IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0019

TOBY E. BELL AND
JANICE JOHNSON
PETITIONERS,

VS.

CASE NO. 16-C-13
Appeal from a Final Order of the Circuit Court
of Pocahontas County
Honorable Jennifer P. Dent

LEE PERKINS, HARRY PERKINS, JR.
REM PERKINS AND ANNIE MARGARET LOU PERKINS
RESPONDENTS,

PETITIONER'S BRIEF

Counsel for Petitioners (W.Va. Bar No. 1002)
895 Court Street North
Lewisburg, W.Va. 24901
304-645-1993
detchlaw@suddenlinkmail.com

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ASSIGNMENT OF ERRORS

1. Did the lower court err in ordering the forfeiture of a one-third undivided interest in real estate allegedly due to the non-payment of a maintenance fee by the remainder interest holder in property in which by the terms of the Will, only the life estate holders were required to pay? The lower court interpreted a twenty-seven year old declaratory judgment ruling in which the earlier court declared the respective rights of the beneficiaries under a Will that made no mention the remainder ownership in property was in any way contingent on the payment of an annual maintenance fee. The parties involved did not demand any maintenance fee, nor was any maintenance fee paid for more than twenty-seven years prior to the request for forfeiture.
2. Did the lower court err in declaring a forfeiture of interest in real estate for an issue that had been waived by all parties for more than twenty-seven years?
3. Did the lower court erred in interpreting a decision from 1989 Declaratory Judgment action that specifically vested titled in certain parties in the declaratory action and for which no protest was made for twenty-seven years?

STATEMENT OF THE CASE

At the time of his death, Okey Johnson Perkins owned a tract of real estate bordering on the eastern edge of the Greenbrier River in Pocahontas County, W.Va. referred to as "Perkarosa Camp." His Will provided in part as follows:

"I will, devise and bequeath unto five of my children, namely, MASON LEE PERKINS, KATHLEEN IRENE MCCLUNG, JAMES ROSS PERKINS, LUCILLE VALENTINE BELL and CECIL RAPP PERKINS, that certain hunting camp located on the Greenbrier River, in Pocahontas County, West Virginia, for their lifetime, and then to their children as their interest may appear."

And be it further provided that it is my desire that this camp be used as a camp for the mutual benefit of my children and that each of the five previously named children be required to

pay to LEE PERKINS, my grandson, who shall be the caretaker of this camp, the sum of One Hundred ($100.00) Dollars per year for the maintenance and upkeep of the premises; and be it further provided that in the event any of the five aforementioned children shall fail to pay the One Hundred Dollars as previously provided, then his or her interest in this property shall be divested as of the date of his or her failure to pay.

And be it further provided that no profit is to be taken from this property but that it is to be used for the maintenance, upkeep and improvement of the premises for the mutual benefit of all concerned."

The Will specifically provide that the five children are to pay the $100.00 fee, "that this camp be used as a camp for the mutual benefit of my children" and then each of the five previously named children be required to pay to Lee Perkins, my grandson, the sum of $100.00 per year." This obligation fell only on the five named children, no mention is made of the remaindermen.

A civil proceeding was filed in 1984 in the Circuit Court of Pocahontas County in case styled 84-C-99; an Order was entered on January 25, 1989, (T.R. P. 27) in which the Court addressed the issues involved in the summary judgment action. The Court found; "The Court does find that the petitioner, Lucille Bell Perry (mother of appellants), has consistently paid the required fees, that the respondent, Mason Lee Perkins and after his death, his sons, has consistently paid the annual fee; and that Cecil Rapp Perkins has consistently paid the annual fee. The Court finds further that as a result of such payments, the petitioners, Lucille Bell Perry and Cecil Rapp Perkins have life interests in said property and that the children of Lucille Bell Perry, Mason Lee Perkins and Cecil Rapp Perkins, namely and respectively, petitioners, Johnson Toby Bell and Lucy Bell, his wife, Janice K. Johnson and Archie Johnson, her husband, and Cuba Jean Douglas and Andrew Douglas, her husband, and respondents, Harry Knight Perkins and Janie Perkins, his wife, and Jana Perkins Wood and Victor Wood, her husband and Jay Perkins and Beth Anne Perkins, his wife, have equal and undivided remainder interests in said property.

(Underlining added for emphasis). (T.R. P. 32). "The Court finds further that Linda McFarren Perkins, widow of Okey Johnson Perkins, has a lifetime interest in the subject property as a result of her dower interest in said property."

