

RENDERED: February 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1644-MR

BARBRA A. HOLLEY, ADMINISTRATRIX
OF THE ESTATE OF AGNES MAY AYLOR,
DECEASED and BARBRA A. HOLLEY,
INDIVIDUALLY AND AS BENEFICIARY OF
THE AGNES MAY AYLOR TRUST

APPELLANTS

V. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 94-CI-397

NELSON GOODRIDGE, ADMINISTRATOR
WWA OF THE ESTATE OF JEMESON C.
AYLOR, DECEASED and NELSON
GOODRIDGE and RUTH AYLOR
GOODRIDGE, HUSBAND and WIFE,
INDIVIDUALLY

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, COMBS and GARDNER, Judges.

GARDNER, JUDGE: Barbra Holley (Holley), as administratrix of Agnes May Aylor's (Agnes) estate and individually as beneficiary of Agnes's trust, appeals from an order of the Boone Circuit Court granting partial summary judgment for the appellees. The court concluded that appellees were entitled to one-half of the proceeds of the sale of a marital residence owned by the decedents in this

case. After reviewing the record and the applicable law, this Court affirms.

Agnes and Jemeson Aylor (Jemeson), both previously married, were married in 1969. During their marriage, Jemeson and Agnes resided at 3135 Robin Court in Hebron, Kentucky. On February 2, 1972, Jemeson deeded this property to Agnes and himself jointly with right of survivorship. On June 5, 1992, Jemeson and Agnes executed a contract to purchase a condominium at 5327 Country Club Lane in Burlington, Kentucky, contingent upon the sale of the marital residence on Robin Court. A counteroffer was made but was allowed to expire on June 8, 1992. On June 19, 1992, Jemeson and Agnes executed an exclusive listing contract for the Robin Court property.

Jemeson's health began to fail, and in September 1992, he was admitted to a hospital. Following release from the hospital he resided in a nursing home. Jemeson granted Agnes his power of attorney. On February 26, 1993, Jemeson by and through Agnes, his attorney-in-fact and Agnes, as husband and wife, conveyed title to the Robin Court property to purchasers for a sale price of \$80,000. After service charges were deducted, Agnes received a check for \$79,871.92 as proceeds from the sale of the real estate. Agnes never deposited these proceeds into a joint account of the Aylors. The proceeds were deposited into a trust account.¹ Jemeson died

¹On November 16, 1992, Agnes executed a trust agreement which created a life estate for her in all of her property with the corpus to be distributed to Holley, her daughter from a previous marriage, at Agnes's death.

testate on March 2, 1993. On April 20, 1993, Jemeson's will was admitted to probate, and Agnes was appointed executrix of his estate. On June 4, 1993, Agnes closed on the condominium using the proceeds from the sale of the Robin Court property. This was the same condominium that Jemeson and Agnes had attempted to purchase earlier. The attorney for Jemeson's estate on June 21, 1993, prepared and filed an estate inventory which did not list any proceeds from the sale of the Robin Court property.

Agnes died in January 1994, before filing a final settlement regarding Jemeson's estate. On February 15, 1994, Nelson Goodridge (Goodridge) was appointed administrator of Jemeson's estate.² Goodridge learned that during Agnes's term as executrix of Jemeson's estate, she had not accounted for \$39,936 which represented Jemeson's share of the proceeds from the sale of the Robin Court property. On May 5, 1994, appellees filed a complaint in circuit court seeking in part an accounting for the proceeds of the sale of the Robin Court property. Holley answered and asserted a counterclaim for inheritance taxes advanced and executrix fees.

On December 28, 1995, Holley filed a motion for partial summary judgment. Appellees filed their own motion for partial summary judgment on February 2, 1996. Holley filed a response on February 13, 1996. Appellees filed another motion for partial summary judgment on March 7, 1996. On March 11, 1996, the circuit

²On March 7, 1994, Holley was appointed administratrix for Agnes's estate.

court granted partial summary judgment for the appellees. The court awarded judgment against Holley in the amount of \$39,936, representing Jemeson's share of the proceeds of the sale of the Robin Court property. On March 21, 1996, the circuit court in an order modified the partial summary judgment by deleting a paragraph. On April 30, 1996, the parties entered into an agreed judgment resolving the other issues in this case. Holley has appealed from the circuit court's order granting partial summary judgment for the appellees.

