

RENDERED: SEPTEMBER 18, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002534-MR

DEBBIE WHISMAN

APPELLANT

v. APPEAL FROM WOLFE CIRCUIT COURT  
HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 06-CI-00128

FRANK WHISMAN AND ALLENE WHISMAN;  
GLORIA EVERIDGE; JOYCE BLAIR; JAMES  
ADKINS; HEATHER CALDWELL; AND STEVE  
GILBERT

APPELLEES

OPINION AND ORDER  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: CLAYTON, KELLER, AND LAMBERT, JUDGES.

CLAYTON, JUDGE: In this partition action, appellant, Debbie Whisman (Debbie), appeals from two orders of the Wolfe Circuit Court entered November 14, 2007, confirming the master commissioner's sale of real estate, including a

manufactured home, to appellee, Steve Gilbert (Steve), and distributing proceeds from that sale to appellees, Frank Whisman (Frank), Allene Whisman (Allene), Gloria Everidge (Gloria), Joyce Blair (Joyce), James Adkins (James), and Heather Caldwell (Heather). Because we find that the trial court had jurisdiction to hear and determine this matter in controversy, but that Frank did not have standing to bring this action, we affirm in part and reverse in part with directions to enter an order denying Frank any portion of the proceeds.

Frank and Debbie were still married but had a pending divorce proceeding when Frank filed a complaint in Wolfe Circuit Court on July 3, 2006. Frank asked that the real estate located in Wolfe County, Kentucky, be sold, with the proceeds distributed to himself and Allene .<sup>1</sup> Frank amended his complaint on November 20, 2006, to add additional owners of the property, Gloria, Joyce, James, and Heather, who collectively owned 25 percent of the total property, with Allene owning the remainder.<sup>2</sup>

On December 6, 2006, Debbie filed a motion to intervene in this action, claiming that the property previously owned by Debbie and conveyed to Allene was nonmarital and was being litigated in the pending divorce action with Frank.<sup>3</sup> The court verbally granted Debbie's motion to intervene during a hearing on January 4, 2007. Frank subsequently moved to sell the property, Debbie filed a

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<sup>1</sup> Allene neither made an appearance in the trial court nor filed a brief in this matter.

<sup>2</sup> The additional owners, Gloria, Joyce, James, and Heather were previously dismissed by this Court and are not parties to this appeal.

<sup>3</sup> The record from the divorce proceeding has not been made a part of the record on review.

motion to consolidate this action with the ongoing divorce litigation, and Frank moved for the dismissal of Debbie as a party based on her prior conveyance of the property to Allene. On May 10, 2007, the court denied Frank's motion to dismiss Debbie as a party, ordered that the issue of marital versus nonmarital property be referred to the master commissioner for further review, denied Debbie's motion to consolidate, ordered that the property be sold by the master commissioner, and ordered that the proceeds be divided according to the proportionate interests of the owners with any amounts to Frank, Allene or Debbie to be placed in escrow pending further orders from the court and a determination of their interests in the property. The order of sale of the property was entered May 30, 2007.

On June 1, 2007, Debbie moved to have the order of sale set aside based on her continued assertions that Frank had no marital interest in any portion of the property conveyed to Allene and that the status of the property as nonmarital was still being litigated in the divorce action between Debbie and Frank. The court denied Debbie's motion and ordered that the property be sold as scheduled. The property was sold on July 28, 2007, to Steve.

Following the sale of the property, Debbie filed a third-party complaint against Steve for wrongful eviction from the manufactured home (the trailer) situated on the property and a motion for temporary restraining order or injunction against Steve requesting that Debbie be given access to the trailer and her personal possessions located therein. Debbie subsequently filed objections to the master commissioner's report of sale, sought to have the sale set aside or a

declaration that the property sold did not include the trailer located thereon, and that Frank be denied any distribution of the proceeds of the sale of the property. Without ruling on any of Debbie's pending motions, the court entered an order on October 1, 2007, confirming the master commissioner's report of sale, awarding Frank attorney fees and costs, and distributing the proceeds of the sale proportionately among all the owners with Frank and Allene equally sharing a 75 percent interest in the property. The court further found that Debbie, having deeded her interest in the property to Allene, was no longer an owner in the subject real estate and was not awarded a share of the proceeds.

