

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001318-MR

MARILYN DISTLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 93-CI-002616

PAUL L. MILLER AND
PEGGY MILLER

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: GUDGEL, CHIEF JUDGE, COMBS AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from the Jefferson Circuit Court order which denied exceptions to a Commissioners' Report and approved the partition of real property as determined by the Commissioners. Appellant argues that in formulating its decision the trial court improperly considered material which was not in the record produced in court and also improperly conducted its own ex parte investigation. Because we find that Appellant failed to preserve the errors asserted, the decision of the trial court is affirmed.

This action originated as a Petition for Partition of Real Property Pursuant to KRS 381.135. The trial court appointed

three Commissioners to partition the property. The Commissioners filed their Report, entitled the Division and Allotment Report. Appellant subsequently filed exceptions to the report and a hearing was held. The Appellant's exceptions to the report included: discrepancies as to the acreage, disagreement with the value assigned the five tracts, the reference to the Appellees' "historical use" of the property and that the land should be surveyed.

At the hearing, Appellant presented the testimony of Mr. Murrell Burton, a licensed appraiser, as to the value of Tract #4, which was the only tract which Burton felt was overvalued. Burton took issue with the tracts of land which the Commissioners used as comparables to appraise Tract #4. Several of the comparables, he stated, had improvements upon them whereas Tract #4 did not. Commissioner Suell was called to testify regarding the comparables.

Subsequent to the hearing, Commissioner Suell sent a letter, dated January 13, 1997, to the Court in order to clarify his testimony because he had not been prepared to testify regarding the comparables at the hearing. This letter stated that Mr. Burton had incorrectly identified the comparable properties and that the comparable tracts were, in fact, unimproved.

Upon receipt of a courtesy copy of Commissioner Suell's letter, counsel for Appellant sent a letter to the Court indicating that the Commissioner's letter had been inappropriate and that the Court should disregard it and make its decision on the evidence presented at the hearing. Moreover, Appellant's

counsel indicated a desire to cross examine Commissioner Suell on his credibility and impartiality, should opposing counsel wish to bring this issue back to court. Appellant did not file any formal motion to strike this letter, nor did she file exceptions to this letter.

In an order entered May 16, 1997, the trial court denied the exceptions and adopted the Report of the Commissioners. Appellant filed her Notice of Appeal on May 28, 1997.

On appeal Appellant asserts two errors. First, she submits that the trial court erred in considering the information provided by Commissioner Suell after the hearing. Second, she contends that the trial court erred in conducting it's own ex parte investigation.

The law is clear that where the trial court has not been given an opportunity to rule on appellant's contentions of error, there can be no appellate review of the alleged errors. Payne v. Hall, Ky., 423 S.W.2d 530 (1968). Moreover, if the trial court has not ruled on the question there can be no error for the Court of Appeals to review. Kaplon v. Chase, Ky.App., 690 S.W.2d 761, 763 (1985).

In this case, there is no question that Appellant failed to raise her concerns regarding the ruling with the trial court. Appellant did not file a CR 59.05 Motion to Alter, Amend or Vacate the Judgment. Therefore, the trial court was denied an opportunity to address the allegations of error and impropriety. As such, there can be no review of the alleged errors.

The Court notes with interest that Appellant failed to address this issue in her Reply brief. Appellant informed this Court that Appellees were precluded from complaining about the hearing because they made no objection and the error was, therefore, not preserved for review. However, Appellant neglected to respond to similar contentions raised by Appellees and explain how Appellant's own assertions of error were preserved. Unfortunately, Appellant's failure to bring these errors to the attention of the trial court is fatal to her appeal.

For the foregoing reason, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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