

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001627-MR

ROBERT D. STEWART

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 05-CI-00083

BONNIE J. HARLOW and  
ISAAC T. HARLOW

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This appeal focuses upon the authority of a life tenant to convey fee simple title to real property. Because the deed which created the life estate at issue in this appeal unambiguously coupled the tenancy with a power of conveyance, the trial court properly upheld the life tenant's conveyance in fee simple to appellees Bonnie J. and Isaac T. Harlow. Finding no error in the trial court's application of well-

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to §110(5)(b) of the Kentucky Constitution and KRS 21.580.

established law to the undisputed facts, we affirm the summary judgment entered on appellant Robert D. Stewart's claim to the property in issue.

The facts are somewhat complex, but not in dispute. In 1947, A. B. Johnson conveyed a tract of land known as the Johnson Farm to Harlow's predecessors in title. The deed of conveyance contained the following language:

...the Party of the First Part [Johnson] has bargained and sold and hereby gives, grants and conveys unto the said William C. Taylor and his wife Josephine Taylor, for their joint lives, with full power in them to sell and convey same and reinvest the proceeds in other lands to be held in the same manner and under the same conditions and restrictions, with remainder in fee simple to their son, Lewis Edward Taylor, the following described real estate....

The only “conditions and restrictions” set out in the deed were the assumption of three separate notes on the property and the following three agreements:

It is agreed and understood that second parties [the Taylors] are to pay the taxes now due on said lands hereby conveyed.

It is agreed and understood that all tobacco sticks now on said place shall go with the land.

It is agreed and understood that the same lien securing the three notes above referred to still subsists and is in full force until said notes ....[remainder of sentence unreadable on copy in court file.]

At the time William and Josephine Taylor purchased this property their son, Lewis Edward Taylor, was a minor.

Some time after the death of William Taylor, Josephine Taylor entered into a contract for deed with the Harlows for the purchase of a house and lot located on a portion of the Johnson Farm. The contract for deed was executed on August 14, 1967,

and the Harlows commenced monthly payments for the purchase price. Josephine's son, Lewis Edward Taylor, sometimes referred to as Louis Edward Taylor, married Betty Rachel Taylor in 1978.

After the contract with the Harlows was paid in full, Josephine conveyed the subject property to them by general warranty deed dated September 13, 1982. Lewis died in 1987 and, as a result of litigation over his estate, Josephine executed a deed dated February 15, 1988, granting Lewis's widow Betty “all of her right, title and interest” in the property described in the 1947 Johnson deed (the Johnson Farm property). This 1988 deed from Josephine to Betty failed to except the portion of the property Josephine had conveyed to the Harlows in 1982. This omission ultimately precipitated the litigation before us in this appeal.

Josephine died on August 22, 1997. In 1998, Betty Taylor conveyed all of her interest in the property she received under the 1988 deed from Josephine as an undivided one-half interest to Robert D. Stewart and an undivided one-half interest to Robert William Stewart and his wife Brenda. Robert William and Brenda Stewart then conveyed their undivided one-half interest in the property to Robert D. Stewart and his wife Bonnie Stewart.

Problems regarding title to the property arose in 1998 when the Harlows attempted to sell the property they had acquired from Josephine as part of their divorce settlement. They publicly auctioned the property and it was purchased by Bobby G. Gibson. The sale was never closed, however, because clear title could not be obtained.

After Gibson refused to surrender the property or remove a mobile home he had placed on the tract, the Harlows filed suit in 2001 to clear the title and regain possession of their property. By order dated June 10, 2003, the Carroll Circuit Court ordered the master commissioner to execute a quitclaim deed to the Harlows when the Gibsons failed to do so.

When the Harlows again attempted to sell the property, appellant Robert D. Stewart filed a petition to quiet title alleging that Josephine Taylor as a life tenant had no interest to convey to the Harlows. In response, the Harlows alleged that they held fee simple title to the real property and that Stewart was trespassing on their land. Both parties then filed motions for summary judgment and, after a hearing, the trial court determined that the Harlows owned the property they had acquired from Josephine in fee simple. This appeal followed.

