



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 23, 2021

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Deborah Murrell Whelihan
JORDAN COYNE LLP
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Re: *In Re: Estate of Ella Miller Hooe, Deceased*, FI 2018-323

Dear Ms. Whelihan:

This matter is before the court on the *Executor's Exceptions To The Report of The Commissioner of Accounts Report of June 11, 2021*. The court heard oral argument from the Executor on October 20, 2021; the Commissioner of Accounts ("Commissioner") was not present, but her *Report* was before the court.

BACKGROUND

Roger S. Brook, an attorney, prepared the Last Will and Testament of Ella Miller Hooe, which she signed on January 2, 2007 ("the Will"). In 2013, Ms. Hooe gave a durable power of attorney to Daphne Sawyer, her goddaughter and closest cousin. Prior to her death, Ms. Hooe lived in an assisted living facility and her monthly expenses exceeded her income from her pension and her social security benefits. Ms. Sawyer decided to sell Ms. Hooe's condominium known as 5150 Maris Avenue, Alexandria, Virginia 22304 ("the Alexandria property") to supplement Ms. Hooe's income. It was sold on March 23, 2017 for \$295,000.00 and the net proceeds (\$269,368.49) were deposited into Ms. Hooe's bank account and commingled with her remaining funds.

At the time of the sale, Ms. Hooe was incompetent. When Ms. Hooe died on December 5, 2017, she was unmarried and had no children; her living relatives were her first, second, and third cousins. In the Will,

Mr. Brook was nominated to be the executor for her estate. On February 14, 2018, Mr. Brook filed the Will with this court and was appointed by this court as the executor.

On February 28, 2019, Mr. Brook distributed \$130,000 to the Article 1(B) beneficiaries and \$100,000.00 to the residuary beneficiary, Mary Grymes Sawyer.¹ On April 15, 2020, because the remaining funds were inadequate to pay the Article 2(B) bequests,² Mr. Brook wrote to the Commissioner regarding whether Code § 64.2-415(C) applied to the distribution. The Commissioner indicated that a hearing was necessary. A hearing was held on May 4, 2020 by the Commissioner, pursuant to Code § 64.2-1209, which was attended by some of the beneficiaries and by Mr. Brook.

On June 11, 2021, the Commissioner issued her decision as to the "disposition of the real property located at 5150 Maris Avenue, Alexandria, Virginia" and "its effect on Article 2(B)" of the Will. *Report* at 3. Specifically, the Commissioner refined the question to be "whether the legacy of the sales proceeds from the Alexandria property in Article 2(B)" of the Will was adeemed and whether the legacies to the Article 2(B) beneficiaries thus failed, or, alternatively, whether the Article 2(B) beneficiaries "are entitled to receive the monetary value of the legacies." *Report* at 5.

The Commissioner opined that the legacies in Article 2(B) of the Will were "demonstrative bequests" which did not adeem and that, if Article 2(B) of the Will is read to provide for "specific bequests," Code § 64.2-415(C) would control. The Commissioner determined that the Article 2(B) beneficiaries should receive the bequests out of the general assets of the estate before not only the residuary beneficiary, Mary Grimes Sawyer, but also before the Article 1(B) legatees.

Because of the payments made to the Article 1(B) legatees and the payment made to the Article 2(C) residuary beneficiary on February 28, 2019, the Commissioner recommended that this court forfeit the bond posted by Mr. Brook and enter judgment against Mr. Brook and RLI Insurance Company, jointly and severally, in the amount of \$200,000.00 in favor of the Estate of Ella Miller Hooe. The Commissioner further recommended that "the fiduciary" pay the Article 2(B) beneficiaries upon receipt of funds from the bonding company.

¹ Although the distributions are reported on the *Second Accounting* (filed 4/9/20) as being made on February 28, 2019, the *First Accounting* had been filed on June 10, 2019, but did not include the February 28, 2019 distributions. Because the reporting dates are not outcome determinative, the court does not resolve this apparent discrepancy.

² \$34,789.12 remained in the estate after debts and expenses were deducted.

Mr. Brook timely filed his exceptions, argument was presented on October 20, 2021, and the court took the matter under advisement.

MR. BROOK'S EXCEPTIONS

Exception 1: Mr. Brook "objects to the entry of any judgment against him and the bonding company, RLI Insurance Company" (*Executor's Exceptions* 4) because: a) upon receipt of the Commissioner's Report, Mr. Brook recovered the \$100,000.00 that he had paid to the residuary beneficiary, Mary Grimes Sawyer, and b) one of the Article 1(B) beneficiaries, Randolph H. ("Bo") Sawyer, is also an Article 2(B) beneficiary who received a distribution of \$20,000.00; thus, Mr. Brook argues that, if this court decides to prioritize the payments to the Article 2(B) legatees over the Article 1(B) legatees, any distribution that this court decides is appropriate under Article 2(B) to Mr. Sawyer has already been made.

