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Property

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PROPERTY

BRAMMER v. TAYLOR, 338 S.E.2d 207 (W. Va. 1985).

Civil Procedure—Evidence—Execution of Will—Property—Torts— Unauthorized Practice of Law

Plaintiff brought a tort action against defendant Gulf National Bank and two of its officers to recover a lost legacy under an improperly executed will, in which decedent had included a codicil leaving plaintiff $70,000. Having had the codicil added to his amended will, for which the bank was the executor, decedent asked defendant to have the codicil witnessed. Defendant had the codicil witnessed three days later, and notarized. The will was denied probate. Plaintiff's theory of recovery was based on (1) the unauthorized practice of law by defendants and (2) negligence in handling the execution of the codicil. The Circuit Court of Raleigh County denied defendant's motion for a directed verdict. The jury rendered a special verdict, finding the decedent guilty of seventy per cent of the fault and defendants guilty of thirty per cent. The trial court entered a judgment order for defendants. Plaintiff then moved for a new trial, or to set aside the judgment due to mistake on the ground that, since plaintiff's share of guilt was zero per cent, she had been the prevailing party. The trial court agreed and granted the plaintiff's motion, entering judgment for the plaintiff.

The court addressed four issues in this case: (1) Whether it was error for the trial court to refuse to allow the question of plaintiff's own contributory negligence to go to the jury; (2) whether plaintiff's case as intended beneficiary must "rise and fall" on what the testator did, so that the jury must consider only the testator's actions and not hers; (3) whether there was a breach of duty owed by defendants to decedent and to plaintiff not to engage in the unauthorized practice of law, the breach of which duty proximately contributed to the legacy being invalidated; (4) whether defendants assumed a common law duty of care to supervise the execution of the codicil, or merely agree to act as attesting witnesses.

The court, ordering a new trial, held that because of the allegation that the decedent reasonably relied upon defendants to supervise the execution of the codicil, based upon prior wills of the decedent having been signed and attested at the bank, if defendants had acted not only as typists and attesting witnesses but actually engaged in the unauthorized practice of law by supervising the execution of these prior wills, the jury might reasonably infer that they had also done so with regard to the codicil in question. Thus, they could be prima facie negligent in supervising the execution of the codicil and would be liable to plaintiff for the value of the lost legacy, unless plaintiff was barred from recovering by her own comparative negligence, if any.

Defendant's instruction as to plaintiff's comparative negligence correctly stated the law, was supported by sufficient evidence, and was not repetitious

of any other instruction. Plaintiff had sat silently throughout the entire original operation at the bank, and said nothing when the decedent was advised to contact an attorney for the proper execution of the codicil. The instruction as to plaintiff's negligence should have been given. The final order of the trial court was reversed, the jury's verdict was set aside, and the case remanded for a new trial.

GUARANTY NAT. BANK v. MORRIS, 342 S.E.2d 194 (W. Va. 1986).

Extrinsic Evidence—Holographic Will—Property—Testamentary Intent

The Circuit Court of Cabell County had declared that a certain holographic document, purporting to be the will of Lucy B. Eneix, was not a valid will in that it failed to demonstrate testamentary intent. Thus, the testatrix died intestate as to her entire estate. Defendants claimed the document was a will and should be construed so as to establish certain individuals as residuary legatees of Lucy B. Eneix' estate.

The issues were: (1) Whether the trial court was correct in permitting the introduction of extrinsic evidence on the question of testamentary intent; and (2) whether the court may supply words in a valid will so that parties, after whose names there are no notations, are designated as the residuary beneficiaries of the estate.

The court, after extensively examining the question of holographic wills, found that Lucy Eneix' document satisfied the requirements for a valid holographic will in that it contained formal indicia of testamentary intent sufficient to permit the introduction of extrinsic evidence on the overall question of intent. It contained certain words typical of wills, it was signed at the end, and dated. The court was correct in admitting the extrinsic evidence as to testamentary intent. Extrinsic evidence may not be admitted, however, "to fill up a total blank, or to determine the person or property intended by the testator, where there is a total failure to designate any." The failure of Mrs. Eneix to specify what the named persons were to receive rendered the sections containing those persons' names wholly ineffective to transfer any property to those persons. Thus, the ruling of the circuit court that the document is not a valid will was reversed, and the case remanded for further development.

McCULLOUGH OIL, INC. v. REZEK, 346 S.E.2d 788 (W. Va. 1986).

