THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-01545-COA

JIMMY NELSON KENDRICK JR., EXECUTOR OF THE ESTATE OF MITTIE TOWNE WARREN, DECEASED — **APPELLANT**

v.

JAMES CONNIE WARREN — **APPELLEE**

DATE OF JUDGMENT:	08/27/2019
TRIAL JUDGE:	HON. VICKI R. BARNES
COURT FROM WHICH APPEALED:	WARREN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	WREN CARROLL WAY
ATTORNEY FOR APPELLEE:	DAVID M. SESSUMS
NATURE OF THE CASE:	CIVIL - WILLS, TRUSTS, AND ESTATES
DISPOSITION:	AFFIRMED - 12/08/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CARLTON, P.J., FOR THE COURT:

¶1. This appeal derives from the probate of the estate of Mittie Towne Warren. A dispute arose with respect to the interpretation of Item II of Mittie's will. Item II provided, "I hereby devise my home and furnishings . . . to my husband, James Connie Warren, if he survives me, or, if he survives me, this devise shall be for his lifetime with remainder to Jimmy Nelson Kendrick, Jr." The Warren County Chancery Court determined that the phrase "if he survives me, or, if he survives me" was "unclear." Upon review of the four corners of the instrument and applying several rules of will construction, the chancery court concluded that Item II devises the home and its furnishings to James in fee simple.

¶2. Jimmy Nelson Kendrick Jr. (Jimmy), as executor of the Estate of Mittie Towne Warren, appeals. The Estate asserts that the chancery court erred in interpreting the plain language of Item II as unclear rather than a clear testamentary disposition of a life estate in James Connie Warren (James) with the remainder to Jimmy. The Estate further asserts that even if Item II was "doubtful," the chancery court erred in failing to hold that the property devised in Item II would then pass to Jimmy under the will's residuary clause. We affirm the chancery court's final judgment for the reasons stated below.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

¶3. Mittie Towne Warren (Mittie) died testate on November 18, 2016. Her estate was opened, and her will was admitted for probate on December 21, 2016, in the Warren County Chancery Court. Mittie's nephew, Jimmy, was appointed as the executor of her estate under her will. Jimmy, as the executor of Mittie's estate, is the appellant (the Estate). Mittie's widower, James, filed a "Petition for Order Directing Payment and for Interpretation of Will and Declaratory Judgment" seeking an interpretation of Item II of Mittie's will, which provides, "I hereby devise my home and furnishings . . . to my husband, James Connie Warren, if he survives me, or, if he survives me, this devise shall be for his lifetime with remainder to Jimmy Nelson Kendrick, Jr."

¶4. In his petition, James asserted that the language of Item II was "confusing and conflicting." James, relying on several rules of will construction, asserted that Item II vests in him a fee simple interest in Mittie's home and the furnishings in it.

¶5. The chancery court entered an order on June 19, 2019, setting James's petition for an August 7, 2019 hearing.

¶6. On July 30, 2019, the Estate responded to James's petition. The Estate contended that Item II "plainly and unambiguously vests James Connie Warren with a life estate in the Drummond Street property, and vests the remainder interest in Mittie's nephew, Jimmy Nelson Kendrick." Alternatively, the Estate asserted that "[e]ven if the wording of Item II is attacked as 'ambiguous,' which it is not, then the Court looks to the four corners of the document to ascertain the testator's intent." In this regard, the Estate asserted that such a review also conveys Mittie's intent to vest James with a life estate and the remainder interest to Jimmy.

¶7. Although, as noted, a hearing on this matter was ordered to take place on August 7, 2019, it does not appear from the record that a hearing occurred. The record does not contain a hearing transcript. On August 27, 2019, the chancery court entered its final judgment based upon "the pleadings, the briefs of the attorneys[,] and the law applicable thereto." In its final judgment, the chancery court determined that "[t]he language 'if he survives me, or if he survives me' [in Item II] is unclear. The initial language of the clause devises a fee simple absolute to [James]. However, the succeeding language of the clause reduces the fee simple absolute to a life estate." Reviewing the four corners of the will and applying several rules of will construction, the chancery court determined that "Item II of the decedent's will devises the home and furnishing[s] at 3138 Drummond Street, Vicksburg, Mississippi, to

[James] in fee simple absolute."

