

RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001830-MR

DAVID WHITTEN, EXECUTOR OF THE
ESTATE OF HIS LATE MOTHER,
JUDY WHITTEN

APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CI-00103

ROBERT L. WHITTEN

APPELLEE

AND NO. 2007-CA-001958-MR

ROBERT L. WHITTEN

APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CI-00103

ESTATE OF JUDY WHITTEN, WHO DIED DURING
THE PENDENCY OF THIS ACTION

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

* * * * *

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

THOMPSON, JUDGE: This case involves two separate appeals both of which are from the identical post-divorce judgment. Robert L. Whitten alleges that the circuit court erred when it held that the statute of limitations and the doctrine of laches did not preclude the estate of Judy Whitten from seeking reimbursement for mortgage payments, insurance, taxes and capital improvements made on certain real property owned by Robert and Judy Whitten. David Whitten, executor of the estate of Judy Whitten, (the estate), appeals from the circuit court's finding that the survivorship clause in the deed is valid and the consequent award of the property to Robert. The estate further contends that it is entitled to recover the entire amount expended for improvements made to the residence. For expediency and simplicity, we address both appeals in a single opinion.

Robert L. Whitten and Judy Whitten were married on June 9, 1962, and, in July 1971, purchased a residence by general warranty deed as "tenants in common with the fee simple title to rest in the survivor of them." The parties purchased the property for \$27,600 and obtained a loan secured by a mortgage on the premises in the amount of \$22,000.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In June 1978, the parties separated. A decree of legal separation, findings of fact, and conclusions of law was entered in September 1978, which was later incorporated into the final dissolution decree. Pursuant to the terms of the decree, Judy was permitted to remain in the residence until the youngest child, then twelve years old, reached eighteen years of age when the house was to be sold in a commercially reasonable manner. Until the house was sold, Judy was awarded the use of the residence and was to pay the payments related to its maintenance, the mortgage, taxes, insurance, and capital improvements. Upon the sale of the residence, she was to be reimbursed for these expenses and the net proceeds divided between the parties.

The youngest child reached eighteen years of age on January 6, 1984. During the interim between the entry of the decree and the child's eighteenth birthday, the child and Judy had minimal contact with Robert. Thereafter, and until her death on May 28, 2006, Judy continued to have exclusive possession of the residence. Judy occupied the residence for twenty-seven years during which time she paid the mortgage that was released in May 2001, the ad valorem taxes, insurance premiums and made improvements to the property.

After being diagnosed with a terminal illness, on March 8, 2006, Judy filed this action in the Calloway Circuit Court seeking to be declared sole owner of the residence and the following amounts to be reimbursed by Robert: mortgage payments, \$50,550; ad valorem taxes, \$17,404; home owners insurance, \$10,235; and improvement to the real estate, \$40,080. In his answer, Robert pled the statute

of limitations and laches as a bar to Judy's action. Following Judy's death, the executor of Judy's estate was substituted as a party.

A motion was filed by the estate to have the survivorship clause in the deed declared invalid based upon the dissolution of marriage decree. Robert again asserted that the estate's claims were time-barred. The court rejected Robert's statute of limitations argument ruling that Judy's claims were equitable in nature. It further held Robert could have, at anytime after the child became eighteen, forced the sale of the house. However, it refused to declare the survivorship clause invalid.

The estate's claims against Robert were the subject of a bench trial after which the trial court issued its findings of fact, conclusions of law and judgment. Computed from the date of the decree of legal separation, the trial court awarded the estate all amounts requested except that it awarded only \$865.97 for improvements. The total amount of the award to the estate was \$79,054.97. Both parties appealed.

We first address Robert's myriad of contentions that the statute of limitations precluded the claims for reimbursement of expenditures on the property. Robert asserts that the claims were precluded by KRS 413.090, which states that an action upon a judgment or decree shall be commenced within fifteen years after the cause of action accrued. He argues that the action accrued in May 1984, when the youngest child became eighteen and Judy had the right to seek the

sale of the house and reimbursement for the mortgage payments and other expenses as provided in the decree.

Alternatively, he argues that if Judy's claims are properly equitable, they arise from an implied contract and, therefore, only those amounts paid within five years prior to the filing of her complaint can be recovered or, if not the date of the complaint, when she filed her motion on September 25, 2001, asserting her equitable claims. KRS 413.120.

Finally, if the court rejects all of his aforementioned alternatives, Robert contends that we consider the amounts allegedly owed to Judy to be the result of an installment judgment. Under this theory, only those amounts attributable to payments and improvements made after March 8, 1991, are recoverable.

This case is unusual in that neither party sought the sale of the residence for twenty-two years following the child's emancipation. However, there was no specified date in the dissolution decree as to when the house was to be sold. It only required that it be after the child reached eighteen. It is logical that Judy, who continued to reside in the residence, did not seek its sale. Her claims did not accrue until Robert sought reimbursement; therefore, we find no merit in Robert's statute of limitations defense.

The doctrine of laches is often pled simultaneously with a statute of limitations defense. It differs, however, in that the passage of time is not the sole consideration. To successfully establish that a claim is precluded by laches, it must

be demonstrated that the failure to assert one's rights within a reasonable time has caused prejudice, injury, or disadvantage or caused the other party to change position. *Wigginton v. Commonwealth*, 760 S.W.2d 885 (Ky.App. 1988).