Ruling As To Exception 1: Because, for the reasons set forth below, the court finds that Mr. Brook made the proper distributions, the court SUSTAINS this exception.

Exception 2: Mr. Brook "objects to the opinion offered by the Commissioner's Report that Virginia Code § 64.2-415(C) controls or even applies in this matter." *Executor's Exceptions* 5. The Commissioner, however, concluded that Code § 64.2-415(C) applied as an alternative only if its primary argument failed, *i.e.*, that Article 2(B) of the Will is a demonstrative legacy. Thus, the court will first address whether the Article 2(B) is a demonstrative legacy.

In addressing this question, the court is guided by *King's Ex'rs v. Sheffey's Adm'r*, 35 Va. 614 (1837) and *May v. Sherrard's Legatees*, 115 Va. 617 (1913).

In *King's Ex'rs*, the testator bequeathed:

"[t]o the children of his son and daughter . . . two fifth parts of the net proceeds of my estate in Fincastle aforesaid, which is to be sold at my beloved wife's death, at the discretion of my executors."

35 Va. at 615.

The testator's estate in Fincastle "consist[ed] of houses and lots" (35 Va. at 614), which he "sold . . . on a credit of one, two, three and four years" and, "[d]uring the same year that the sale was made, the testator died." *Id.* at 615.

The Court first observed:

For here it is clear, the testator had no design that his general assets should ever be charged with these legacies. The

fund out of which they were to come was a land fund, and the personalty could never be reached by them.

Id. at 616.

In the case at bar, Ms. Hooe also had no design that her general assets should ever be charged with the Article 2(B) bequests because the Article 2(B) bequests were limited to the "proceeds of sale" of the Alexandria property if and when it was sold after the death of Ms. Hooe.

The Court further explained that the bequest it was considering:

was not a bequest of a certain sum (as of 500 dollars) chargeable upon the land, which, according to the case of *Fowler v. Willoughby*, 2 Sim. & Stuart 354. might be charged on the general assets, if the land failed

Id.

In the case at bar, the Article 2(B) bequests were of certain sums. Thus, the Court's above statement, at first glance, because of the reference to "a certain sum (as of 500 dollars)," seems to suggest that, if there is a bequest of a certain sum to come out of land, the bequest can be charged on the general assets if the land is sold before the death of the testator. That conclusion reads too much into the above statement as evidenced by the subsequent statement at page 620 of *King's Ex'rs*:

[I]n *Newbold v. Roadknight*, 1 Russell & Mylne 677. there was a devise to trustees to sell, and out of the proceeds to pay T. N. £3000.; and the residue to be divided among several. Afterwards the testator sold the lands, and conveyed them to the purchaser. The master of the rolls decided, that all the legacies were adeemed,--even the particular legacy of £3000. He said, "The gift to one of a sum of money, part of the produce of real estate directed to be sold, followed by a gift of the residue of the purchase money to others, is substantially a gift of the estate, and not a gift of legacies with a collateral charge upon the estate;" and that, he said, distinguished this case from *Fowler v. Willoughby*.

Id. at 620.

The Court then noted that *Newbold v. Roadknight* was one of the cases which "seem to me decisive of the present question." *Id.*

Accordingly, the statement at page 616 (citing *Fowler v. Willoughby*) cannot be read to apply to a situation, as in the case at bar, where the land from which bequests are to be paid is sold by the testator prior to her death, but must be limited to situations where the land is still owned by the testator at the time of her death, but is not of sufficient value to allow for the recipients to take the full amount of the certain

sums, i.e., where "the land failed"

King's Ex'rs further explained that the devise at issue therein:

being of realty, that is, of an equitable interest in land, was revoked by alienation. This principle is too plain to require support. If I devise lands today, and sell them tomorrow, it is a revocation

Id. at 619.

In sum, the lesson of *King's Ex'rs* is that, if land from which sums certain are to be paid is sold by the testator, the legacies are adeemed.

