IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2010-CA-02000

HEMETER PROPERTIES, LLC, PEACHTREE PROPERTIES, LLC, GARDNER CLARK FAMILY, LLC, T R CLARK, LLC, CHARLES M. HAMILTON, JAMES STEVEN GARDNER, ADRIAN CODY CLARK, FRANKLIN D. HEMETER, JR., STEPHANIE A. BAREFOOT, AND JAMES SCOTT HEMETER — APPELLANTS

VERUS

REYNOLDS CLARK — APPELLEE

APPEAL FROM THE CHANCERY COURT OF WAYNE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

INTRODUCTION

Appellee Reynolds Clark contends that this case is governed by *In Re Estate of Kelly*, 193 So. 2d 575 (Miss. 1967), and that the 1978 *ex parte* order of Special Chancellor Sullivan correctly applied the doctrine of equitable approximation to construe Ben Meador's will. The 1978 order simply disregarded language of the will "upon condition that said land never be sold" and held that the 10-year limitation of Mississippi's Mortmain statute commenced only when the interest of the proscribed institution became possessory. The Appellee carries this argument to the present case adding that Father Flanagan's Boys' Home "did not hold or become vested with title" until Martha Meador, life tenant under the will, died in 1973.

Reynolds Clark argues that Charles H. Cole, IV, grantee of Martha Meador, Ben Meador's surviving spouse and sole heir at law, was not a bona fide purchaser. This contention is based solely on the stipulated fact that Charles H. Cole, IV, while competent in all respects, was unemployed, never having held a job.

The Appellee Clark does not dispute that the provision in Ben Meador's will "upon condition that said land never be sold" is contrary to public policy and constitutes an unlawful prohibition against alienation of real property. While arguing that Charles H. Cole, IV was not a bona fide purchaser for value, the Appellee does not contest that this issue was tried by consent in the lower court and decided on the merits by Chancellor Franklin C. McKenzie, Jr.

Finally, the Appellee contends that the standard of review should be manifest error/substantial evidence rather than *de novo*.

SUMMARY OF REPLY ARGUMENT

The case of *In Re Estate of Kelly*, dealt with a devise restraining alienation of real property until devisees in remainder reached a specified age. The court applied the doctrine of equitable approximation, upholding restraint of sale of the property during the term of the life tenant, but disallowing the testator's direction that the restraint extend until the two devisees in remainder reach the age of 45 years.

The will provisions *In Re Estate of Kelly*, differ in material respects to the provisions of Ben Meador's will. Arthur C. Kelly's will provided for a limited restraint on alienation, but beyond that allowed by statute. It is reasonable to apply the testator's direction as far as the law permits, so long as the result is consistent with the terms of his will. He clearly intended to confer benefits upon his daughter, for her life, and his two grandchildren vested with the remainder.

Ben Meador's will, in contrast, provides for a devise for the benefit of a charitable institution, on condition that said land *never* be sold. The plain language makes the devise subject to an unambiguous condition against public policy and unlawful. Employing the terms "condition" and "never" the plain language of the will leaves no room for approximation of Ben Meador's intent. The unequivocal condition is unlawful, the devise fails, and the subject property passed under the laws of intestate succession.

If the condition of Ben Meador's devise of his real property is disregarded, causing an estate to vest in or for the benefit of Father Flanagan's Boys' Home, Mississippi's Mortmain statute in effect at the time applies. It is hornbook law that a will speaks at the death of the testator, and that interests in land devised under the will vest at his death. The will of Ben Meador purports to leave a life estate in all real property to his surviving spouse Martha Meador, with remainder to or for the benefit of Father Flanagan's Boys' Home, a proscribed institution under Mississippi's Mortmain

statute. Upon the death of Ben Meador, Martha Meador became vested with a life estate and a remainder, subject to defeasance within 10 years, to the vested interest of Father Flanagan's Boys' Home. Father Flanagan's Boys' Home had 10 years from the death of Ben Meador within which to dispose of its remainder to Martha Meador's life estate. Having failed to exercise its right of disposition within 10 years of the death of Ben Meador, a fee simple interest vested in Martha Meador pursuant to Mississippi's Mortmain statute.