¶8. The Estate appeals. As noted, the record does not contain a hearing transcript. We further observe that in its designation of the record, the Estate did not designate a hearing transcript or refer to any hearing having taken place with respect to James's petition.

STANDARD OF REVIEW

¶9. "Questions of will construction[, as in this case,] . . . are questions of law and are reviewed under a de novo standard." *Nichols v. Phillips (In re Estate of Brill)*, 76 So. 3d 695, 698 (¶13) (Miss. 2011); *see also Adams v. Carney (In re Estate of Carney)*, 758 So. 2d 1017, 1019 (¶8) (Miss. 2000) ("[W]hen reviewing a chancellor's legal findings, particularly involving the interpretation or construction of a will, this Court will apply a de novo standard of review."); *Terry v. Phelps (In re Estate of Phelps)*, 180 So. 3d 835, 838 (¶13) (Miss. Ct. App. 2015). No extrinsic evidence or testimony was offered by either party or considered by the chancery court.

DISCUSSION

I. Item II of the Will

¶10. For ease of reference, we reiterate Item II of Mittie's will:

> I hereby devise my home and furnishings . . . to my husband, James Connie Warren, if he survives me, or, if he survives me, this devise shall be for his lifetime with remainder to Jimmy Nelson Kendrick, Jr.

The Estate asserts that in Item II, Mittie "spoke clearly her intent to vest James with a life estate, if her husband survived her, 'for his lifetime,' with 'remainder to Jimmy.'" In

contrast, James asserts that the two clauses in Item II of Mittie's will are conflicting. He further asserts that employing the canons of will construction supports the chancery court's determination that Mittie devised her home and its furnishings to him in fee simple and not a life estate with the remainder to Jimmy. We agree with James for the reasons addressed below.

¶11. Our analysis in this case is guided by the principle that "[f]or purposes of testamentary construction, it is the responsibility of a reviewing court to determine and respect the intent of a testator." *Old Ladies Home Ass'n v. Junius Ward Johnson Mem'l Young Men's Christian Ass'n (In re Estate of Williams)*, 672 So. 2d 1173, 1175 (Miss. 1996); *see Blount v. Papps (In re Estate of Blount)*, 611 So. 2d 862, 866 (Miss. 1992). In this regard, "[w]here a will is susceptible to more than one construction, [as here,] it is [our duty] . . . to adopt that construction which is most consistent with the intent of the testator." *Estate of Williams*, 672 So. 2d at 1175. In *Mississippi State University Foundation Inc. v. Quarles (In re Estate of Homburg)*, 697 So. 2d 1154, 1157-58 (¶11) (Miss. 1997), the Mississippi Supreme Court explained that "[i]n determining the testatrix's intent, the Court is limited to the four corners of the Will [as aided by] . . . [t]he four cardinal rules of construction[.]" The rules of construction provide:

> First, the prime inquiry is the intention of the testatrix[.] Second, the law favors the vesting of the estates at the earliest possible moment[.] Third, in the absence of a clear intent to the contrary, that construction should be adopted which will result in a just and reasonable disposition of the property[.] Fourth, life tenancies are not favored.

Id. at 1158 (¶11).

¶12. In determining Mittie's intent with respect to the conflicting clauses in Item II of Mittie's will, we begin by reviewing the entire will, bearing in mind that "[t]he language used in a single clause or sentence does not control against the purposes and intention as shown by the entire will." 9 Jeffrey Jackson, Mary Miller & Donald E. Campbell, *Encyclopedia of Mississippi Law* § 75:61, Westlaw (database updated October 2019).

¶13. Mittie's will contains ten "Items." In three other Items of her will Mittie also devises real property to James. In each of these other Items, James is the first taker, just as he is in Item II. In the other three Items, however, Mittie clearly and unequivocally devises a life estate to James, with the remainder to go to Connie Kendrick in Item IV, and the remainder to go to Jimmy in Items V and VII. Also, all three of these Items contain an identical second sentence clearly stating how any net proceeds must be divided between James and the remainderman if James sells the subject property during his lifetime.