Stewart raises two basic arguments in support of his contention that the decision of the trial court is erroneous: 1) that ownership of the entire Johnson Farm was resolved in litigation between Josephine and Betty Taylor and thus the Harlows' claim is barred by res judicata; and 2) that the language in the 1947 deed granting Robert and Josephine Taylor the right of conveyance did not enlarge their life estates or give them authority to convey a fee simple interest. We do not agree with either contention.

First, concerning the litigation between Josephine Taylor and her daughter-in-law Betty, Stewart maintains that the circuit court determined in 1988 that Josephine's interest in the Johnson Farm was merely a life estate, with remainder vesting in her

deceased son and through him, by will, in his widow Betty. The fallacy in Stewart's argument is that the order he relies upon is an agreed order of dismissal which merely recites the terms of the parties' settlement. It can in no way be construed to be a resolution on the merits of Josephine's authority to exercise the power of conveyance contained in the 1947 deed.

As has been frequently reiterated by the Supreme Court of Kentucky, the doctrine of res judicata “bars subsequent suits between the same parties and their privies on a cause of action that was previously decided upon its merits”. *City of Louisville v. Louisville Professional Firefighters Ass'n.*, 813 S.W.2d 804, 806 (Ky. 1991). More specifically, in *Buis v. Elliott* 142 S.W.3d 137, 140 (Ky. 2004), the Supreme Court explained that res judicata is generally thought of as consisting of two subparts:

Claim preclusion "bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." Issue preclusion, also known as collateral estoppel, bars a party from re-litigating "any issue actually litigated and finally decided in an earlier action."  
[Citations omitted.]

As was the case in *Buis*, neither principle bars the Harlows' claim to the property at issue in this appeal.

The most that can be said of the agreed order in the litigation between Josephine and Betty Taylor is that it reflects the fact that they agreed to settle their dispute and dismisses the action reciting the following terms:

1. The Petitioner, Josephine Taylor and Respondent, Betty R. Taylor, shall divide equally the proceeds of the life insurance policies through the Equicor-Equitable HCA

Corporation and the Central States Health and Welfare Fund issued on the life of Louis Taylor, which said policies are the subject of this action;

2. **The Petitioner, Josephine Taylor, shall execute a deed for the real estate which is the subject matter of Count Two of the Petition herein, granting to herself a life estate in said property with a fee simple remainder interest to the Respondent, Betty Taylor, who shall thereby have fee simple Title to said property upon the death of Josephine Taylor;**
3. The Petitioner's claim for \$8,000.00 for an alleged debt from Louis Taylor, deceased, to the Petitioner is dismissed with prejudice, and that Petitioner will withdraw the claim she filed against the estate of Louis Taylor in the Carroll District Court Case No. 87-P-010. [Emphasis added.]

Nothing in that order satisfies the cited elements of res judicata as to the issue of Josephine's right to make a **prior** conveyance to the Harlows.

First, the Harlows cannot be considered Josephine's privies in this litigation as they acquired title to the property in 1982, six years prior to the entry of the agreed order. Because they were not parties to the litigation resulting in the agreed order, the Harlows did not have an opportunity to litigate the issue of the extent of Josephine's power of conveyance. Even more importantly, the agreed order makes absolutely no reference to Josephine's authority to make the conveyance prior to the entry of the agreed order. However, as the Harlows point out, if Josephine did not have the power of conveyance, by what authority did she execute the deed to Betty as set out in section 2 of their agreed order? Finally, in this regard, the current litigation cannot be construed as an attempt to re-litigate Josephine and Betty's 1988 litigation, as it involves two entirely

different parties and an entirely distinct issue. In sum, we are convinced that the doctrine of res judicata has no application to the facts of this appeal.