On appeal, Holley argues that the proceeds from the sale of the Robin Court property should in equity be treated as part of Agnes's estate. She argues that the doctrine of equitable conversion should be applied to give effect to the intention of the testator. Specifically, she argues that Jemeson intended for the proceeds from the sale of the marital residence to go to Agnes and be used for the purchase of the condominium. She maintains that this is evidenced by the 1972 deed which called for a tenancy by the entirety, and the first contract to purchase the condominium which was allowed to expire. She argues that Agnes's and Jemeson's intent should prevail over what ordinarily would result by operation of law. We disagree and conclude that the circuit court correctly awarded one-half of the proceeds from the sale of the marital residence to appellees.

Equitable conversion is not applicable to the case at bar.

Equitable conversion is a mere fiction resting upon the principle that equity

regards things which are directed to be done as having actually been performed where nothing has intervened which ought to prevent such performance, and may be defined as a constructive alteration in the nature of property whereby, in equity, real estate may be considered as personalty, or vice versa.

Tatman v. Cook's Adm'x., 302 Ky. 529, 195 S.W.2d 72, 74 (1946). It is based on the principle that equity will regard as done that which is directed or ought to be done. Bitzer v. Moock's Executor and Trustee, Ky., 271 S.W.2d 877, 879 (1954). See also Munday v. Munday, Ky., 687 S.W.2d 143 (1985); 27A Am.Jur.2d Equity §116 at 598 (1996). The doctrine of equitable conversion does not apply when there is neither an express devise in fee to the executor or trustee nor any such language in a will as to raise a fee by force of implication. Tatman v. Cook's Adm'x., 195 S.W.2d at 74. See also Willett v. Willett, 197 Ky. 663, 247 S.W. 739, 741 (1923).

"A tenancy by the entirety is an estate in land shared by husband and wife, whereby at the death of either the survivor is entitled to a full fee simple ownership." Sanderson v. Saxon, Ky., 834 S.W.2d 676, 678 (1992). Under tenancy by the entirety, the survivor takes the entire estate at the death of the deceased cotenant not by virtue of that death, but because by law, each was considered to own the entire estate from the time of its creation. Id. See also Hoffmann v. Newell, 249 Ky. 270, 60 S.W.2d 607, 609 (1932). Under Kentucky Revised Statute (KRS) 381.050(1), "[i]f real estate is conveyed or devised to husband and wife, unless a right by survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them, but they

shall take as tenants in common. . . ." KRS 381.050(2) permits tenancies by the entirety if the conveyance or devise expressly creates such a right.

In the instant case, neither tenancy by the entirety nor the doctrine of equitable conversion apply based upon the facts presented. While Jemeson apparently did provide for a tenancy by the entirety in a 1972 deed for the Robin Court property, this fact became academic when the property was sold in February 1993 while both he and Agnes were still alive. At his death, only the funds obtained from the sale of the property existed. These funds are considered personal property and by law would be divided between the parties. Holley has not proven sufficient intent on the part of Jemeson for equitable conversion to apply. Jemeson and Agnes permitted the first contract to purchase the condominium to lapse. Agnes did not enter into another contract to purchase the condominium until after Jemeson had died. His will did not mention anything regarding the matter. The circuit court correctly awarded one-half of the funds from the sale of the marital residence to Jemeson's estate. By applying the principles of Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991), and its progeny, a partial summary judgment was correct on this issue as a matter of law.³

³Holley also argues that the inventory filed in Jemeson's estate is conclusively presumed correct and must be binding on the successor administrator. Her argument is misplaced. Williams' Adm'r. v. Vonderhaar's Executrix, 262 Ky. 68, 89 S.W.2d 321, 326 (1935), cited by Holley, states that an inventory is prima facie correct until assailed by an appropriate pleading. In this case, appellees rebutted and proved that the proceeds from the sale were

For the foregoing reasons, this Court affirms the order of the Boone Circuit Court granting partial summary judgment for the appellees.

BUCKINGHAM, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

incorrectly deposited in a trust fund benefitting Agnes and Holley.

BRIEF FOR APPELLANT:

Paul J. Vesper
Crescent Springs, Kentucky

BRIEF FOR APPELLEE:

Terry. R. Edwards
Florence, Kentucky