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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002107-MR

CHARLES R. ELLIOTT AND
JUANITA ELLIOTT — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 07-CI-00521

CYNTHIA ELLIOTT O'DANIEL;
JOE KENT ELLIOTT; SHERRY
ELLIOTT ROSS; AND JEFFREY
PAGE ELLIOTT — APPELLEES

OPINION
REVERSING AND
REMANDING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: Charles R. Elliott and his wife, Juanita Elliott, appeal from orders of the McCracken Circuit Court which granted partial summary judgment to their nieces and nephews in connection with a farm Charles had owned as a joint tenant with his late sister-in-law, Betty. The central issue is whether a deed executed by Betty shortly before her death, in which she conveyed her interest in the property to her children, was sufficient to destroy her joint tenancy with Charles under the terms of KRS 381.130(2)(a)(2.). Because the language of the deed was insufficient to sever the joint tenancy, and a deed of correction filed after her death was ineffective, we reverse the order of the circuit court.

Since the 1950s, Charles R. Elliott and his brother, Lee Earl Elliott, had farmed several tracts of property together in McCracken and Ballard counties. Some of the property was owned individually, other property was owned jointly. Lee Earl and his wife Betty had four children, Sherry, Kent, Cindy and Jeff, who are the appellees in this action. In 1966, Lee Earl died following a farm accident. Charles continued to farm for himself and his brother's widow, Betty. They divided the profits earned on jointly owned property.

On September 3, 1971, Charles and Betty purchased the Champion farm (a/k/a the Luttrell farm) in McCracken County. The parties' rights of survivorship were described in the deed as follows:

> IT IS AGREED AND UNDERSTOOD, and is a part of the consideration hereof, that by this instrument the above-described property is conveyed to the parties of

> the second part [Charles and Betty] with right of survivorship, that, upon the death of either of the parties of the second part while they are still the owners of the above-described property, or any part thereof, or any interest therein, all right, title and interest of the one so dying shall immediately vest in the survivor.

It is undisputed by the parties that this deed created a joint tenancy with right of survivorship.

Thirty years later, in June 2001, Betty asked Charles to alter the survivorship arrangement. Charles refused. Betty then asked two of her children, Cynthia and Sherry, to enlist the aid of an attorney to change the Champion farm ownership from a joint tenancy with right of survivorship into a tenancy in common, and to assist her in conveying her interest in the property to her children. The attorney drafted a deed which Betty signed on July 8, 2005, at which time she was hospitalized, suffering from a serious illness. The deed was recorded on the same day. It stated in pertinent part as follows:

> THAT FOR AND IN TOTAL CONSIDERATION of $1.00 cash in hand paid, the receipt and sufficiency of which are hereby acknowledged, and the love and affection of the Grantor for her children, the Grantees, the Grantor has bargained and sold and does hereby grant, sell and convey unto the Grantees all of her one-half undivided interest in and to the property described below as follows: unto Cynthia Elliott O'Daniel, her heirs and assigns forever, an undivided 1/8 interest in and to the hereinafter described property, unto Joe Kent Elliott, his heirs and assigns forever, an undivided 1/8 interest in and to the hereinafter described property, unto Sherry Elliott Ross, her heirs and assigns forever, an undivided 1/8 interest in and to the hereinafter described property, unto Jeffrey Page Elliott, his heirs and assigns forever, an undivided 1/8 interest in and to the hereinafter

> described property, located in McCracken County, Kentucky, and more particularly described as follows, to wit:
>
> . . . . [Property description omitted]
>
> TO HAVE AND TO HOLD the above-described real property together with all appurtenances and privileges thereunto belonging unto the Grantees as follows: unto Cynthia Elliott O'Daniel, her heirs and assigns forever, an undivided 1/8 interest in and to the above-described property, unto Joe Kent Elliott, his heirs and assigns forever, an undivided 1/8 interest in and to the above-described property, unto Sherry Elliott Ross, her heirs and assigns forever, an undivided 1/8 interest in and to the above-described property, unto Jeffrey Page Elliott, his heirs and assigns forever, an undivided 1/8 interest in and to the above-described property.

Betty died one month later. After her death, her children asserted a one-half undivided interest in the Champion Farm. Charles filed a declaratory action in the McCracken Circuit Court, seeking a declaration that the deed from Betty to her children was ineffective to sever his survivorship rights in the farm, and that he consequently held the entire property in fee simple. Specifically, Charles argued that the July 8, 2005, deed from Betty to her children did not contain the language required under KRS 381.130(2)(a)(2.) to partition a joint tenancy. On November 28, 2007, he moved for partial summary judgment.