Ben Meador died in February, 1962. His sole heir Martha Meador conveyed the subject property to Charles H. Cole, IV in August, 1972, reserving a life estate. Martha Meador died September 19, 1973. Ben Meador's will was offered for probate by Father Flanagan's Boys' Home in 1978. When Father Flanagan quitclaimed the mineral interest to Reynolds Clark later in 1978, Clark took nothing. Martha Meador's fee title vested, at the latest, on February 17, 1972.

When Martha Meador conveyed the subject property to Charles H. Cole, IV in 1972, reserving a life estate, there was nothing to impart actual or constructive notice of adverse claims. Ben Meador and Martha Meador were married once, and then to each other. No children were born to the marriage and none were adopted. Land records of the Wayne County Chancery Clerk's Office reflected fee simple title in Ben Meador at the time of his death. No will was presented for probate for Ben Meador and Martha Meador was in possession of the property from 1962 until her death in 1973.

The warranty deed from Martha Meador to Charles H. Cole, IV, recites consideration of "ten dollars ($10.00) and other good and valuable considerations." A warranty deed that acknowledges payment or receipt of valuable consideration is prima facie evidence that the grantee was a purchaser for value without notice of adverse claims and places the burden of going forward to establish notice or a lack of consideration on the party attacking the deed. The fact that the grantee Charles H. Cole,

IV was an unemployed invalid is not probative of whether or not he parted with a valuable consideration for the conveyance from Martha Meador.

This case was submitted below on stipulated facts and jointly sponsored documenting evidence. The contested issues are of law and the standard of review is *de novo*.

REPLY ARGUMENT

Ben Meador's Will

In Re Estate of Kelly, 193 So. 2d 575, 578 recognizes the common law rule that disabling restraints against alienation of real property are void, but prohibition of alienation during the lifetime of a life tenant is permissible. The case does not stand for the proposition that an absolute prohibition of alienation in a will should be disregarded with the devise otherwise respected. In *Kelly*, the court considered the testator's will as a whole, not disregarding the restraints on alienation, but upholding those provisions to the extent permitted by law. The testator clearly intended his real property to go to his daughter for life, and then to his two grandchildren upon her death. Prohibition of alienation of the property until the grandchildren reached 45 years of age could restrict the property beyond the lifetime of the life tenant. It was in accord with the testator's overall purpose to limit the restraint to the lifetime of the life tenant, rather than declare the entire devise void.

In this case, it can not be said that simply ignoring the prohibition against alienation and upholding a conditional devise to Father Flanagan's Boys' Home best approximates the actual wishes of the testator. There is no parol evidence available to predict whether Ben Meador would have preferred the remainder to vest for the benefit for Father Flanagan's Boys' Home without the condition prohibiting alienation; or whether he would have preferred the property to vest in fee in his "beloved wife" Martha Meador should the condition fail. Any such parol evidence would be inadmissible since the intention of the testator can be gleaned from the four corners of the will. But

there can be little doubt that Ben Meador's beloved wife and sole heir Martha was an intended beneficiary of his estate by the terms of his will. (Exh. 5, pp. 4-5; R.E. Tab 7). *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659, 668-69 (1987).

The phrase "upon the condition that said land never be sold" is not subject to differing interpretations. Absolute restraints of alienation are by definition "disabling" and are void. *In Re Estate of Kelly*, 193 So. 2d at 578. The terms "condition" and "never" have clear and unequivocal meanings. There being no suggestion in the will that Ben Meador wished Father Flanagan's Boys' Home to benefit from his real property should the condition of the devise fail, it should not be upheld. This is in contrast to Arthur C. Kelly's will which stated a clear intent to confer benefits to a succession of devisees, including his only daughter and two grandchildren.

The Appellee Reynolds Clark relies on the rationale of Special Chancellor Sullivan stated in his 1978 order construing the will of Ben Meador. Beyond the language of the statute, no authority was cited by Chancellor Sullivan in support of his finding that the 10-year period of Mortmain commenced upon the death of Martha Meador rather than upon the death of the testator Ben Meador. Neither is any authority for this proposition cited by the Appellee Clark.