The lower court made no findings that these ownership interests were in anyway subject to any further payment of $100.00 per annum. Specifically, the Court referred to this and declared that each of the parties had an "equal and undivided remainder interest in the said property." (T.R. P. 32). In short, the Court by its clear language declared that the life estates in the original children were now vested in the remaindermen for whom no obligation for further payment was required in the original Will. The Court made no provision for any contingency for any further payments. The only mention of a payment was if the issues were resolved in this case, which resolved then with no payment being required. The issue was resolved by the Court imposing no obligation for further payment.

In 1989, the Court further ordered that the property could be partitioned. (T.R. P. 32). In 1990, a partition proceeding was filed but not pursued by either party. (T.R. P. 89) The issue of partition and the ownership of the property not being in issue. The issue of the payment of the $100.00 was either resolved in 1989 by the judge's ruling or it has not been resolved even today.

This ruling went unchallenged for 27 years. All parties lived under this Order and relied upon the clear language that they owned their respective interests, in accordance with the rulings that the interests were vested. No monies for maintenance were demanded and none were paid.

In 2016, the proceedings upon which this appeal is made was filed in the Circuit Court of Pocahontas County (T.R. P. 4) by the appellees, who sought the interests of the appellants/petitioners herein be forfeited for non-payment. Their argument was that the non-payment of the maintenance fees for the past 27 years constituted a forfeiture under the terms of

the original Will. The lower court declared the one-third interest of the appellants herein be forfeited and from this decision this appeal is filed.

SUMMARY OF ARGUMENT

Your appellant contends that title to real estate should be certain and that the Court cannot declare a forfeiture for a matter that has been openly acquiesced into by all parties concerned for in excess of twenty seven years. The original Will placed a requirement for payment only on the decedent's five children, not on their heirs. A declaratory judgment action vested the property in the remaindermen and made no requirement for an annual payment. Your appellant pleads waiver and estoppel, and pleads that title to real estate must be based on certainty and not contingent events.

STATEMENT REGARDING ORAL ARGUMENT

Your appellant herein seeks oral argument based on Rule 19 and your appellant states that this case may be appropriate for a memorandum decision but that your appellant would be available to answer any questions and states that the time allotted is sufficient.

ARGUMENT

The original petition filed in the Circuit Court of Pocahontas County in 1984 requested that the Court define the legal rights of the parties under the Will of the late Okey Johnson Perkins. The lower court did as requested and no one challenged the ruling until twenty-seven years later.

After specifically mentioning the rights vested in each individual, the Court made the finding that the parties: "have equal and undivided remainder interest in said property." (T.R. P. 32). The original Will made no provision for the remainder interest holders to pay any maintenance fee nor does the declaratory judgment order. The Will only mentions the

decedent's five original children pay the fee. When the judge ruled that each was to have an equal and undivided remainder interest in the property, he was placing all of those mentioned into the category of those who are no longer obligated to make any payment, as the children of Lucille Bell Perry they were.

The Court in 1989 (T.R. P. 27) made no finding that these interests in property were contingent upon any further payment of $100.00 per annum. The Court's clear intention by its Order in 1989 was there was to be no longer any requirement under the Last Will and Testament to make any further payment. All parties lived under this interpretation for twenty-seven years.

There are a number of reasons for the Court's earlier ruling.

(1) Title to real estate needs to be clear and certain; a person examining the title would have to know whether the deed was good or not so that the title could be certified without holding a hearing to determine if a $100.00 fee had been paid or if the fees were waived.

(2) The earlier Court Order of 1989 indicates that the property is already vested. The parties were declared all to be holding a remainder interest, which required no fee. There was no reason why the children paid a fee and the grandchildren did not --- so none paid. The Court ruled it could be portioned. The partition would release any need for payments.

(3) The Will, as interpreted by the lower court, had problems with the rule against perpetuities and made no provision for when the payment was to be made and for how long. Nor was it clear as to whom the divesting interests of the property were to go in the event that any party failed to make their payment. The Will makes no requirement that the remaindermen makes any payment, nor does the Order.

The original Will can be modified by the parties.

In Vol. 80 Am Jur 2d Wills, Sec. 945 discusses the "family settlement doctrine," which affords the devisees of a Will the right to agree to divide property as they wish and is an alternative to the formal administration of a Will. Am Jur 2d quotes P. 171, "the family settlement doctrine involves three basic principles (1) the decedent's right to make a testamentary disposition; (2) the beneficiaries' right to convey their rights; and (3) balancing those competing rights by requiring an agreement to an alternate distribution plan. Thus, a "family settlement agreement" or "family agreement" has been defined as an agreement between the parties with interests in a decedent's property to distribute the property in a manner different from that prescribed by law or by testamentary instrument." (i.e. by agreement the parties or the Court can rewrite a Will and did so in this case).

