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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002037-MR
and
CROSS-APPEAL NO. 1997-CA-002132-MR

WILLARD D. GROSS — APPELLANT/CROSS-APPELLEE

v.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 91-CI-00158

LAURA GROSS; FRED IRTZ;
PNC BANK, formerly CITIZENS
FIDELITY BANK — APPELLEES/CROSS-APPELLANTS

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON, and KNOPF, Judges.

HUDDLESTON, Judge: Willard D. Gross appeals from a Fayette Circuit Court order holding that he failed to meet his burden of proving that five $100,000.00 certificates of deposit (CDs) had been given to him as gifts by his father prior to the latter's death. Laura Gross has cross-appealed for the purpose of protecting the record as to the trial court's rulings relating to her dower interest in the CDs in the event Willard should prevail on appeal.

Laura Gross is the widow of Caleb P. Gross (C.P.). C.P. died in June 1991 at age ninety. Prior to his fifty-four year marriage to Laura, C.P. had previously been married, and had three children from that marriage: Willard Gross (Willard); Eugene C.

Gross (Eugene); and daughter Lillian Gross Geghali (Eileen). Frances Gross is Willard's wife. The trial court proceedings as they relate to Bank One, formerly Citizens Fidelity Bank, were bifurcated from the issues on appeal.

In its opinion and order of October 2, 1996, the circuit court throughly stated the relevant facts in this case, which we adopt:

> The facts of the case are that Laura Gross was married to C.P. Gross for about 54 ½ years. She is now 90 years old. C.P. Gross was previously divorced and had three children, two boys and a girl, from that marriage. After Laura and C.P. married, they raised the boys and the daughter stayed with her mother. At the time of their marriage, and for two or three years thereafter, Laura taught school and C.P. worked in the mines. They then entered into an agreement with C.P.'s brother to establish a business in Bell County, Kentucky, known as the Bell County Country Club. The Country Club provided a place for people to drink, use slot machines and had private cabins for private parties. This was a successful business which they ran until after World War II when Bell County voted to go dry.
>
> At that time, the Grosses turned the running of the business over to other family members and moved to Garrard County where they bought a farm. At some time subsequent to moving to Garrard County, they bought 50 acres of land in Fayette County on which is now the current site of South

Park Shopping Center. They built a liquor store and ran the liquor store there for a number of years. In the liquor store business, Laura did most of the day-to-day operation although Mr. Gross did order the liquor. However, he spent considerable time continuing to work the farm in Garrard County which they owned for a few years after they also had the liquor store business.

At some time subsequent, Mr. Gross sold the property where the liquor store sat, some 50 acres, for $850,000.00. A considerable portion of this apparently went to taxes and other expenses, but by testimony, he gave Laura Gross $100,000.00 from the sale and told her she could put it in her name in a Certificate of Deposit. He kept the rest of it, placing $500,000.00 in individual Certificates of Deposit of $100,000.00 each, in various banks. Over the next few years, he and Laura essentially lived off of the interest income from these Certificates of Deposit and other property.

In early 1990, C.P. Gross was apparently ailing, and Willard Gross began to assist him more by taking him to the doctor, on short trips, and with his financial affairs. On or about January 3, 1990, C.P. gave Willard a general power of attorney to conduct business for him. At some point between then and November of 1990, Willard came into possession of the five CD's [sic] for $100,000.00 each. In November of 1990, using the power of attorney, Willard

transferred the CD's [sic] out of his father's name and into his name solely.

Willard claims that his father gave him the CDs for a number of reasons, but primarily because he didn't want Laura Gross to have access to them; he felt that Willard deserved them because of some business advice he had given C.P. and which Willard claims helped C.P. save the South Park property; and because C.P. and Willard were very close to one another. Willard claims that C.P. gave him the CD's [sic] with no strings attached to be Willard's property free and clear.

However, by Willard's own testimony, the CDs were delivered to him from his father on January 3, 1990, but at that date, his father did not take the legal steps necessary to transfer the CDs over into Willard's name. Willard further testified that his father fully understood what would be necessary to transfer a CD from one person to another, C.P. having considerable business experience and having a number of CDs over the years.

