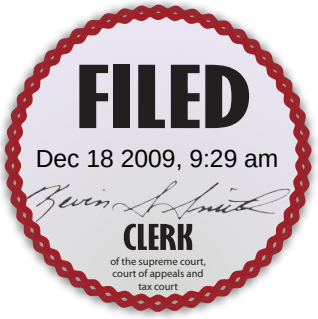

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IN THE COURT OF APPEALS OF INDIANA

RUSSELL LAKIN,	)	
	)	
Appellant-Petitioner/Cross-Appellees,	)	
	)	
vs.	)	No. 37A03-0905-CV-212
	)	
ESTATE OF ROBERT C. LAKIN and CL Corporation (Intervenor),	)	
	)	
	)	
Appellees-Respondents/Cross-Appellants.	)	

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable James R. Ahler Judge
Cause No. 37D01-0804-ES-204

December 18, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Russell Lakin appeals the trial court's order denying his "Petition to Affirm Beneficiaries' Disclaimer of an Estate Asset and to Transfer Estate Asset to the Non-Disclaiming Beneficiary." We affirm.

Issue

Russell raises several issues, which we consolidate and restate as whether the trial court properly determined that the agricultural lease, in which the decedent was the tenant, was terminated by the majority of the beneficiaries.

Facts

In January 1983, Robert Lakin, as tenant, entered into a Crop Share Lease ("Lease") with CL Corporation, as landlord. The term of the Lease was until January 1, 2018, "unless terminated by mutual agreement of the parties." App. p. 24. Under the Lease, Robert rented a 520-acre farm and all harvested crops were to be divided "on a 50/50 basis," except that Robert would receive all of "the hay or pasture on the permanent pasture and woodlots on the property." Id. at 25. Additionally, the Lease provided:

> The terms of this lease shall be binding on the heirs, executors, administrators, successors and assigns of both landlord and tenant, in the same manner as upon the original parties, provided however, that upon the death of the Tenant, Tenant's heirs (including his sons, David, Russell and Steven Lakin) shall have an option to terminate said lease by giving written notice of said termination within ninety (90) days immediately prior to the next anniversary date of said lease.

> The Tenant shall not assign or sub-let this lease to any party, other than blood relatives of the Tenant, without the prior written consent of the Landlord.

Id. at 24.

Robert died on August 7, 2005, and his unsupervised estate was opened on August 24, 2005. Robert's will named his children, Russell Lakin, David Lakin, James Lakin, Stephen Lakin, and Elizabeth Bacon, as equal devisees of his estate. Initially, David and Russell were appointed as co-personal representatives. However, in October 2006, the siblings reached a Family Agreement, in which they agreed, in part, that David and Russell would resign as co-personal representatives and that James would become the personal representative.

The personal representatives did not marshal, inventory, or administer the Lease Agreement. Rather, Russell asserted that Robert had assigned the Lease to him prior to Robert's death. However, CL Corporation disputed Russell's assertion, and in January 2007, CL Corporation filed a declaratory judgment action against Russell and the Estate. In December 2007, the trial court granted summary judgment to CL Corporation. Specifically, the trial court found that Robert did not assign the Lease to Russell before his death and that there were no third party beneficiaries to the Lease. The trial court also found that Robert's interest in the Lease transferred to his estate and that his executor had the responsibility to control the Lease interest while the estate was pending.[1]

[1] Russell initiated an appeal to this court, but later filed a motion to dismiss the appeal, which we granted.

In February 2008, James, David, Stephen, and Elizabeth ("Majority Siblings") entered into a stipulation and agreement, which provided that the Lease had been abandoned, that the Lease should be terminated according to its provisions, and that "it is in the best interest of the estate that the aforementioned Lease is terminated which avoids continuing potential obligations or responsibilities of the Estate or collective beneficiaries thereof." Id. at 33. Russell then filed a "Petition to Affirm Beneficiaries' Disclaimer of an Estate Asset and to Transfer Estate Asset to the Non-Disclaiming Beneficiary." Id. at 19. Russell claimed that the Majority Siblings had disclaimed their interest in the Lease, leaving Russell as the sole beneficiary "who takes the lease under the terms of the will." Id. at 22.

