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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000357-MR

ELIZABETH BONVILLAIN AND
ALICE HEINLEIN — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 15-CI-04186

JOHN M. O'BRYAN, INDIVIDUALLY
AND IN HIS CAPACITIES AS EXECUTOR
OF THE ESTATE OF TERRY O'BRYAN
DAUGHERTY, TRUSTEE OF THE JUSTIN
MICHAEL O'BRYAN REVOCABLE TRUST
DATED JANUARY 22, 2013, AND TRUSTEE
OF THE LAUREN THERESE O'BRYAN
REVOCABLE TRUST DATED JANUARY
22, 2013; AND PREVENTION RESEARCH
INSTITUTE, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND D. LAMBERT, JUDGES.

DIXON, JUDGE: Appellants, Elizabeth Bonvillain and Alice Heinlein (collectively "Bonvillain"), appeal from an order of the Fayette Circuit Court granting summary judgment in favor of Appellee, John O'Bryan, individually, and in his capacities as Executor of the Estate of Terry O'Bryan Daugherty, Trustee of the Justin Michael O'Bryan Revocable Trust dated January 22, 2013, and Trustee of the Lauren O'Bryan Revocable Trust dated January 22, 2013 ("O'Bryan"). Finding no error, we affirm.

On October 1, 1998, Terry O'Bryan Daugherty (Ms. Daugherty), now deceased, assigned her copyright interests in certain intellectual property[1] to Prevention Research Institute, Inc. ("PRI") pursuant to a written contract ("Agreement"). As consideration for her assignment, PRI agreed to pay Ms. Daugherty a 7.5% royalty for the sale and/or use of the intellectual property, with an annual cap of $75,000. The Agreement also provided, "The terms of this Agreement may not be amended, waived or terminated orally, but only by an instrument in writing signed by all parties[,]" and "This agreement shall inure to the benefit of and bind the parties hereto and their respective heirs, legal representatives, successors and assigns." Finally, the Agreement recited that its term "shall remain and continue in force until the expiration of the copyrights in the 1985 version of the Program . . . ." On May 5, 1999, the parties modified the

[1] Ms. Daugherty authored or co-authored with her husband numerous books concerning methods for educating young people about the effects of drugs and alcohol. The books were published by PRI, an organization that Ms. Daugherty helped found and of which she later became a salaried employee.

Agreement to cap the amount of royalties that Ms. Daugherty would receive at $90,000 annually.

Subsequently, on June 3, 2011, Ms. Daugherty and PRI amended the Agreement to allow Ms. Daugherty to designate to whom the royalties were to be paid upon her death. (2011 Amendment). The Amendment provided:

> Rather than PRI having to determine the appropriate parties for payment in the event of Ms. O'Bryan-Daugherty's death, and her heirs experiencing delays in payment until such verifications can be made, the parties wish to amend the Agreement to provide a mechanism for Ms. O'Bryan-Daugherty to designate a Beneficiary to receive Royalties.

Accordingly, the Amendment modified Paragraph 11 of the Agreement in its entirety to read as follows:

> This Agreement shall inure to the benefit of and bind the parties hereto and their respective heirs, legal representatives, successors and assigns. "Heirs" for this purpose shall be the beneficiary(ies) designated by Ms. O'Bryan-Daugherty in accordance with this paragraph. Upon the death of Ms. O'Bryan-Daugherty before all Royalties due hereunder have ceased, the remaining Royalties payable during the Term shall be paid to her designated Beneficiary or Beneficiaries, as determined based upon the last writing actually delivered to PRI, on a form similar to that attached hereto as Annex A.

Annex A (referred to hereinafter as the beneficiary designation form) directed that O'Bryan receive 80% of the royalties with a niece and Ms. Daugherty's step-children receiving the remaining 20%. Bonvillain[2] was not mentioned in the 2011

[2] Appellants Bonvillain and Heinlein are Ms. Daugherty's sisters.

