RENDERED: August 22, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2001-CA-002000-MR

ESTATE OF CARL J. MABRY — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 97-CI-00325

COMMERCIAL BANK OF GRAYSON — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: This is the second time these parties have been before this court on appeal. On remand from this court, the Estate of Carl J. Mabry (the Estate) appeals the Carter Circuit Court's order and judgment in favor of the Commercial Bank of Grayson (Bank) in distributing the proceeds from the sale of real property owned by Carl J. Mabry which descended to Billy Jack Mabry, Carl's son, under Carl's will. The estate argues that the sale of the real property resulted in excess proceeds after the satisfaction of a mortgage on the property. Moreover, the excess proceeds belonged to the insolvent estate to be distributed under KRS 396.095; however, the Bank wrongly took the excess proceeds in satisfaction of other secured debts owed by Carl J. Mabry to the Bank. Finding no error, we affirm.

Carl J. Mabry died on January 12, 1997. This case began in September of 1997 when the Bank initiated a lawsuit against the Estate and Billy Jack Mabry, individually, in an effort to collect the unpaid balances owed by Carl J. Mabry on three loan obligations and secured by a perfected security interest in a motor vehicle. In addition to the three loan obligations, Carl Mabry granted the bank a mortgage on his real property in Carter County, Kentucky

Sometime in September or October of 1997, Billy Jack Mabry brought the vehicle that served as the collateral for the three loan obligations to the Bank. The Bank sold the vehicle and applied the proceeds to the satisfaction of Carl Mabry’s various obligations, thereby eliminating one debt, reducing another debt and leaving one debt in full.

On November 3, 1997, the trial court awarded the Bank a default judgment on the two debts that remained after the sale of the vehicle. The Estate did not appeal the entry of the default judgment. Subsequently, the Bank perfected a judgment lien against the real property.

Next, in February of 1998, the Bank filed an amended complaint seeking to recover the balance owed on the mortgage note. As relief, the Bank requested that the mortgaged property be sold and that the net proceeds from the sale be applied toward the balance due on the mortgage note.

After limited discovery occurrred in the action to enforce the mortgage, the Bank made a motion for summary judgment. The trial court granted the Bank’s motion on December 1, 1998, and directed the master commissioner to sell the real property. The proceeds of the sale were to be applied to satisfy the mortgage note as well as all of the indebtedness set forth in the default judgment entered in November of 1997 on the secured loans. At this point, the total amount necessary to satisfy the mortgage was in excess of $16,000 and the judgment lien was $10,830.64 plus costs, interest and attorney’s fees.

Billy Jack Mabry, as the executor of the Estate, sold the property in a private sale for $25,000. The Bank applied this amount to payoff the mortgage and held the remainder to satisfy the judgment lien.

The Estate appealed asserting, among other claims not relevant to this appeal, that the Bank wrongfully and without judicial or statutory authority seized the excess funds to pay off the two personal debts not secured by the real estate and refused to turn over the funds to the Estate. In setting out the history of the case below, this court noted that the judgment lien perfected by the bank as a result of the November 1997 default judgment "secured payment of the default judgment in derogation of the rights of any other creditors of the estate, and regardless of whether any such creditors were entitled to priority." In support, this court cited KRS 396.095. Having said that, later in the opinion when discussing the issue of the proper distribution of the proceeds from the sale of the real property, this court held as follows:

> At the outset, it is appropriate to analyze the posture of this litigation as it has been presented to this court. First, it is clear that the November 1997 default judgment against Carl Mabry's estate and its executor is valid and enforceable. Although KRS 396.135 clearly prohibited any levy or execution on that judgment against Carl Mabry's property, the parties have acknowledged that such a levy was effected. However, the record contains no documentation to establish this fact. Moreover, the record neither includes any order regarding the distribution of the funds, nor otherwise shows whether the net proceeds derived from the sale of the mortgaged property were sufficient to satisfy the balance due on the 1992 mortgage note, the amount of the judgment lien, and/or the claims of creditors. Presumably, if the assets were sufficient to pay all outstanding claims, both of appellee's judgments would have been fully satisfied. On the other hand, if the assets were not sufficient to pay all outstanding claims, the available funds should have been distributed to creditors consistent with the dictates of KRS 396.095(1) and (2), except insofar as appellee, as a secured creditor, was entitled to priority in regard to the net proceeds from the judicial sale of the residence.

> . . .
>
> In summary, we affirm the November 1997 and December 1998 judgments as to the liability of Carl Mabry's estate and Billy Mabry as executor thereof. Moreover, we also affirm so much of the December 1998 judgment as directs a sale of Carl Mabry's mortgaged property and orders the net proceeds thereof to be applied in satisfaction of the balance due thereon. However, any additional net proceeds derived from that judicial sale must be distributed consistent with the dictates of KRS 396.095 and 396.135.

