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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001403-MR

DEBBIE DUTTON

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 08-CI-00877

DANIEL DUTTON AND
PHYLLIS DUTTON MILLER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Debbie Dutton appeals from a judgment following a bench trial.

Joseph V. Dutton (Joseph V.) was the son of Joseph Leslie Dutton (Joseph L.) and Cebah Dutton, and brother to Phyllis Dutton Miller and Daniel Dutton. Joseph V., Joseph L. and Cebah are all deceased. Joseph V. was married

to Debbie Dutton, the executor of his estate. In 2003, Phyllis and Daniel were appointed Cebah's attorneys in fact and are the executors of her estate.

Joseph L. and Joseph V. had an equal partnership in which Joseph L. supplied cattle and land, and Joseph V. supplied labor. Shortly before Joseph L.'s death in 1999, Joseph L. and Cebah partitioned their farm into two tracts and Joseph V. took ownership of one of the tracts. At the time of Joseph L.'s death, there were 75 to 100 cattle on the farm and the two tracts continued to be used jointly for the cattle operation and farming crops. Joseph V. also raised horses in a separate operation using their joint land and a converted barn on his parents' tract.

From 1999 to 2007, the herd increased in size through the birth of calves and the purchase of animals, despite the sale of some animals. The composition of the herd also changed as Joseph V. preferred breeding practices that produced mixed breed cattle. Between 1999 through 2007, Joseph V. and Debbie purchased two bulls and twelve cows.

Following Joseph L.'s death, Joseph V. and Cebah had an arrangement in which he paid her for cattle as shown by eight cancelled checks between 1999 and 2005 for a total of \$14,997.97. All of these checks indicated they were for cattle and some stated they were for "1/4 of calves."

Joseph V. was diagnosed with leukemia in October 2004 and died on July 10, 2007. Between 2003 and 2007, Joseph V. sold 254 head of cattle at the Lake Cumberland Livestock market for a net total of \$83,661.23. Cebah received two checks from Joseph V. in 2003, no checks in 2004 and two checks in 2005 for

a total of \$5,824 between 2003 and 2005. Cebah did not receive any proceeds from cattle sales in 2006 or 2007.

After Joseph V.'s death, Debbie sold the remaining sixteen head of cattle in 2007 and 2008. Debbie sold six head of cattle in July 2007, for \$3,104.97 and ten head of cattle in March 2008, for an undisclosed amount. Following the sale of all the cattle, Phyllis, on behalf of Cebah who was incompetent, demanded from Debbie one quarter share of the proceeds. Debbie refused.

On April 8, 2008, Phyllis, on behalf of Cebah, filed a proof of claim on Joseph V.'s estate arguing Joseph V. and Debbie, as his executor, sold cattle belonging to Cebah and seeking \$70,000 as compensation from the estate. On June 10, 2008, Cebah filed a petition seeking an accounting of the partnership and a judgment for the amount due her. After Cebah's death in 2010, Phyllis and Daniel, as executors of the Cebah's estate, were substituted as plaintiffs.

Following a bench trial, the trial court entered findings of fact, conclusions of law and judgment. The trial court found the checks Cebah received from Joseph V. did not actually correspond to a one-fourth share of the net cattle sales conducted during the relevant periods, with \$20,665.31 corresponding to a one-fourth share. The trial court found the cattle Debbie sold in March 2008, sold for \$500 a head for a total of \$5,000.

The trial court determined a partnership or joint venture existed prior to Joseph L.'s death between Joseph L. and Joseph V. to run a cattle operation

through pooled efforts and equally share the proceeds. The relationship terminated upon Joseph L.'s death.

The trial court determined a partnership or joint venture was formed between Joseph V. and Cebah following Joseph L.'s death. It found the un rebutted evidence established Joseph V. and Cebah shared in the profits from the proceeds of the sale of cattle following Joseph L.'s death with Joseph V. retaining 75% of the profits and Cebah purportedly receiving the remaining 25%. Cebah contributed to the cattle operation through use of her land for pasture, the production of hay and the intermittent use of a barn located on her property. Joseph V. contributed his labor and purchased cattle to supplement the herd.

The trial court determined the receipt of business profits was *prima facie* evidence of the existence of a partnership and, standing alone, established Joseph V. and Cebah engaged in an informal partnership or joint venture involving the production of cattle. It determined the cattle and any incidental property acquired for use in the partnership or with partnership funds belonged to the partnership. While the trial court considered whether the partnership could have been fifty-fifty between Cebah and Joseph V., it concluded "while a preponderance of the evidence convincingly establishes the existence of the partnership and that the allocation of that partnership was at least 25/75, the Court is not convinced by a preponderance of the evidence that an equal partnership existed."