Three-quarters of a century later, in *May*, the Court addressed a similar situation. In *May*, the testator's will directed that her real property was "to be sold and equally divided between" named beneficiaries (115 Va. at 619), but she sold it before her death. *Id.* In affirming the trial court holding that the bequest was "specific and not demonstrative," that "the gift . . . was adeemed or revoked," and that the devisees "took nothing" (*Id.* at 619-620), the Court explained that:

Mr. Pomeroy . . . defines a specific legacy as "a bequest of a specific article of the testator's estate, distinguished from all others of the same kind, as, for example, a particular horse, or piece of plate, or money in a certain purse, or chart, a particular stock in the public funds, a particular bond or other instrument for the payment of money." (Vol. 3 [3rd ed.][Pom. Eq. Jur.] section 1130.) He defines demonstrative legacies as "bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, but made payable *primarily* out of a particular designated fund or piece of property belonging or assumed to belong to the testator." (Same volume, section 1133).

Id. at 620 (emphasis in original).

The Court further observed:

If it be a gift of the house and lot, it is manifestly a specific devise; **if it is a gift of the fund arising from the sale directed, it is equally specific as it seems to us.**

Id. at 621 (emphasis added).

Similarly, the Court adopted the following:

"Where the testator deals with specific property . . . , not by giving . . . sums of money out of it, but by dividing and **apportioning out . . . the proceeds** of it, **if it is directed to**

be sold and converted into money, then the bequests of the parts thus apportioned among the legatees will be specific."

Id. at 624 (emphasis added).

Further, the Court agreed that "'a gift of the proceeds of the sale of specific real estate . . . is specific.'" (Citation omitted)." *Id.* at 625. The Court thus held that, because:

the gift in question was specific, it follows that the appellants can take nothing under the second clause of the will . . .; for the alienation of the property by the testatrix worked a revocation if it was a devise, and an ademption if it was a bequest. Liability to ademption is said to be the most distinctive feature of a specific legacy.

Id. at 626.

The Commissioner's Report takes the position that *May* "may have held that the devise of real property . . . was a demonstrative legacy if the testator had granted specific amounts to each beneficiary rather than equal shares in the property," relying on *May*'s quotation (115 Va. at 622-623) from *King's Ex'rs* concerning *Fowler v. Willoughby* (*King's Ex'rs*, 35 Va. at 616). Report 11. In light of the analysis of the citation of *Fowler v. Willoughby*, *supra*, the Commissioner errs in this assertion; the fact that certain sums are to be paid from the sale of land does not convert the bequest from a specific bequest to a demonstrative bequest.

In view of *May*, the Commissioner also errs in concluding, based upon the definition of a demonstrative bequest, that the Article 2(B) bequests are demonstrative bequests. While correctly quoting the definition of a demonstrative bequest ("a bequest of a sum of money payable primarily out of a designated fund or piece of property," Report 7), the Commissioner's application of the definition omits the crucial word "primarily" when she states that the Article 2(B) bequests were "for specific sums of money to be from a designated piece of property" Report 8.³ In fact, the Article 2(B) bequests were to be paid *exclusively* out of the proceeds from the sale of the property.⁴ There is nothing in the Will which requires that the Article 2(B) bequests be paid from some other source if

³ It was undoubtedly intentional that the Court italicized the word "primarily" in the Court's quotation from section 1133 of *Pomeroy's Equity Jurisprudence*.

⁴ The Commissioner's Report errs in stating: "Unlike the *May* beneficiaries, the beneficiaries in the instant case were granted 'a particular sum . . . to be paid primarily out of the proceeds of the sale of the house'" Report 11. In fact, the Article 2(B) beneficiaries were granted particular sums to be paid *exclusively* out of the proceeds of the sale of the house.

the sale of the land did not generate sufficient funds to pay all the Article 2(B) bequests.⁵

Having found that Article 2(B) of the Will is not a demonstrative legacy, the court will address the argument of the Commissioner that, "even if Article 2(B) of the will is not a demonstrative legacy, it is a specific devise of real property, such that Virginia Code § 64.2-415(C) applies to prevent the Alexandria property's ademption." Report 12.

Code § 64.2-415(C) provides in pertinent part:

Unless a contrary intention appears in a testator's will . . . , a bequest or devise of specific property shall . . . be deemed to be a bequest of a pecuniary amount if such specific property, during the life of the testator and while he is incapacitated, was sold by an agent acting within the authority of a durable power of attorney for the testator For purposes of this subsection, (i) the pecuniary amount shall be the net sale price . . . (ii) no adjudication of the testator's incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator. . . .

