

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2003-CA-002287-MR

PATRICIA FERGUSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 98-CI-02903

RICHARD PARKS,
D/B/A EXQUISITE BELVEDERE BARBER
SHOP; AND EXQUISITE BELVEDERE
STYLING SALON

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Patricia Ferguson appeals from an order of the Fayette Circuit Court entered October 2, 2003, dismissing her complaint against Richard Parks. Ferguson claims that in 1997 she was injured in a beauty parlor of which Parks was the

proprietor when she suffered an adverse reaction to a hair coloring product applied by one of Parks's employees. She filed her complaint against Parks in 1998. In May 2002, while the matter was still pending, Parks died. In September 2002, Ferguson moved the probate division of the Fayette District Court to appoint an administrator for Parks's estate. The motion included notice of the pending claim in circuit court. In November, the district court appointed an administrator, but Ferguson did not seek to revive the circuit-court action against him. In September 2003, the attorney who had represented Parks filed a motion to dismiss Ferguson's complaint because it had not been revived within the period allowed by law for that purpose. The trial court granted the motion and Ferguson appealed.

Technically, the death of a sole defendant or sole plaintiff terminates a court's jurisdiction because in the absence of adverse parties there can be no case or controversy, a constitutional requirement for adjudication.¹ Certain causes of action survive the death of a party, however, so in those cases our law provides that the court's jurisdiction over the claim does not terminate, but rather abates and may be revived

¹ Associated Industries of Kentucky v. Commonwealth, 912 S.W.2d 947 (Ky. 1995); West v. Commonwealth, 887 S.W.2d 338 (Ky. 1994); Veith v. City of Louisville, 355 S.W.2d 295 (Ky. 1962).

if a proper party is duly substituted for the decedent.² CR 25.01 provides that jurisdiction over the substituted party and over the revived claim is to be invoked by a "motion for substitution," which

may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5, and upon persons not parties as provided in Rule 4 for the service of summons.

KRS 395.278 provides that the "application to revive an action" must be made "within one (1) year after the death of the deceased party." Construed together, these provisions require that within a year following the death of a party a motion for substitution must be filed in the court where the abated action is pending, or the action terminates and must be dismissed.³

Ferguson contends that her district-court motion for the appointment of an administrator should be deemed "an application to revive" under KRS 395.278, because it put the administrator on notice of her intention to continue the claim against him. As just explained, however, the purpose of KRS

² Daniel v. Fourth and Market, Inc., 445 S.W.2d 699 (Ky. 1968).

³ Daniel v. Fourth and Market, Inc., *supra*; Greyhound Corporation v. Dowling, 334 S.W.2d 259 (Ky. 1960); Osborne v. Kenacre Land Corporation, 65 S.W.3d 534 (Ky.App. 2001); Snyder v. Snyder, 769 S.W.2d 70 (Ky.App. 1989).

395.278 and CR 25.01 is not merely that notice be given to the substituted party, but that the party be substituted, that the lapsed jurisdiction of the court where the matter is pending be revived. Ferguson's motion in district court did not invoke the circuit court's jurisdiction.

A thornier question is by what authority, then, the circuit court entered its order to dismiss. Parks's erstwhile counsel no longer represented a party in the case and so was not authorized to move for dismissal,⁴ and as noted, Ferguson had not moved to substitute the administrator. If the court's jurisdiction had lapsed, how was the court to act?

The answer, we believe, is that a court always has jurisdiction to consider its jurisdiction and may do so on its own motion.⁵ Here, the court had lost jurisdiction over Ferguson's claim unless the claim was revived within a year of Parks's death. When it became clear that the statutory period had expired, the court was authorized to provide Ferguson with an opportunity to explain why her claim should not be dismissed, and, absent a sufficient explanation, to dismiss the claim for

⁴ Brantley v. Fallston General Hospital, Inc., 636 A.2d 444 (Md.App. 1994); Fariss v. Lynchburg Foundry, 769 F.2d 958 (4th Cir. 1985). Likewise, counsel was not authorized to submit a brief to this Court on behalf of a non-existent party to the appeal.

⁵ Privett v. Clendenin, 52 S.W.3d 530 (Ky. 2001); Commonwealth Health Corporation v. Croslin, 920 S.W.2d 46 (Ky. 1996).

lack of jurisdiction. We agree with the trial court that Ferguson's explanation was not sufficient and that dismissal was therefore required. Accordingly, we affirm the October 2, 2003, order of the Fayette Circuit Court.

We also deny, as not properly before the Court, the motion to dismiss the appeal by counsel who formerly represented Parks.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS WITH RESULT.

ENTERED: _____

\s\ William L. Knopf
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Charles W. Arnold
Lexington, Kentucky

BRIEF FOR APPELLEE:

Stephen D. Wolnitzek
Wolnitzek & Rowekamp, P.S.C.
Covington, Kentucky