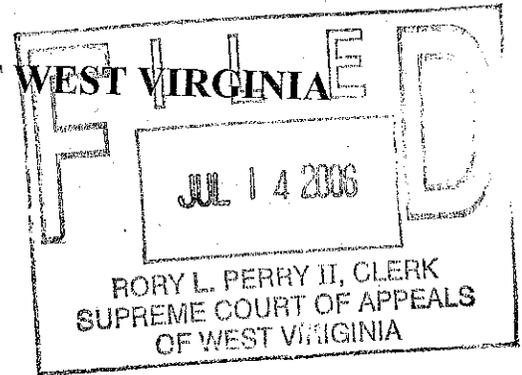


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OPHA L. KEITH, ESTATE, BY
SHARON BUCKLAND, EXECUTRIX,

Plaintiff



v.

No. 33131

DAVID W. KEITH,

Defendant.

CERTIFIED QUESTIONS FROM THE CIRCUIT COURT OF
MONROE COUNTY, WEST VIRGINIA
MONROE COUNTY CIVIL ACTION NO. 04-C-86

DEFENDANT'S BRIEF ON CERTIFIED QUESTIONS

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DEFENDANT'S BRIEF ON CERTIFIED QUESTIONS

I. STATEMENT OF THE CASE AND NATURE OF PETITION

This matter arises out of a dispute as to the entitlement to the proceeds of a policy of insurance insuring a structure and personal property in which Plaintiff held a life estate and Defendant held a remainder interest. This action was commenced by Plaintiff, Opha L. Keith¹, as a declaratory judgment action pursuant to West Virginia Code § 55-13-1, *et seq.*, against Defendant, David W. Keith, and the insurer, Municipal Mutual Insurance Company. Subsequent to the filing of Plaintiff's Complaint, Municipal Mutual Insurance Company tendered the insurance policy proceeds of \$54,000.00 to the Monroe County Circuit Clerk and was voluntarily dismissed as a party hereto. This matter is currently before the Court as result of an Order Regarding Certified Questions entered by the Circuit Court of Monroe County on February 2, 2006.

II. BRIEF FACTUAL STATEMENT

The facts in this matter are essentially undisputed. Emogene Keith, Plaintiff, Opha L. Keith's wife and Defendant, David W. Keith's mother, passed away in 1993. Under the Last Will and Testament of Emogene Keith, admitted to probate in 1993, Plaintiff was devised a life estate and Defendant was devised a remainder interest in the Decedent's entire estate. A copy of the Last Will and Testament of Emogene Keith is attached as Exhibit "A" to Defendant's Motion for Partial Summary Judgment. Said estate included, *inter alia*, real property located in Monroe County, West Virginia, a home located on said real property, and items of personal property located within said

¹This action was instituted by Opha L. Keith, however, during the pendency of this matter, Opha L. Keith passed away. As a result, Opha L. Keith's estate, by and through Sharon Buckland, Executrix, was substituted as the Plaintiff herein.

home.

In or about 1989, Emogene Keith and Plaintiff applied for and were issued a policy of insurance covering the above described home and personal property by Municipal Mutual Insurance Company (Policy No. 6109-184). Following the passing of Emogene Keith, Plaintiff continued to pay the premiums on said insurance policy. Despite her passing in 1993, Emogene Keith was never removed as a named insured under the Municipal Mutual Insurance Company policy

On or about January 17, 2004, the home and personal property in which Plaintiff held a life estate and Defendant held a remainder interest, and which was insured by the above referenced Municipal Mutual Insurance Company policy, were consumed by fire. Subsequent to said fire, Plaintiff made a claim for this loss under the Municipal Mutual Insurance Company policy. Thereafter, on February 24, 2004, Municipal Mutual Insurance Company issued a check in the amount of \$54,000.00 payable to Opha L. Keith, Emogene Keith, and David W. Keith.² Plaintiff and Defendant were unable to agree as to the distribution of the insurance proceeds, therefore, Plaintiff commenced the instant litigation.³

Since the initiation of this litigation, by agreement of the parties, the check issued by Municipal Mutual Insurance Company has been voided and Municipal Mutual Insurance Company has deposited \$54,000.00 with the Clerk of the Court.

