

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003052-MR

MELISSA CHILDERS BOGGS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, SPECIAL JUDGE
ACTION NO. 94-CI-00212

WILLIAM DOUGLAS
CHILDERS, DECEASED

APPELLEE

OPINION
REVERSING AND REMANDING WITH DIRECTIONS
** ** * * * * *

BEFORE: BARBER, HUDDLESTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Melissa Childers Boggs has appealed from the judgment of the Letcher Circuit Court which denied her motion to revive the dissolution action commenced by her deceased husband, William Douglas Childers.¹ Having reviewed the record, we

¹In a previous ruling entered May 12, 2000, this Court determined that the appeal would proceed to a determination on the merits although the appellant, Melissa Childers Boggs, failed to name the administrator of the estate of William Douglas Childers as a party in her notice of appeal. Boggs did serve her notice of appeal on the attorney for the administrator and, apparently realizing he was the only possible appellee given the nature and history of the case, Sheriff Banks fully participated and filed an appellee brief without voicing any objection to the
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conclude that the trial court erred in refusing to revive the action against the administrator of Childers' estate and in failing to address the merits of the various substantive issues relating to the proper division of assets of the marital estate. Thus, we reverse and remand for further proceedings.

Boggs and the decedent, Childers, were married in 1987 and had two children: Jordan was born on May 5, 1990; Carlie was born on April 14, 1992. Childers filed a petition for the dissolution of the parties' marriage on July 19, 1994, and a decree dissolving the marriage was entered on October 4, 1994. All issues pertaining to child support, maintenance and property division were retained on the court's docket for future adjudication. The parties conducted considerable discovery particularly in respect to Childers' holdings in a closely held corporation.

Before the trial court disposed of the pending issues in the dissolution action, Childers died, intestate, on August 3, 1996. Boggs was appointed as the guardian of their two minor children by the Letcher District Court. Both she, and Childers' father, Donald Childers, sought to be appointed as the administrator of Childers' estate. The Letcher District Court refused to appoint either Boggs or Childers' father as the personal representative and suggested that they find a mutually

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Court's jurisdiction. After the case was submitted to this panel for decision on the merits, we sua sponte raised the issue of whether the failure to name the administrator, Sheriff Steve Banks, was of jurisdictional import. After considering the arguments of both Boggs and Sheriff Banks, we concluded that it was not.

agreeable third party to represent the estate. Apparently, Boggs and Donald Childers were unable to agree on an administrator.

On September 11, 1996, Donald Childers moved the trial court to relieve his son's estate of the obligation to make the \$386 monthly house payment as previously ordered. This motion was prepared and filed on behalf of Donald Childers by Darrell Hall, the attorney who had represented Childers prior to his death. Boggs objected to the motion and argued that Donald Childers lacked standing to make such a motion and that she and the children would have no place to live if the mortgage payments were not made. Attorney Hall and Bogg's attorney, Nancy Collins, appeared in court on September 26, 1996, at which time the trial court declined to consider the motion and noted on its calender "no admin. been appointed--no action can be taken until admin. appointed."

On July 16, 1997, three weeks short of one year from Childers' death, the Letcher District Court appointed Sheriff Steve Banks, as the administrator of Childers' estate.² Sheriff

²Kentucky Revised Statutes (KRS) 395.390 provides:

(1) The district court of a county which has a public administrator and guardian shall, after the expiration of sixty (60) days from the death of the decedent, order the public administrator and guardian to administer the estate of the decedent where the surviving spouse and heirs waive their right to be appointed, or if the surviving spouse does not nominate a suitable administrator, or in the event any of the persons designated in KRS 395.040 are unable, or found to be incapable of handling or managing the estate, or if from any other cause there is no personal representative. If there is no public administrator and guardian, the court

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Banks took his oath and posted a bond in August 1997. On December 12, 1997, sixteen months after Childers' death, and four months after Sheriff Banks' appointment as administrator of Childers' estate, Boggs filed her motion to revive the dissolution action and to substitute Sheriff Banks for the deceased petitioner. Sheriff Banks did not file a response to the motion. However, Hall, the attorney of record for the decedent, Childers, filed a response, identified as a response on behalf of his former client, and therein objected to the motion as not having been timely filed within the one-year limitations period for revival provided for in KRS 395.278.