On November 8, 2007, with the divorce case apparently still ongoing, the court held a hearing and found that the trailer was permanently affixed to the property and was sold to the highest bidder at the master commissioner's sale. The order confirming the court's findings on that issue was entered November 14, 2007. By a separate order entered November 14, 2007, the court again determined that Debbie was no longer an owner in the subject property, having previously deeded her interest to Allene, and ordered that 25 percent of the proceeds be distributed to Gloria, Joyce, James, and Heather, with Frank and Allene receiving an equal share in the remaining 75 percent of the proceeds. Debbie brings her appeal from both of these orders entered by the court on November 14, 2007.

Debbie contends on appeal that Frank was not entitled to share in the proceeds from the sale of the property, having only an inchoate expectant interest in the property contingent upon Debbie preceding him in death. Debbie further

argues that the trailer was not permanently affixed to the property and was therefore not sold along with the property at the master commissioner's sale.

Frank counters that Debbie waived the issues argued in her brief by failing to raise them in the prehearing statement, that he was properly awarded a dower interest in the property, and that the court did not err in ruling that the trailer was permanently affixed to the property.

We first address Frank's argument that Debbie waived her issues by failing to raise them in her prehearing statement. In reviewing Debbie's prehearing statement, we find that Debbie summarized her issues sufficiently to bring them within appellate review. Kentucky Rules of Civil Procedure (CR) 76.03(8); *see also Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 196-97 (Ky. 1994).

We next address Debbie's argument that the court improperly found that the trailer was permanently affixed to and sold with the property at the master commissioner's sale. Because this was a factual determination based on the evidence presented, the court's finding will not be overturned unless clearly erroneous. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982); CR. 52.01. A finding of fact is not clearly erroneous if it is based on substantial evidence "that a reasonable mind would accept as adequate to support a conclusion[.]" *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citing *Black's Law Dictionary* 580 (7th ed. 1999)); *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)) (additional citations omitted).

Debbie contends that the trailer was not a part of the land because there was no certificate of title in the record nor had an affidavit affixing the trailer to the property been recorded with the county clerk. The status of the trailer in this case as a “manufactured home” falling within the definition of Kentucky Revised Statutes (KRS) 186.650 is not in dispute. The only question is whether the trailer was affixed to the property and passed with the commissioner's sale or is the personal property of Debbie.

Debbie relies on *PHH Mortg. Services v. Higgason*, 345 B.R. 584, 587-588 (E.D.Ky. 2006) for the proposition that since KRS 186A.297(1)<sup>4</sup> was not complied with by surrendering the certificate of title to the county clerk and filing an affidavit of conversion to real estate to same, the trailer did not become permanently affixed to the land so as to pass with the sale of the property. Frank counters that Debbie's reliance on KRS 186A.297 is misplaced since the statute was not effective until after Debbie acquired both the property and the trailer. As we have nothing in the record to indicate when Debbie acquired either the trailer or the property in dispute, we cannot make a determination of whether KRS 186A.297 is applicable.

However, Debbie's reliance on *PHH Mortg.* is misplaced. Both that decision and our court's earlier decisions in *Hiers v. Bank One, West Virginia, Williamson, NA*, 946 S.W.2d 196 (Ky. App. 1996), dealt with perfection of security interests in a manufactured home as against other creditors. Although

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<sup>4</sup> Appellant's brief referred to this statute as KRS 186.297(1).

both are somewhat analogous to the present issue, and thus somewhat instructive, neither decides this particular issue.

*Hiers*, which was decided prior to the enactment of KRS 186A.297, was concerned with whether the permanent attachment of a manufactured home to a property owned by another, would defeat a prior perfected lien on that same manufactured home. *Id.* This Court found that, under the statutes then in effect, a notation on the certificate of title was the exclusive method for perfecting a security interest “regardless of whether the disputed [trailer] in the instant action was permanently affixed to the real estate[.]” *Id.* at 198.

*PHH Mortg.*, 345 B.R. 584, which was decided after our legislature's enactment of KRS 186A.297, also dealt with the perfection of a security interest, albeit in a bankruptcy proceeding. The primary question was whether the bankruptcy trustee could avoid perfection of the manufactured home for PHH's failure to record a security interest on the certificate of title. *Id.* at 586. As in the instant case, there was no certificate of title ever issued to the manufactured home in question nor was there record of the manufactured home in the AVIS records as required by KRS 186A.070 and KRS 186A.010. *Id.* at 587. Without this necessary information, the Court could not determine whether the manufactured home had been converted to real property subject to PHH's lien, as was possible under KRS 186A.297, or was separate property of the bankruptcy estate. *Id.* at 587-588. Therefore, the Court vacated the bankruptcy court's decision and

remanded it for a determination on the status of the manufactured home. *Id.* at 588.