Civil Procedure—Contracts—Habendum and Savings Clauses—Oil and Gas Leases— Property

The Circuit Court of Wood County had examined a lease by McCullough to oil and gas rights in Wood County, on Neal Island, whereby McCullough received a 7/8 part interest, with 1/8 reserved to the lessor, Ohio River Sand & Gravel, through its McDonough Company division. The primary term of the

lease was eighty days, with the lease to continue as long as oil and gas were found in paying quantities. After the primary term, if production ceased for any reason, the lessee had a sixty day "grace period" in which to resume production before the lease would terminate. McCullough later assigned most of its rights in the lease to William Rezek, with the proviso that all rights should revert to McCullough should the lease be abandoned for any reason by Rezek, his successors or assigns. Through several mesne conveyances the lease was assigned to James V. Reynolds, but between 1972 and 1978 there was no production at all of oil or gas. McCullough claimed in its suit to quiet title that Reynolds' abandonment of 1980 triggered a reversion of its 7/8 interest, and demanded damages from an alleged civil conspiracy of defendants Reynolds, Dravo Corporation, *et al.* to deprive McCullough of its interests. The trial court granted defendants' motion for summary judgment, ruling that the lease initially reverted to McCullough, but then expired by its own terms, extinguishing McCullough's interest, due to cessation of production after the primary term without resumption of operations within sixty days. Also the court ruled the case did not involve a "forfeiture" for failure to perform a "condition" which would have required notice to McCullough or its assignees and the opportunity to correct the default.

The two issues addressed by the court were: (1) Whether a habendum clause in an oil and gas lease providing for a short primary term and a secondary term for "so long as" production continues in paying quantities conveys a "determinable" interest; and (2) whether the lessee, or its assignee as operator, was entitled to notice before the lease terminated automatically under the habendum clause or the cessation of production clause of an oil and gas lease.

The court found that the lease involved in the dispute contained what may be termed standard habendum and "savings" or "cessation of production" clauses. Analysis of a wide spectrum of case law shows that such leases convey a determinable interest and not an interest subject to a condition subsequent. Such an interest automatically terminates by its own terms upon the occurrence of the stated event; the lessor need take no affirmative action for the lease to terminate. Where the lease contains a "cessation of production" clause, as herein, the lease terminates automatically at the end of the "grace period" if production has not been resumed. Appellant's emphasis on a "notice and demand" clause in the lease was beside the point, for such a clause "does not convert a determinable interest...into an interest subject to a condition subsequent." Thus, the lessee was not entitled to notice, which in any event would be superfluous. The trial court was correct in deciding that the lease herein expired by its own terms upon failure to resume operations within sixty days after production ceased during the secondary term of the lease. No default or forfeiture resulted, and McCullough was not entitled to notice. The trial court properly granted the defendants' motion for summary judgment.

MYERS v. MYERS, 342 S.E.2d 294 (W. Va. 1986).

Convenience and Requirements—Partition—Property

The Circuit Court of Cabell County found that two tracts of land owned by the appellant and her former husband were not susceptible to partition in kind, and ordered a sale, which was stayed pending the outcome of the appeal. The court also imposed an equitable lien on two Mason County tracts, due to an unpaid unsecured note in favor of Guaranty National Bank.

The three issues determined by the court were: (1) Whether diversity of terrain alone is sufficient to render partition impossible, (2) whether the circuit court erred in refusing to divide property according to the plan of appellant's expert witness, and (3) whether the appellee demonstrated the necessary "real and substantial obstacle" to division in kind.

The court held that the appellee failed to meet his burden of showing that partition was not convenient. The circuit court's refusal to accept appellant's plan of partition solely because appellee objected to it was not a proper ground for non-partition. By focusing on the hostility between the parties rather than the respective values of the properties, thus failing to determine if value after partition would be significantly less than without partition, the court erred in ruling for partition. Imposition of the equitable lien was also error, since the presumption that the purchase of one parcel was a gift from husband to wife rather than for investment purposes was not rebutted.

RAY v. MANGUM, 346 S.E.2d 52 (W. Va. 1986).

Destruction of Gamecocks—Property

The Circuit Court of Raleigh County had entered an order to the county sheriff to destroy approximately sixty-five gamecocks allegedly used in cock-fighting activity. Petitioner William A. Ray, owner of five of the gamecocks, asked the West Virginia Supreme Court of Appeals to prohibit the order. The circuit court was ordered to show cause why the relief in prohibition should not be awarded, and to return the birds to their rightful owners pending the outcome of the proceeding.

