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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000359-MR

LEO C. ARNOLD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 06-CI-009001

NATIONAL CITY BANK; AND SHERIDAN CORNETT, CO-EXECUTORS OF THE ESTATE OF DENVER B. CORNETT JR. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE:: Leo C. Arnold ("Leo") appeals the February 8, 2007, opinion and order of the Jefferson Circuit Court which held that although his late wife, Louellen Cornett Arnold ("Louellen"), had adopted him as her son, he could not inherit through her

two preexisting testamentary trusts created by her parents. For the reasons that follow, we affirm.

The sole issue presented on appeal is whether Kentucky law allows an adult, adopted by his spouse, to inherit under a preexisting testamentary disposition through his adopting spouse. While it appears this question has vexed Kentucky courts for decades, the facts of this case are undisputed.

Louellen, the daughter of Edith I. ("Edith") and Denver B. Cornett, Sr. ("Denver, Sr."), and the sister of Denver B. Cornett, Jr. ("Denver, Jr."), died testate[1] in a Louisville, Kentucky, nursing home on August 4, 2006. Louellen had no natural children; her sole heir and beneficiary was Leo, her third husband, whom she married in Acapulco, Mexico, on February 6, 1981, when she was 64 and he was 48.[2] Ten months later, on

[1] Louellen's will has little bearing on the issue before us. Nevertheless, it was executed on July 2, 2003, and made several bequests of jewelry, household goods, and money, and provided for her dog, Tuffy, which she left "to my son, Leo." Throughout the will, Louellen referred to Leo only as her "son" and never as her husband. Item 5 of her will bequeathed her residuary estate to Leo, but in the event he predeceased her specified that, "my brother, DENVER B. CORNETT, JR. and all issue of DENVER B. CORNETT, JR. shall not be included in any distribution hereunder. It is my express intent that DENVER B. CORNETT, JR. and any issue or descendants of DENVER B. CORNETT, JR. be omitted as distributees under this Will." Item 7 of her will stated that, "[s]eparate trusts were created for me under the Will of my Father, DENVER B. CORNETT, and my mother, EDITH I. CORNETT, in which I had a lifetime interest. Upon my death, the remainder interests of the trusts are to pass to my descendants. My son, LEO C. ARNOLD, was an adult when he was adopted by me in 1981. His adoption took place after the death of my parents. Nevertheless, it is my strong belief that my parents intended to pass the remainder interests of the trusts established for my lifetime benefit to my adopted descendant regardless of his age when I adopted him. I make this statement in support of any rights that my son LEO C. ARNOLD, may assert to his interest in the trusts created by my parents under their respective Wills."

[2] Louellen was born August 29, 1916. Leo was born October 7, 1932.

November 30, 1981, in Jefferson County, Kentucky, Louellen adopted Leo as her son. According to the order of adoption,

> from this date, Leo C. Arnold shall be deemed the lawful heir at law and legal descendant of the Petitioner, Louellen C. Arnold, and shall be considered for purposes of inheritance and succession and for all other legal consideration, the lawful heir at law and legal descendant of Louellen C. Arnold.

No reason for the adoption appears in the record.

During her lifetime, Louellen benefited from two testamentary trusts created by her parents in their wills. Louellen received income from "Trust A" created by her mother's residuary estate. According to the terms of Edith's will, this trust terminated upon Louellen's death and the trustee, National City Bank ("trustee"), was directed to "distribute the corpus in fee and per stirpes among the then surviving descendants of my said daughter, if any, and if none, then "Trust A" shall be distributed to my son, DENVER B. CORNETT, JR., or to his descendants, per stirpes. . . ."[3]

A second testamentary trust was created by Denver, Sr.'s will.[4] During their lives, income from this trust was distributed equally between Louellen and her brother. Upon the death of either,

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[3] Edith's will was executed on July 10, 1959. She died on January 19, 1961. Her will also created "Trust B" which paid income to her son, Denver, Jr., during his lifetime and upon his death was to terminate with the corpus being distributed to his "surviving descendants," if any. As no proof has been taken in this case, the pleadings allege the current value of Edith's trust is $1,031,000.00.

[4] Denver, Sr.'s will was executed August 17, 1948. He died November 23, 1949. The value of his trust is estimated at $272,000.00.

> the issue of any deceased children to take its parents share, per stirpes; but should either of my said children die, without issue surviving him, or her, or should all of such issue die before the termination of this trust as hereinafter provided, the entire net income from Fund B shall be paid to my surviving child.

Another provision in Denver, Sr.'s will specified the trust "shall cease and terminate upon the death of the survivor, or longest-lived, of my two children, DENVER B. CORNETT, JR., and LOUELLEN CORNETT THOMPSON, whereupon the principal of the trust shall be distributed, in fee, to my said two children's respective legal descendants, per stirpes."