The trial court determined the partnership terminated with Joseph V.'s death. Pursuant to statute, Cebah was entitled to have Debbie, as the personal

representative of Joseph V.'s estate, make an accounting to the partnership.

Debbie was required to hold, as trustee for the partnership, any profits derived from the sixteen cattle she sold following Joseph V.'s death. Cebah was entitled to receive the profits for her share in the cattle operation. Accordingly, Debbie was obligated to pay Cebah her quarter share of profits from the sale of cattle both before and after Joseph V.'s death.

The trial court further found Debbie failed in her burden to establish the existence and amounts of any deductions to be taken from Cebah's share for expenses associated with the production of cattle. The trial court also rejected Debbie's statute of fraud defense, finding the partnership had no fixed duration and could have been performed within a year.

The trial court determined the statute of limitations contained in KRS 413.120 barred any claim for Cebah's share of the profits prior to April 2003. It therefore considered only the net sales amount from April 2003 through 2007. The final judgment required Debbie to pay, on behalf of Joseph V.'s estate and herself, the one quarter share of the proceeds Cebah should have received during this period, minus the amounts she did receive, for a total of \$16,867.55 plus interest.

The trial court denied Debbie's motion to alter, amend or vacate its judgment and Debbie appealed. Debbie argues the trial court should have denied the claims by Cebah's estate because (1) they are barred by the doctrines of waiver, laches and estoppel; (2) they are barred by the statute of frauds; (3) there was

insufficient evidence of a partnership; and (4) the award of damages was not supported by the facts or law.

When reviewing a bench trial, we will not set aside the factual findings of the trial court unless they are clearly erroneous because they are not supported by substantial evidence. *Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky.App. 2009); CR 52.01. In making such findings, the trial court is entitled to judge the credibility of the witnesses. *Calloway v. Calloway*, 832 S.W.2d 890, 893 (Ky.App. 1992); CR 52.01. Substantial evidence is relevant evidence, whether taken alone or in light of all the evidence, which a reasonable person might accept as adequate to support a conclusion even if two inconsistent conclusions could be supported by the evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 307-308 (Ky. 1972). We review issues of law *de novo*. *Slone v. Calhoun*, 386 S.W.3d 745, 747 (Ky.App. 2012).

Debbie's first argument is the claim by Cebah's estate is barred by waiver, laches and estoppel because it was not pursued while Joseph V. was alive or Cebah was competent, and the absence of their testimony prejudiced her. Suits filed within the statutes of limitations are not barred by these equitable remedies unless prejudice is established. *Plaza Condo. Ass'n, Inc. v. Wellington Corp.*, 920 S.W.2d 51, 54 (Ky. 1996); *Stell v. Williams' Adm'r*, 233 Ky. 441, 26 S.W.2d 8, 10 (1930); *Maryland Cas. Co. v. Dickerson*, 213 Ky. 305, 280 S.W. 1106, 1107 (1926).

We agree with the trial court the claim by Cebah was not barred by waiver, laches or estoppel where the trial court considered only profits earned within the

five year statute of limitations and appropriate claims were made within a year of Joseph V.'s death. Phyllis requested Debbie pay Cebah profits from the sale of cattle following Joseph V.'s death and the sale of the remaining cattle. A timely proof of claim was filed with Joseph V.'s estate. A petition seeking an accounting was filed shortly thereafter.

Debbie failed to show prejudice from Cebah not seeking an accounting from Joseph V. while he was seriously ill or filing suit immediately after his death. It was not unreasonable for Cebah to delay making a financial claim against Joseph V. during the course of his ultimately terminal illness or from Debbie immediately following Joseph V.'s death. Any delay did not prejudice Debbie because records of the cattle operation were not lost due to delay, but were never created.

Debbie's second argument is any partnership agreement between Cebah and Joseph V. is barred by the statute of frauds. Debbie claims the partnership agreement was required to be in writing because the purchase and sale of livestock is covered by Uniform Commercial Code (UCC). She further contends the agreement could not be performed within a year because the operation required the breeding of cattle, birthing of calves and raising the calves to a profitable size before sale.