The Majority Siblings responded by signing and filing an "Objection/Affidavit," which stated that the Majority Siblings intended to terminate, not disclaim, the Lease. Id. at 158. The Objection/Affidavit also provided:

> The undersigned is of the opinion that the Lease was properly terminated while the Estate was unsupervised and, therefore, required no Court approval. However and to the extent the termination of Lease requires Court approval, then and in that event, the undersigned requests the Personal Representative affirm the termination and obtain a Court Order determining that the Lease is terminated.

Id. at 159. CL Corporation also responded that the Majority Siblings had terminated, not disclaimed, the Lease. CL Corporation noted that it had, in March 2008, filed a

complaint for eviction against Russell because Russell continued to farm the land subject to the Lease and had refused CL Corporation's requests for him to vacate the property.[2]

In April 2008, Russell filed a petition to change the Estate from an unsupervised estate to a supervised estate, which the trial court granted. CL Corporation also filed a motion to construe the will and Lease, arguing that the Lease lapsed, the Estate surrendered the Lease, the Lease was surrendered by operation of law, Russell was estopped from arguing that the Estate had an interest in the Lease, the Lease was terminated pursuant to its terms by the heirs, and the Lease was terminated by mutual agreement of the parties.

The trial court held a hearing to address "whether or not the Lease is an existing asset of the Estate, the Lease should be marshaled/inventoried and administered by the Estate and whether or not the Lease has been terminated, abandoned or lapsed by operation of the Law." Id. at 100. At the hearing, James, the personal representative, testified that the Lease had "limited or no value at all to the estate" but that the Lease did have potential liability to the Estate. Tr. p. 45-46. The trial court entered findings of fact and conclusions thereon at the parties' request denying Russell's motion. The trial court found "that the Stipulation and Agreement shows or reflects an intent that the Majority Lakin Siblings did not want to be bound by the Lease Agreement and wished to see that agreement terminate" and that "that the Stipulation and Agreement does not state that it is

[2] This action was resolved with a stipulation to dismissal with prejudice after Russell vacated the property.

a disclaimer." App. p. 11. The trial court also found "that the Objection/Affidavit shows or reflects an intent that the Majority Lakin Siblings did not want to be bound by the Lease Agreement and wished to see the agreement terminate." Id. at 12. The trial court concluded that the Majority Siblings did not "disclaim" the Lease because the requirements of Indiana Code Section 31-17.5-3-3 were not met. Id. at 13. Rather, the trial court found that the Majority Siblings intended the Lease to terminate.

Next, the trial court concluded that the Lease was in the nature of a personal services contract and that all of the "heirs" had to consent to being bound by the Lease. Id. at 15. The trial court determined that the heirs "rejected the Lease Agreement within a reasonable time period and did not agree to be bound by that agreement." Id. at 16. The trial court found that the Lease was terminated and that James Lakin, as personal representative, had "no further duty to undertake efforts to marshal, inventory, or administer the Lease Agreement." Id. at 17. Because it resolved the litigation on this basis, the trial court did not address the remaining arguments asserted by CL Corporation and the Majority Siblings.

Analysis

The issue on appeal is whether the trial court properly determined that the Lease was terminated by the Majority Siblings. At the parties' request, the trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000). In our review, we first consider

whether the evidence supports the factual findings. Id. Second, we consider whether the findings support the judgment. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, 726 N.E.2d at 1210. We give due regard to the trial court's ability to assess the credibility of witnesses. Id. Although we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

We begin by discussing Russell's motion to dismiss and/or motion to strike pages thirty-nine through forty-seven of Appellee's brief filed by CL Corporation and the Estate. Those pages contain arguments that CL Corporation and the Estate describe as a cross-appeal or, alternatively, an "alternate basis for affirming the trial court's judgment." Appellee's Br. p. 40. Specifically, CL Corporation and the Estate argue that the heirs timely exercised the option to terminate the Lease, that the Lease was terminated by mutual agreement of the parties, and that the Lease was terminated by operation of law. Russell asserts that the issues are not proper for a cross-appeal and that we cannot affirm on these alternate bases because we may only review the findings and conclusions issued by the trial court, and the trial court did not decide the case on any of these bases.