Between that January 3rd date and November, Willard did cause his name to be placed on three of the CDs as a joint owner with his father. Those three CD's [sic] in joint names, and two that remained in C.P. Gross' name alone, were kept in that form until November. The interest from the CDs was paid directly into C.P.'s account by the banks at the direction of Willard. That apparently was done for a number of months until in November an interest

check instead went to the home of C.P. and Laura Gross. That check was made out to Willard and C.P. Gross. According to Laura, this was the first C.P. was aware that Willard's name appeared on any of the CDs. Laura claims that C.P. was very upset at that and that he went to the bank and demanded that the bank reissue a check in his name alone, which the bank apparently did.

After that, C.P., according to Laura, checked on his other CDs and found out "that he didn't have any". Laura called Willard and told him that he needed to bring his father's CDs back to him. Reportedly, Willard said that he wasn't going to and no one could make him. Laura then called Eugene Gross and [sic] Harlan, another son of C.P. and brother of Willard, and complained to them that Willard had stolen his dad's CDs.

The next day, Eugene Gross came to Lexington from Harlan to visit with Laura and C.P. and took C.P. to Willard's house, where by all accounts they had a nice afternoon visit. Willard's wife, Frances, and Willard, both testified that Willard asked C.P., in the presence of Eugene, whether C.P. recalled "giving" the CDs to Willard, and that C.P. replied "Yes, I certainly did."

Either acting on his own intentions or under someone's influence, C.P. subsequently set about revoking the power of attorney that he had given to Willard. However, before the power of attorney could be revoked, and notice given to Willard. Willard had exercised the power of attorney

to transfer the five $100,000.00 CDs over into his sole name. By this time both sides were talking to attorneys, but Eugene and Willard were apparently still communicating and still operating on of [sic] the joint purpose to keep Laura Gross from receiving any of the funds.

Then in April of 1991, Laura Gross instigated a mental inquest regarding C.P. because she claimed that he "didn't know anybody", and that he would wander off and get lost. A hearing was held and attorney Nancy Curtis was appointed limited guardian to assist in management of C.P.'s financial affairs. Laura Gross was appointed limited guardian to handle his health concerns, which she did by obtaining the services of Caretenders. Caretenders assisted with Mr. C.P. Gross until he died shortly thereafter. After his death, the son Eugene was appointed executor of the estate.

There had been a prior will which left a reasonable widow's portion to Laura and made distributions to all of C.P.'s children. That will, however, was amended after Willard Gross became closely involved in his father's affairs, and the new will significantly reduced Laura Gross' share of C.P.'s estate and completely disinherited his daughter Eileen.

By this point in time, circumstances between Eugene Gross and Willard Gross were becoming strained as Eugene began to realize that Willard was fully intent upon keeping the money from those CDs for himself. Willard had actually cashed in some of the CDs at a loss because he took them

on early withdrawal and had to pay penalties. When this began happening, it became apparent to Eugene that Willard was not going to share the money from the CDs with him or other family members. At about that point in time, this suit was filed alleging that Willard obtained the CDs through undue influence over his father and that the CDs were never intended to be a gift to Willard alone.

Following a bench trial, the circuit court entered an opinion and order holding, (1) that one-half of the $500,000.00 represented by the CDs, or $250,000.00, could not have been given to Willard by C.P., as that amount constituted Laura's dower interest in C.P.'s estate, and any attempt by C.P. to convey that interest to Willard created a fraud against Laura's distributable share of one-half of C.P.'s estate; and (2) that as to the remaining one-half of the $500,000.00 represented by the CDs, or $250.000.00, that Willard failed to meet his burden of proving by clear and convincing evidence that the CDs were a gift to him alone.[1]

Willard first argues that the circuit court erred in holding that he had failed to meet his burden of proving that the five CDs were valid gifts. As a point of clarification, Willard

[1] Throughout these proceedings the circuit court and the parties have adopted the convention of referring to Laura's dower interest in these CDs as "one-half", or $250,000.00. We follow this convention; however, it is recognized that Laura's dower interest in C.P.'s estate is one-half of C.P.'s total surplus estate, which would take into consideration assets other than the CDs as well as the debts of the estate. See KRS 392.020. Hence, any reference to one-half of the CDs, or to $250,000.00, is an approximation.

does not allege that the power of attorney he held from January 1990 until November 1990 gave him the power to gift the CDs to himself or that he exercised the power of attorney to gift the CDs to himself. Rather, Willard's fundamental position is that C.P. made a valid inter vivos gift of the CDs to him.

