in her devise, Laura substantially complied with the terms of Nace's will, which terms -- we agree with the Hudsons -- are not as clear as those employed in the cases that Nace's descendants cite in support of their arguments.

We reverse the order and judgment of the trial court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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NO BRIEF FILED ON BEHALF OF OLD NATIONAL TRUST

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