Amendment. Further, the 2011 Amendment expressly acknowledged that the Agreement's term expired in 2060 (75 years from 1985).

On January 22, 2013, Ms. Daugherty executed a Last Will and Testament. After the payment of taxes, Ms. Daugherty devised the "rest, residue and remainder" of her estate as follows: O'Bryan (son) – 30%; Carrie Alish Valeska Keith (niece) – 30%; Elizabeth Bonvillain (sister) – 30%; Alice Heinlein (sister) – 5%; Bonnie Valeska (sister) – 5%.

Shortly thereafter, on March 6, 2013, Ms. Daugherty and PRI again amended the Agreement to allow Ms. Daugherty to designate to whom the royalties would be paid upon her death ("2013 Amendment"). The 2013 Amendment included substantially the same language in the Agreement as the 2011 Amendment, with the substituted Annex A/beneficiary designation form directing that the royalties would be paid to O'Bryan (90%) and the two trusts for Ms. Daugherty's minor grandchildren (10%) upon her death. Again, Bonvillain was not mentioned in the 2013 amendment.

On June 2, 2013, Ms. Daugherty died testate. Her will was ordered to be probated by the Fayette District Court on July 8, 2013, with O'Bryan as Executor. On August 11, 2015, O'Bryan filed a final settlement statement in the probate court proceeding stating that the total value of Ms. Daugherty's estate was $24,915.40. Upon learning that future royalties had been excluded from the estate based upon the beneficiary designation form, Bonvillain filed an objection to approval of the final settlement statement. Therein, she argued that the beneficiary

designation was an invalid testamentary disposition of property because it did not comport with the statutory requirements for a will.

Subsequently, on November 13, 2015, Bonvillain filed an action in the Fayette Circuit Court seeking a determination that the beneficiary designation form was unenforceable as a matter of law and that any future royalty payments should be distributed under the residuary clause of Ms. Daugherty's will. Both parties thereafter filed motions for summary judgment. Following oral arguments, the trial court granted summary judgment on February 26, 2016, in favor of O'Bryan, finding that the Agreement as amended by the beneficiary designation form was a non-testamentary contract. The trial court also concluded that the agreement was a "conveyance" within the terms of Kentucky Revised Statute (KRS) 391.360, as well as a document "consistent with and similar to the other types of instruments discussed in KRS 391.360." This appeal ensued.

When reviewing the grant of a summary judgment, the question is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of

fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In this Court, Bonvillain argues that the disposition of copyrights and royalties of any kind typically pass as personal property under a decedent's will or, if there is no will, under the laws of intestate succession of the decedent's resident state. Further, Bonvillain contends that Ms. Daugherty's attempt to make a nontestamentary transfer of the royalties in the beneficiary designation form was ineffective because it does not qualify as a nontestamentary instrument under KRS 391.360. We must disagree.

While Bonvillain is certainly correct that copyright interests and interests in future royalties *may* pass through the probate process, there is no statutory requirement that they do so. Rather, "[t]he ownership of a copyright may be transferred in whole or in part **by any means of conveyance or by operation of law**, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." 17 U.S.C. §201(d)(1) (emphasis added). In other words, § 201(d)(1) simply states that copyrights "may" be transferred by will, as did the old 1909 Copyright Act. However, the remainder of the statute allows, and indeed presupposes, that copyright interests may also be transferred in other ways, such as transfers by ordinary conveyance or operation of law.

The trial court found that that Ms. Daugherty's copyright interests were personal property that she assigned or transferred to PRI in exchange for PRI's obligation to make royalty payments for a set term. Accordingly, the trial court

concluded that this is a contract rather than testamentary matter. Bonvillain, on the other hand, maintains that the Agreement was not a valid nontestamentary document because it does not fall with the scope of KRS 391.360. KRS 391.360 provides in relevant part:

> (1) A written provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certified or uncertified security account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. These written provisions shall include, but not be limited to, written provisions which provide that:
>
> (a) Money or other benefits due to, controlled, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed before, at the same time, or after the instrument is executed;
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> (b) Money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or the promissor before payment or demand; or
>
> (c) Any property, controlled by or owned by the decedent before death, which is the subject of the instrument shall pass to a person the decedent designates either in the instrument or in a separate writing, including a will, executed before, at the

> same time, or after the instrument is executed.