The Effect of Mississippi's Mortmain Statue

A devise subject to Mortmain otherwise allowed under the statue[1] "may be legally owned and further may be held by the devisee for a period of not longer than 10 years after such devise becomes

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1

Ben Meador died in 1962 and no evidence is available to determine whether the property that he undertook to devise to or for the benefit of Father Flanagan's Boys' Home exceeded 1/3 of his estate in violation of Section 270 of the Constitution and Mississippi's Mortmain statute in effect at the time. Also, the Appellants have not addressed issues of Martha Meador's rights to elect against the will had it been offered for probate during her lifetime, since the rule appears to be that the wife's right to renounce her husband's will is personal and abates at her death. *Shattuck v. Estate of Tyson*, 508 So. 2d 1077 (Miss. 1987).

effective,..." Miss. Code 1942, § 671. The reasoning of the lower court follows the rulings of Special Chancellor Sullivan in 1978 that the devised property was not legally owned or held by or for the benefit of Father Flanagan's Boys' Home until its remainder ripened to a fee upon the death of Martha Meador. This conflicts directly with decisions of this court that the 10-year period of Mortmain commences on the death of the testator because "... such devise becomes effective..." at that time. *Id.*(see *Mississippi College v. May*, 235 Miss. 200, 108 So. 2d 703 (1959); *Methodist Hosp. v. Slack*, 330 So. 2d 882 (Miss. 1976); *Crook v. Commercial Natl. Bank & Trust Co.*, 375 So. 2d 1006 (Miss. 1979); *Johnson v. Bd. of Trustees of Miss. Annual Conf. of the Methodist Church*, 492 So. 2d 269 (Miss. 1986)). Each of those cases dealt with Mississippi's Mortmain statute in effect at the time Ben Meador's will was executed and each case holds that the 10- year period of Mortmain commences at the testator's death because his devise becomes effective at that time, regardless of whether the devised interest includes a present right of possession.[2]

The argument that "any land devised... may be legally owned and further may be held by the devisee for a period of not longer than 10 years..." requires or contemplates only a fee or possessory interest is contrary to statute as well. Miss. Code 1942 §683 provides:

> The term "land" when used in any statute, shall include all corporeal hereditaments whatever, and any interest therein, whether an estate for years or a different estate.

Miss. Code Ann. Section 1-23-5 (1972). In *Hays v. Cole*, 221 Miss. 459, 73 So. 2d 258 (1954), this court stated the general rule:

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In 1987 Section 270 of the Mississippi Constitution was amended and in 1988 Miss. Code. Ann. §91-5-31 was amended to add the phrase " as a fee simple or possessory interest ..." In 1992 Section 270 and Miss. Code Ann. § 91-5-31were repealed. The amendments to the constitution and statute and their subsequent repeal have prospective application only and don't affect this case. *Hudson v. Moon*, 732 So 2d 927, 930-31 (Miss. 1999).

> It is well-settled that the law favors the vesting of estates or interests, and that any doubts as to whether the testator so intended should be resolved in favor of the vesting at the death of the testator of any right conferred upon any beneficiary named in the will, even though the enjoyment of such right is to be postponed until the happening of any event or contingency therein mentioned...

Id., p. 472. The law is clear that a vested interest in land such as a remainder to a life estate, is legally owned and held by a devisee regardless of whether the interest includes a right of possession.

In *Johnson v. Board of Trustees*, supra, the testator devised certain property to the predecessor of the Board of Trustees of the Mississippi Annual Conference of the Methodist Church for the benefit of certain needy children, with a direction that the property not be sold for 10 years. When the testator died, her real property was subject to a lease with options for renewal and a sublease. The appellant Johnson acquired quitclaim deeds from testator's heirs at law 13 years after the testator's death while the property was subject to the lease and sublease.

The Board of Trustees contended that the 10-year period of Mortmain did not run against it while the lease was in effect since its interest did not include a present right of possession. The final assignment of error addressed by the court is as follows:

> DID THE COURT ERR IN FINDING THAT THE DEVISE TO THE APPELLEE BECAME EFFECTIVE, WITHIN THE MEANING OF THE MORTMAIN STATUTE, AS OF THE DEATH OF MRS. GEORGE HODGES, RATHER THAN AT THE TERMINATION OF THE TWENTY-FIVE YEAR DEHMER LEASE?