The elements necessary to constitute a gift are: (1) there must be a competent donor; (2) there must be an intention on the part of the donor to make the gift; (3) there must be a competent donee; (4) the gift must be complete, with nothing left undone; (5) the property must be delivered and the delivery have immediate effect; and, (6) the gift must be irrevocable. Lyle v. Snowden's Adm'x, 295 Ky. 505, 174 S.W.2d 691, 694 (1943); Gernert v. Liberty Nat. Bank & Trust Co. of Louisville, 284 Ky. 575, 145 S.W.2d 522, 525 (1940). Evidence of a gift inter vivos must be clear, convincing and free from reasonable doubt, Hale v. Hale, Ky., 224 S.W. 1078 (1920), and the burden of establishing the gift rests on the party claiming it, Combs v. Roark's Adm'r, Ky. 299 S.W. 576, 579 (1927); Knox v. Trimble, Ky., 324 S.W.2d 130, 132 (1959). A gift asserted to have been made by one since deceased must be established by clear and satisfactory proof of every element requisite to a gift. Aubrey's Adm'x v. Kent et al., Ky., 167 S.W.2d 831, 834 (1942). It follows that the burden of proof in this case was upon Willard to prove each of the six elements of a valid gift, inter vivos by clear and convincing evidence.[2]

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[2] In its October 2, 1996, opinion and order the circuit court, without citation, stated that the administrator of an estate, "when alleging that a gift has been made improperly and should be brought back into the estate, must prove undue

(continued...)

The circuit court concluded that, "Willard Gross has not met the burden of proving by clear and convincing evidence that the CDs were a gift to him alone, from his father C.P." The circuit court's opinion further suggests that Willard did not meet his burden of proving that C.P. intended to gift him the CDs. In this regard, the circuit court said that:

> If it is believed that C.P. told Willard to transfer the CDs to himself by exercising power of attorney, then perhaps that exercise is appropriate. On the other hand, since there is no evidence that is precisely what he did, although Willard says it is inferred by the fact that his father was well aware that he had given him power of

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[2](...continued)
influence, duress or fraud. This proof must be by clear and convincing evidence and the burden of proof is on the beneficiary who did not receive to prove that the beneficiary who did receive obtained the gift, devise, etc. through these means." As illustrated by the foregoing authorities, under the facts of this case, this is an incorrect statement of the law. (See Kitts v. Kitts, Ky., 315 S.W.2d 617, 618 (1958), and citations therein, concerning the burden of proof in an undue influence case.) However, the trial court, upon considering Willard's fiduciary duties as C.P.'s attorney in fact, ultimately placed the burden of proving the gift upon Willard by clear and convincing evidence. While Willard's status as C.P.'s attorney in fact imposed fiduciary responsibilities, Willard has failed to establish a valid inter vivos gift under the basic principles of gift law. Since Willard has failed to meet this threshold burden, it is unnecessary for us to address the issue as to how Willard's fiduciary duties as C.P.'s attorney in fact would bear on the resolution of the dispute assuming, arguendo, that Willard had proven all elements of a valid gift. However, we note that a power of attorney is a form of agency, Moore v. Scott, Ky. App., 759 S.W.2d 827, 828 (1988), an agent must act with the utmost good faith toward his principal, Priestly v. Priestly, Ky., 949 S.W.2d 594, 598 (1997), and every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, Johns v. Parsons, 215 S.W. 194, 195 (1919). In using his power of attorney to facilitate "delivery" of the CDs in conjunction with the alleged gift, Willard egregiously abused his agency relationship with his father.

attorney and intended him to use the power of attorney in any way he needed to. As a matter of law, and absent any other evidence, it is certainly too questionable to accept at face value that C.P. Gross did intend to gift all of his interest in the CDs to Willard alone. It had been C.P. Gross' habit to give approximately equal amounts in gift [sic] to all three of his children. Also, there was no other evidence presented which would indicate that he had any reason to slight Eugene and to completely disinherit Eileen. While it is true that C.P. gave Willard a power of attorney, if that had been the method by which he meant to convey the CDs to Willard, C.P. would have told Willard to act, immediately, rather than leaving the situation unresolved till events became complicated in November. Willard did not exercise the power in his behalf until it appeared C.P. was going to revoke it, and other family members had learned that Willard had it.