On remand, the Estate made a motion to have the matter referred to the master commissioner for an accounting of the funds held by the Bank in conformity with the opinion of this court. In response, the Bank submitted a letter from the Bank's President which provided the following breakdown of the application of the proceeds from the sale of the real property:

Payments Received

| | |
|---|---|
| $23,008.00 | from Fisher's Auto Sales [Buyer] |
| 250.00 | from Pearl Crum, Realtor |
| $23,258.00 | total received |

Payments Applied

| | |
|---|---|
| $16,215.57 | principal payment on mortgage loan |
| 313.62 | interest on mortgage loan from Oct. 1 to Dec. 24, 1998 |
| 80.00 | late charges on mortgage loan |
| 28.64 | forced place insurance on mortgage loan |
| 2,710.79 | attorney fees to Jeff Scott |
| 2,033.25 | principal payment on Carl Mabry note #74560 |
| 1,876.13 | principal payment on Carl Mabry note #22191 |
| $23,258.00 | Total disbursed |

The Bank asserted that its application of the proceeds conformed with the December 1998 judgment which this court specifically upheld and affirmed.

The trial court referred the matter to the master commissioner for an evidentiary hearing to determine whether there were any excess proceeds from the sale of the real property. After the hearing, the master commissioner found, in pertinent part, that the notes on which the November 1997 judgment was based were secured notes. Moreover, the Estate did not appeal the November 1997 judgment. In addition, the commissioner found that the devisee in Carl Mabry’s will sold the real estate and further concluded that the real estate was not a probatable asset, therefore it was not even an asset of the estate. The commissioner concluded that attorney’s fees on both the mortgage and the promissory notes were properly withheld because the Court of Appeals did not reverse on the issue of attorney’s fees, and the mortgage and the notes sued upon specifically provided for an award of attorney’s fees.

In accord with his findings and conclusions, the commissioner recommended that no money be returned to the Estate as the sale proceeds of the real property were sale proceeds of a non-probatable asset and were paid to extinguish the lawful debts of the decedent which the executor had both the authority and the duty to pay pursuant to KRS 396.155. The estate filed exceptions to the commissioner's report; however, the trial court found that the report was supported by substantial evidence and that the legal authority cited by the commissioner was sound and based upon the facts of the case. As such, the trial court adopted the commissioner's report in total, precipitating this appeal.

The Estate raises five arguments on appeal. First, the Estate argues that the trial court was required to enforce the mandate of this court and not reinterpret it or ignore it. Second, the Estate argues that the law of the case did not allow the trial court to relitigate issues already decided by the initial opinion of the court of appeals. Third, the Estate argues that the trial court committed reversible error when it failed to independently review the commissioner's report. Fourth, the Estate argues that the trial court erred in ruling that the real estate was a non-probatable asset. Finally, the Estate argues that KRS 396.095 requires all assets of the estate to be distributed in order of priority.

The heart of this case is the significance of secured transactions in the satisfaction of the debts of the decedent's estate. In other words, this is a case about priority. In reaching our conclusion on this second appeal, we must bear in mind that neither party sought review of the first decision of this court. In particular, the Estate did not seek review of this court’s holding that the Bank was entitled to priority as a secured creditor in the distribution of the net proceeds from the sale of the residence.

We first address the Estate’s arguments regarding the trial court’s task upon remand by this court. The Estate correctly asserts that the law of the case doctrine is applicable here. “The law of the case doctrine essentially holds that a final decision of an appellate court is determinative of an issue, whether that decision is right or wrong, and a lower court is bound by the higher court's decision.” Ranier v. Kiger Ins., Inc., Ky. App., 998 S.W.2d 515, 518 (1999). The doctrine applies to the determination of questions of law and not questions of fact. Inman v. Inman, Ky., 648 S.W.2d 847, 849 (1982).

> As the term ‘law of the case’ is most commonly used, . . . it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term ‘law of the case’ is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on

> remand the trial court must strictly follow the mandate of the appellate court.

Inman v. Inman, Ky., 648 S.W.2d 847, 849 (1982) (citing 5 Am.Jur.2d, Appeal and Error, Sec. 744). In this case, since the issues have not changed and the evidence has merely been developed by the parties pursuant to this court's mandate, under the law of the case doctrine, our review is limited to whether the trial court properly construed and applied the mandate of this court from the first appeal.

The mandate to the trial court was to determine whether there were any excess proceeds from the sale of the real property after the estate satisfied Carl Mabry's secured debts. Specifically, this court remanded the case and instructed the trial court as follows: "if the assets were not sufficient to pay all outstanding claims, the available funds should have been distributed to creditors consistent with the dictates of KRS 396.095(1) and (2), **except insofar as appellee, as a secured creditor, was entitled to priority in regard to the net proceeds from the judicial sale of the residence.**" (emphasis added).

Upon hearing the evidence, the trial court determined that no monies remained from the sale of the real property after the satisfaction of Carl Mabry's secured liabilities. The Bank applied the proceeds from the sale of the real property to satisfy the mortgage in full. Once the mortgage was satisfied, the Bank applied the remainder in partial satisfaction of the secured promissory notes. After making these disbursements, no funds were left over to be distributed under KRS 396.095.