The Agreement expressly recited that it was an assignment. "Assignment" is defined as "[t]he transfer of rights or property." BLACK'S LAW DICTIONARY 136 (9th Ed. 2004). "Conveyance" is similarly defined as "[t]he voluntary transfer of a right or of property." BLACK'S LAW DICTIONARY 383 (9th Ed. 2004). Given the almost identical definitions of the terms, we must agree with the trial court that the Agreement, which is clearly an assignment, is also a conveyance, and falls squarely within the identified categories to which KRS 391.360(1) applies.

We find no merit in Bonvillain's argument that "conveyance" as used in KRS 391.360 was intended to be synonymous with "deed," and applies only to transfers of interests in real property. Had the General Assembly intended to limit the term "conveyance" to only to real property, it would have specified "conveyance by deed or will" in the terms of KRS 391.360 since KRS 382.010 mandates that transfers of real property be made by deed or will.

We also agree with the trial court that in addition to being a conveyance, the Agreement was "of a similar nature" to the instruments identified in KRS 391.360(1). Both a life insurance policy, an instrument identified in KRS 391.360 and an annuity, which has been held to be an instrument of a similar nature[3], involve a contract between two parties whereby one party transfers a thing of value for the right to receive an agreed upon benefit in the future. The term of each is

[3] *In re Estate of Jung*, 616 N.W.2d 118, 122 (Wis. App. 2000).

finite. With an insurance policy, the anticipated event triggering payment may or may not occur before the last premium payment is due.

As noted by a panel of this Court in *Haste v. The Vanguard Group, Inc.*, 502 S.W.3d 611 (Ky. App. 2016),

> Life insurance policies, annuities and IRAs are similar in the respect that all arise from contractual relationships where one party agrees, "for valuable consideration . . . to pay a sum of money on specified contingency to a designated person called a beneficiary." *Ping v. Denton*, 562 S.W.2d 314, 316 (Ky. 1978). In those instances, the proceeds pass automatically to the beneficiary. However, during the life of the owner, the beneficiary's interest is revocable by the owner and contingent on the beneficiary being designated as such when the owner dies. [*Sadler v. Buskirk*, 478 S.W.3d 379, 382 n. 2 (Ky. 2015).]

Id. at 615. Similarly, the Agreement herein required Ms. Daugherty to transfer her copyright interests and PRI agreed to pay her a stream of royalties for the set term of the Agreement.

Bonvillain contends that to include royalty agreements within the purview of KRS 391.360 would effectively nullify the requirements of the will statute, KRS 394.040, because it would be difficult to envision any instrument not falling within KRS 391.360. We disagree. As with all instruments enumerated in KRS 391.360, a royalty agreement is a contract that involves multiple parties and imposes present, binding, and enforceable obligations upon those parties. *See DeLapp v. Anderson*, 305 Ky. 333, 203 S.W.2d 388, 389 (1947). A will, on the other hand, is revocable at any time and does not take effect until the testator's death. This fundamental difference necessarily limits the types of instruments encompassed by

KRS 391.360. If the instrument at issue is characterized by any attributes of a will, it cannot fall within KRS 391.360, and the requirements of KRS 394.040 apply.