. . . . .

It is questionable whether Willard was indeed following through on his father's intentions when he transferred the $500,000 in CDs to himself. (Emphasis supplied).

We construe the foregoing as a finding of fact that Willard did not meet his burden of proving by clear and convincing evidence that C.P. intended to give him the CDs as a gift. Where findings of fact made by a trial court are supported by substantial evidence and are not clearly erroneous, they are binding on appeal.

Allen v. Arnett, Ky., 524 S.W.2d 748 (1972); CR 52.01. The trial court's findings that Willard did not meet his burden of proving that the CDs were gifted to him, and, more specifically, that Willard failed to clearly and convincingly establish C.P.'s intent to make a gift of the CDs to him is supported by substantial evidence in the record. Absent clear and convincing proof of C.P.'s intent, it follows that Willard has failed to prove that the CDs were a gift to him.

The five CDs represented the majority of C.P.'s estate. Laura and C.P. had a fifty-four year marriage, and C.P. had a history, when he made gifts, of sharing with his children equally. While every person has the right to give his estate to whomever he desires and his view of right and justice, not that of any other person, controls, Calverad v. Reynolds, Ky., 136 S.W.2d 795, 798 (1940), the one claiming that a decedent has gifted him his estate inter vivos must prove this clearly and convincingly. Aubrey's Adm'x v. Kent et al., supra.

If C.P. intended to gift the CDs to Willard, then Willard, at the time the gift was made, did not undertake measures to establish that as a clear and convincing fact. The alleged $500,000.00 gift was not made openly and in an unambiguous and forthright manner, nor was it documented and witnessed in a manner consistent with the gifting of such a significant sum of money. Rather, the alleged gift was carried out secretly. The transaction was kept from the other heirs, and the logistics of the alleged gift were carried out, in part, by Willard in his capacity as C.P.'s attorney in fact, rather than by the endorsement of C.P.

The final transfers of the CDs to Willard were effected in large part immediately following the discovery by the other heirs that Willard had made himself a co-payee of the CDs and had taken the CDs into his personal custody. Willard's power of attorney was revoked a short time later. The foregoing facts mitigate strongly against the clear and convincing establishment of a valid inter vivos gift

Willard introduced various statements made by Eugene and his wife allegedly corroborating his claim. The statements are, first of all, ambiguous. Eugene conceded that he made statements to the effect that C.P. "gave" Willard the CDs. However, he testified that these statements meant that C.P. had given the CDs to Willard to hold for safe-keeping, not that the CDs were given to Willard as a gift. Moreover, at the time the statements were made, Willard and Eugene were apparently working in concert to keep the CDs from coming into Laura's possession, and Eugene apparently made statements in support of Willard to further this objective. The statements were later repudiated. In summary, these statements, when weighed against the remaining evidence, do not establish a gift of the CDs by clear and convincing evidence.

Clear and convincing proof is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people. Rowland v. Holt, Ky., 70 S.W.2d 5, 9 (1934). The evidence offered by Willard in support of his position does not meet this standard, and the circuit court properly found that he had failed to meet his burden of proving that the CDs were gifted to him.

Willard's second argument is that the circuit court violated his constitutional rights by denying him a jury trial after he had demanded one. In his answer to the original complaint, Willard requested a jury trial pursuant to CR 38.02. On November 21, 1995, the circuit court issued an order setting the case for a jury trial to be held on May 15, 1996. On April 17, 1996, the court entered an order re-setting the case for a bench trial to be held on May 20, 1996. Willard did not object to the setting of the matter for a bench trial in the weeks prior to the commencement of the trial. On the day of the trial, despite the circuit court's inquiry as to whether there were any other matters to take up prior to commencing the trial, Willard did not object to a bench trial.