Mr. Brook contends that the substantive provision of Code § 64.2-415(C) does not apply because the initial language of Code § 64.2-415(C) states "Unless a contrary intention appears in a testator's will" and there is a contrary intention that appears in the Will, to wit, that the Will "lists the Article 1(B) beneficiaries first because those legatees were who Ms. Hooe intended would inherit whatever assets that she still had at her death" and Code § 64.2-415(C) "assumes that the proceeds from the sale of the Alexandria property exist (*sic*) at the time of the decedent's death." *Executor's Exceptions* at 5. Mr. Brook notes that the proceeds of the sale of the Alexandria property:

were used to pay her expense (*sic*) before she died and the remainder of those monies were commingled with all of her pension monies, social security payments, and other monies. The fact that Ms. Hooe had monies at her death does not make those monies the sales proceeds from the Alexandria property as opposed to the monies that she also had and the income that she continued to receive from other sources.

Id.

⁵ This court respectfully disagrees with the conclusion of the circuit court in *Kinnamon v. Hastings*, 18 Va. Cir. 376 (1989), that "the bequest of \$50,000 in Item Two C of the will is a demonstrative legacy" because the five (5) bequests were to be paid exclusively, not primarily, from the testator's life insurance.

Mr. Brook is correct that the substantive provision of Code § 64.2-415(C) does not apply as its initial language states "Unless a contrary intention appears in a testator's will" and there is a contrary intention that appears in the Will, i.e., that the Article 2(B) beneficiaries were only to receive the "proceeds of sale" of the Alexandria property if and when it was sold after the death of Ms. Hooe.⁶

In sum, because property was sold before the death of the testator, all the Article 2(B) bequests were adeemed by operation of the language of the Will; as a result, the substantive language of Code § 64.2-415(C) does not apply.

Ruling As To Exception 2: For the reasons set forth above, the court SUSTAINS this exception.

Exception 3: Mr. Brook argues that "the Alexandria property did adeem." *Executor's Exceptions 6.*

Ruling As To Exception 3: For the reasons set forth above with respect to Exception 2, the court SUSTAINS this exception.

Exception 4: Mr. Brook contends that, "assuming that the Article 2(B) legacies were not specific, then Article 2(B) beneficiaries were general legacies like the Article 1(B) legacies to be paid after those bequests." *Executor's Exceptions 6.*

Ruling As To Exception 4: For the reasons set forth above with respect to Exception 2, the Article 2(B) legacies were specific; thus, the court need not address this exception.

Exception 5: Mr. Brook "excepts to the Commissioner's Report as "unfair and unnecessary" because "courts should defer to the Will, and not re-write it" and "the Commissioner of Accounts has adopted a construction of the Will which results in disinheriting the Article 1(B) beneficiaries who were Ms. Hooe's closest relatives." *Executor's Exceptions 7-8.*

Ruling As To Exception 5: While the court rejects as a legal argument that the Commissioner's Report is "unfair and unnecessary," the court agrees that courts must defer to the language of the Will. Thus, for the reasons set forth above with respect to Exception 2, the court SUSTAINS this exception.


⁶ Moreover, on the merits of the specific language of the substantive provision of Code § 64.2-415(C), Code § 64.2-415(C) would not apply because Article 2(B) was not "a bequest or devise of specific property"; it was a bequest or devise of the proceeds of the sale of specific property.

CONCLUSION

In light of the above, the court finds that Mr. Brook properly distributed \$130,000 to the Article 1(B) beneficiaries and properly distributed the remaining \$100,000.00 to the residuary beneficiary, Mary Grymes Sawyer, as the legacy of the sales proceeds from the Alexandria property in Article 2(B) was adeemed and the legacies to the Article 2(B) beneficiaries thus failed.

An appropriate order will enter.

Sincerely yours



Richard E. Gardiner
Judge

cc: Anne M. Heishman
Commissioner of Accounts
4084 University Drive, Suite 102
Fairfax, VA 22030

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

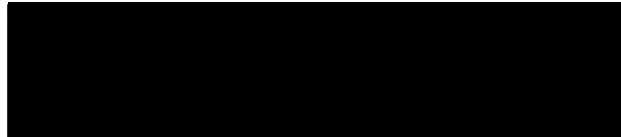
IN RE: ESTATE OF ELLA MILLER) FI 2018-323
DECEASED) CL 2021-14098

ORDER

THIS MATTER came before the court on the *Executor's Exceptions To The Report of The Commissioner of Accounts Report of June 11, 2021.*

THE COURT, having considered the arguments of the Executor and, for the reasons set forth in the court's letter opinion of today's date, hereby SUSTAINS Executor's Exceptions 1, 2, 3, and 5, and, in light thereof, does not need to address Exception 4.

ENTERED this 23rd day of November, 2021.



Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS
WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE
SUPREME COURT OF VIRGINIA

Copies to:

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Commissioner of Accounts