

RENDERED: DECEMBER 12, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002516-MR

THE ESTATE OF CHRISTOPHER DUNCAN APPELLANT

v. APPEAL FROM HANCOCK CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
INDICTMENT NO. 99-CR-00034

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, the Estate of Christopher Duncan, appeals from an order of the Hancock Circuit Court forfeiting 25 guns seized by police from decedent, Christopher Duncan. Finding that the circuit court lacked jurisdiction, we reverse.

In 1999, Christopher Duncan and his wife, Rhonda Duncan, were indicted by a Hancock County grand jury on various drug charges. At the time of their arrest, Hancock County sheriff's deputies seized twenty-five long arm rifles. Duncan died on July 6, 2001, without resolution of the criminal offenses. Following his death, decedent/defendant's counsel filed a motion on November 6, 2001, and again on October 6, 2003, to return the seized property. No ruling was apparently made on either motion. In the interim, however, Rhonda entered into a pretrial diversion agreement on September 5, 2003, with one of the conditions being that, "All seized property be forfeited to the Hancock County Sheriff's Department."

On March 24, 2004, the Commonwealth moved that the property be "forfeited to the Hancock County Sheriff's Department except the drugs and paraphernalia are to be destroyed." Appellant filed a response objecting to the forfeiture on the grounds that decedent/defendant had never been convicted. On April 15, 2004, the circuit court entered an order granting the forfeiture motion.

On appeal, a panel of this Court, in an unpublished opinion, reversed the lower court, holding:

Duncan's estate argues, and the Commonwealth agrees, that, pursuant to KRS 527.060, a conviction is required before property can be forfeited to the state. Consequently, the Commonwealth concedes that "the guns should be returned to [Duncan's] estate in accordance with the statute."

*Duncan v. Commonwealth of Kentucky*, 2004-CA-000832-MR (May 19, 2006).

After the matter was remanded, Appellant filed a motion to return the seized property in compliance with this Court's opinion. During a subsequent hearing, the Commonwealth objected to the return because a condition of Rhonda's pretrial diversion was that all seized property was to be forfeited to the sheriff's department. Following a hearing, the circuit court denied Appellant's motion to return the seized property, noting that it was not "blatantly disregarding the Court of Appeals' order, but [was] rather providing an explanation and complete record that the Court of Appeals did not have before it." The circuit court further stated,

[T]he Decedent/Defendant argued that this Court must obey the Court of Appeals Order and return the guns to the estate being administered for the Decedent/Defendant.

The Commonwealth, on the other hand, contended that if the guns were returned to the estate, then the Administrator had a duty to turn them over to Rhonda Duncan, the surviving widow and her two children as heirs. In turn, Rhonda Duncan had a duty to forfeit them to the Hancock County Sheriff's Department pursuant to the terms and conditions of the Pretrial Diversion Agreement that she entered into with the Commonwealth. The Commonwealth also argued that Rhonda Duncan, under KRS 391.030, as a surviving widow, had a spousal exemption of \$15,000 of personal property which would be transferred to her over and above the claims of creditors or heirs. This Court notes that in the papers of the estate, the Administrator claimed that the guns would not be worth \$15,000 which would allow the widow to have possession of the guns and which would not be subject to the claims of creditors or heirs.

Rhonda Duncan appeared at the October 5, 2007, hearing and this Court appointed at her request, the Department of Public Advocacy to represent her. Ms. Duncan was placed under oath and stated that it was still her desire to forfeit those guns to the Hancock County Sheriff's Department pursuant to her plea agreement and the pretrial diversion order.

...

Therefore, this Court is in the position of either overruling the motion to return the guns or engage in the legal fictions of having the Hancock County Sheriff's Department turn the guns over to the administrator of the Decedent/Defendant's estate who would then turn the guns over to the surviving widow pursuant to her spousal exemption under KRS 391.030. To overrule the Decedent/Defendant's motion for return of the guns to the estate would be a blatant disregard of the Court of Appeals Order, and to engage in either of the legal fictions as set out above would allow the guns to remain in the possession of the Hancock County Sheriff's Department because Ms. Duncan has entered into the plea agreement forfeiting the guns to the Hancock County Sheriff's Department.

