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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001392-MR

MAE S. MEFFORD AND LARRY P. SWINNEY, BENEFICIARIES AND HEIRS AT LAW OF THE ESTATE OF MARGIE ODENE COX SWINNEY, AND MAE S. MEDFORD AND LARRY P. SWINNEY, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 05-CI-01445

WILLIAM C. SWINNEY AS EXECUTOR OF THE ESTATE OF MARGIE ODENE COX SWINNEY, WILLIAM S. SWINNEY, INDIVIDUALLY, AND HAPPY HOLLOW ACRES, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

BUCKINGHAM, SENIOR JUDGE: This case involves a dispute between three siblings over the deeding of the family farm by their mother to one of the siblings prior to her death. Two of the siblings filed a civil complaint against the third sibling in the Christian Circuit Court in December 2005. The circuit court determined that the complaint was barred by the applicable statute of limitations and dismissed it. We agree and thus affirm.

Estille Swinney and Margie Swinney were husband and wife. They had three children whose names are Mae, Larry, and William. Estille and Margie lived long lives and had valuable farm land in Todd County. According to Mae and Larry, William had tried several times to get Estille and Margie to give or sell the land to him, but they refused to do so.

On February 14, 1997, Estille and Margie executed wills that ultimately left their property to their three children equally. The wills also provided that the three children would serve as co-executors of the estates. Estille died on March 29, 1999, at the age of 90. William, who was a banker, and Larry were appointed by the district court on November 30, 1999, as co-executors. Earlier that same month, William had formed Happy Hollow Acres, LLC, by filing articles of incorporation.

In December 1999, Margie deeded the land, which had been appraised at $750,000, to William for $500,000. She also made contemporaneous gifts to Mae and Larry of approximately $250,000 each.[2] Also, according to Mae and Larry, William had

[2] William asserts that the effect of this would be to equalize the discount of approximately $250,000 that he had received in purchasing the farm. In other words, William received a $250,000 discount on the sale of the farm, and Mae and Larry each received cash gifts of approximately $250,000.

represented to Margie and to them that he would always make the farm available to them and their families for their use and enjoyment should he acquire it and that he would not sell it.

On March 3, 2000, an inventory of Estille's estate was filed in the district court. Although William and Larry were co-executors of Estille's estate, only William signed the inventory form. No mention was made of the sale of the farm from Margie to William.

Margie died while residing in Christian County on December 8, 2002. Her will was admitted to probate on March 14, 2003, and William was appointed as executor of her estate after Mae and Larry waived their rights under the will to serve as co-executors. Estille's estate was closed on October 6, 2003, by final settlement signed only by William. Margie's estate remained open as of the filing of the appeal herein.

On August 14, 2004, Happy Hollow Acres sold the timber from the farm for $257,466.94. On September 2, 2005, it sold the farm itself for $1,585,000. When Mae and Larry learned of this, they instituted an action in the district court to have William removed as executor of Margie's estate. The court denied their motion in an order entered on December 2, 2005. Then, on December 7, 2005, Mae and Larry filed a civil complaint in the Christian Circuit Court against William and Happy Hollow Acres. The complaint alleged various causes of action, including fraud, breach of fiduciary duties, maladministration of estate, and conversion.

William moved the court to dismiss the complaint on several grounds, including that it was barred by the applicable statute of limitations. The court agreed and entered an order on June 8, 2006, to that effect. The court reasoned that all counts in the complaint related to the sale of the farm from Margie to William that occurred in December 1999 and that the five-year limitations period in Kentucky Revised Statute (KRS) 413.120 barred the complaint which had been filed on December 7, 2005. This appeal by Mae and Larry followed.

Mae and Larry first argue that their complaint for fraud was not barred by the statute of limitations because William had engaged in a course of conduct for a period of time continuing through the sale of the farm in September 2005 and because of the applicability of the "discovery rule". Pursuant to KRS 413.120(12), there is a five-year statute of limitations for fraud. However, pursuant to KRS 413.130(3), "the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake." Mae and Larry argue that William engaged in a course of conduct that was not discoverable by them until he sold the farm for a profit in September 2005. Thus, they maintain that their cause of action did not accrue until that time and that they filed their complaint well within the limitations period.

On the other hand, William contends that if any fraud was committed (which he denies), it was committed in 1999 when he purchased the property, and that any action for fraud had to be brought within five years of that date, which it was not. He asserts that what Mae and Larry "discovered" in 2005 was not fraud but was his

purported profit on the sale of the farm. In support of his argument, William cites *Hollifield v. Blackburn*, 294 Ky. 74, 170 S.W.2d 910 (1943), and *Skaggs v. Vaughn*, 550 S.W.2d 574 (Ky.App. 1977). In *Skaggs*, the court held that

> As a general rule, the recording of a deed obtained by fraud is notice to the grantor, and the grantor must bring an action to set aside the deed within five years after the recording of the deed, or within ten years of the execution of the deed, whichever is earlier.