On October 11, 2006, Leo filed this action in Jefferson Circuit Court[5] when the trustee refused to recognize him as Louellen's living descendant and distribute money to him under the two testamentary trusts. On October 31, 2006, without filing an answer to the complaint, the trustee moved for judgment on the pleadings under CR 12.03[6] and asked the circuit court to dismiss the complaint with prejudice. On December 8, 2006, a brief hearing was held to sort out the various motions. Leo alleged he was entitled to a default judgment because the trustee never filed an answer, but instead had filed only a

[5] Circuit court has jurisdiction over construction and interpretation of wills. Kentucky Revised Statutes ("KRS") 394.240(1). Denver, Jr. was alive when suit was filed, however a copy of the complaint was never served upon him and he has since died.

[6] Kentucky Rules of Civil Procedure ("CR") 12.03 states, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

motion for judgment on the pleadings and a motion for dismissal of the suit. Because the trustee admitted it had attached pleadings to its motions that were outside the record, the trial court treated the trustee's pleadings as a motion for summary judgment, denied Leo's motions for default judgment and/or to strike the trustee's pleadings, and set an accelerated briefing schedule. On December 12, 2006, Leo filed a counter-motion for judgment on the pleadings.

On February 8, 2007, the Jefferson Circuit Court issued an opinion and order granting the trustee's combined motion for judgment on the pleadings/motion to dismiss and denying Leo's counter-motion for judgment on the pleadings. The court reasoned that KRS 199.520 allows an adopted *child* to be considered the natural, legitimate child of his adopting parent for inheritance and succession purposes. However, in the context of an adoption, Kentucky defines a *child* as one who has not yet reached his eighteenth birthday. KRS 199.011(4). Since Leo was almost fifty when Louellen adopted him, the circuit court found he did not qualify as a *child* for inheritance and succession purposes under KRS Chapter 199. The circuit court further found that while KRS 405.390 allows adoption of an adult, the case of *Minary v. Citizens Fid. Bank & Trust Co.,* 419 S.W.2d 340, 344 (Ky.App. 1967), forbids "[a]doption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered. . . ." Contrary to Leo's assertion, the court saw no conflict in the statutes governing adoption and the holding of *Minary* and specifically rejected Leo's contention that by applying *Minary* the court

would violate the separation of powers doctrine in that it would be ignoring KRS 405.390 and KRS 199.520(2). Further, upon reviewing the wills of both Edith and Denver, Sr., the circuit court found no evidence either intended Leo to inherit from them as a "future adopted spouse," even though they both supposedly knew Louellen was barren as early as 1948 and therefore any "descendant" of Louellen would have been the result of an adoption. This appeal followed. We now affirm the decision of the Jefferson Circuit Court.

Leo alleges the circuit court misapplied *Minary, supra,* because there was no clear evidence Edith and/or Denver, Sr. excluded him from inheriting the trusts as Louellen's adopted son. He claims he should inherit *through* Louellen because her parents died with the knowledge that Louellen was barren but still referred to her in their wills as having "descendants" which he says proves they planned for the possibility that Louellen would adopt a child who would then inherit the trusts through her. Conversely, the trustee argues the circuit court correctly applied *Minary* because there was no evidence Edith and Denver, Sr. knew anything about Leo or anticipated he would be adopted by their daughter, and they never expressed any intent that Leo should inherit from them upon Louellen's death. Since the trustee's combined motion was filed pursuant to CR 12.03, we apply the standard of review set forth in *Blevins v. Moran,* 12 S.W.3d 698, 700-701 (Ky.App. 2000):

> The trial court entered its judgment in response to cross-motions for judgment on the pleadings. Because the trial court considered matters outside the pleadings, however, we

> shall review its decision as though it were a summary judgment. CR 12.03; *Old Mason's Home of Kentucky, Inc. v. Mitchell,* 892 S.W.2d 304 (Ky.App. 1995). Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court. As did the trial court, we ask whether material facts are in dispute and whether the party moving for judgment is clearly entitled thereto as a matter of law. Under this state's rules of practice, summary judgments are to be granted cautiously; they are appropriate only when it appears impossible for the non-movant to prove facts establishing a right to relief or release, as the case may be. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

Since the parties agree there are no factual disputes, our *de novo* review will concentrate on whether Leo was entitled to judgment as a matter of law. This requires us to review the wills of both Edith and Denver, Sr. in their entirety and to determine how they intended the trusts created in their wills to be distributed upon the deaths of their children, Louellen and Denver, Jr. *Wilson v. Johnson*, 389 S.W.2d 634, 636 (Ky. 1965) (citing *Gratz v. Hamilton,* 309 S.W.2d 181 (Ky. 1958)). If the intent of Edith and Denver, Sr. is unclear from their wills, only then will we engage in statutory construction. *Major v. Kammer,* 258 S.W.2d 506, 507 (Ky. 1953).