Bonvillain further argues that even if the royalty agreement falls within KRS 391.360, the purported designation of beneficiaries is nevertheless invalid because the designation does not comply with the second part of the statute since the royalties were not "due to, controlled, or owned by a decedent before death." KRS 391.360(1)(a). Again, we disagree. While the royalties may not have existed at the time the parties entered into the Agreement, Ms. Daugherty had a fully vested inchoate interest in the right to royalties upon execution of the Agreement and transfer of her copyright interests that could not be changed absent her consent. Thus, although the amount of the royalty payments could vary depending on PRI's use of the copyright, Ms. Daugherty had an absolute property right in the royalties that was in existence and fully paid for at the time of her death.

Even if we were to conclude that the Agreement fell outside the scope of KRS 391.360, common law would dictate that it still did not need to satisfy the requirements of a will to be valid. Kentucky law is clear that contracts may contain executory clauses intended by the parties to take effect upon the occurrence of a certain future event without rendering the contract testamentary. *More v. Carnes*, 309 Ky. 41, 214 S.W.2d 984 (1948). So long as there are present, existing contractual rights of the parties upon execution, the document is not testamentary in nature. *Id.* Kentucky's then-highest court in *More* noted that the contract at issue (a partnership agreement) was operative from the day it was

signed, and created immediate obligations and rights which the parties were entitled to have performed. *Id.* The Court concluded that simply because the partnership agreement contained a provision that in the event of the death of one of the partners, his interest in the partnership became the property of the other partners, such did not render the contract testamentary in nature. *Id.* Accordingly, the Court stated that "[i]t is this element of present existing contractual rights that distinguishes this case from those where the instrument has been declared testamentary in character." *Id.* at 988 (*quoting Ireland v. Lester*, 298 N.W. 488, 489 (Mich. 1941)).

The trial court herein was persuaded by the reasoning in *Bendit v. Intarante*, 175 A.2d 222, 225, 229 (Superior Court of New Jersey, App. Division), wherein the New Jersey court applied the same rationale to the transfer of property to a third party. Therein, the court noted,

> The rule is generally well-settled that a contract creating a present obligation is not testamentary merely because the obligation is to be performed wholly or in part after the death of the obligor. The fact that the contract provides that the time of death of one of the parties determines the time for performance does not of itself make the contract testamentary. A provision in a contract calling for installment payments and, further, that in the event of the creditor's death the balance due will be paid to a designated person, has been held not to be testamentary in nature.
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> . . . .
>
> An otherwise valid and binding contract for the payment of monies due or to become due to the promisee is not invalidated because one of its provisions calls for

> payment of the balance due to a third party, in the event of the promisee's death before receiving payment in full. *Franklin Washington Trust Co. v. Beltram*, supra; *Reynolds v. Danko, supra; Legro v. Kelley, supra; Michaels v. Donato, supra; Kerrigan's Estate v. Joseph E. Seagram & Sons, supra*. Thus, where a substantial element of the decedent's purpose in making the contract relates to objectives to be accomplished during his lifetime (here the sale of his business and an assurance of an income of $100 a week for ten years) an incidental provision covering the contingency of his death prior to payment in full will not be defeated as a testamentary disposition.

(citation omitted). Herein, the "substantial objective" Ms. Daugherty had in entering into the Agreement with PRI was to transfer her copyright interests to PRI in exchange for the right to royalties for the term of the Agreement. In other words, the "substantial objective" was to create a binding agreement that set forth the parties' immediate rights and responsibilities.

There can be no genuine dispute that the original 1996 Agreement between Ms. Daugherty and PRI was a valid contract assigning to PRI her copyright interests in exchange for the payment of royalties. In exchange for Ms. Daugherty immediately assigning her copyright interests to PRI, PRI agreed to pay royalties first to Ms. Daugherty and then to her "heirs, legal representatives, successors and assigns" upon her death. We are of the opinion that the Agreement, despite having an executory clause intended to take effect upon Ms. Daugherty's death, was not testamentary in nature because its terms took effect and created binding and enforceable obligations upon the parties immediately upon its execution.

For the reasons set forth herein, the order of the Fayette Circuit Curt is affirmed.

ALL CONCUR.

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