²David W. Keith was included on the proceeds check as he possessed a remainder interest in the property pursuant to Emogene Keith's will. Municipal Mutual Insurance Company did not pay the entire proceeds to Plaintiff as Plaintiff only owned a fractional interest in the covered property. See August 2, 2004 letter from Brian Taylor, Claims Manager, to Joseph Aucremanne, attached to Defendant's Motion for Summary Judgment as Exhibit "B."

³In response to Plaintiff's declaratory judgment action, Defendant filed a counterclaim for waste based on Plaintiff's negligence in starting the fire that consumed the property in question. Said counterclaim is not before the Court at this time.

III. CERTIFIED QUESTIONS

The Order Regarding Certified Questions entered by the Circuit Court of Monroe County on February 2, 2006, posits the following questions:

1. In the event that certain improvements to real estate in the possession of a life tenant, insured against fire on a policy obtained by the life tenant under which only the life tenant is a beneficiary, are destroyed by fire, does the remainderman have an interest in the insurance proceeds though he is neither a named insured or paid any premiums?
2. In the event that the remainderman is determined to have an interest in the insurance proceeds, is West Virginia Code § 43-2-1, *et seq.*, appropriate to determine the share of the proceeds to be paid to the remainderman?
3. If West Virginia Code § 43-2-1, *et seq.*, is deemed an appropriate method to calculate the remainderman's share in the insurance loss from the structure, is this also applicable to the loss of personal property on the premises?
4. In the event that West Virginia Code § 43-2-1, *et seq.*, is determined to be the appropriate method to calculate the remainderman's share of the insurance proceeds, is the remainderman precluded from pursuing a negligence claim against the life tenant for the loss of the improvements?

IV. ARGUMENT

- a. **In the event that certain improvements to real estate in the possession of a life tenant, insured against fire on a policy obtained by the life tenant under which only the life tenant is a beneficiary, are destroyed by fire, the remainderman does have an interest in the insurance proceeds though he is neither a named insured or paid any premiums.**

As recognized by the Circuit Court of Monroe County in its February 2, 2006 Order Regarding Certified Questions (hereinafter the "Order"), the authorities disagree as to the rights of remaindermen in the proceeds of insurance when a policy of insurance for the full value of the property is taken out by a life tenant for his or her own use. This disagreement was also recognized by this Court in footnote fourteen of *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997).

The Circuit Court of Monroe County states that based on case law from other jurisdictions, the “more prevalent view” is that “when a life tenant insures the property in his own name and for his own benefit and pays the premiums from his own funds, the life tenant is entitled to all the insurance proceeds.” Therefore, the Circuit Court proposes that the answer to Certified Question No. 1 be in the negative. The Circuit Court goes on to note, however, that “this rule presumes the absence of a fiduciary relationship with the remainderman apart from the usual nature and incidents of the tenancy, or of an agreement between them to procure and maintain the insurance.” The position espoused by the Circuit Court is essentially a contract law view that a non-party to the insurance contract is not entitled to any benefit therefrom. The view relied upon by the Circuit Court has been adopted in Arkansas, see e.g., *Coleman v. Gardner*, 231 Ark. 521, 330 S.W.2d 954 (1960); Maryland, see e.g., *The Home Ins. Co. v. Adler*, 269 Md. 715, 309 A.2d 751 (1973); Massachusetts, see e.g., *Harrison v. Pepper*, 166 Mass. 288, 44 N.E. 222 (1896); and Mississippi, see e.g., *King v. King*, 163 Miss. 584, 143 So. 422 (1932). These courts have essentially held that the insurance proceeds are proceeds of a contract and not a substitute for the destroyed property, therefore, the remainderman has no rights to said proceeds.

On the other hand, several jurisdictions have held that the relationship of a life tenant to a remainderman is that of an implied or quasi trustee. See, e.g., *Crisp County Lumber Co. v. Bridges*, 187 Ga. 484, 200 S.E. 777 (1939) (Supreme Court of Georgia); *Fitterling v. Johnson County Mutual Fire Ins. Co.*, 232 Mo. App. 805, 112 S.W.2d 347 (1938) (Court of Appeals of Missouri); *Crook v. Hartford Fire Ins. Co.*, 175 S.C. 42, 178 S.E. 254 (1935) (Supreme Court of South Carolina); *Sampson v. Grogan*, 21 R.I. 174, 42 A. 712 (1899) (Supreme Court of Rhode Island). Additionally, courts in Kentucky and New York have held that a life tenant has the duty to insure the estate