¶14. We find that these provisions indicate that when Mittie intended to devise a life estate she clearly knew how to do so, and she also clearly knew how to address the issue of what would happen should James sell these properties. Neither of these factors are present in Item II of Mittie's will, which is a point we find indicates Mittie's intent that her home and the furnishings covered by Item II are to go to James in fee simple, as stated in the first clause of Item II: "I hereby devise my home and furnishings . . . to my husband, James Connie Warren, if he survives me[.]" In short, we find that reading Item II in the context of Mittie's

entire will shows that Mittie intended that James inherit the property covered by Item II in fee simple.

¶15. This determination is also supported by the other "cardinal rules" of will construction stated above. As we have addressed, the first cardinal rule—the testatrix's intent—is the primary inquiry. The second rule provides that "the law favors the vesting of the estates at the earliest possible moment." *Estate of Homburg*, 697 So. 2d at 1158 (¶11). In this case, that estate is a fee simple estate in James, as this is the first vested estate created under Item II. *See Estate of Blount*, 611 So. 2d at 863, 866-67.

¶16. In *Estate of Blount*, 611 So. 2d at 863, the supreme court interpreted a decedent's will in which he gave his wife an absolute fee simple interest in his personal property in one sentence, but in the following sentence purported to give his wife a life estate in that property with the remainder to his named children. The supreme court held that the wife obtained a fee simple interest in the property, recognizing that (among other rules), the second ("early vesting") rule of construction serves to "buttress[]" the principle announced in *Harvey v. Johnson*, 111 Miss. 566, 573, 71 So. 824, 826 (1916), that "[w]here an interest or estate is given in one clause of a will in clear and decisive terms, it cannot be taken away [by] . . . application of a subsequent clause."[1] *Id*. at 866-67. We understand the supreme court's analysis to mean that in applying the second rule of construction, we look to the *first*

[1] We discuss the *Harvey* rule in further detail below.

described vested interest in seeking to determine Mittie's intent under Item II of the will.[2]

¶17. The third rule provides that a construction "should be adopted which will result in a just and reasonable disposition of the property" where there is no "clear intent to the contrary." *Estate of Homburg*, 697 So. 2d at 1158 (¶11). We find that this rule is likewise met in determining that James was devised a fee simple estate in the home and its furnishings under Item II. In examining the entire will, we find no clear intent to the contrary when Item II is compared to Items IV, V, and VII in which James is plainly and unambiguously devised a life estate and specific instructions are given on dividing any net proceeds should he sell the property during his lifetime. Those details are not found in Item II.

¶18. The fourth rule of construction that "the law does not favor life tenancies," *id.*, is also met in our determination that James inherited the home and furnishings under Item II in fee simple.

¶19. Additional principles relating to determining a testatrix's intent also support this determination. For example, Mittie's intent that James inherit under Item II in fee simple is supported by the rule that "the law favors that construction of a will which conforms most nearly to the general law of inheritance[.]" *Boyd v. Belin (In re Boyd's Estate)*, 228 Miss.

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[2] Both alternatives in Item II of the will vest at the testatrix's death. *See McClelland v. Bank of Clarksdale*, 238 Miss. 557, 571, 119 So. 2d 262, 267 (1960) ("[A] gift of a life estate with remainder to a named person creates a vested remainder on the death of the testator."). In light of *Estate of Blount*, however, we look to the *order in which these vested interests appear* in applying the second rule of construction to discern Mittie's intent under Item II of her will.

526, 533, 87 So. 2d 902, 904 (1956). Under the general law of intestate descent and distribution, "[i]f a married woman die owning any real or personal estate . . . it shall descend to her husband and her children . . . in equal parts[.]" Miss. Code Ann. § 91-1-7 (Rev. 2018). Thus James's inheriting the home and furnishings under Item II in fee simple conforms with the general law of inheritance in this case where there are no children.