Id. at 572. William thus maintains that even if Mae and Larry had standing to file suit (which he doesn't concede), they were required to do so within five years of the sale of the farm or else be barred by the statute of limitations. Mae and Larry respond that *Hollified* and *Skaggs* are not applicable to this case because those cases did not involve situations where a fiduciary or confidential relationship existed between the parties as it did here.

We agree with William that the fraud action was barred by the statute of limitations and that the discovery rule was not applicable. Mae and Larry knew of the sale of the farm in 1999, yet they waited until more than five years passed, after they discovered the purported profits made by William, before they filed an action against him. Assuming Mae and Larry had standing to file their action, it was barred by KRS 413.120(12). *See Hollified*, *supra*, and *Skaggs*, *supra*.

Also, we disagree that William owed any fiduciary duties in connection with his purchase of the farm. It is true that William was a co-executor of Estille's estate when he purchased the farm from Margie. However, the farm had been held in the names

of both Estille and Margie as joint tenants with right of survivorship. As noted by the circuit court in its order, at Estille's death the farm passed directly to Margie and was not a part of Estille's estate. Therefore, there was no breach of fiduciary duty in this regard. Furthermore, William owed no fiduciary duty, based on a confidential relationship or otherwise, to Mae and Larry in connection with the sale of the farm because they had no ownership interest in it.

Mae's and Larry's second argument is that their claims were not barred by the statute of limitations because William held the farm pursuant to an express parol trust against which the statute of limitations does not run. They contend that William promised Margie and them that he would allow their use and enjoyment of the property if it was sold to him and that he would not sell it. In support of this argument, they cite several cases for the proposition that an enforceable express trust in real estate may be created orally notwithstanding the statute of frauds (KRS 371.010).

In reviewing Mae's and Larry's Verified Complaint, under "Factual Background" they state that William represented to Margie that the farm "was being conveyed in such a manner that it would never be sold outside of the family, that he would manage and control the Farm for the best interest and benefit of the family whereby his siblings and their children would always be assured of use and access to the Farm." However, none of the twelve counts or causes of action stated in the 18-page complaint mention entitlement to damages or the property itself based on a theory that William held the property in a trust, express or otherwise. Furthermore, when Mae and

Larry responded to William's motion to dismiss, they argued the existence of a constructive trust, not an express parol trust.[3]

Kentucky Rule of Civil Procedure (CR) 76.12 (4)(c)(v) provides in part that appellants' briefs must contain "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Mae's and Larry's brief is deficient in this regard. It makes no mention of where the theory of express parol trust was raised before the circuit court.

In *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986), the Kentucky Supreme Court stated, "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Id*. at 950. Stated differently in the oft-quoted case of *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976), "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Id*. at 222. In short, we decline to address this argument because it was not properly preserved for our review.

As to Mae's and Larry's argument to the circuit court that William held the property in a constructive trust, William correctly states in his brief that the absence of some writing indicating a constructive trust bars its enforceability pursuant to KRS 371.010. *See Hoheimer v. Hoheimer*, 30 S.W.2d 176 (Ky. 2000). There being no writing indicating the existence of a constructive trust, Mae's and Larry's argument is without merit.

[3] On page four of their response to William's motion to dismiss before the circuit court, Mae and Larry noted that under Kentucky law a trust may be established by parol agreement. However, their argument was the existence of a constructive trust.

Mae's and Larry's third argument is that their claims against William for maladministration of Estille's and Margie's estates were not barred by any statute of limitations. Concerning Estille's estate, the final settlement was filed on October 6, 2003. Any action against William in that regard was barred after two years. *See* KRS 396.205. Concerning Margie's estate, we agree with the circuit court and William that the farm was not part of her estate (since she had deeded it to him before her death) and that William's actions concerning the farm thus could not have amounted to maladministration of her estate.

Finally, Mae and Larry argue that the circuit court erred in dismissing their negligence claims as barred by the statute of limitations. Noting that Estille's estate was closed by final settlement in October 2003 and that Margie's estate remains open, Mae and Larry assert that the five-year limitations period for negligence claims had not expired when they filed their civil complaint in 2005.

As we have noted, any claims against William relative to Estille's estate are barred by the two-year limitations period in KRS 396.205. Further, any claims of negligence relative to William's handling of the sale of the property are likewise time-barred, regardless of whether a two-year or a five-year limitations period applies. In addition, William could not have been negligent in his capacity as executor of Margie's estate in the sale of property because said property was never a part of her estate as it had been sold by her to Happy Hollow Acres in 1999.

The order of the Christian Circuit Court dismissing Mae's and Larry's complaint is affirmed.

ALL CONCUR.

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