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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000699-MR

REBECCA SUE STORY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 05-CI-00309

SHARNA STORY SHIRCLIFFE,
EXECUTRIX OF THE WILL OF
JAMES D. STORY, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

KELLER, JUDGE: Rebecca Sue Story (Sue) appeals from the circuit court's order and judgment regarding the disposition of property following the death of Sue's husband, James D. Story (James). On appeal, Sue argues that the circuit court

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

erred: when it determined that James was a resident of Kentucky at the time of his death; when the court determined it had jurisdiction to determine ownership of real property located in Florida; when the court refused to include a jury instruction or permit argument regarding partial abandonment of an antenuptial agreement; and when the court found that closing documents related to the purchase of Florida real estate did not modify the antenuptial agreement. Sharna Story Shircliffe (Sharna), as executrix of James's will, disagrees. Having reviewed the record and the arguments of counsel, we affirm.

FACTS

The basic facts in this matter are not in dispute. In the mid-1990's James and Sue met in Bowling Green, Kentucky, where both resided. At the time, James owned several rental properties and his residence, located at 868 Richland Drive (the Richland Drive Property) in Bowling Green. On November 13, 1998, James purchased real estate located on 41st Street in Cape Coral, Florida (the 41st Street Property). On December 15, 1998, James executed a quitclaim deed on the 41st Street Property naming he and Sue as "co-tenants in common with a (50%/50%) respective interest."

On December 18, 1998, the day of their wedding, James and Sue executed an antenuptial agreement. That agreement provided that the parties would retain their separate estates for the benefit of their children from previous marriages and they agreed to waive their respective curtsey and dower interests.

Of particular pertinence are the following paragraphs in the agreement. Paragraph six provides that

> [a]ny property the parties acquire from their joint efforts after entering into marriage will be divided between their respective estates. This division will occur during the settlement of the estate of the second to die. Both parties understand and agree that property acquired after entering into marriage shall not include any property being reinvested from either party's separate property that was acquired prior to their marriage.

Paragraph seven provided that, the parties were or had acquired "as joint tenants" the 41st Street Property. The down payment for the property was made by James from pre-marital funds. Furthermore, the paragraph provided that, if James predeceased Sue, his estate would "continue to make the existing monthly mortgage payments for a period of time not to exceed twelve (12) months after his death or until the home is sold whichever event shall first occur." After Sue's death, or after the sale of the real estate, the proceeds from the sale of the 41st Street Property were to be divided equally between the parties or their respective estates. The agreement did not specifically provide for what happened to the proceeds from any disposition of the 41st Street Property while both parties lived.

Paragraph eleven provided that the agreement could only be modified in writing signed by both parties. Paragraph twelve provided that the provisions were severable, and paragraph thirteen provided that any disputes regarding interpretation of the agreement would be resolved using Kentucky law.

In December 2001, while in Bowling Green, James executed a will. In his will, James noted that he and Sue had entered into an antenuptial agreement and stated that he was therefore making no testamentary provisions for her. James provided specific gifts for his daughter, Ann Story Petri, her grandchildren/his great-grandchildren, and others. The residue, which represents the majority of the estate, James left to another daughter, Sharna, whom he named as executrix.

In April 2002, James and Sue sold the 41st Street Property and, using the proceeds from that sale, purchased real estate located at 413 Aviation Parkway in Cape Coral, Florida (the Aviation Parkway Property). The title to the Aviation Parkway Property is in the names of "James B. Story and Rebecca Sue Story, husband and wife."

Following their marriage James and Sue spent eight to ten months a year in Cape Coral, Florida and two to four months in Bowling Green, Kentucky. During the later years of the marriage, James's health deteriorated. The couple made their yearly summer trip to Bowling Green in 2004. However, because of James's health, they were not able to return to Cape Coral and James died in Bowling Green on October 30, 2004.