A proper demand for trial by jury may not be withdrawn without the consent of the parties. CR 38.04. The trial of all issues so demanded shall be by jury, unless (a) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (b) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or statutes of Kentucky. CR 39.01. The record is silent as to any consent by Willard; however, it is uncontested the record contains no specific waiver by Willard, oral or written, to his prior request for a jury trial.

Despite his initial, proper, demand for a jury trial, we conclude that Willard waived his right to a jury trial. The

Federal Rules of Civil Procedure (Fed.R.Civ.P.) relevant to this issue prescribe rules substantially identical to the aforementioned Kentucky Civil Rules. See Fed.R.Civ.P. 38 and 39. Hence, we are persuaded by the Sixth Circuit case, Sewell v. Jefferson County Fiscal Court, 863 F.2d 461 (6th Cir. 1988), which presented essentially the identical issue for consideration under the federal rules.

In Sewell, the plaintiff-appellant, Sewell, filed a Civil Rights Action in the United States District Court for the Western District of Kentucky, and specifically requested a jury. It was undisputed that she had properly endorsed a request for a jury trial on the complaint in accordance with Fed.R.Civ.P. 38(b), which is substantially similar to CR 38.02.

Following a pretrial conference the court entered an order scheduling the case for a jury trial on all issues except one. During the final pretrial conference, counsel for Sewell orally requested a continuance of the jury trial date. The district court granted the motion and removed the case from the jury trial docket and continued the case for a bench trial before the court. The court's written order stated that: "IT IS ORDERED that this case be remanded from the trial calendar of September 23, 1986, and is continued to JANUARY 22, 1987, at 10:00 A.M. for a trial before the COURT." (Original emphasis.) Plaintiff's counsel made no objection to the court's order reassigning the case for trial before the court until the commencement of the trial.

On the day of the trial, after the parties had announced that they were prepared to proceed, Sewell's counsel requested the

court to summon the jury. The court examined the aforementioned order and noted that it stated that the trial was to be before the court. After a discussion with counsel for the parties, the court concluded that Sewell had waived the right to trial by jury by failing to timely object to the court's order removing the case from the jury trial docket. The court proceeded to try all of Sewell's claims. The court entered judgment for the defendants on all counts.

The facts in the Sewell case are substantially the same as in the case on appeal. If anything, Sewell was more entitled to a finding of no waiver in that she renewed her request for a jury trial prior to the commencement of the bench trial, whereas Willard did not. Following is the 6th Circuit's analysis of the issue under the Federal Rules of Civil Procedure which, again, are in relevant part substantially identical to the Kentucky Rules of Civil Procedure:

> On appeal, Sewell has argued that the district court erred by denying her fundamental constitutional right to a trial by a jury. See U.S. Const. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."); Fed.R.Civ.P. 38(a)[3] ("The right of trial by jury as declared by the Seventh Amendment to the Constitution ... shall be preserved to the parties inviolate."); see also, Aetna Ins. Co. v. Kennedy, 301

[3] CR 38.01 closely follows Fed.R.Civ.P. 38(a), with references to the state constitution and statutes rather than those of the Federal Government.

U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177 (1937); Bellmore v. Mobil Oil Corp., 783 F.2d 300, 306 (2nd Cir.1986). Although the right to a jury trial is guaranteed by the Constitution, "like other constitutional rights, can be waived by the parties." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2321, at 101 (1971); see also Fed.R.Civ.P. 38(d),[4] 39(a)[5]; United States v. Moore, 340 U.S. 616, 621, 71 S.Ct. 524, 526, 95 L.Ed. 582 (1951); Bellmore, 783 F.2d at 306. The standard for determining whether there has been a subsequent waiver of a jury trial, which had previously been timely entered pursuant to Federal Rule of Civil Procedure 38(a), is set forth in Federal Rule of Civil Procedure 39(a): [footnote addressed to dissent omitted]

> The trial of all issues so demanded shall be by jury, unless ... the parties or their attorneys of record, by written stipulation or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury . . . .

