

RENDERED: NOVEMBER 13, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001630-MR

VIRGINIA HORN MEEK ESTATE;
PAT COLVIN;
HARRY COLVIN ESTATE;
JODI COLVIN BRANTNER; AND
MATTHEW AARON COLVIN

APPELLANTS

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 05-CI-00249

THOMAS LEE HORNE¹

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, MOORE AND TAYLOR, JUDGES.

¹ Thomas Lee Horne's name is spelled "Horne" and "Horn" in various pleadings. Because Mr. Horne spelled his name with an "e" in his complaint and in his brief, we will use that spelling.

KELLER, JUDGE: This appeal arises from a dispute regarding the disposition of real property that belonged to Virginia Horn Meek (Meek).² On appeal, the appellants argue that a deed of that property from Meek to Thomas Lee Horne (Horne), is invalid; that a deed from Meek to Harry Colvin (Harry), executed by Patricia Ann Colvin (Patricia), as Meek's attorney in fact is valid; and that the trial court's findings to the contrary are in error. For the following reasons, we affirm.

FACTS

On July 1, 1994, Meek executed a power of attorney, naming Patricia as attorney-in-fact, and a Will leaving her "farm located at Jennies³ Creek, Johnson County, Kentucky" (the Jennies Creek property), to Horne. None of the parties contested the validity of the Will and they agreed the power of attorney was not durable in that it did not provide for continued use should Meek become incompetent.

On January 7, 1998, Meek executed a deed granting title to the Jennies Creek property to Horne (the 1998 deed). Meek then gave the deed, which had not been executed by Horne or filed, to Horne's father.

In late February 2005, Meek, who was 90 years of age at the time, was hospitalized. On March 1, 2005, while Meek was in the hospital, Patricia, ostensibly acting through her power of attorney, executed several deeds, one of

² Virginia Horn Meek's name is spelled with and without an "e". Also, in her will, Meek spelled her name without an "e"; therefore, we use that spelling.

³ In the record and briefs, the property is referred to as "Jenny's Creek", "Jennys Creek", and "Jennies Creek". In Meek's will, the property is referred to as "Jennies Creek"; therefore, we will use that spelling.

which transferred title to the Jennies Creek property, from Meek to Harry. That deed (the 2005 deed), states that the Jennies Creek property was worth \$5,000.00 and that Harry, in consideration of the transfer, forgave a \$5,000.00 debt owed to him by Meek. The 2005 deed was recorded on March 1, 2005, two days before Meek's death.

On or about March 21, 2005, eighteen days after Meek's death, Horne's father gave Horne the 1998 deed. Horne executed and recorded the deed that day. On June 24, 2005, Horne filed a complaint in circuit court, seeking to invalidate the 2005 deed. In his complaint, Horne alleged Meek's power-of-attorney was not valid when she executed the 2005 deed because of Meek's incapacity. Furthermore, Horne alleged: that the transfer was without consideration because Meek was not indebted to Harry; that Meek, through her Will, had devised the Jennies Creek property to Horne; and that Patricia transferred the Jennies Creek property to Harry in order to thwart Meek's intended testamentary disposition of that property.

On May 15, 2006, Harry died, leaving his estate to Jody Colvin Brantner (Brantner), and Matthew Aaron Colvin (Matthew). Horne then substituted Harry's estate and named his heirs as parties.

Following a bench trial on July 24, 2008, the trial court rendered judgment in favor of Horne. In its judgment, the court found that Meek was incapacitated on March 1, 2005; therefore, the power of attorney was no longer valid. Furthermore, the court found that the 2005 deed was not supported by

consideration because there was not sufficient evidence to support Harry's claim that Meek owed him \$5,000.00. Based on these findings, the court ordered the 2005 deed to "be **SET ASIDE AND HELD FOR NAUGHT**, the same not having lawfully conveyed any property to Harry W. Colvin." (Emphasis in original). The judgment did not address the validity of the 1998 deed. It is from this judgment that the appellants appeal.

STANDARD OF REVIEW

The findings of fact by the trial court following a bench trial "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rule of Civil Procedure (CR) 52.01 and *Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky. App. 2009). With that standard in mind, we will analyze the issues raised by the appellants herein.

ANALYSIS

The appellants make three primary arguments: the deed from Meek to Horne was defective either because it was not delivered to Horne or because it was not delivered with the intent to divest ownership; Harry was a bona fide purchaser; and Patricia was authorized to execute the 2005 deed because she had no knowledge of the existence of the 1998 deed. We are not persuaded by any of these arguments.

First, we note that the trial court made no finding regarding the validity or invalidity of the 1998 deed. The trial court simply found that the 2005

deed was not valid. Therefore, whether Meek intended to make a gift of the Jennies Creek property to Horne and/or to divest herself of ownership in that property through the 1998 deed is irrelevant.

As to whether Harry was a bona fide purchaser, we look first to the power of attorney. That document authorizes Patricia “to sell or exchange real estate”; it does not authorize Patricia to make a gift of real estate. Patricia argues that she transferred the Jennies Creek property to Harry in exchange for forgiveness of Meek’s \$5,000.00 debt. The court found that there was not sufficient evidence to support Harry’s claim that Meek owed him \$5,000.00, a finding which is supported by the record. Therefore, Harry had nothing to exchange for the Jennies Creek property and any transfer of that property would have been a gift, which was not authorized by the power of attorney, rather than a purchase.

Furthermore, as noted by the court, the power of attorney was not “durable.” Kentucky Revised Statute (KRS) 386.093(4) provides that:

[t]he disability or incapacity of the principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

Patricia testified that she did not believe Meek was incapacitated on March 1, 2005. However, Horne, Horne’s father, and Meek’s physician testified

that Meek was incapacitated on March 1, 2005. Based on that evidence the trial court found that Patricia “either knew or should have known of the incapacity of Virginia Horne [sic] Meek.” That finding of fact, which is supported by substantial evidence, cannot be disturbed on appeal. Based on that finding of fact, the trial court’s further finding that the power of attorney was no longer effective on March 1, 2005, was correct. Therefore, we agree with the trial court that Patricia lacked the capacity to convey any of Meek’s property pursuant to that power of attorney.

The appellants’ final argument, that Patricia’s authority to execute the 2005 deed was in some way dependent on whether she had any knowledge of the 1998 deed, is without merit. Patricia’s authority to act on behalf of Meek was dependent on and flowed from the power of attorney. Because Patricia had no authority under the power of authority to execute the 2005 deed, her knowledge of the existence of the 1998 deed is irrelevant.

CONCLUSION

Based on the preceding, we hold that the trial court appropriately found that Patricia Ann Colvin lacked the authority to convey the Jennies Creek property to Harry W. Colvin on March 1, 2005. Therefore, we affirm the trial court’s judgment and order setting aside that deed of conveyance.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patricia Ann Colvin, *pro se*
Paintsville, Kentucky

Jody Colvin Brantner, *pro se*
Stanton Island, New York

Matthew Colvin, *pro se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

Donald L. Jones
Paintsville, Kentucky