¶20. Mittie's intent that James inherit under Item II in fee simple is also supported by the principle that "[i]n interpreting wills, favor will be accorded to those beneficiaries who appear to be the special objects of the testator's bounty[.]" *New Orleans Baptist Theological Seminary v. Lacy*, 219 So. 2d 665, 672 (Miss. 1969); *see also Tinnin v. First United Bank of Miss*., 570 So. 2d 1193, 1195 (Miss. 1990) (stating that "[t]he law favors beneficiaries who appear to be the special objects of the testator's bounty when an instrument is ambiguous and capable of two constructions"); *see Burgess v. Granberrry (In re Granberry's Estate)*, 310 So. 2d 708, 715 (Miss. 1975) (Gillespie, C.J., dissenting) (recognizing that the testatrix's children, "along with [her] widow[er] are the primary objects of [her] bounty"). In this regard, "where the disposing language is ambiguous or susceptible of more than one construction, the *first taker of a devise* or bequest is to be regarded as the primary object of the testator's bounty[.]" 96 C.J.S. *Wills* § 951, Westlaw (database updated June 2020) (emphasis added) (citing *White v. Wachovia Bank & Tr. Co.*, 251 F. Supp. 155, 161-62 (M.D.N.C. 1966) (recognizing that "the first taker means the primary beneficiary of a gift or the first person to receive benefit from it")). James is Mittie's widower and the "first taker"

in Item II as well as Items IV, V, and VII. Under the above-stated principles, James is plainly the "special object of [Mittie's] bounty." *New Orleans Baptist Theological Seminary*, 219 So. 2d at 672.

¶21. Mississippi Code Annotated section 89-1-5 (Rev. 2011) also supports our determination that James inherited the home and furnishings in Item II in fee simple, as follows:

> Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, *shall be deemed a fee-simple* if a less estate be not limited by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby.

(Emphasis added). This rule has long been recognized under Mississippi common law as well, as stated in *Harvey*, 111 Miss. at 573, 71 So. at 826:

> Where two clauses of a will create an estate in several devises named, and they are not united grammatically by the expression of a common purpose, each clause must be considered and construed separately, and without relation to the other . . . .
>
> Where an interest or estate is given in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon the meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words giving the interest or estate.

¶22. Similarly, in *Martin v. Eslick*, 229 Miss. 234, 258, 90 So. 2d 635, 643 (1956), the supreme court recognized that "[a]n absolute devise may not be reduced to a life estate by any succeeding language which is inferior in clarity or certainty in the devising estate." More recently in *Dedeaux v. Dedeaux (In re Matter of Estate of Dedeaux)*, 584 So. 2d 419, 420

(Miss. 1991), the Mississippi Supreme Court relied on the above-stated principle from *Harvey* and *Martin* in interpreting a will provision initially devising the decedent's "earthly possessions" to his wife, then in the following sentence directing that certain items were to be devised to other members of the family after his wife's death. The supreme court affirmed the chancellor's determination that the decedent left all his property in fee simple to his widow. *Id.* at 420-23.

¶23. In this case, we find that the first clause in Item II of Mittie's will, "I hereby devise my home and furnishings . . . to my husband, James Connie Warren, if he survives me" clearly devises Mittie's home and furnishings to James in fee simple in accordance with section 89-1-5, and the phrase "or, if he survives me," following this clear fee simple devise is confusing and renders the subsequent life estate restriction "inferior in clarity or certainty" because it creates a superfluous and unnecessary alternative disposition. Under the rule of construction cited above, we find that the plainly stated fee-simple estate devised to James cannot be diminished by the subsequent confusing alternative "or, if he survives me, this devise shall be for his lifetime with remainder to Jimmy Nelson Kendrick, Jr." *See Estate of Dedeaux*, 584 So. at 420-23; *Martin*, 229 Miss. at 258, 90 So. 2d at 643; *Harvey*, 71 So. at 826.

¶24. For all the above-stated reasons, we find that Mittie devised her home and its furnishings to James in fee simple, and thus we reject the Estate's contention that James received a life estate with the remainder to Jimmy under Item II of Mittie's will.