property and pay the premiums therefor. See, e.g., *Adams v. Adams*, 371 S.W.2d 637 (1963) (Court of Appeals of Kentucky); *In re: John's Will*, 75 N.Y.S.2d 693 (1947) (New York Surrogate's Court). As a result of this quasi-trustee relationship, the proceeds from a policy of insurance procured by the life tenant on the estate property "should be used in rebuilding, or should go to the remainderman, reserving the interest for life for the life tenant." *Fitterling*, supra, at 810; see *Sampson*, supra, at 187; *Crisp County Lumber Co.*, supra, at 485.

Defendant in the instant action asserts that the more proper approach is that of the states that have held that a life tenant is the quasi-trustee of the remainderman. It is without question that the life tenant has the duty to preserve the corpus of the estate and not commit waste. *Keesecker*, supra, at 682. Such duties are in line with a quasi-trustee type relationship. Moreover, it is easy to conceive of the negative incentives which would arise if a life tenant were not obligated to share with the remainderman the insurance proceeds recovered as a result of the destruction of the estate property. A life tenant "ought not to be allowed to put himself in a position in which he would have no motive for proper care of the estate by having a policy of fire insurance by which, in case of loss, he could substitute the full fee simple value of the buildings in place of his interest for life." *Fitterling*, supra, at 810. Furthermore, to allow a life tenant to receive the full value of property in which he or she only possesses a fractional interest would result in an unjust enrichment to the life tenant. Defendant asserts that sound public policy dictates that a remainderman should share in the proceeds of insurance received upon the destruction of the estate property.

Based on the foregoing, Defendant respectfully submits that this Court should answer Certified Question No. 1 in the affirmative and find that in the event that certain improvements to real estate in the possession of a life tenant, insured against fire on a policy obtained by the life

tenant under which only the life tenant is a beneficiary, are destroyed by fire, the *remainderman does have an interest in the insurance proceeds* though he is neither a named insured or paid any premiums.

- b. **In the event that the remainderman is determined to have an interest in the insurance proceeds, West Virginia Code § 43-2-1, *et seq.*, is appropriate to determine the share of the proceeds to be paid to the remainderman.**

Defendant asserts that West Virginia Code § 43-2-1, *et seq.*, is the appropriate statute by which to determine the respective interests of a life tenant and a remainderman in the proceeds from a policy of insurance received upon the destruction of property in which they both possess an interest.

West Virginia Code § 43-2-1 states:

[w]hen a party as a tenant for life . . . is entitled to the use of any estate, or any part thereof, or of the proceeds arising therefrom by a sale or otherwise . . . or if it shall be desirable for any purpose to ascertain the value thereof, the sum to be paid or the present value thereof shall be estimated according to the then value of an annuity of five percent on the principal sum during the probable life of such person, according to the following table showing the present value, on the basis of interest at five percent, of an annuity of one dollar, payable at the end of each year that a person of a given age shall live . . .

West Virginia Code § 43-2-1.

The West Virginia legislature recognized that situations would arise wherein it would be necessary to calculate the value of a life estate. It is well settled that the holder of the life estate is only vested with a limited interest in the property subject to such life estate. A life tenant is not entitled to all of the proceeds arising from the sale of the property subject to such life estate or all of the proceeds that may otherwise arise from the estate. In fact, a life tenant has the duty to preserve the corpus of the estate for the benefit of the remainderman. *Keesecker, supra*, at 682.

In the instant case, the interest in the home and its contents was not vested entirely in Plaintiff

as a mere life tenant. As a remainderman, Defendant had a real and valuable interest in the home and its contents. When the home and its contents were destroyed by fire, it was not solely Plaintiff's interest in the home and its contents that was destroyed, but Defendant's interest in the home and its contents was destroyed as well. It follows then that part of the moneys received to compensate for the losses due to the fire represent Plaintiff's interest and part of the proceeds represent Defendant's interest. The only issue remaining is what value to place on the parties' respective interests in the destroyed property.