Similar to *PHH Mortg.*, we are without evidence indicating to whom the trailer belonged, when it was purchased or whether it was permanently affixed to the property. Despite Debbie's contention that the trailer was personal property and not a permanent fixture, Debbie presented no evidence to support her position either in her brief or in the trial record below. By contrast, at the November 8, 2007, hearing of this matter Frank submitted photographs of the trailer in question. After reviewing the evidence presented, the court ruled that the trailer was permanently affixed to the property and sold at the master commissioner's sale. Based upon the only evidence presented, we cannot find that the court's finding of fact on this issue was clearly erroneous. We therefore uphold the trial court's determination that the trailer was permanently affixed to the property.

Debbie's remaining contention is that the court erred in awarding Frank one-half of the interest in the property conveyed by Debbie to Allene. Debbie argues that Frank held only an inchoate expectant interest in the property which would not accrue until Debbie's death. Frank argues that having deeded away her interest in the property, Debbie had no judicable interest in the value assigned to Frank and was in no position to argue the percentage assigned by the court to Frank. While we agree with the court's ruling and Frank's argument that Debbie was no longer an owner in the property, we find a similar lack of ownership interest by Frank.



Our courts have long recognized that a spouse's right of action for a dower or curtesy interest does not accrue until the death of the other spouse with the surviving spouse “not entitled to any interest until the happening of that event[.]” *Smith v. Myers*, 7 Ky.L.Rptr. 443, 1885 WL 5723 (Ky. App. 1885). *Faulkner v. Terrell*, 287 S.W.2d 409, 414-15 (Ky. 1956); *Trimble v. Kentucky River Coal Corp.*, 235 Ky. 301, 31 S.W.2d 367, 369 (Ky. App. 1930) (citations omitted). A surviving widow's inchoate right “is made perfect or becomes absolute” upon surviving her husband. *Smith*, 7 Ky.L.Rptr. 443; *see also Pursifull's Adm'x v. Pursifull*, 299 Ky. 245, 184 S.W.2d 967 (Ky. 1945) (citing *Chalk v. Chalk*, 291 Ky. 702, 165 S.W.2d 534, 536 (Ky. App. 1942)). Although “no act done by him during his lifetime can deprive her of this right[.]” *Smith*, 7 Ky.L.Rptr. 443, a widow's cause of action for assertion of dower cannot accrue until the death of her husband. *Trimble*, 31 S.W.2d at 369 (citations omitted); *Moore v. Hudson*, 194 Ky. 725, 240 S.W. 383 (Ky. App. 1922). Furthermore, KRS 392.020, which provides the definition of the surviving spouse's interest in property of a deceased, specifically provides that “dower” or “curtesy” refer to the surviving spouse's interest created *after the death* of his or her spouse. (Emphasis added). Debbie was still alive at the time this action was instituted.

Frank has not argued, and we therefore find unnecessary to address, that he was entitled to a marital interest in the property. It is clear from the record that at the time this action was brought before this Court, Debbie and Frank were involved in a separate divorce proceeding. Whether the divorce proceeding will

give Frank an interest in the property is left to the determination of the court presiding over the divorce proceeding. *See First Union Home Equity Bank, N.A. v. Bedford Loan and Deposit Bank*, 111 S.W.3d 892, 895 (Ky. App. 2003). Since Frank's only claim is based on an inchoate curtesy interest in the property, Frank did not have a cause of action to bring this partition claim.

Because Frank did not have standing to bring this partition action, it is necessary to address whether the trial court was acting outside of its jurisdiction in this matter. Questions of jurisdiction may be raised at any time, by any party or the court itself and cannot be waived. *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 47 (Ky. 1996) (citing *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908)). If a court is without jurisdiction to act, it is without the power to do so. *Croslin*, 920 S.W.2d at 48 (citing *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970)). Debbie did not specifically raise the issue of jurisdiction.