In her reply to Hall's response, Boggs alleged that since his representation of Childers ceased upon Childers' death, Hall lacked standing to raise any objection to her motion for the substitution of Sheriff Banks for the deceased petitioner. She also alleged that Hall was currently representing Childers' parents, Donald and Peggy Childers, in their pursuit of claims against their son's estate. Further, Boggs represented to the trial court that the attorney for the estate, Edison G. Banks, II, had "orally agreed that the action should proceed for division of the marital property and debts, as well as restoration to the Estate of Mr. Childers' non-marital property." In addressing the merits of Hall's argument that her motion to revive was time-barred, Boggs contended that it was not possible

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shall order the sheriff to administer the estate.

for her to have complied with the time limitations in KRS 395.278, and to have filed a motion to revive within one year of Childers' death because a personal representative had not been appointed and qualified within the one-year period.

Boggs also moved the trial court to strike Hall's response to her motion to revive for the reasons that his client had died and Hall's representation had thus ended, and because he was representing creditors of his former client's estate. Hall did not respond to the merits of this motion. Instead, Hall moved the trial court, again in the guise as counsel for the deceased Childers, to dismiss the dissolution action. Citing Royce v. Commonwealth,³ Boggs again asserted that Hall no longer had standing to file motions in the proceeding, or to seek dismissal of the action, or any authority to appear in the case. She reiterated that Hall's interests were contrary to those of the estate and Childers' only heirs, his two children, and that counsel for the administrator of Childers' estate had agreed that the dissolution should proceed to its conclusion.

These motions were heard by the trial court on January 22, 1998. Present at the hearing were Boggs and her attorney, Collins, Hall, ostensibly in his capacity as the attorney for the decedent, and Edison G. Banks II, counsel for Sheriff Banks, the administrator of Childers' estate. The trial court did not resolve any of the motions at that time, but ordered that briefs be filed and that another hearing be conducted on March 4, 1998. There is no indication in the record that a hearing was conducted

³Ky., 577 S.W.2d 615 (1979).

in March 1998. Instead, the several pending motions, including Boggs' motion to revive the action, to substitute Sheriff Banks as the petitioner, and to strike the motions and pleadings filed by Hall, and Hall's motion to dismiss, were finally heard in November 1998. Although Sheriff Banks was before the trial court, the record reflects that the administrator made no objection whatsoever to Boggs' motions to revive the dissolution action and to substitute him for his decedent, Childers. Neither did Sheriff Banks ever dispute Boggs' allegations that his attorney had consented to the motion to revive the dissolution proceeding, although untimely made, nor did he join in Hall's motion to dismiss. On November 12, 1998, the trial court entered the order from which this appeal has been taken. It denied Boggs' motions to revive the action and to substitute Sheriff Banks as a party as having been filed beyond the one-year limitations period provided for in KRS 395.278, and granted Hall's motion to dismiss the dissolution action.⁴

In her appeal, Boggs argues that the trial court erred in dismissing the dissolution action and in denying her motion to revive as having been untimely filed. We agree. The trial court's judgment does not mention, much less analyze, the various issues raised by Boggs including Sheriff Banks' waiver of the

⁴On the same day, the trial court also granted the motion of Edison G. Banks, II, to withdraw as counsel for Sheriff Banks. The attorney stated that the "allegations of fraudulent conveyances, transfers and/or forged documents made on behalf of Melissa Childers Boggs" created a conflict for him in his capacity as an Assistant County Attorney for Letcher County. Sheriff Banks is currently represented in this appeal by Daniel F. Dotson.

limitations defense, application of the doctrine of estoppel as precluding the estate from asserting the defense given its failure to have a personal representative within the statutory period and/or Attorney Banks' purported consent to proceed with the dissolution, or the impossibility to comply with the statute of limitations. Rather, the judgment merely concludes that the "law in Kentucky is clear that KRS 395.278 operates as a statute of limitations, is mandatory and [is] not subject to enlargement."