This argument was resolved by our supreme court in Mitchell v. Mitchell, 695 N.E.2d 920, 923-24 (Ind. 1998), where the court held:

> [W]here a trial court has made special findings pursuant to a party's request under Trial Rule 52(A), the reviewing court may affirm the judgment on any legal theory supported by the findings. Whether it is prudent to do so may turn on the extent to which the issue is briefed on appeal. In this case, both parties expressed their views on the correct rule of law in the Court of Appeals. Under these circumstances, there is no surprise and no risk of the appellate court's introducing an unvetted legal theory. In addition, before affirming on a legal theory supported by the findings but not espoused by the trial court, the appellate court should be confident that its affirmance is consistent with all of the trial court's findings of fact and the inferences reasonably drawn from the findings.

Consequently, we deny Russell's motion to dismiss the cross-appeal or strike portions of Appellee's brief. We may affirm on any legal theory supported by the trial court's findings if we are confident that such affirmance is consistent with all of the trial court's findings of fact and inferences drawn therefrom. In fact, although we reach the same result as the trial court, our analysis, based on the trial court's findings, is slightly different.

The trial court concluded that the Majority Siblings could terminate the Lease. On appeal, Russell argues that he was a co-tenant of the Lease and that the Majority Siblings had no authority to terminate any interest except their own. He also argues that the language of the Lease demonstrates an intent that the Lease continue unless all heirs desire to terminate the Lease. Contrary to Russell's argument, we conclude that Russell and the other siblings were not co-tenants of the Lease.

At issue here is the Lease between Robert and CL Corporation, which provided:

> The terms of this lease shall be binding on the heirs, executors, administrators, successors and assigns of both landlord and tenant, in the same manner as upon the original parties, provided however, that upon the death of the Tenant, Tenant's heirs[3] (including his sons, David, Russell and Steven Lakin) shall have an option to terminate said lease by giving written notice of said termination within ninety (90) days immediately prior to the next anniversary date of said lease.[4]

App. p. 24. As determined by the trial court in CL Corporation's declaratory judgment action, upon Robert's death, the Lease became an Estate asset to be administered by the personal representative.

In general, a personal representative "shall have a right to take, and shall take, possession of all the real and personal property of the decedent." Ind. Code § 29-1-13-1. This court held in Miller v. Ready, 59 Ind. App. 195, 201-02, 108 N.E. 605, 608 (1915), that, except in the case of a personal services contract, the death of a lessee in an ordinary lease of real estate does not terminate the lease.[5] Rather, "the term or the unexpired

[3] We note that the probate code defines "heirs" as "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will." Ind. Code § 29-1-1-3(11). However, Robert was not intestate; he had executed a will. The term "devisee" or "legatee" is used in conjunction with a testamentary disposition. I.C. § 29-1-1-3(5), -3(7). However, the parties do not dispute that "heirs," as used in the Lease, refers to Robert's five children.

[4] Russell makes no argument concerning the time limitations of the Lease.

[5] CL Corporation and the Estate argue that the Lease was a personal services contract. This issue has been the subject of significant debate. See In re Estate of Sauder, 156 P.3d 1204, 1215 (Kan. 2007). We question whether the Lease could have been intended as a personal services contract where the Lease specifically provides that it is "binding on the heirs, executors, administrators, successors and assigns" of the tenant. App. p. 24. Further, in CL Corporation's declaratory judgment action, the trial court

portion thereof becomes a part of the personal assets of the estate, to be inventoried, appraised, and sold as other personal property."[6] Miller, 59 Ind. App. at 202, 108 N.E. at 608; see also I.C. § 32-31-1-16 ("An executor or administrator of the estate of a decedent, whether a testator or intestate: . . . (2) is subject to the same liabilities to pay rents; as the decedent."); Spiro v. Robertson, 57 Ind. App. 229, 234, 106 N.E. 726, 728 (1914) ("A lease of real estate for years is 'personal estate,' and passes to the personal representative of the lessee, upon his death intestate, and not to his heirs."); In re Estate of Sauder, 156 P.3d 1204, 1215 (Kan. 2007) (holding that a crop lease did not terminate upon the lessee's death).

We addressed a similar lease in Crowell v. Himes, 117 Ind. App. 56, 69 N.E.2d 135 (1946). There, Phebe Hanes entered into a lease with Ora and Vera Himes, which provided, in part: "It is further hereby agreed and understood by the parties hereto that in the event of the death of [Hanes] during the existence of this lease, any and all personal property on the farm belonging to her shall become the property of [the Himeses] and shall be their property absolutely without any claim whatsoever on the part of [Hanes]." Crowell, 117 Ind. App. at 60, 69 N.E.2d at 137. We held that, upon Hanes's death, title in the farm personal property passed to and vested in Hanes's personal representative. Id.