Three separate categories of jurisdiction exist: (1) personal jurisdiction over specific persons; (2) subject matter over the nature of the case and type of controversy; and (3) particular case jurisdiction over the specific case. *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 429 (Ky. App. 2008). Partition actions, such as the instant matter, require the court to have both *in rem* and personal jurisdiction. *Id.* The Wolfe Circuit Court had both *in rem* and personal jurisdiction.

However, we find that the court was lacking particular case jurisdiction based on the lack of standing for Frank to bring this action. “[L]ack of particular case jurisdiction merely renders a judgment voidable, rather than *void ab initio*.” *Hisle*, 258 S.W.3d at 431. Particular case jurisdiction depends upon the existence of particular facts. *Id.* Since partition statutes constitute procedural provisions to be followed by the court as part of its particular case jurisdiction, a prerequisite to a partition action is that the person bringing the action for partition shares title in the property to be partitioned. *Id.* at 432-433; KRS 389A.030(1); *Terteling Bros., Inc. v. Bennett*, 287 S.W.2d 607, 608 (Ky. 1956). Mere expectancy or a future interest is not sufficient. *Noell v. Webster*, 260 Ky. 823, 86 S.W.2d 1013, 1014 (Ky. App. 1935) (citing *Adams v. De Dominques*, 129 Ky. 599, 112 S. W. 663 (Ky. App. 1908)); *Ward v. Edge*, 19 Ky.L.Rptr. 59, 100 Ky. 757, 39 S.W. 440 (Ky. App. 1897); *Bayne v. Stratton*, 131 Ky. 494, 115 S.W. 728, 730 (Ky. App. 1909). Any error in the court's application of KRS 389A.030 concerns the particular facts of this case but may be subject to consent, waiver or estoppel. *Hisle*, 258 S.W.3d at 433-434.

In *Bayne*, 115 S.W. 728, our predecessor Court vacated an order of sale for failure to comply with the statute requiring an interested party to bring the partition action. The Court found that, although one of the co-owners, defendant J.C. Stratton, filed an answer and joined with the petitioners in requesting the partition, the parties initiating the action did not have the requisite interest in the real property to be partitioned. *Id.* at 730. Furthermore, the Court found that it did

not have jurisdiction over all the necessary parties as process had not been made on one of the defendant co-owners. *Id.* Based on both the lack of jurisdiction and the action being a defective proceeding, the Court reversed the judgment of sale and directed that the petitioners join J.C. Stratton as a party plaintiff before again requesting partition. *Id.*

In the present case, Frank did not have an ownership interest in the property he sought to partition. Although two of the defendants, Joyce and Gloria, neither of which are a party to this appeal, responded and pled no contest to the sale of the property, they had not brought the action nor were they joined as plaintiffs. Because this action for partition was not brought by any person having an ownership interest, we find that the court lacked particular case jurisdiction to order the sale of the property.

Failure to have particular case jurisdiction by failing to comply with KRS 389A.030 makes the judgments herein appealed voidable, but not void, subject to challenge on appeal. *Hisle*, 258 S.W.3d at 432. As Debbie failed to raise this issue in her prehearing statement or brief, we thus consider this issue to be waived. *See Collins v. Duff*, 283 S.W.2d 179, 182 (Ky. 1955) Furthermore, because there are other parties involved in the sale of the property who are not before this Court, the balancing of equities weigh in favor of us confirming the sale of the property. We therefore decline to void the sale of the property for failure to comply with the statute requiring an interested party to bring a partition action.

In summary, we affirm the Circuit Court's November 14, 2007, order finding that the trailer was permanently affixed to the property sold at the master commissioner's sale. We affirm, in part, the court's November 14, 2007, order confirming the master commissioner's report of sale, the approval of attorney's fees and costs and the distribution of proceeds to Gloria, Joyce, James, and Heather. However, we reverse the portion of the order awarding Frank a 50 percent interest in the 75 percent of the proceeds awarded to both Frank and Allene, and direct the court to enter an order assigning the entire 75 percent of those proceeds to Allene.

ALL CONCUR.

ENTERED: September 18, 2009

/s/ Denise Clayton  
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Richard Kenniston  
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BRIEF FOR APPELLEE, FRANK  
WHISMAN:

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NO BRIEF FILED FOR APPELLEES  
ALLENE WHISMAN, GLORIA  
EVERIDGE, JOYCE BLAIR, JAMES  
ADKINS, HEATHER CALDWELL  
AND STEVE GILBERT