

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000380-MR

DIANA BUTLER FUGATE
AND KEVIN FUGATE

APPELLANTS

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 06-CI-471

JORDAN FUGATE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: DIXON, VANMETER AND WINE, JUDGES

DIXON, JUDGE: Appellants, Diana Butler Fugate and Kevin Fugate, appeal from an order of the Breathitt Circuit Court denying their motion to partition real estate in Breathitt County, Kentucky.

The property at issue consists of a lot and house that Diana and her ex-husband, Appellee Jordan Fugate, jointly owned. Diana asserts in her brief to this Court that the property was purchased on February 16, 2006, after the couple was divorced,

while Appellee claimed in the lower court that the couple owned the property in 2003, at the time they separated.

On November 27, 2006, Appellants filed a partition action, requesting that the property be sold and the proceeds distributed between the parties. Appellants argued that a sale was necessary since the real estate could not “be divided without materially impairing its value or the value of the interest of the Plaintiffs” Appellee thereafter filed a *pro se* response objecting to the sale on the grounds that he was living on the property and had been paying all of the expenses attributable to such.

The trial court held a hearing on February 9, 2007, during which the court ruled that because Diana had “moved on” and had a “new man,” and because Appellee was sick, it was not going to order the property sold. Thus, it denied Appellants' request for partition. This appeal ensued. We would note that Appellants filed a motion on August 20, 2007, informing this Court that Appellee had died. There has been no substitution of parties.

Appellants argue herein that the trial court erred in denying the motion to sell the property. They point out that Diana's marital status and Jordan's health status were irrelevant to the determination of whether partition was appropriate. We agree.

Partition of property in Kentucky is governed by KRS 381.120 to 381.136. Where land is jointly owned, a partition is the joint owner's primary right. *See Leslie v. Sparks*, 172 Ky. 303, 189 S.W. 463 (1916). However, if it appears that the property is indivisible without materially impairing its value, a sale of the property as a whole is the

proper procedure. *Id.* See also *Turley v. Turley*, 193 Ky. 151, 235 S.W. 18 (1921). In *Talbott v. Campbell*, 67 S.W. 53 (Ky. 1900), Kentucky's highest court noted that, “the owner of each share is entitled to hold his property subject only to the rights of his co-tenants. If indivisible, it would be unjust to the other tenants to compel them to suffer sacrifices to gratify one joint owner's whim or claim to personal use of the identical property.”

We conclude that the trial court herein failed to set forth valid grounds for denying the request for partition. See *VanMeter v. VanMeter*, 160 Ky. 163, 168, 169 S.W. 592, 594-95 (1914) (courts are required to follow statutory direction in cases involving partition of real property). We further note that the record is devoid of any affirmative evidence as to when the property was purchased and how it was held by the parties. Certainly, as Appellee is now deceased, these factors may determine whether a sale is required or if this action is moot.

Accordingly, we reverse the Breathitt Circuit Court and remand this matter for additional fact finding and for an order of either partition or sale of the subject property if, in fact, Appellant's action is still viable. See KRS 381.135.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa C. Howard
Jackson, Kentucky

BRIEF FOR APPELLEE:

No brief filed