Johnson, 492 So. 2d at 276.Citing *Mississippi College v. May*, 108 So. 2d 703, 712 (1959), this court answered in the negative, holding that all of the interests in land created by Mrs. Hodges' will became effective at her death. The court in *Johnson* noted that in *Mississippi College v. May*, the remainder interest to the residuary devisee, as well as the interest devised to Mississippi College became effective upon the death of Dr. May. Because Mississippi College and the Foreign Mission Board, residuary devisee, were each proscribed institutions under Mortmain, the 10-year period

began running against both upon the testator's death. This is the rule even though the Foreign Mission Boards' interest would become possessory only upon the tenth anniversary of the testator's death, providing that Mississippi College did not exercise its right of disposition before then.

The rule announced in *Mississippi College v. May* and *Johnson v. Board of Trustees* is dispositive of Reynolds Clark contention that the devise of Ben Meador to Father Flanagan's Boys' Home was not effective until the date of death of the life tenant Martha Meador. These cases refute entirely the Appellee's argument that "Father Flanagan's Boys' Home did not become vested with an interest in the property until such time as said will was probated..." and ... "no estate was created in Father Flanagan's Boys' Home until that time." (See Brief of Appellee, p. 15).

Bona Fide Purchaser Status of Charles H. Cole, IV

In its final judgment, the lower court stated that "Charles H. Cole, IV, and Nolan Clark were on notice of the fact that Martha Meador only owned a life estate in the property." (Vol. II, p. 159, R. E. Tab 4).This is plainly in error as to Charles H. Cole, IV. At the time Martha Meador conveyed the subject property to him in 1972 (Exh. 8), there was nothing to impart actual or constructive notice contradicting that Martha Meador owned a fee simple interest to the property, subject only to a non-participating royalty interest outstanding. The record owner of the property, Ben Meador, died in 1962. His sole heir at law was his surviving spouse Martha Meador who had been in possession of the property since Ben Meador died. Father Flanagan's Boys' Home only offered Ben Meador' s will for probate in 1978, 16 years after his death and 5 ½ years after Martha Meador conveyed the property to Charles H. Cole, IV, reserving a life estate. Martha Meador died September 19, 1973. (Vol. I, pp. 65-66; R.E. Tab 3 "Stipulation of Facts"). Cole conveyed the property to Reynolds Clark and Robert Comerio on January 12, 1976, reserving all minerals two years before Ben Meador's will was probated. (Exh. 9).

The recitation in the warranty deed from Martha Meador to Charles H. Cole, IV of consideration of "Ten dollars ($10.00) and other good and valuable considerations" is prima facie evidence that valuable consideration actually existed and that the grantee had no notice of adverse claims. *Mills v. Damson Oil Corp.*, 686 F.2d, 1096, 1101, citing *Hiller v. Jones*, 66 Miss. 636, 6 So. 465 (1889); *Atkinson v. Greaves*, 70 Miss. 42, 11 So. 688 (1892); *Burks v. Moody*, 141 Miss. 370, 106 So. 528, suggestion of error overruled, 141 Miss. 370, 107 So. 279 (1926); *Rollings v. Rosenbaum*, 166 Miss. 499, 148 So. 384 (1933). In *Mills v. Damson Oil Corp.*, supra, the district court held that the appellants failed to prove consideration. The Fifth Circuit Court of Appeals reversed the district court, holding that the burden was on Damson Oil to prove a lack of consideration which it failed to do. The lower court here made the same error when it found "there is absolutely no proof that Charles H. Cole, IV, was a bona fide purchaser who gave consideration for the property, and the parties' stipulation says that he was an invalid and never held a job." (Vol. II, p. 159 "Findings of Fact, Conclusion of Law and Final Judgment Removing Cloud on Title"; R.E. Tab 4). The burden is on Reynolds Clark to prove a lack of consideration. The stipulated fact that Charles H. Cole, IV, was an invalid and never held a job (Vol. I, p. 65, Item 9; R.E. Tab 3 "Stipulation of Facts") is not proof that no consideration was actually paid by him. It does not speak to payment of consideration at all.