We start by deciphering what Edith and Denver, Sr. knew about Louellen when they executed their wills as it may bear upon the terms they ultimately used in their wills. Leo alleges Louellen's parents knew she was barren as early as November 1948. As proof, he offers a single notarized paragraph Louellen signed on June 8, 1998, stating:

> Approximately one year prior to my father's death, my mother and father became aware that I could not conceive a

> child and, therefore, could not produce a child by natural childbirth. Therefore, my parents were fully cognizant of the fact that any direct descendant of mine would have to be adopted by me. I am certain that both of my parents would want my adopted son, Leo C. Arnold, to receive the shares of their respective trust funds which are due to pass to my issue upon my death.

This statement is interesting both for what it says and for what it leaves unsaid. For example, it does not explain how Edith and Denver, Sr. allegedly learned Louellen was barren nor from whom. It places the timing of the news at about one year before Denver, Sr.'s death which occurred on November 23, 1949. Since Denver, Sr. executed his will on August 17, 1948, he had about fourteen months in which to revise his will to omit references to Louellen's "issue" and to specifically include the possibility of an adopted child inheriting his trust, if indeed such was his intent. No such revision was ever made. The time factor is even more dramatic regarding Edith's will since she supposedly knew of Louellen's inability to bear a child for eleven years before executing her will. Still, with full knowledge of her daughter's health status , Edith chose to use the term "surviving descendants" in describing who would inherit the remainder of the trust upon Louellen's death. Additionally, we note that Louellen's statement does not claim to be based upon personal knowledge or conversations with her parents so it is unclear how she could have been so certain her parents would have wanted a person who was unknown to them to inherit their accumulated wealth.

Of greatest concern to us is that at the time Denver, Sr. executed his will in 1948, Louellen was married to her first husband, a man named Richard Thompson whom

she later divorced. When Edith executed her will in 1961, Louellen was married to her second husband, a man named Lee Curd Miller who is now deceased. Edith bequeathed $3,000.00 to Miller in her will. Louellen did not marry Leo, her third husband, until 1981, some thirty-one years after Denver, Sr.'s death and twenty years after Edith's death. Louellen then adopted Leo some ten months after their marriage. It is not alleged that Louellen's parents ever met Leo or knew of him such that they would have had reason to provide for him. Furthermore, if Edith wanted her third son-in-law to take under her will, she could have provided for that eventuality, just as she did by her bequest to her second son-in-law. Based upon the facts presented to us, we can ascribe little or no value to Louellen's notarized statement.

For similar reasons we must also discount Items 5 and 7 of Louellen's will, executed July 2, 2003, in which she repeats her "strong belief that my parents intended to pass the remainder interests of the trusts established for my lifetime benefit to my adopted descendant regardless of his age when I adopted him." Again, Louellen's will provides no basis from which this Court reasonably conclude her parents anticipated her future marriage to a third husband whom she would ultimately adopt. After reviewing the wills of Edith and Denver, Sr., it is simply beyond belief that they could have reasonably anticipated their daughter would marry Leo twenty years after Edith's death and adopt him as her son so he could inherit their considerable wealth.

We turn our attention now to the specific language used by Edith and Denver, Sr. in their wills. In doing so, we must presume "that every word is intended by

the testator to have some meaning, and no word or clause in a will is to be rejected if a reasonable effect can be given it." *Collis v. Citizens Fidelity Bank & Trust Co.,* 234 S.W.2d 164, 168 (Ky. 1950) (citing *McCormick v. Reinberger*, 192 Ky. 608, 234 S.W. 300 (Ky.App. 1921)). As recently as 1992, this Court held "[u]se of the term 'issue of the body' in a will shows an intent to exclude adopted children." *Vega v. Kosair Charities Committee, Inc.* 832 S.W.2d 895, 897 (Ky.App. 1992). Since 1945, the terms "heirs" and "issue" have been interpreted as referring to "natural or blood relationships and do not include an adopted child in the absence of circumstances clearly showing that the testator so intended. . . ." *Copeland v. State Bank & Trust Co.,* 188 S.W.2d 1017, 1023 (Ky. 1945). The word "descendant," in its technical sense, means "issue of a deceased person." *Collis, supra,* at 167 (quoting *Rice v. Klette,* 149 S.W. 1019, 1021 (Ky. 1912)).