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concluded that Robert's interest in the Lease transferred to his estate and that his executor had the responsibility to control the Lease interest while the estate was pending, and the Estate did not appeal this determination. However, we need not address this argument because we resolve the appeal in favor of CL Corporation and the Estate on a different basis.

[6] A tenancy at will, which is not at issue here, is also terminated by tenant's death. Sabinske v. Patterson, 100 Ind. App. 657, 667, 196 N.E. 539, 543 (1935).

at 67, 69 N.E. at 140. Further, we held that "the clause of the contract involved was an attempted testamentary disposition of personal property to take effect at the death of the owner under certain conditions and is invalid because not executed under the formalities required to make a will." Id., 69 N.E. at 140.

Once the personal representative takes possession of the Lease, "[u]ntil in some manner released or discharged, it devolves upon the administrator to perform the covenants of the lease . . . ." Miller, 59 Ind. App. at 202, 108 N.E. at 608 (emphasis added). Thus, possession of a decedent's property remains with the personal representative until properly distributed through the probate process. See Matter of Kingseed's Estate, 413 N.E.2d 917, 924-25 (Ind. Ct. App. 1980) (holding that the personal representative had a duty to take possession of the decedent's property "until the court delivered possession to the devisees under an order for distribution").

Upon Robert's death, his personal representative had a duty to take possession of Robert's property, including the Lease. As Russell was claiming a sole interest in the Lease after Robert's death, the personal representatives initially did not take "possession" of the Lease. However, CL Corporation challenged Russell's claim to the Lease. After CL Corporation brought its declaratory judgment action against Russell, in December 2007, the trial court issued an order finding that Russell had not been assigned Robert's interest in the Lease prior to his death. The trial court further found that Robert's interest in the Lease transferred to his estate and that his executor had the responsibility to control the Lease interest while the estate was pending. Shortly thereafter, the Majority Siblings,

including the personal representative, agreed that the Lease had been abandoned or should be terminated.

Russell contends that the "heirs" were co-tenants of the Lease. However, this assertion ignores the nature of the probate process. The "heirs" were not yet in possession of the Lease. Rather, the personal representative was still in possession of the Lease and had the responsibility to manage it.

Until April 2008, the estate was unsupervised. Under Indiana Code Section 29-1-7.5-3, an unsupervised personal representative "may do the following without order of the court: . . . (6) . . . abandon an estate asset; . . . [and] (11) Abandon property when, in the opinion of the personal representatives, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate." Consequently, prior to April 2008, the personal representative, James Lakin, could abandon the Lease without court approval if he determined it was "valueless, or is so encumbered, or is in condition that it is of no benefit to the estate." I.C. § 29-1-7.5-3(11).

Lakin, along with the other Majority Siblings, signed an affidavit stating that the Lease "is abandoned by the Estate," that the Lease "should be and is terminated," and that "it is in the best interest of the estate that the aforementioned Lease is terminated which avoids continuing potential obligations or responsibilities of the Estate or collective beneficiaries thereof." App. p. 32-33. At the hearing, James, the personal representative, testified that the Lease had "limited or no value at all to the estate" but that the Lease did have potential liability to the Estate. Tr. p. 45-46. Under these

circumstances, we conclude that the personal representative properly abandoned the Lease during the unsupervised administration of the Estate.

Finally, Russell also argues that the Majority Siblings waived any interest in the Lease. Russell argues that the Majority Siblings failed to assert an interest in the Lease as co-tenants at the hearing on this matter. As we noted, Russell and the Majority Siblings were not yet tenants under the Lease. Moreover, as devisees under Robert's will, the siblings could refuse to accept property by following the statutory disclaimer procedure set forth in Indiana Code Section 32-17.5-3-3. The trial court determined that the affidavit executed by the Majority Siblings was not a disclaimer, and Russell does not appeal that determination. Appellant's Reply Br. p. 15. Russell makes no cogent argument that the Majority Siblings have "waived" their interest in the Lease. See Ind. Appellate Rule 46(A)(8).

Conclusion

The Majority Siblings were not co-tenants of the Lease. Rather, the personal representative was in possession of the Lease and properly abandoned it. We conclude that the trial court did not err when it denied Russell's motion. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.