While the trial court apparently ruled that the limitations period cannot be waived, the law is otherwise. KRS 395.278 reads: "An application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." There is no question that this statute "operates as a statute of limitations."⁵ However, it is also settled that the right of a personal representative to insist on a timely motion to revive may be "lost" by "waiver, estoppel, or consent."⁶ As a general rule, "the [s]tatute of [l]imitations is a shield and not a sword."⁷ The defense of limitation "is a personal one and in

⁵Hammons v. Tremco, Inc., Ky., 887 S.W.2d 336, 338 (1994).

⁶Daniel v. Fourth and Market, Inc., Ky., 445 S.W.2d 699, 701 (1968).

⁷See Rader v. Dean, 275 Ky. 255, 121 S.W.2d 43, 45 (1938).

order for it to become an issue in the case it must be pled affirmatively.”⁸

A careful examination of the record reveals, as stated earlier, that Sheriff Banks, at no time, raised any objection to the timeliness of the motion to revive and to substitute him for his decedent.⁹ His failure to so plead or to object constitutes a clear waiver of that defense.¹⁰ In order to overcome this unquestionable waiver, Sheriff Banks relies on the objections and motions filed by Hall to support the trial court’s judgment of dismissal. Obviously, Hall’s motions and objections on behalf of Childers, who was deceased and from a legal standpoint no longer existed, were inappropriate and of no legal significance.¹¹ The

⁸Young v. Tackett, Ky., 481 S.W.2d 661, 663 (1972) (quoting Thompson v. Ward, Ky., 409 S.W.2d 807 (1966)).

⁹Sheriff Banks has presented this Court with a document entitled “Position Statement of Sheriff Steve Banks, Administrator for the Estate of William Douglas Childers, Deceased,” which he represents as appearing in the record at pages 236-238, pages which actually contain documents filed by Boggs prior to Childers’ death in 1995. The “position statement” is not located anywhere in the record certified by the clerk of the Letcher Circuit Court, nor has Sheriff Banks attempted to supplement the record on appeal with this document. In any event, the document further underscores Boggs’ waiver argument as assuming Sheriff Banks did tender it to the trial court, he specifically maintained therein a neutral position with respect to the issue of the timeliness of the motion to revive, and merely requested that the trial court consider the arguments of both Hall and Boggs’ attorney, Collins, and “enter an appropriate Order.”

¹⁰Id. at 664. See also Commonwealth, Department of Highways v. Chinn, Ky., 350 S.W.2d 622 (1961).

¹¹See Royce supra (it is “elementary” that the death of a party “ends the relationship of attorney and client” and attorney has “neither authority nor standing to speak for the dead man”). See also Kentucky Bar Association v. Geisler, Ky., 938 S.W.2d 578, 580 (1997) (attorney has no authority to act for client

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trial court correctly refused to entertain any motions in the matter until an administrator was appointed. It was error for the trial court to tolerate Hall's continued participation in this action after the death of Childers, particularly after Hall filed a motion on behalf of Donald Childers who was never a party to the dissolution. Sheriff Banks suggests that the trial court was exercising appropriate discretion in allowing Hall to protect Childers' interest. This, of course, overlooks the fact that Childers no longer had any interest to protect. In any event, it is clear to this Court that Sheriff Banks did not endorse the position taken by Hall, nor did he, although represented by counsel, independently challenge the timeliness of Boggs' motions.¹² Since Hall's motions and responses to Boggs' motions were a nullity, the trial court erred in considering his arguments to defeat Boggs' motion and in granting Hall the relief he requested.

Accordingly, we hold that the trial court erred in dismissing the dissolution action. We further hold that the trial court erred in denying Boggs' motion to strike the motions filed by Attorney Hall after his client's death, and in denying her motion to substitute Sheriff Banks as the petitioner and in failing to allow the dissolution to be revived. The judgment is

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after his death).

¹²This Court is perplexed, given the duties of the administrator to garner and protect the various assets of Childers' estate for the benefit of Childers' heirs at law, at the position taken by the administrator in this appeal, and why he now objects to the motion to revive and to substitute him for his decedent.

reversed and the matter is remanded to the Letcher Circuit Court for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nancy M. Collins
Hazard, KY

BRIEF FOR APPELLEE:

Daniel F. Dotson
Whitesburg, KY