Fed.R.Civ.P. 39(a); see also, 9 C. Wright & A. Miller, Federal Practice and Procedure § 2332, at 108-09

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[4] Fed.R.Civ.P. 38(d) is substantially similar to CR 38.04.

[5] Fed.R.Civ.P. 39(a) is substantially similar to CR 39.01.

(1971); compare Fed.R.Civ.P. 38(d)[6] ("A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2321, at 101-02 (1971).

The requirements of Rule 39(a) have "been interpreted broadly so as to encompass orders entered by the court and not objected to." Lovelace v. Dall, 820 F.2d 223, 227 (7th Cir. 1987). In the instant case, the counsel for the plaintiff made an oral motion for a continuance of the trial date during the final pretrial conference on September 15, 1986. The court granted the motion orally, and then entered a written order on September 17, 1986 which stated that the case was continued until January 22, 1987 "for a trial before the court." The court's order of September 17, 1986 was binding upon all parties, see Fed.R.Civ.P. 16(e);[7] Ghandi v. Police Dep't of Detroit, 823 F.2d 959, 962 (6th Cir.1987), cert. denied sub nom. Ghandi v. Fayed, 484 U.S. 1042, 108 S.Ct. 774, 98 L.Ed.2d 861 (1988); Daniels v. Board of Educ. of Ravenna School Dist., 805 F.2d 203, 209 (6th Cir. 1986); accord Annot., Binding Effect of Court's Order Entered After Pretrial Conference, 22 A.L.R.2d 599, 601-03 (1952), and constituted a "suffi-

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[6] Fed.R.Civ.P. 38(d) is substantially similar to CR 38.04.

[7] Fed.R.Civ.P. 16(e) is substantially similar, in relevant part, to CR 16(2).

cient entry in the record to satisfy the requirements of Fed.R.Civ.P. 39(a)." Fields Eng'g & Equip., Inc. v. Cargill, Inc., 651 F.2d 589, 592 (8th Cir. 1981) (waiver contained in the court's order); see also Harden v. Adams, 760 F.2d 1158, 1166 (11th Cir.) (waiver contained in amended complaint and later orders of the court), cert. denied sub nom. Grimmer v. Harden, 474 U.S. 1007, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985); Moser v. Texas Trailer Corp., 623 F.2d 1006, 1011 (5th Cir. 1980) (amended complaint which provided for trial "without a jury" sufficient to waive jury trial); General Business Servs., Inc. v. Fletcher, 435 F.2d 863, 864 (4th Cir. 1970) (order of court noting waiver of jury trial); accord Lovelace, 820 F.2d at 227 (pretrial minutes stating that jury demand withdrawn and matter set for bench trial; court decided there was no waiver based upon other grounds).

The plaintiff, however, has urged this court to find that the September 17, 1986 order was insufficient by itself to evidence a waiver of Sewell's right to a jury trial, charging that there was no record that the parties to this controversy had ever discussed the issue. It is well established, however, that there is no requirement that a written expression of waiver be accompanied by any additional documentation. See, e.g., Fields Eng'g & Equip., Inc., 651 F.2d at 592 ("It is immaterial that the pretrial conference itself was not on the record. The

agreement to waive a jury . . . was recorded in the pretrial order."); Fletcher, 435 F.2d at 864 (affirmed trial before court where appellant claimed that he thought court had agreed at pretrial conference to submit issue of damages to jury, but pretrial order reflected waiver of jury trial and the pretrial conference had not been recorded); Annot., Binding Effect of Court's Order Entered After Pretrial Conference, 22 A.L.R.2d 599, 602 (1952) ("[P]arties may be bound by recitals in the pretrial order or report on the theory that they are stipulations."); accord Moser v. Texas Trailer Corp., 623 F.2d 1006, 1010-11 (5th Cir. 1980) (appellant failed to object to amended complaint waiving jury trial; no record that parties had discussed issue).