During the marriage, James maintained bank and investment accounts in Bowling Green and was registered to vote in Bowling Green. However, he did not vote either in person or by absentee ballot. Notably, James listed his address as the Richland Drive Property on the deed to the 41st Street Property and James and Sue listed the Richland Drive Property as their address on the deed to the Aviation

Parkway Property. We also note that the couple used their Florida addresses on their federal tax returns and filed non-resident/part-time resident Kentucky tax returns.

Shortly after James's death, the Warren District Court appointed Sharna as executrix of his estate. Nearly simultaneously, Sue filed a "Continuous Marriage Affidavit" in Florida, indicating that she and James were married prior to the acquisition of the Aviation Parkway Property; that they owned the property "as an estate by the entireties;" and that she now owned the property.

On February 23, 2005, Sharna filed a petition for declaration of rights under the antenuptial agreement and will. In her petition, Sharna sought interpretation and enforcement of the antenuptial agreement and an accounting from Sue regarding assets identified in that agreement. In her response to the petition, Sue claimed sole ownership of the Aviation Parkway Property and contested the validity of the antenuptial agreement. We note that, although Sue contests whether James was a resident of Kentucky, she admitted in her response to the petition that she was a citizen and resident of Kentucky.

Early in the litigation, disputes arose regarding the disposition of personal property, payment of real estate taxes on the Aviation Parkway Property, and the filing of income tax returns. We note that no specific issues regarding disposition of the personal property are before us; therefore, we will not further address the disposition of that property. As to the tax issues, Sue paid the real estate taxes and sought reimbursement from the estate for what she deemed its

proportionate share of those taxes. Sharna, on behalf of the estate, sought Sue's signature on joint tax returns. When the parties could not reach an agreement, they filed cross-motions to compel. The court determined that it could not require Sue to sign a joint tax return when she had no obligation to do so and reserved until final judgment the real estate tax issue.

Sue filed a motion to dismiss, arguing that the court did not have jurisdiction because James was not a legal resident of Kentucky at the time of his death. Following review of voluminous briefs and exhibits, the court determined that James was a legal resident of Kentucky and that it had jurisdiction. In doing so, the court noted that James continued to own the Richland Drive Property throughout the marriage; James was registered to vote in Bowling Green, Kentucky; James maintained investment and bank accounts in Bowling Green, Kentucky; James had his will prepared in Bowling Green, Kentucky; the antenuptial agreement was prepared in Bowling Green, Kentucky, and contained a choice of law provision in favor of Kentucky law; and James died in Bowling Green, Kentucky. The court noted the Florida addresses on the tax returns, but found that evidence was not persuasive.

Following several attempts by Sue to change the court's ruling and various disputes regarding the disposition of personal property, the parties eventually tried the validity of the antenuptial agreement to a jury. The jury found that James made no misrepresentations and did not exercise undue influence; that James had not "abandoned' the antenuptial agreement after signing it; and that

enforcement of the agreement was not unconscionable. The court then entered a final order and judgment in which it distributed the real and personal property according to the terms of the antenuptial agreement. According to that agreement, the court ordered all pre-marital property returned to the parties. The court determined that the quitclaim deed, which transferred the property equally to James and Sue, acted to modify the antenuptial agreement as to the 41st Street Property. The court then found that the proceeds from the sale of the 41st Street Property were used to purchase the Aviation Parkway Property. Pursuant to the agreement, the court then applied the distribution plan from Paragraph six of the agreement, finding that the Aviation Parkway Property would be divided equally upon Sue's death. Sue's arguments to the contrary notwithstanding, the court found that the deed to the Aviation Parkway Property did not act as a modification of the agreement. In doing so, the court noted that the Aviation Parkway Property deed had not been signed by either Sue or James, a requirement for modification of the antenuptial agreement. The court then made distribution of personal property that had been acquired after the marriage pursuant to the antenuptial agreement. Finally, the court determined that Florida law regarding interpretation of the Aviation Parkway Property deed was not applicable. This appeal followed.