In this case, Robert has failed to prove harm or prejudice caused by Judy's failure to seek immediate reimbursement following the emancipation of their youngest child. To the contrary, she preserved the residence by paying the mortgage, taxes, insurance, and maintenance on the residence all of which benefited Robert. We now turn to the remaining issues.

A threshold inquiry into the merits of both parties' claims is the ownership of the property. If, as the trial court concluded, Robert is the sole owner by virtue of the survivorship clause in the deed, the estate's claim is limited to a judgment for monetary reimbursement and it has no interest in the property. In contrast, absent the validity of the survivorship clause, the estate and Robert share the property as tenants in common. Each is entitled to a one-half interest in the property with Robert's share subject to the estate's claims.

We begin our analysis with reference to the deed. Although it states that Robert and Judy share the property as tenants in common, it also includes a survivorship provision. The entitlement of the survivor to fee simple ownership of the property upon the death of the remaining tenant or tenants is a distinguishing feature between a tenancy in common and a joint tenancy. When the tenants are husband and wife, a joint tenancy is a tenancy by the entirity. *Sanderson v. Saxon*, 834 S.W.2d 676, 678 (Ky. 1992). The husband or wife who survives takes the

entire estate by virtue of the legal axiom that views each to have owned the entire estate from the time of its creation. *Id.*

The survivorship clause in the instant deed created a tenancy by the entirety. Indeed, the use of the terms “tenants in common” is necessarily a misnomer when used in conjunction with a survivorship clause.

The question remaining is the effect of the dissolution decree. A “decree of dissolution by operation of law, terminates a tenancy by the entirety and the concomitant right of survivorship to the entire estate.” *Nelson v. Mahurin*, 994 S.W.2d 10, 14 (Ky.App. 1998). As a caveat, the court added that the parties can, by agreement, define the rights of each in their property, including the right to survivorship. *Id.* at 15. As in *Nelson*, Robert and Judy made no reference to the right of survivorship in the property following the dissolution of their marriage. The agreement that Judy had the sole right of possession until the youngest child’s emancipation is undisputedly indicative of the parties’ intent to sever the unity of possession necessary to maintain a joint tenancy. *Id.*

Based on the reasoning recited, we conclude that the trial court erred when it found Robert to be the sole owner of the property by virtue of the survivorship clause. The parties held the property as tenants in common with each entitled to one-half of the entirety. Thus, we turn our attention to the issue of whether the estate is entitled to reimbursement for its expenditures.

The trial court found that the estate’s claims were equitable in nature, a finding that Robert disputes. We conclude that whether the claims for

reimbursement are equitable or for enforcement of the decree is a distinction without impact on the resolution of the issue. While certainly equity demands that the estate be permitted to assert a claim for expenditures on the property, the agreement of the parties mandates the same result.

The parties' agreement required that Judy pay the mortgage, taxes, insurance, and maintenance on the residence until sold, at which time she was to be reimbursed for her expenditures. The fact that neither party sought the sale of the residence until 2006 does not preclude the enforcement of the parties' agreement. Judy continued to make the necessary expenditures to benefit the property. After the youngest child was emancipated, had Robert desired to access his interest in the property, he could have done so by forcing the sale of the property. His inaction cannot be a barrier to the estate's recoupment of that to which Judy was entitled. We now address the estate's assertion that the trial court erred when it failed to award it the entire amount sought for improvements to the property.

Our review of a trial court's findings of fact is limited to the clearly erroneous standard. *Arnold v. Patterson*, 229 S.W.3d 923 (Ky.App. 2007). A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998). Substantial evidence is that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.*

The estate introduced the testimony of Michael D. Pierce, a certified public accountant, and a compilation of expenditures on the residence from 1979 through 2006. The itemized list included wallpaper, blinds, carpet, painting, termite control, roof replacement, and various permanent and cosmetic improvements; however, there was no testimony to establish the necessity for the expenditures or to establish the increase in the value of the property.

When improvements are made by a co-tenant, the measure of recovery is not necessarily that expended, rather, it is the value of the improvements to the property and depends on the necessity of the improvements. *See Rose v. Holbrook*, 287 S.W.2d 914, 916 (Ky. 1956). The same logic is applicable when reimbursement is required by a dissolution decree.

Judy kept a detailed list of expenditures. However, some are clearly not recoverable: Blinds, carpet and paint do not necessarily permanently increase the value of the property. Moreover, there is no evidence that any of the expenditures were necessary to maintain the property. Based on the record, we cannot say that the trial court was clearly erroneous in awarding the estate only \$865.97 for capital improvements to the property.

In conclusion, we hold that the trial court erred when it found that Robert owns the entirety of the disputed property by virtue of the survivorship clause. The property is held by the parties as tenants in common subject to the \$79,054.97 owed the estate for expenditures during Judy's possession of the property. We remand to the trial court for entry of an order for the sale of the

property, the proceeds of which are to be first paid to the estate in satisfaction of the \$79,054.97 judgment and the remainder to be divided equally between the estate and Robert.

ALL CONCUR.

BRIEF FOR APPELLANT DAVID WHITTEN:

Ricky A. Lampkin
Murray, Kentucky

BRIEF FOR APPELLEE ROBERT L. WHITTEN:

K. Bryan Ernstberger
Murray, Kentucky