RENDERED: October 23, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002901-MR

HENRIETTA L. ENGLISH; and JAMES P. ENGLISH — APPELLANTS

v.

APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAN CORNETTE, JUDGE
ACTION NO. 96-CI-00003

IDA MAE WORTHINGTON — APPELLEE

OPINION
AFFIRMING

* * * * * * * *

BEFORE: DYCHE, EMBERTON and JOHNSON, Judges.

EMBERTON, JUDGE. On April 5, 1975, Joe Worthington, now deceased, conveyed certain real estate to the appellants, Henrietta English and James English, his niece and nephew. Following a bench trial, the deed to the appellants was declared null and void and the appellee, Ida Mae Worthington, Joe's widow, was restored her dower interest. The appellants allege that the trial court findings are clearly erroneous; that they were entitled to a trial by jury; that the action is barred by the statute of limitations; and that the trial court erred in

awarding appellee a one-third dower interest in the real estate. We affirm.

Appellee initially argues that appellants' appeal should be dismissed because the notice of appeal was filed prior to the entry of an order overruling the October 9, 1996, judgment. The amended order only clarified the extent of appellee's dower interest awarded in the final judgment. Under the rule of "relation forward," we find the appeal timely filed. Johnson v. Smith, Ky., 885 S.W.2d 944 (1994).

The appellee and Joe were married on April 24, 1975. Both were widowed, Joe had no children and appellee had two adult children. When Joe and appellee met, Joe owned his home situated on a 119 acre farm, a 78 acre farm with no improvements, and his savings. Following his engagement to appellee, Joe conveyed the 119 acre farm, including the home, to appellants in consideration of $1.00 and love and affection. At the time, Joe was seventy-three years of age and appellee was fifty-eight years of age.

After twenty years of marriage, appellee and Joe both became ill and required hospitalization. On July 14, 1995, Joe executed a power-of-attorney appointing his neighbor, Glenn Ellis, as his attorney-in-fact and executed a new will devising the bulk of his estate to Mr. Ellis. After his discharge from the hospital, Joe was sent to a nursing home where Mr. Ellis assisted Joe in preparing and filing a divorce petition. Joe died, however, on August 8, 1995, before service was rendered.

Joe's most recently executed will was admitted to probate and appellee renounced the will seeking her dower right and interest in the estate. On January 19, 1996, appellee filed a complaint alleging the conveyance to appellants by Joe to be a fraud on her dower interest, and therefore, void.

In Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1940), the court held that a widow was entitled to dower in property that her husband had disposed of prior to the marriage in an attempt to defeat her dower interest. Subsequently, "we have held in many cases that the widow's right to dower cannot be defeated by a gift by her spouse of all, or more than one-half, of his property to another with the intent to defeat claims to dower." Harris v. Rock, Ky., 799 S.W.2d 10 (1990).

Appellants argue that the transfer can be set aside only upon a showing that the intent of the deceased at the time of the conveyance was to defeat the prospective spouse's soon to be acquired dower interest in the property. While we agree with appellants' recitation of the law, we have consistently held that such a motive may be demonstrated by circumstantial evidence. Anderson v. Anderson, Ky. App., 583 S.W.2d 504 (1979).

> A man is presumed to intend the natural consequences of his acts, and where the effect of his acts is to disinherit his wife from such a substantial portion of his estate as was the case here, it would be unreasonable to infer that the gift to the children was made without an intention to disinherit the wife.

Id. at 505.

There is no dispute that the conveyance in this case occurred just prior to the impending marriage of appellee and Joe. Although there was some evidence that appellee and Joe may have had an interruption in their engagement, there was sufficient evidence from which to conclude that the couple began contemplating marriage in March 1975. Appellants' contention that Joe, since the death of his first wife, had always intended that the family-owned farm go to them, supports the position that Joe's intent was to deprive appellee of her dower interest in the property. At age seventy-three and contemplating marriage, it is reasonable to infer that Joe intended to deprive appellee of any ownership interest in the farm at his death.