¶25. The Estate also asserts on appeal that after determining that Item II of the will was unclear, the chancery court erred in failing to conduct a "full hearing as to extrinsic evidence affecting the circumstances surrounding the will and of the parties."

¶26. In response, James states in his appellee's brief that "[t]he fact is that [the Estate] did not desire to present parole evidence to the [chancery] [c]ourt as [the Estate] did not request the opportunity to do so. Instead the parties agreed to submit the issue to the Chancellor under the rules of will construction." The Estate did not deny this statement or offer any rebuttal at all to this statement in its reply brief.

¶27. Although the record does not contain any agreement by the parties to submit the issue of interpreting Item II based upon "the rules of will construction," we nevertheless find from the record that the Estate waived its argument that the chancery court should have considered extrinsic evidence in interpreting Item II of Mittie's will.

¶28. In his petition, James requested that the chancery court interpret Item II of Mittie's will. The Estate made no argument whatsoever in its response to that petition that the chancery court must consider extrinsic evidence to resolve the issue before it. Rather, the Estate contended as an alternative argument that "if the wording of Item II is attacked as 'ambiguous,' . . . then the Court looks to the four corners of the document to ascertain the testator's intent." The Estate then cited to rules of will construction and the language of the will in support of its contention that Mittie intended to convey a life estate to James in Item II of her will with the remainder to Jimmy. The Estate *did not* assert that if Item II were

deemed ambiguous, the chancery court must consider extrinsic evidence to determine Mittie's intent. Indeed, the Estate did not attach any extrinsic evidence to its response for the chancery court's consideration. As such, we find that the Estate waived this issue: "It is axiomatic that the trial judge cannot be put in error on a matter which was not presented to him for decision." *Waller v. Wall*, 273 So. 3d 717, 721 (¶16) (Miss. 2019) (internal quotation mark omitted).

¶29. We find that this rule is particularly applicable here, where the record reflects that the chancery court *did* set this matter for an August 7, 2019 hearing pursuant to its order dated June 19, 2019. The record, however, contains no transcript of any hearing, no evidence that testimony regarding Mittie's intent was taken in any manner, and no evidence that any extrinsic evidence was provided to the chancery court. Nor did the Estate raise any issue that the chancery court should have considered extrinsic evidence, or attach any such evidence, in a motion for reconsideration or in any other post-judgment motion. The issue is waived.

II. The Residuary Clause of the Will

¶30. As its second assignment of error, the Estate asserts that even if Item II of the will was "doubtful," the chancery court erred because it did not determine that Mittie's home and its furnishings should then pass to Jimmy under the will's residuary clause. Apparently in support of this assignment of error, the Estate makes the following "observation" in its appellant's brief: "Observation: If the provisions of Item II are indeed doubtful, why is not Item II void, leaving Mittie's home to pass under the residuary clause (Item X of Mittie's

will) of which Jimmy is the sole beneficiary?" We do not find this "observation" convincing in this case in the light of our review of the will as a whole and the rules of construction we have applied in discerning Mittie's intent that James, her widower, inherit her home and its furnishings in fee simple.

¶31. We find further guidance on this point in the rule recognized by the supreme court in *Keeley v. Adams*, 149 Miss. 201, 115 So. 344, 345 (1928): "The will must be construed as made. Courts have no authority to either add to, or take from, a will, *except surplusage in the language of a will may be disregarded, if necessary, to get the intention of the testator*[.]" (Emphasis added); *see Estate of Homburg*, 697 So. 2d at 1158 (¶11) ("In appropriate cases this Court may order modification or excision of testamentary terms incapable of performance or enforcement for whatever reason."). In this case, we construe the alternative life estate disposition as surplusage in order to reach Mittie's intent as we have ascertained from the four corners of Mittie's will and in applying the rules of will construction discussed above. We find that the Estate's assertion that the property devised under Item II should go to Jimmy under the will's residuary clause without merit.

¶32. **AFFIRMED.**

WILSON, P.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE AND McCARTY, JJ., CONCUR. BARNES, C.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.