The issue in this case was whether the gamecocks were contraband within the meaning of West Virginia Code section 61-8-19 and therefore subject to destruction.

The court held that West Virginia Code section 61-8-19 to -23, provided no guidance as to the disposition of the birds. Respondents' effort to equate the gamecocks with gaming equipment and devices is erroneous, for such mechanical items are not the same as live birds. If the legislature desired to allow the destruction of gamecocks, it could have specifically authorized it. Absent any

statutory authorization, a court may not order destruction of the birds in question. Ordinarily they must be returned to the owners.

REED v. TOOTHMAN, 342 S.E.2d 207 (W. Va. 1986).

Evidence—Mutual Mistake—Property—Reformation of a Deed

The Circuit Court of Harrison County had refused to reform a deed whereby the appellant conveyed a tract of land to the appellees, intending to sell only a portion of the five-acre parcel. As executed, the deed described the entire parcel, and appellees asserted that it was understood they were to receive the entire parcel, thus there was no mutual mistake to support reformation.

The court decided two issues in this case: (1) Whether the evidence supported the conclusion that the Toothmans understood they were to receive the entire tract, and (2) whether equity has jurisdiction to reform a deed executed through a mutual mistake of fact when the mistake is due to a scrivener's error in the preparation of the deed.

The supreme court found from the appellant's testimony that she intended to sell only a portion of her land, that she advertised only a portion of it, and showed the purchasers only a portion when they came to view it. The testimony was convincing when combined with the Bank of Shinnston officers' testimony that appellees' loan application for the transaction was replete with indicia that appellee intended to purchase only one acre. Further, the bank's appraiser was told to and actually did appraise only one acre. It was only when appellant delivered the deed for the entire property to the bank's attorney, in order to draft the property description, that the error occurred.

The court stated the mistake of a scrivener in preparing a deed is regarded as the mistake of both parties, he being regarded as the agent of both. Recent decisions support the rule. The judgment of the Circuit Court of Harrison County was reversed, and the case remanded to determine the exact description of the property subject to the agreement.

TABLER v. WELLER, 342 S.E.2d 234 (W. Va. 1986).

Annual Statements—Estate Administrators—Lost Interest—Property

The Circuit Court of Berkeley County held that an attorney who was executor of an estate was not liable for interest lost when he liquidated interest-bearing bonds to pay outstanding debts of the estate. Collaterally, the question of attorney's compensation being withheld for failure to file statutorily mandated annual statement of accounts was resolved in attorney's favor.

The three issues addressed by the court were as follows: (1) Applying the standard of "ordinary care and reasonable diligence" where an executor or administrator of an estate is found to have a duty to place funds in his control

at interest, if he fails to do so, whether he may be charged with the amount of interest that would have been earned; (2) whether executor's failure to file the annual statement of accounts required by West Virginia Code section 44-4-9 may result in his receiving no compensation for his services during such year; (3) whether a court may assess the reasonableness of an executor's fee under West Virginia Code section 44-4-14.

The court found no justification for conversion of the entire amount of bonds to cash, beyond the needs of debt retirement. The executor was thus charged with interest from the date of the cashing of the bonds to the date of distribution of the funds to heirs, exclusive of those used to pay estate debts. The attorney was not entitled to a fee for the year 1976, during which he did not file an annual accounting, and must repay the $1,000 fee which he took for that period.

VINCENT v. GUSTKE, 336 S.E.2d 33 (W. Va. 1985).

Creditors' Rights—Joint Tenants—Partition—Property

In this case, Reynolds Memorial Hospital brought an action in the Circuit Court of Marshall County to enforce a judgment lien against property owned in joint tenancy by Dr. Alfred Vincent and his wife. Vincent brought a writ of prohibition against Judge Arthur W. Gustke of the circuit court. The West Virginia Supreme Court of Appeals granted a rule to show cause to insure that petitioners are protected under the rules recently enunciated in *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984).

The court looked at two issues: (1) Whether *Harris* precludes a judgment creditor of one spouse from subjecting a jointly owned family residence to a suit to enforce its judgment lien if it does not then ask for partition by sale, and (2) whether the hospital could sell Dr. Vincent's interest in the property, leaving Mrs. Vincent as a tenant in common, and thereby avoid any inquiry into possible prejudice to Mrs. Vincent.