The 119 acre farm, valued at Joe's death at $178,200, constituted the bulk of Joe's estate. The only remaining asset in the estate was an unimproved 78 acre farm having an assessed value of $93,600.[1] In Benge v. Barnett, 309 Ky. 354, 217 S.W.2d 782, 783 (1949), the court quoted with approval the following:

> The view has been taken, however, that a husband's gift of the bulk of his estate without his wife's knowledge raises a prima facie case of fraud, and unless such presumption is removed by the beneficiaries of the gift, it will be declared void as to the wife. Nevertheless, in order to establish fraud on the part of the husband in giving away property during coverture, the intention to defraud his wife must be proved, the existence of which intention is to be

[1] Just prior to Joe's death appellee transferred several joint Certificates of Deposit and joint accounts in excess of $110,000 to her individual name. After she renounced the will she received $31,000 as her dower interest in the 78 acre farm.

> arrived at by consideration of the facts of a particular case.

We hold that the trial court's finding under Martin, and its progeny, that the conveyance from Joe to appellants with the intent to deprive appellee of her dower interest, was not clearly erroneous. Lawson v. Loid, Ky., 896 S.W.2d 1 (1995).

Appellants now argue that they were entitled to a jury trial. Initially, we note that the record does not contain an objection to the bench trial. Most important, this action was commenced by appellee to have a deed declared null and void. "A suit to set aside the transfer of real or personal property is peculiarly one of equitable cognizance. Regardless of demand, no party has a right to a jury trial." Averitt v. Bellamy, Ky., 406 S.W.2d 410, 411 (1966).

Appellants next argue that the action is barred by the statute of limitations. It is well established that a cause of action accrues when the party has the right and capacity to sue. Hager v. Coleman, 307 Ky. 74, 208 S.W.2d 518 (1948). In this case, appellee had no cause of action until the death of her husband. Joe died in August 1995, and the action was timely commenced in January 1996.

Finally, appellants disagree with the trial court's award of an undivided one-third interest in the real estate and argue instead that she should have been awarded a one-third life estate in the property pursuant to KRS 392.080. Appellee renounced the will and is entitled to receive her share under KRS

392.020 as if no will had been made, except that her share in any real estate shall be one-third. The language contained in KRS 392.020 which limits the spouse's interest to one-third for life has no application since it is limited to situations where the real estate is owned by a person or anyone else for the use of such person during the marriage but not at death. In this case, the conveyance to appellants is void and appellee is entitled to a one-third undivided interest in the property.

It has not gone unnoticed that Mr. Ellis apparently played a major role in the final testamentary disposition of Joe's estate and will reap some benefit from our decision. The motivations of Mr. Ellis, however, are not an issue before this court. Joe's motivation and his intent to transfer to appellants a farm which had been in the family for generations, is neither uncommon nor ignoble; it remains, however, that the act was performed also with the intent to deprive appellee of her statutory interest, which clearly is not permitted under the holding of Martin.

The judgment of the McLean Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent, The Majority Opinion affirms the trial court's findings of fact as not being clearly erroneous. However, the trial court stated; "The court seriously doubts that there is any genuine issue of material fact whatever in this case." The trial court in its

"Findings of Fact and Conclusions of Law" merely stated legal conclusions and made no factual findings. Thus, what is obviously lacking in the trial court's judgment is a factual finding that Joe voluntarily made a transfer of the 119-acre farm to Henrietta and James "with the intent to prevent his. . .intended wife[] from sharing in such property at his death. . . ." Martin v. Martin, 282 Ky. 411, 422, 138 S.W.2d 509 (1940).

The trial court is simply incorrect when it states; "The simple and sometimes hard, or sometimes brutal, fact is that if a man is about to marry, he cannot convey away his real estate without receiving something near fair value for it." The Majority Opinion apparently recognizes that the trial court misstated the law since the Majority correctly points out that the widow's right to dower cannot be defeated by a gift by the spouse of his property to another if the gift is made "with the intent to defeat the claims to dower." Harris v. Rock, Ky., 799 S.W.2d 10, 11 (1990). The Majority Opinion goes on to set forth various findings of fact that could have been made to support the trial court's judgment. Unfortunately, the trial court did not make such findings, and consequently, I would vacate the judgment and remand for appropriate findings of fact. It is not the role of this appellate court to act as fact-finder.

BRIEF FOR APPELLANTS:

Stewart B. Elliott

BRIEF FOR APPELLEE:

Ralph D. Vick

Owensboro, Kentucky

Greenville, Kentucky