Before the trial court had ruled on his motion, Betty's children recorded a "Deed of Correction" on March 21, 2008. Betty's daughter, Sherry, the executrix of her estate, signed the deed, which stated in pertinent part as follows:

> WHEREAS, by Deed dated July 8, 2005 and recorded in Deed Book 1069, page 377, in the office of the

> McCracken County clerk, Grantor herein attempted to convey unto Cynthia Elliott O'Daniel, Joe Kent Elliott, Sherry Elliott Ross and Jeffrey Page Elliott a certain tract of land in McCracken County, Kentucky; and
>
> WHEREAS, the parties to that transaction intended to partition the survivorship aspect of Betty R. Elliott and Charles R. Elliott's joint tenancy in the property;
>
> WHEREAS said conveyance arguably failed to include a phrase in the consideration clause indicating the intent to partition the joint tenants' interest in the property;
>
> WHEREAS, said tract of land intended to be conveyed by said deed is the property hereinafter described; and
>
> WHEREAS, said parties hereto desire to correct said conveyance . . . .

The appellees also filed a cross-motion for summary judgment, which the trial court granted in an order entered on April 17, 2008. Charles and his nieces and nephews were adjudged tenants in common to the Champion farm, with Charles holding a one-half interest and each of the appellees a one-eighth interest. This appeal followed.

The seminal case on the issue of joint tenancies in Kentucky is *Sanderson v. Saxon*, 834 S.W.2d 676 (Ky. 1992). It defines joint tenancy as follows:

> A *joint tenancy*, as distinguished from the tenancy by the entirety, is an estate held by two or more people who (in the case where the estate is held by only two) are not husband and wife. Each is jointly entitled to the enjoyment of the estate so long as all live; however, the interest of a joint tenant, at his or her death, passes to the survivor.

Id. at 678 (citations omitted, emphasis in original).

The *Sanderson* Court observed that, at common law, "it seems uncontroverted that one joint tenant could destroy the right of survivorship of the other joint tenant, by way of a conveyance to a third party." *Id.* at 679. The Court explained that this principle was embodied by the General Assembly in KRS 381.120, which provides that

> Joint tenants may be compelled to make partition, and when a joint tenant dies, the joint tenant's part of the joint estate, real or personal, shall descend to the joint tenant's heirs, or pass by devise, or go to the joint tenant's personal representative, subject to debts, curtesy, dower, or distribution.

The Court further noted, however, that the General Assembly had "carved out an exception to KRS 381.120" in the form of KRS 381.130, which at the time the *Sanderson* opinion was written provided as follows:

> KRS 381.120 shall not apply to any estate which joint tenants hold as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears, from the tenor of the instrument, that it was intended that the part of the one dying should belong to the others, neither shall it affect the mode of proceeding on any joint contract or judgment.

The Court concluded that the General Assembly had redefined the nature of a joint tenancy. "The clear intent of KRS 381.120 is to preserve the survivorship aspect of joint tenancies, where 'it manifestly appears, from the tenor of the instrument, that it was intended that the part of the one dying should belong to the others. . . .'" *Sanderson*, 834 S.W.2d at 679.

In 1998, the General Assembly amended KRS 381.130 by adding an additional provision; it now states as follows:

> (1) KRS 381.120 shall not apply to any estate which joint tenants hold as executors or trustees, nor, except as provided in subsection (2) of this section, to an estate conveyed or devised to persons in their own right, when it manifestly appears, from the tenor of the instrument, that it was intended that the part of the one dying should belong to the others, neither shall it affect the mode of proceeding on any joint contract or judgment.
>
> (2) (a) 1. Except as provided in paragraph (b) of this subsection, one (1) or more joint tenants of real property may partition their interest in the real property during their lifetime by deed or other instrument.
>
> 2. The deed or other instrument shall express the intent of the joint tenant to partition the joint tenant's interest in the real property and shall be recorded at the office of the county clerk in the county where the real property or any portion of the real property is located.
>
> 3. The partitioning shall be effective at the time the deed or other instrument is recorded.
>
> (b) Residential real property that is owned exclusively by husband and wife as joint tenants with a right of survivorship and actually occupied by them as a principal residence shall not be partitioned as provided in paragraph (a) of this subsection.
>
> (c) The deed or other instrument shall convert the partitioning joint tenant's interest in the real property into a tenancy in common with the remaining joint tenants. If there are two (2) or more nonpartitioning joint tenants, the interests of

> the nonpartitioning joint tenants in relation to each other shall be governed pursuant to the terms of the instrument creating the interest.