In his will, Denver, Sr. specified that upon the death of Denver, Jr. or Louellen, their "issue" would inherit their share of the trust, or if either died "without issue," the remainder of the trust would be paid to the surviving child. In light of the previous recitation of authority, we must conclude that Denver, Sr. did not intend for an adopted child to inherit any portion of the trust he established. *Vega, supra.* Moreover, upon the death of both Denver, Jr. and Louellen, the principal of the trust was to "be distributed, in fee, to my said two children's respective legal descendants, per stirpes." Since "descendant" is another word for "issue" of a deceased person, *Collis, supra,* an adopted child could not take under this provision either. Similarly, Edith's will specified that upon Louellen's death, her "descendants" would receive her share of the trust. Thus,

while Leo could have inherited *from* Louellen as her son, there is no theory under which he could have inherited *through her* the trusts established for her lifetime benefit by her father and mother. Thus, the trustee was entitled to judgment as a matter of law regarding both trusts.

Like the circuit court, we deem *Minary, supra,* to be controlling. Therein the court construed the will of Amelia Minary which created a trust with the income being paid to her husband and to her three sons. The trust was to terminate upon the death of the last surviving beneficiary with the corpus being distributed to Amelia's "then surviving heirs, according to the laws of descent and distribution then in force in Kentucky, and if no such heirs, then to the First Christian Church, Louisville, Kentucky." *Minary, supra,* at 340. Amelia died in 1932 and her husband died three years later. One of Amelia's three sons, Thomas, had two children. The other sons, James and Alfred, died without issue. However, in 1934, Alfred wed a woman named Myra, and prior to his death in 1959, he adopted Myra as his child. Thus, the question presented in *Minary* was whether Myra's adoption qualified her as Amelia's surviving heir and therefore entitled her to inherit under Amelia's will. *Minary* traced the development of adoption law in Kentucky, including the fact that in ancient times an adopted child was considered "the legal heir of the adopting party only." *Id.* at 342. Ultimately, the court rejected the practice of adopting an adult just to bring him or her under the provisions of an existing will and thereby thwart the testator's intent. The facts presented in the case *sub judice* are no different than those in *Minary* and the court's responsibility to carry out the testator's

intent no less. In 1967 it was "of paramount importance that man be permitted to pass on his property at his death to those who represent the natural objects of his bounty." *Minary, supra,* 419 S.W.2d at 343-344. This sentiment was restated in 1992 in *Vega, supra,* 832 S.W.2d at 897 and remains good law today. The caution voiced in *Minary* is particularly apropos in this case where Leo and Louellen have attempted to defeat the expressed intentions of Edith and Denver, Sr. From all appearances, Louellen adopted Leo solely in hopes of qualifying him as an heir and claimant to the sizable trusts created by her parents. While we recognize KRS 405.390 allows anyone over the age of eighteen to be adopted the same as would be an infant, we see this maneuver for what it is, "an act of subterfuge which in effect thwarts the intent of the ancestor whose property is being distributed and cheats the rightful heirs." *Minary, supra,* 419 S.W.2d at 343. Full review of all the evidence simply does not convince us Leo was the "natural object" of Edith and Denver, Sr.'s bounty.

Similarly, we are unpersuaded by Leo's claim that the circuit court ignored KRS 199.520(2)[7] and KRS 405.390 and thereby violated the separation of powers

[7] The Brief for Appellant references KRS 199.530. We assume this was a typographical error because that statute, pertaining to the right of adopted children to inherit, was repealed in 1956. We further assume Leo meant to say the court should have applied KRS 199.520(2) which reads:

> Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies. Upon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive

doctrine. In support of his argument, Leo notes that the two cited statutes have not been declared unconstitutional and therefore must be heeded. While the path of Kentucky case law on the proper handling of an adult adoption designed to bring someone under the terms of a testamentary disposition has not been steady and straight, indeed it has been fraught with twists and turns and at times contradictory decisions, *Minary, supra,* was rendered in 1967 and has not been overruled. Thus, we are bound by it. As a result, we must conclude there is no conflict between Kentucky's adoption statutes and our application of *Minary* since Leo was well over the age of eighteen at the time of his adoption and could not qualify as a "child" under KRS Chapter 199 for inheritance purposes. Therefore, we have demonstrated the inapplicability of KRS 199.520(2) and take this opportunity to reiterate the holding of *Minary, supra,* at 344.

> Our adoption statutes are humanitarian in nature and of great importance to the welfare of the public. However, these statutes should not be given a construction that does violence to the above rule and to the extent that they violate the rule and prevent one from passing on his property in accord with his wishes, they must give way. Adoption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered should not be permitted and we do not view this as doing any great violence to the intent and purpose of our adoption laws.

For the foregoing reasons, we affirm the opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

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parent.

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