Therefore, to allow an appellate court to straighten out this mess and to insure the issue is clear and correct and that an entire record is before them regarding this matter, and the Court being otherwise sufficiently advised;

**IT IS FURTHER ORDERED AND ADJUDGED** that the guns shall be constructively transferred to the administrator of the Decedent/Defendant's estate who will constructively transfer the guns to Rhonda Duncan, pursuant to her spousal exemption, who will then constructively transfer the guns back to the Hancock County Sheriff's Department.

This appeal followed.

We are troubled by several aspects of this case. Clearly, as noted in the earlier opinion of this Court, the criminal case against the decedent/defendant was rendered moot prior to any disposition of the criminal charges by virtue of his death. *See Royce v. Commonwealth*, 577 S.W.2d 615 (Ky. 1979). As a result, the lack of conviction bars any forfeiture of the seized property under KRS 527.060. At that point, the Hancock County Sheriff's Department lost all authority to retain the property. More importantly, however, when the decedent/defendant died, the circuit court lost jurisdiction to dispose of the property.

The district court has exclusive original jurisdiction over all probate matters concerning decedents' estates. KRS 24A.010(1); KRS 24A.020; KRS 24A.120(1)(b). As provided in KRS 395.030, "When a person dies intestate, the District Court which would have had jurisdiction to probate his will, had he made a will, shall have jurisdiction to grant administration on his estate." The circuit court's action herein of "constructively" administering the decedent/defendant's estate violates Section 113(6) of our Kentucky Constitution.

Even more problematic are the presumptions the circuit court made to reach the desired result. The court noted that because the guns were valued at less than \$15,000, they would pass to Rhonda pursuant to the widow's exemption in KRS 391.030. However, KRS 391.030 specifically requires an application to the district court by the surviving spouse or the exemption is not granted. There is no evidence in the record that Rhonda intended to assert her right to the widow's

exemption. Furthermore, the exemption at the time of the decedent/defendant's death in 2001 was only \$7,500, not \$15,000 as asserted by the Commonwealth.

Moreover, even if Rhonda had claimed a dower interest in one-half of the decedent/defendant's surplus personal property under KRS 391.030, the remaining property would have passed to the children. *See Harris v. Rock*, 799 S.W.2d 10, 11 (Ky. 1990). *See also Mattingly v. Gentry*, 419 S.W.2d 745 (Ky. 1967); *Talbott's Ex'r v. Goetz*, 286 Ky. 504, 151 S.W.2d 369 (1941). And if Rhonda waived her dower rights, the children would have inherited all of the decedent/defendant's property, including the guns. Thus, there were multiple issues that were solely within the district court's jurisdiction.

Finally, we are troubled by the fact that it appears that a majority of the guns were sold by the Hancock County Sheriff's Department. On August 28, 2007, the Commonwealth filed a "Disposition of Personal Property," indicating that twenty of the twenty-five seized guns were sold at a public auction for a total of \$2,400. The disposition does not state on what date the sale occurred. Certainly, if such was the case after this Court's May 19, 2006, opinion, there was no authority for the auction, and the Sheriff's Department may be in contempt of this Court's earlier ruling. Appellant has chosen not to pursue this issue, however, and therefore we are without sufficient evidence to address it. In any event, the defendant/decedent's estate is entitled to the proceeds of that auction as well as the guns remaining in the possession of the Commonwealth.

In rendering this opinion, we are cognizant that the circuit court was presented with an unusual situation and ruled in a manner that it believed accomplished the purposes of both this Court's earlier opinion and Rhonda's pre-trial diversion agreement. Nevertheless, we are compelled to conclude that the court's remedy effectively administered the defendant/decedent's estate, which it was unquestionably without jurisdiction to do. KRS 395.030.

This matter is remanded to the Hancock Circuit Court for an order directing that the Hancock County Sheriff's Department return the remaining seized guns as well as the proceeds of the auction to the decedent/defendant's estate.

ALL CONCUR.

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