We interpret the revision of the statute to mean that joint tenants with survivorship may partition their interest in real property during their lifetimes by recording a deed to that effect, and that the partition is effective if the deed or other instrument expresses the intent of the joint tenant to partition the interest in the real property.

Charles argues that the deed executed by Betty before her death was inadequate to express her intent to partition the survivorship interest. The appellees contend that Betty clearly intended and attempted to sever the joint tenancy by means of the 2005 deed; and that any deficiency in that deed was remedied by the deed of correction. Because Betty had discussed her desire to sever the tenancy with Charles in 2001, they argue that he was not an innocent third party to the transaction and is therefore estopped from challenging the validity of the deed of correction.

We turn first to the appellees' contention that the deed of correction signed by the executrix of Betty's estate was effective to convey the intent to partition, and that it in effect had "retroactive application." *Sanderson* plainly states that "the interest of a joint tenant, *at his or her death*, passes to the survivor." 834 S.W.2d at 678 (emphasis supplied). If the deed signed by Betty and recorded on July 8, 2005, was ineffective to partition the joint tenancy, then her interest passed immediately to Charles upon her death. The deed signed by her executrix

and entered after her death would have no effect because Betty's share would already have passed to Charles.

The appellees contend that because Charles was fully aware that Betty wanted to terminate the joint survivorship arrangement, he was not an innocent third party and is therefore estopped from challenging the validity of the deed of correction. But KRS 381.130 clearly requires that the joint tenant who wishes to partition the interest shall record a deed or other instrument expressing that intent, and that this partition must occur during his or her lifetime. These statutory conditions were simply not met in this case.

The July 8, 2005, deed, states that "the Grantor has bargained and sold and does hereby grant, sell and convey unto the Grantees all of her one-half undivided interest in and to the property described below as follows: . . . ." This conveyance of Betty's interest to a third party would have been sufficient under the old common law rule to destroy Charles's right of survivorship. Under KRS 381.130(2), however, a more explicit statement of the intent to partition the joint tenancy is required. Such a statement is lacking in the deed.

The interpretation of a deed is a matter of law and the court is bound by the four corners of the document. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 600 (Ky. App. 2006). The law is clear that "[e]xtrinsic evidence cannot be admitted to vary the terms of a written instrument in the absence of an ambiguous deed." *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). However, "[w]here the language employed in a deed is uncertain in its meaning, it

is proper to consider the nature of the instrument, the situation of the parties executing it, and the objects which they had in view." *Sword v. Sword*, 252 S.W.2d 869, 870 (Ky. 1952). If a deed is ambiguous, the terms are construed "strongly against the preparers, whether that be the grantor or the grantees." *Florman*, 207 S.W.3d at 600.

The July 8, 2005, deed conveys Betty's interest in the property to her children, with no express intent to sever the survivorship arrangement with Charles. As a matter of law, the deed is not ambiguous and consequently we may not consider extrinsic evidence (such as Betty's request to Charles to sever the joint tenancy arrangement) in order to interpret it. We reiterate that, under the old common law rule, such a deed of conveyance to a third party would have been sufficient to sever the joint tenancy with survivorship. Under the operation of KRS 381.130(2), however, Betty conveyed at most a life estate to the appellees which ended upon her death.

The partial summary judgment of the McCracken Circuit Court naming the appellees as tenants in common of the Champion farm is therefore reversed, and the case is remanded for entry of a judgment naming Charles as the owner in fee simple of the Champion farm.

LAMBERT, JUDGE, CONCURS IN RESULT ONLY.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: In my view, the 2005 deed from Betty to her children sufficiently evinces Betty's intent to partition her interest in the real property in compliance with KRS 381.130(2). I would affirm the trial court.

BRIEFS FOR APPELLANTS:

Kerry D. Smith
Paducah, Kentucky

BRIEF FOR APPELLEE:

Joe H. Kimmel III
James R. Coltharp, Jr.
Paducah, Kentucky