Reynolds Clark argues that the conveyance from Cole to Nolan Clark in 1983 (Exh. 18) is invalid because, by that time, the will of Ben Meador had been offered for probate by Father Flanagan's Boys' Home. It is not necessary for Nolan Clark to establish his status as a bona fide purchaser for value without notice as he acquired title to a mineral interest from its vested owner, Charles H. Cole, IV. Where a subsequent purchaser for value takes title from a prior bona fide purchaser for value without notice, the subsequent purchaser is entitled to all the protection the

recording system offered his grantor. *Robertson v. Dombroski*, 678 So. 2d 637, 640 (Miss. 1996); *Reddoch v. Williams*, 129 Miss. 706, 92 So. 831, 835 (1922).

In this context, there is no reason to distinguish between a deed and a will as the source of title. Miss. Code 1942, Section 831, as well as its current version Miss. Code Ann. Section 89-1-1(1972), provide for conveyances of interests in land by writing signed and delivered. A will is within the statute. *Ricks v. Merchants Nat. Bank & Trust Co. of Vicksburg*, 191 Miss. 323, 2 So. 2d 344 (Miss. 1941). Further, the main distinction between a deed and a will is that a deed must pass a present interest in property purported to be conveyed, whereas a will takes effect upon the testator's death. *Watts v. Watts*, 198 Miss. 246, 22 So. 2d 625 (1945); *Hald v. Pearson*, 197 Miss. 410, 20 So. 2d 71 (1944).

In *In Re Will of Wilcher* 994 So. 2d 170, 175 (Miss. 2008), this court held that while there is no statute of limitations for probating a will, a will proponent may be subject to estoppel when there was fraudulent conduct or "long delay in propounding the will for probate during which the property of the estate was transferred to subsequent purchasers for value and without notice of the will."*Id.* Here there is no evidence of fraudulent conduct, but there was long delay in offering Ben Meador's will for probate during which time the property was transferred to a bona fide purchaser.

If *Wilcher* stands for the proposition that the Appellants Hemeter Properties are required to demonstrate detrimental reliance by Charles H. Cole, IV, the record shows that this element is satisfied. In addition to payment of a valuable consideration, Charles H. Cole, IV later conveyed the surface of the subject property and other lands by warranty deed to Reynolds Clark and Robert T. Comerio (Exh. 9). His warranties of title subjected Charles H. Cole, IV to liability for any failure of

title to his grantees Reynolds Clark and Robert T. Comerio[3], as well as potential liability to the subsequent grantees of those two men. *Howard v. Clanton*, 481 So. 2d 272, 275 (1985). This represents a clear change of position by Cole in reliance upon Martha Meador's deed of August 24, 1972. (Exh. 8).

De Novo Standard of Review

Reynolds Clark concludes his Brief for Appellee with an argument that manifest error is the standard of review. Nevertheless, the Appellee recognizes that " the court's finding and judgment were based on stipulated facts... and agreed exhibits" (See page 20, Brief of Appellee Reynolds Clark). The entire case was submitted on stipulation of facts leaving no factual issues to be decided by the chancellor. A chancery court's interpretation of the law is reviewed under a *de novo* standard. This court has declared that when reviewing a chancellor's legal findings, particularly involving the interpretation or construction of a will, the appellate court will apply a *de novo* standard of review. In such case, the manifest error/substantial evidence rule has no application. *In Re Estate of Homburg*, 697 So. 2d 1154, 1157 (Miss. 1997).

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Clark and Comerio conveyed at least 13 lots from the subject lands to third parties by warranty deeds between 1976 and 1978, based on their title to the surface from Charles H. Cole, IV. (Exh. 16). The will of Ben Meador was not offered for probate by Father Flanagan's Boys' Home until March of 1978.

CONCLUSION

The Appellants Hemeter Properties, LLC, urge this Court to reverse the judgment of the chancellor and render judgment in favor of the Appellants Hemeter Properties, LLC, confirming their title against Appellee Reynolds Clark to the subject mineral, royalty and overriding royalty interests, and the proceeds of hydrocarbon production therefrom.

Respectfully submitted this the 5th day of May, 2011.

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CERTIFICATE OF SERVICE

I, James L. Quinn, attorney for Hemeter Properties, LLC, Peachtree Properties, LLC, Gardner Clark Family, LLC, TR Clark, LLC, Charles M. Hamilton, James Steven Gardner, Adrian Cody Clark, Franklin D. Hemeter, Jr., Stephanie A. Barefoot and James Scott Hemeter , do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the Reply Brief of Appellants to the following:

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