The Estate's position throughout this case has been that Carl Mabry's secured debts are on equal footing with Carl Mabry's unsecured debts. However, since 1897, Kentucky courts have consistently held otherwise, recognizing the priority of secured transactions in doing so. See Milward v. Shields, Ky., 43 S.W. 184, 185 (1897); International Harvester Co. v. Dyer's Adm'r, Ky., 178 S.W.2d 966, 968 (1944) (holding former KRS 396.090 applies to assets in the hands of a personal representative and does not take precedence over a mortgage lien on mining equipment that was recorded prior to the equipment's placement in the mine); Graham v. Graham's Adm'x, Ky., 306 S.W.2d 831 (1957) (holding an unrecorded chattel mortgage lien has preference and priority over the preferred claim for burial expenses provided under former KRS 396.090). In Milward, the court held that a mortgage lien is superior to the lien of an undertaker for funeral expenses. Id. More important for the purposes of this appeal is the court's reasoning in reaching that conclusion:

> The statute [which provides that: "If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent . . . shall be paid in full before any pro rata

distribution shall be made”] has no reference to, nor any effect upon, bona fide liens secured to creditors of the decedent under the general law, such as liens by mortgage, or liens acquired-like attachment liens-by operation of law, but regulates priorities in reference only to unsecured liabilities, gives certain liabilities and expenses priority, and then puts all other debts and liabilities on equal footing. It leaves valid liens acquired on the decedent's estate where the rules of the general law leave them. Such liens have no validity by virtue of the statute in question, but exist independent of it. They overrule burial expenses, claims due the estate of a dead person, or of a ward, or of a person of unsound mind committed by a court of record to and remaining in the hands of a decedent, and the costs and charges of administration, except so far as the latter may necessarily be incurred in ascertaining the lien, and pursuing it to judgment, with a view to determine whether any assets, personal or real, may be left, after the incumbrance is satisfied, for distribution under the terms of the statute. Every lien may be considered exposed to this peril, but no more. If burial expenses are allowed to overreach a valid lien, acquired in good faith before the death of the decedent, so may what he owes as fiduciary to the estate of a dead person, of a ward, or of a lunatic, and the lien might be totally destroyed, if such claims had priority; and, no matter how acquired in the lifetime of the decedent, they might be as worthless as the paper by which they are evidenced. The burial expenses and the other statutory priorities are placed on the same footing, and are of the same dignity, and are superior only to the general unsecured liabilities of the decedent. They cannot prevail against and consume liens created voluntarily by the decedent before he dies, or by the equally binding operation of law, but stand secure

> in their inherent force, by virtue of the
> general law governing them.

Milward, at 185.

In obtaining a default judgment on the secured promissory notes, the Bank, as a secured creditor, exercised those rights to which it was entitled pursuant to the default and enforcement of security interest provisions of Article 9 of Kentucky's Uniform Commercial Code. See KRS 355.9-601, et. seq. Although not relevant to the issues on appeal, we note that KRS 396.135 provides for such enforcement when it states "but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding."

Taking the Estate's arguments out of order, we address the argument that the trial court erred in ruling that the real estate was a non-probatable asset. We believe the law-of-the-case doctrine is applicable here and hold that this finding is superfluous and irrelevant to the mandate of this court. This court upheld the Bank's action to foreclose on the mortgaged real property. The mandate of this court was to hear evidence on the application of the proceeds of the sale of the real property to the secured debts of Carl Mabry, those secured debts being the mortgage and the promissory notes which had been reduced to a judgment lien. If any proceeds remained, they were to be distributed as assets of the estate under KRS 396.095. The court followed this mandate, and to the extent that the trial court made any additional findings, we hold that it is harmless error.

We move to the Estate’s argument that the trial court committed reversible error when it failed to independently review the master commissioner’s report of July 25, 2001. The Estate contends that the trial court’s failure to conduct an independent review is evident in the fact that it adopted the commissioner’s report, for had the court conducted an independent review, it would have found numerous errors of law. In support, the Estate lists the following errors: the commissioner’s failure to follow the dictates of the law of the case; and the commissioner’s consideration of the status of Carl Mabry’s other debts with the Bank, whether the real estate was a probatable asset or not and whether the Bank could retain funds that belonged to the Estate. As discussed above, we affirm the order and judgment of the trial court, therefore we believe this argument has no merit.

Having concluded that there were no excess proceeds after the complete satisfaction of the mortgage and partial satisfaction of the secured promissory notes, we need not address the Estate’s final argument that KRS 396.095 requires all assets of the estate to be distributed in order of priority.

On remand, the Bank demonstrated that after the satisfaction of Carl Mabry’s secured liabilities, no assets remained.

For the foregoing reasons, the order and judgment of the Carter Circuit Court is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Christophe G. Stewart<br>Louisville, Kentucky | W. Jeffrey Scott<br>Grayson, Kentucky |