STANDARD OF REVIEW

Because the issues before us have different standards of review, we set forth the appropriate standard as we analyze each issue.

ANALYSIS

1. Residency

Whether James was a resident of Kentucky is a question of fact to be determined on a case by case basis from the totality of the evidence. *See Perry v. Motorists Mut. Ins. Co.,* 860 S.W.2d 762, 764-65 (Ky. 1993). We reverse a trial court's findings on questions of fact only if those findings are clearly erroneous and not supported by evidence of substance. *Moore v. Assente,* 110 S.W.3d 336, 353-54 (Ky. 2003).

"A change of legal residence or domicile requires a physical act coupled with the intent to abandon the domicile previously established." *Hunter v. Mena,* 302 S.W.3d 93, 96 (Ky. App. 2010). The person seeking to establish a change of domicile has the burden of proof on that issue. *Id.*

As noted above, both parties offered proof that could have supported a finding by the trial court that James resided in Kentucky or Florida at the time of his death. In addition to what the trial court and the parties noted, we note the following: the quitclaim deed to the 41st Street Property and the deed of sale of that property lists the Richland Drive Property as James's address; James's 2001 will states that he is "of Bowling Green, Kentucky;" the closing documents for the sale of the 41st Street Property list Richland Drive as James's address; and Sue admitted in her response to Sharna's petition that she was a resident and citizen of Kentucky. Although we might have found otherwise, in light of the proof noted by the parties and the preceding, we cannot say that the trial court's determination that James was a resident of Kentucky was clearly erroneous.

2. Jury Instructions

Sue requested a jury instruction on partial abandonment of the antenuptial agreement, which the court refused to give. Sue now argues that was error. In support of her argument, Sue cites to a letter sent to the court and counsel the Monday after the verdict by one of the jurors, Michael Hunt (Hunt). In that letter, Hunt indicated that he believed that James and Sue were residents of Florida; that James intended for Sue to take the Aviation Parkway Property upon his death by putting that property in both names; and that any portion of the agreement negated by language in the deed should be severed. Sue argues that this correspondence is evidence of the court's error in denying the requested instruction.

Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981).

Sue does not point to any evidence that would have supported her contention that she was entitled to the requested jury instruction. Furthermore, she does not cite to any legal authority to support her argument that a post-verdict letter from a juror demonstrates that the trial court erred by not giving the requested instruction. If a party does not cite to any authority for an argument, we are not required to address that argument. *See* CR 76.12 *and Cherry v. Augustus*,

245 S.W.3d 766, 781 (Ky. App. 2006). Because Sue has not cited any authority to support her argument or what evidence would have supported the requested instruction, we will not further address it.

3. Jurisdiction Over Florida Real Estate

Sue argues that a Kentucky court does not have jurisdiction to determine who owns real estate in Florida and that such determination must be made by a Florida court. According to Sue, the deed to the Aviation Parkway Property gave her right of survivorship to that property free and clear from any claims by James's estate.

However, Sue has incorrectly framed the issue. The trial court did not determine ownership interest in the Aviation Parkway Property. James and Sue made that determination in the antenuptial agreement. In that agreement, Sue and James stated that they wanted to keep their pre-marital estates separate. Paragraph six of the agreement provides that any property acquired after marriage through the joint efforts of the parties is to be divided between the parties' estates after the last party dies. Any property acquired after marriage through reinvestment of property acquired prior to marriage shall not be subject to the preceding division. Since it is not subject to that division, such property remains part of the separate estates.

The 41st Street Property was acquired by James before marriage and he deeded half of that property to Sue before marriage. Therefore, James and Sue each had a one-half interest in the 41st Street Property pre-marriage. During the marriage, the proceeds from the sale of the property were reinvested in the

Aviation Parkway Property. Thus, pursuant to the agreement, the parties' ownership interest in the Aviation Parkway Property remained the same as their pre-marital interest in the 41st Street Property, half to James and half to Sue. We agree with the trial court that, absent a written amendment to the antenuptial agreement signed by both Sue and James, any provision in a deed to the contrary is meaningless.