Furthermore, the fact that the plaintiff in the case at bar made no objection to the language of the September 17, 1986 order for nearly four months provided additional support for the district court's conclusion that there had been a waiver of the jury trial.[8] See United States v. Missouri River Breaks Hunt Club, 641 F.2d 689, 693 (9th Cir. 1981) (judge's oral statement that parties had waived jury trial affirmed in light of appellant's failure to have objected in the two months before bench trial began); Southland Reship, Inc. v. Flegel, 534 F.2d

[8] In this case the order setting the matter for a bench trial was entered on April 17, 1996, and the trial was held on May 20, 1996, so Willard had slightly over one month to object. This does not distinguish Sewell from the case at bar.

639, 644 (5th Cir. 1976) (failure to have made any objection for over a month after judge's oral ruling regarding bench trial sufficient to affirm waiver of jury trial); accord Harden, 760 F.2d at 1168 (no objection made to amendment to the complaint or court's orders indicating waiver of jury trial); Cf. Ghandi, 823 F.2d at 963 nn. 1 & 3 (failure to have moved to amend the court's order of September 17, 1986 pursuant to Fed.R.Civ.P. 16(e)); Daniels, 805 F.2d at 209 (same).

Plaintiff's disclaimer of knowledge that the September 17, 1986 order had assigned the case for a bench trial is likewise of no significance because inadvertence or mistaken impression is not sufficient to relieve the party from the effects of an otherwise valid waiver of a jury trial. See Fletcher, 435 F.2d at 864; Bush v. Allstate Ins. Co., 425 F.2d 393, 396 (5th Cir.), cert. denied, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed.2d 64 (1970). Nor did the plaintiff's objection at the commencement of the bench trial serve to reinstate the right to a trial by jury. "Ordinarily, once a party withdraws his demand for a jury trial, with the requisite consent of the other parties, he may not change his mind." Hanlon v. Providence College, 615 F.2d 535, 538-39 (1st Cir. 1980); see also West v. Devitt, 311 F.2d 787, 788 (8th Cir. 1963) ("The mere fact that petitioner had changed his mind would not of itself require the court to set aside the procedural order made.");

Fletcher, 435 F.2d at 864 (renewed demand for jury trial made five days after pretrial order expressing waiver of same did not preserve right); Annot., Withdrawal or Disregard of Jury Trial in Civil Action, 64 A.L.R.2d 506, 517-19 (1959) ("The rule recognized in a number of cases is that once a waiver of jury trial has matured, the waiver may not be withdrawn at the insistence of one party."); 9 C. Wright & A. Miller, Federal Practice and Procedure §.S 2321, at 104 & n. 64 (1971); accord Bellmore, 783 F.2d at 307 ("[S]omething beyond the mere inadvertence of counsel is required to relieve a party from its waiver.") (applying Fed.R.Civ.P. 39(b))[9] (quoting Alvarado v. Santana-Lopez, 101 F.R.D. 367, 368 (S.D.N.Y. 1984)). The suggestion that the district court erred in concluding that Sewell had waived the right to trial by jury is accordingly without merit.

We agree with the analysis of the 6th Circuit, and, applying the reasoning of Sewell to the case at bar, we conclude that under the applicable Kentucky Civil Rules Willard waived his right to a jury trial when he failed to object to the trial court's order setting the matter for a bench trial following the entry of that order, and when he failed to object prior to the commencement of the bench trial despite the trial court's direct query to the parties as to whether there were any other matters to be addressed prior to the commencement of the trial.

[9] Fed.R.Civ.P. 39(b) is the same as CR 39.02.

Finally, Laura filed a cross-appeal in this matter "to protect the record in the event this case should be reversed on the appeal of Willard D. Gross." Laura sought to ensure that in the event of a reversal on Willard's appeal, the portion of the circuit court's opinion and order relating to a finding of a fraud on Laura's dower rights would not likewise be set aside. Willard did not appeal this aspect of the circuit court's order and Laura's cross-appeal to protect the record appears to have been unnecessary; however, inasmuch as Willard's appeal was not successful, we deem Laura's cross-appeal to be moot.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Jack Martin Goins
Paris, Kentucky

BRIEFS FOR APPELLEES/
CROSS-APPELLANTS:

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