In awarding the writ, the court found that case law clearly allows a judgment lien creditor of a debtor who owns property in joint tenancy to execute his lien against the debtor's share of the property. West Virginia Code section 36-1-19 removes the right of survivorship and requires that a joint tenant's interest pass as if he had been a tenant in common and subject to claims upon the debtor's estate. The creditor may then ask for a partition; but in such a suit, the court is free to consider the equities discussed in *Harris* before granting the partition. The court must consider possible prejudice to a joint tenant whenever another tenant seeks partition in kind or by sale. If the hospital insists on selling Dr. Vincent's one-half interest in his residence, and the purchaser is willing to take the residence subject to Mrs. Vincent's right to live there with her husband and children, then the hospital is within its rights. The circuit court therefore was

not required to hold a hearing on the sale, until such time as the hospital also sought to subject the property to partition by sale.

WILKINS v. WILKINS, 338 S.E.2d 388 (W. Va. 1985).

Aggregate Value—Partition—Property—Sale in Kind

The Circuit Court of Hardy County found that the property of a divorced couple could not be partitioned in kind, and ordered sale. The appellee husband purchased the property, and the court order confirmed the sale.

The court addressed five issues: (1) Whether the circuit court erred in finding that partition in kind was not equitable or possible, (2) whether there was error in refusing to allot all or a portion of the property to appellant wife, (3) whether there was error in refusing to partition property unequally, (4) whether the court erred in not appointing commissioners to appraise the property, and (5) whether the court erred in denying a stay of sale pending appeal.

The court held that before compelling partition through sale, one must demonstrate that property cannot be conveniently partitioned in kind, that interests of one or more of the parties will be promoted, and that the other parties will not be prejudiced by the sale. "Real and substantial obstacle" to partition in kind was present, due to a ravine dividing the property unequally. The appellee's interest would be promoted by sale and purchase, allowing encumbrances to be removed on title, while appellant, not living on the premises, would not be prejudiced. A fair test for promotion of interest is also whether the aggregate value of the several parcels into which the premises must be divided will, when held in severalty, be materially less than the value of the property undivided, which was the case herein.

The failure to appoint commissioners was not error, since this need be done only when the parties disagree as to value of property. There was no equitable basis for allotment or unequal sharing of the property, since both parties were equally entitled to it. Any benefit of a stay of sale disappeared when the property was sold; moreover, appellant did not follow through with her appeal.

WILLIAMSON v. GANE, 345 S.E.2d 318 (W. Va. 1986).

Intestacy and Illegitimate Children—Partition—Property

The Circuit Court of Lewis County denied the motion of appellants to intervene in the underlying partition suit for property brought by the heirs of Denzil A. Cowgar. Appellants alleged they were illegitimate children of the decedent and thus should be made parties to the suit and each receive a one-eighth interest in the property. The court determined that title to the real estate vested in the four heirs at law and the principle of *Adkins v. McEldowney*, 280 S.E.2d 231 (W. Va. 1981), should not be applied retroactively to alter the disposition of this estate.

The issue involved determination of the extent of retroactivity, if any, of *Trimble v. Gordon*, 430 U.S. 762 (1977), and of the doctrine of neutral extension applied by the West Virginia Supreme Court of Appeals in *Adkins* permitting illegitimate children to inherit from both father and mother.

The court held that "prospective only" applications of overruling decisions should be limited to cases where the hardships on those who relied on the old rule outweigh the hardships on those who were denied the benefit of the new rule. Thus, *Adkins* is fully retroactive where there has been no justifiable and detrimental reliance on the law invalidated therein, where the subject property has not been transferred to an innocent purchaser for value, or where the estate and administration is subject to further resolution.

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See also,

CIVIL PROCEDURE:

Sally-Mike Properties v. Yokum, 332 S.E.2d 597 (W. Va. 1985).

Sally-Mike Properties v. Yokum, No. 16987, slip op. (W. Va. June 12, 1986).

COMMERCIAL LAW:

Charleston Urban Renewal Authority v. Stanley, 346 S.E.2d 740 (W. Va. 1985).

CONSTITUTIONAL LAW:

Barron v. Board of Trustees, 345 S.E.2d 779 (W. Va. 1985).

DOMESTIC RELATIONS:

Caldwell v. Caldwell, 350 S.E.2d 688 (W. Va. 1986).