We disagree. The partnership agreement was not governed by the UCC because Cebah and Joseph V. were not selling cattle to one another. *Compare with Goodwin v. Smith*, 144 Ky. 41, 137 S.W. 789 (1911) (an agreement to become partners and deal in real estate is not subject to the statute of frauds because it is

not a contract to buy or sell real estate). Additionally, partnership agreements are generally not within the statute of frauds. *Stewart v. Stovall*, 191 Ky. 508, 230 S.W. 929, 932 (1921). We agree with the trial court that the agreement was not required to be in writing because it could be performed within one year. KRS 371.010(7); *20th Century Coal Co. v. Taylor*, 275 S.W.2d 72, 75 (Ky. 1954).

Debbie's third argument is there was insufficient evidence for the trial court to conclude a partnership existed between Cebah and Joseph V. She argues Joseph V.'s payments to Cebah were more consistent with final disbursements and distributions from Joseph V. and Joseph L.'s partnership or a gift to his mother. She also argues Cebah's estate erred in failing to show which cattle were covered by the partnership agreement because the evidence showed Joseph V. and Debbie spent substantial sums of money purchasing additional cattle for themselves.

Whether Cebah and Joseph V. had a partnership is governed by the Uniform Partnership Act as adopted by Kentucky. KRS 362.150 et. seq. "A partnership is an association of two (2) or more persons to carry on as co-owners a business for profit[.]" KRS 362.175(1). "[A]n agreement to share profits is an essential element of every true partnership." *Boreing v. Wilson*, 128 Ky. 570, 108 S.W. 914, 922 (1908). "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business[.]" KRS 362.180(4). "[T]he law is well settled that where the parties, by their acts, conduct, and writings, show that they intended a partnership, and did in fact agree to share the

profits of the business as joint owners, such parties are partners.” *Boreing*, 108 S.W. at 922. *See Stewart v. Stovall*, 191 Ky. 508, 230 S.W. 929, 932 (1921).

The checks which Joseph V. paid Cebah were notated for one quarter calves and cattle. This was sufficient evidence to conclude Cebah was sharing in the profits of the cattle business and was a partner in the business for one quarter share of the profits. *Compare Graham v. Swann*, 148 Ky. 608, 147 S.W. 11, 12 (1912) (affirming the fact finder’s determination a partnership existed in which Swann was entitled to receive one third of the Grahams’ profits, despite “[t]he whole record disclos[ing] a loose and careless business arrangement, of which the proof is far from satisfactory or convincing”) *with Harrison’s Adm’x v. Heath*, 307 Ky. 463, 464-466, 211 S.W.2d 676, 677-678 (1948) (affirming the fact finder’s determination no partnership existed because the evidence supporting a partnership was mere speculation and guess work).

While there was a paucity of evidence as to the exact parameters of the partnership, there was sufficient evidence for the trial court to determine the scope of the partnership agreement. Therefore, the trial court properly determined the cattle Joseph V. and Debbie purchased were acquired for the partnership. KRS 362.185(1).

Debbie’s final argument is the award of damages was not supported by the facts or law because she presented substantial evidence as to the losses and expenses Joseph V. incurred in the cattle operation, which should offset the amount Cebah’s estate should receive. Debbie argues any recovery should be

limited to the difference between the amount Cebah received and the fair rental value of her land. Debbie further argues the trial court erred in allowing Cebah's estate to recover one quarter of the net sale amount received from the livestock market because she presented records establishing net losses to the business and some of the costs incurred in raising the cattle.

While Debbie is correct the costs of the cattle operation should be deducted from the net sales price of the cattle in determining Cebah's one quarter share of the profits, the evidence Debbie presented was insufficient to establish those operational costs. Joseph V. did not keep records that would allow the trial court to determine what costs were attributable to the cattle rather than his horse operation or other farming costs. When the partner in charge of conducting the business fails to keep accurate partnership records, all doubts respecting particular items, credits and allowances will be resolved against him and the court will use the best evidence to apportion partnership assets. *Marcum's Adm'r v. Marcum*, 154 Ky. 401, 157 S.W. 1101, 1104 (1913); *Moore v. Malis*, 292 Ky. 106, 166 S.W.2d 52, 53-54 (1942); *Pendleton v. Strange*, 381 S.W.2d 617, 619-620 (Ky. 1964). The records of the net sale price of the cattle at the livestock market were the most accurate information as to the profits of the operation and the trial court did not err in using these figures to determine the profit to which Cebah was entitled.

Accordingly, we affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Winter R. Huff
Monticello, Kentucky

BRIEF FOR APPELLEE:

William F. Stewart
Bruce D. Orwin
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