In support of her argument, Sue primarily cites to: *Middleton's Trustee v. Middleton, et al.*, 172 Ky. 826, 189 S.W. 1133 (1916); *Kyle v. Kyle*, 128 So.2d 427 (Fla. Dist. Ct. App. 1961); and *Santos v. Nicole-Sauri,* 648 So.2d 277 (Fla. Dist. Ct. App. 1995). However, these cases are not persuasive. *Middleton's Trustee* involved a trust. The only portion of the trust corpus at issue before the court was real property in Mississippi. This case is distinguishable for two reasons. First, unlike *Middleton's Trustee*, the case herein involved property in both Kentucky and Florida. Second, it does not appear that the trust in *Middleton's Trustee* had a choice of law provision. The parties herein specifically indicated that the antenuptial agreement would be interpreted under Kentucky law. Therefore, *Middleton's Trustee* is not persuasive.

In *Kyle*, Mr. and Mrs. Kyle, who were Canadian, signed an antenuptial agreement waiving their respective dower and curtsey rights. The agreement was valid under Canadian law, but not under Florida law. Ten years after Mr. Kyle and his wife were "separated from bed and board" by a Canadian court, Mr. Kyle purchased real estate in Florida. Following the purchase, Mr. Kyle

sought to transfer the real estate to a corporation, but the transfer could not take place because Mrs. Kyle would not sign a waiver of her dower rights. Mr. Kyle then sought to enforce the antenuptial agreement and to force Mrs. Kyle to sign a waiver of her dower interest in the real estate. The Florida appellate court held that, because the antenuptial agreement was not valid in Florida, Mrs. Kyle had not relinquished her dower interest in the Florida real estate.

Kyle can be distinguished for two reasons. First, dower and curtsey were abolished in 1979 when the Florida legislature enacted Fla. Stat. § 732.111. *In re Anderson's Estate*, 394 So.2d 1146 (Fla. Ct. App. 1981). Therefore, Sue had no dower interest to assert in Florida, regardless of the enforceability of the antenuptial agreement. Second, by statute, Florida has abrogated the holding in *Kyle* that a waiver must meet Florida's requirements to be enforceable. Pursuant to Fla. Stat. § 732.702, such a waiver is valid in Florida if valid where executed. The Warren Circuit Court determined that the antenuptial agreement between James and Sue was valid under Kentucky law; therefore, it is valid under Florida law.

In *Santos,* a Puerto Rican couple signed an antenuptial agreement in Puerto Rico and owned real estate in Florida. The Florida Court of Appeals determined that the pre-nuptial agreement should be interpreted according to the law of Puerto Rico, not the law of Florida. As to the real estate, the Florida Court of Appeals remanded the matter to the trial court so that it could determine if the real estate was a "homestead" under Florida law. "In order for property to classify as homestead, the property must be the residence of either the owner or the owner's

family and the owner must be the 'head of a family.'" *In re Estate of Melisi*, 440 So.2d 584, 585 (Fla. Dist. Ct. App. 1983). Based on the Warren Circuit Court's determination that James was a resident of Kentucky, Florida's homestead law has no application. Therefore, this case is not persuasive.

4. Effect of Closing Documents

Sue argues that the closing documents for the Aviation Parkway Property acted as an amendment to the antenuptial agreement. As the trial court did, we disagree.

The antenuptial agreement provided that it could only be amended or altered by a writing signed by both parties. The closing documents are signed by both Sue and James; however, the documents only show how money related to the purchase of the property was to be collected and disbursed. The documents do not mention the antenuptial agreement, nor do they indicate that they are to act as an amendment to the agreement. Therefore, this argument is without merit.

CONCLUSION

Having reviewed the record, the pertinent law, and the arguments of counsel, we discern no error on the part of the trial court. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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