Turning to Stewart's contention that the 1947 deed did not give Josephine authority to make a fee simple conveyance to the Harlows, we observe the long-standing and fundamental rule that deeds are to be construed so as to effectuate the intention of the grantor as gathered from the four corners of the instrument. *Townsend v. Cable*, 378 S.W.2d 806, 808 (Ky. 1964). This Court recently had occasion to discuss the nature of a life estate coupled with a power in *Angel v. McKeehan*, 63 S.W.3d 185, 191 -192 (Ky.App. 2001):

[In *Moore v. Morris*, Ky., 258 S.W.2d 908 (1953)], [t]he court stated that to determine whether the devisee received a life estate or a fee two things must be considered. First, the court must consider the intent of the testator by looking at the language of the whole will. Second, the court must consider whether the devisee received an unlimited power of disposition. An unlimited power of disposition includes not only the power to make inter vivos disposition but also the power to make a disposition through a will. “If she [the devisee] was clothed with the unqualified power of disposition we have just mentioned, she was invested with a fee. On the other hand, if she can only execute and deliver inter vivos conveyances, she has only a life estate in the property.” (parenthetical added). *Id.* at 910, quoting *Wintuska v. Peart*, 237 Ky. 666, 36 S.W.2d 50 (1931); *Evans v. Leer*, 232 Ky. 358, 23 S.W.2d 553 (1930); *Spicer v. Spicer*, 177 Ky. 400, 197 S.W. 959 (1917); and *Angel v. Wood*, 153 Ky. 195, 154 S.W. 1103 (1913). The court held that the decedent had reserved the right to make testamentary dispositions for himself; therefore, his widow received a life estate only. *Id.* *Moore v. Morris* was overruled by *Melton v. Wyatt*, Ky., 517 S.W.2d 242, 244 (1974) **but only, “to the extent that,”** *Moore* placed, **“any limitation on the use or disposition of the property except the making of a testamentary**

**disposition.**” As to the issue of life estate versus fee simple, we find the *Moore* is still dispositive. [Emphasis added.]

The import of this distinction in the context of this appeal lies in the fact that although William and Josephine Taylor received only a life estate, they were also granted an unlimited right to dispose of the property during their lifetimes. Should they not exercise the power during their lives, fee simple title would vest in their son Lewis Edward upon the death of the survivor of them. In other words, although the 1947 deed did not give William and Josephine fee simple title to the Johnson Farm, it did give them the power to convey fee simple title to that property during their lives.

That is precisely what occurred here. After William's death, Josephine had the power to and did convey a portion of the Johnson Farm to the Harlows. Any deeds concerning the Johnson Farm after 1982 were subject to that conveyance. Thus, when Josephine executed the 1988 deed to Betty Taylor, she could convey only what interest she retained after the Harlow conveyance. Betty's remainder interest was therefore subject to Josephine's deed to the Harlows and, consequently, any conveyances she made after Josephine's death were likewise subject to the Harlow deed.

We would also point out that Stewart, in his citation to the holding in *De Charette v. St. Matthews Bank & Trust Co.*, 283 S.W. 410, 414 (Ky.App. 1926), omits an important qualifier from the quoted language. The full text is entirely consistent with the analysis set out in *Angel*: “[i]t is well settled that a power to dispose of property **by devise** conferred upon a life tenant does not create a fee or enlarge the estate of the life tenant.” [Emphasis added.] Omission of the words “by devise” clearly changes the point

the court was making, that a power to convey by devise may be exercised only in a testamentary conveyance, a situation which has no application here.

Finally, although Stewart insists that William and Josephine's power of conveyance was limited by the words “and reinvest the proceeds in other lands to be held in the same manner...,” a reading of the instrument as a whole does not support that interpretation. The deed does not use language of limitation such as, “provided that the proceeds are reinvested,” or “so long as the proceeds are reinvested.” The deed clearly states that the life tenants “have **full power** to sell and convey and reinvest...” [Emphasis added.] A more reasoned interpretation of the “reinvestment” language is that it is an additional power, not a limitation upon the “full power” previously granted. Furthermore, we are convinced that any dispute as to the disposition of the proceeds, whether they were in fact reinvested, has no effect upon the validity of Josephine's deed to the Harlows.

Accordingly, the judgment of the Carroll Circuit Court is hereby affirmed.

ALL CONCUR.

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