On P. 174, "the law generally favors, even strongly favors, and encourages, the settlement of an estate by agreement of the heirs. In general, probate settlement agreements are binding upon the beneficiaries themselves, as well as those claiming under them, and should be accorded finality to the fullest extent possible. Family agreements should not be disturbed by those who enter into them or by those claiming under or through them."

Appellant contends this family has lived by the Court's order that required no fee for twenty-seven years. The Order itself was prepared by Jesse Guills, who represented the then appellees. He could have included a contingency of $100.00 had that been the Court's desire. Instead, he chose the language used, because it was clearly the intended desire that the obligation be ended. The reference to ending the controversy was partition. If there is any ambiguity in the language of the Order it should be construed against Guills and the appellees herein. However, the appellant herein states that the exact clear language of the original Order should be enforced,

because the language indicates that the parties "have an equal and undivided remainder interest in the said property." The Court's approval of a partition should stop any payment.

It is clear that Judge Jolliffe's Order of 1989 makes no provision that the remaindermen interest of these parties to be contingent upon the payment of any sums of money to be paid in the future. The earlier proceeding in 1984 was to declare the interests of these parties. It did so.

The original Will made no provision for payment by anyone other than by the children of Perkins. The requirement of payment by the remaindermen has been ignored for twenty-seven years, and this Court should maintain the status quo.

This settlement of the parties, by the Order approved by Mr. Detch and drafted by Mr. Guills, was in substance, a "family settlement agreement." Judge Jolliffe's Order has gone unchallenged for twenty-seven years, and the declaration that the life estate had become a remainder interest has gone unchallenged. In 4A M.J. Sect. 56, P. 552 quotes the definition of waiver as follows: "waiver had been defined as a renunciation of some rule which invalidates the contract but which, having been introduced for the benefit of the contracting party, may be dispensed with at his or her pleasure."

M.J. quotes: "strict compliance with the terms of a contract on the part of one party may be waived by the other either expressly or by acts or declarations indicating a relinquishment of the provisions of the contract."

Your appellant contends that a twenty-seven year acquiesce in the non-payment of maintenance fees is a clear indication that the parties involved are waiving any right to demand such payment. 14B M.J. Penalties and Forfeitures, Sect. 6 cites: "a forfeiture will be deemed waived by any agreement, declaration or course of action on the part of the persons who has benefited by such forfeiture, which leads the other party to believe that by conforming thereto the

forfeiture will not be incurred." Pyle v. Henderson, 65 W.Va. 39, 63 S.E. 762 (1909). Sect. 11, P. 106 "equity looks with disfavor upon forfeitures and will not be quick, active or alert to see, declare or enforce them. Forfeitures still remain so obnoxious to judicial minds that slight circumstances are eagerly seized to avoid their enforcement when the substantial rights of parties insisting thereon can otherwise be adequately protected." Citing McCartney v. Campbell, 114 W.Va. 322, 171 S.E. 821 (1933) and also Sun Lbr. Co. v. Thompson Land & Coal Co., 138 W.Va. 68, 76 S.E. 2d 105 (1953).

The appellees waited twenty-seven years to claim any type of forfeiture. Petitioners herein contend that this is a waiver and that they are estopped from asserting a claim that has been ignored for twenty-seven years. At the very least, appellants should be given an opportunity to pay any arrearage they didn't know they owed.

CONCLUSION

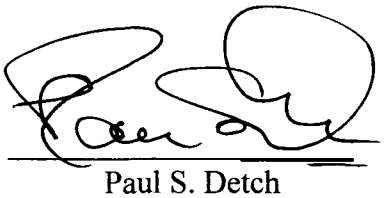
The Courts abhor a forfeiture. The appellees by waiting twenty-seven years to claim a maintenance fee waived their right to declare a forfeiture. At the very least, appellants should be given the right to pay any arrearage they believed was not owing.

TOBY BELL ET ALS
By Counsel

PAUL S. DETCH
895 COURT STREET NORTH
LEWISBURG, W.VA. 24901
W.VA. BAR NO. 1002
304-645-1993

CERTIFICATE OF SERVICE

I, Paul S. Detch, hereby certify that a true and exact copy of the foregoing PETITIONER'S BRIEF was served upon Jeffry A. Pritt, Esquire, P.O. Box 708, Union, W.Va. 24983 by mailing a true and exact copy by regular United States mail on this 27 day of June, 2019.



Paul S. Detch