West Virginia Code § 43-2-1 establishes the equation to be used to calculate the value of a life estate when a life tenant is entitled to proceeds arising from the estate "by sale or otherwise." In the instant case, the insurance money proceeds arose from the estate and therefore, by the language of the statute, this calculation can be properly applied in this situation. In addition to the above calculation being used to value the estate after a "sale or otherwise," the statute also provides that it can be used "if it shall be desirable for any purpose to ascertain the value thereof" In the instant case, it is desirable to ascertain the value of Plaintiff's interest in his life estate so the insurance proceeds can be distributed accordingly. Again, the above calculation can be properly applied in this situation.

The above statute is the only guidance given by the West Virginia legislature as to valuation of life estates. It is undisputed that both Plaintiff, the life tenant, and Defendant, the remainderman, had an interest in the property that was destroyed by fire. It is also undisputed that the insurance policy covered that property. Therefore, the insurance policy covered both the interests of the life tenant and the remainderman in the subject property. The above statute provides a method to value a life estate and clearly can be applied whenever it is "desirable" to value a life estate. This is

certainly a situation where it is desirable to ascertain the value of a life estate.

- c. **If West Virginia Code § 43-2-1, *et seq.*, is deemed an appropriate method to calculate the remainderman's share in the insurance loss from the structure, *this is also applicable to the loss of personal property on the premises.***

For the reasons more fully stated in response to Certified Question No. 2 above, Defendant asserts that West Virginia Code § 43-2-1, *et seq.*, is the appropriate statute by which to determine the respective interests of a life tenant and a remainderman in the lost personal property.

- d. **In the event that West Virginia Code § 43-2-1, *et seq.*, is determined to be the appropriate method to calculate the remainderman's share of the insurance proceeds, the remainderman *is not* precluded from pursuing a negligence claim against the life tenant for the loss of the improvements.**

Defendant asserts that in the event West Virginia Code § 43-2-1, *et seq.*, is determined to be the appropriate method to calculate a remainderman's share in insurance proceeds received as a result of the destruction of an estate asset, a remainderman should not be precluded from pursuing a negligence claim against the life tenant for loss of improvements upon the estate property.

The simple reason for answering Certified Question No. 4 in the negative is that the insurance proceeds received may not have equaled the actual value of the property at the time of its destruction. It follows then that if the property was destroyed as a result of the negligence of the life tenant, and the insurance proceeds were insufficient to satisfy the total amount of the remainderman's loss, the remainderman ought to be able to recover from a negligent life tenant in order to be made whole. Moreover, a life tenant should not be able to insulate him or herself from personal liability for negligence by simply insuring the property for a nominal amount. This is in line with West Virginia laws regarding negligent operation of a motor vehicle. A negligent motor vehicle operator is not automatically relieved of personal liability upon the payment of policy.

proceeds to an injured party by the negligent operator's insurance company. If the insurance policy is insufficient to cover the injured party's damages, the injured party has the option of pursuing recovery against the negligent operator individually. There is no reason that the same should not be true in the circumstances presented in Certified Question No. 4.

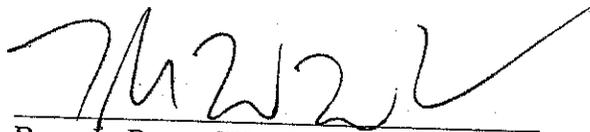
V. CONCLUSION

Based on the foregoing, Defendant respectfully that this Court consider the Certified Questions presented by the Circuit Court of Monroe County, and that the Court answer Certified Question No. 1 in the positive, Certified Question No. 2 in the positive, Certified Question No. 3 in the positive, and Certified Question No. 4 in the negative.

Defendant requests ORAL ARGUMENT

Respectfully submitted,

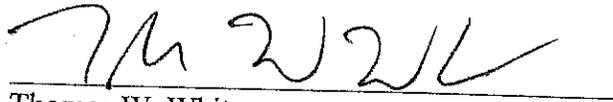
DAVID W. KEITH
Defendant
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CERTIFICATE OF SERVICE

I, Thomas W. White, do hereby certify that I have served a true copy of the foregoing **DEFENDANT'S BRIEF ON CERTIFIED QUESTIONS**, upon Joseph Aucremanne, Esq., counsel for the Plaintiff, by facsimile to (304) 466-0460 and mailing same to P.O. Box 669, Hinton, West Virginia 25951, this 13th day of July, 2006.



Thomas W. White