

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000611-MR
and
NO. 2013-CA-000654-MR

VERA L. HAMMOND

APPELLANT/CROSS-APPELLEE

v. APPEAL & CROSS-APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 12-CI-00151

WILLIAM JOHN CARR

APPELLEE/CROSS-APPELLANT

OPINION
DISMISSING AS TO APPEAL
AND
VACATING AND REMANDING AS TO CROSS-APPEAL

** ** * * * * *

BEFORE: COMBS, STUMBO, AND THOMPSON, JUDGES.

COMBS, JUDGE: Vera L. Hammond appeals from a partial summary judgment of the Martin Circuit Court dismissing her complaint in which she challenged the will of her late father, Herman Hammond. The court concluded that a hand-written

document signed by the decedent constituted a mere codicil to his original will that had not been revoked and remained valid. William John Carr cross-appeals from the final judgment's holding that the decedent's mobile home, although affixed to real property, remained personal property. Due to the failure of the appellant to name indispensable parties, we must dismiss the appeal. We vacate and remand as to the cross-appeal.

Herman Hammond, a widower, died on December 11, 2011. He left a joint will directing that upon his death all real and personal property was to be sold with the proceeds to be divided among the children of him and his late wife, Mary Ann. The will further provided that the share of the couple's late son, Claude Edward Hammond, was to be divided between Claude's children, Heather L. Hammond and Halley Marie Hammond. The will was jointly executed by Herman and Mary Ann in 1996, and it designated Vera Hammond, the appellant, as the executrix of their estates.

On January 3, 2012, William John Carr, a son of Herman and Mary Ann, who was a beneficiary under their joint will, filed a probate action in the Martin District Court seeking to probate the 1996 joint will of Herman Hammond and Mary Ann Hammond as the last will and testament of Herman Hammond. Vera Hammond filed a competing petition in the same action. She presented a handwritten document executed in March 2011 as the last will and testament of Herman Hammond. This document purported to devise all of Hammond's personal property to Vera Hammond. In March 2012, the Martin District Court

decided that the 2011 handwritten document was authentic; that the original joint will had not been revoked and remained valid; and that the 2011 handwritten document was a valid codicil to the 1996 joint will. Carr and Vera were named as co-executors of the estate.

On June 8, 2012, Vera Hammond filed an adversary action in the Martin Circuit Court. Vera alleged that her father had revoked the 1996 joint will by executing the 2011 handwritten document and that he intended to leave the entirety of his estate to her alone. She named William John Carr alone as defendant -- although Herman's other children and two granddaughters had also been named as beneficiaries under the 1996 will. Agreeing with Carr's motion, the circuit court determined that the other beneficiaries were necessary parties to the proceedings. As a result, Vera filed an amended complaint naming these necessary parties as defendants. Although summonses were issued for service on the new parties, Vera admits that at least two of them were never served with process.

Nevertheless, the proceedings continued, and the circuit court concluded that the original 1996 joint will and the handwritten 2011 codicil were both valid. It held that the original had not been revoked and that each testamentary document disposed of part of the decedent's estate. The court found that no genuine issue of material fact existed as to the effect to be given to the two documents; therefore, the circuit court granted partial summary judgment to William John Carr. Reading the will and the codicil together, the court divided the decedent's estate as follows: all of the personal property would go to Vera; the

real estate would be sold, and the proceeds would be divided among the heirs pursuant to the 1996 joint will. The only remaining issue to be determined was whether the decedent's mobile home should be characterized as realty or personalty.

Ultimately, the circuit court determined that the mobile home was affixed to the real estate but that it nonetheless remained personal property. Consequently, the mobile home was awarded to Vera. The final and appealable order and judgment was entered on March 7, 2013. This appeal and cross-appeal followed.

On appeal, Vera contends that the trial court erred by concluding that the 1996 will was not revoked by the subsequent execution of the handwritten testamentary document. Carr argues that the appeal must be dismissed because Vera failed to join indispensable parties. We agree that the appeal must be dismissed.

In *Kesler v. Shehan*, 934 S.W.2d 254, 257 (Ky.1996), the Supreme Court of Kentucky referred to a series of early cases holding that all beneficiaries of a will are necessary parties in a will contest. The court observed that its decision in *West v. Goldstein*, 830 S.W.2d 379 (Ky. 1992), modified -- but did not specifically overrule -- these early cases. *Id.*

In *West*, our Supreme Court held that the failure of the plaintiff to join all beneficiaries under the will to the will contest action was not fatally defective to the proceedings. *Id.* at 385-86. The Court reasoned that the unnamed beneficiaries

were not necessary parties in *West* because the plaintiffs had waived any and all rights to contest distributions to these beneficiaries. Additionally, the specific bequests in the contested will amounted to less than the bequests that the beneficiaries would have received under the will which the plaintiffs had sought to uphold. The Court decided that the unnamed beneficiaries were not necessary parties to the action since they no longer had an interest in the litigation. *Id.* at 385-86. The exception discussed in *West* does not apply to the case before us since the beneficiaries included in the amended complaint retained an interest in seeing the 1996 joint will probated. Consequently, they were necessary to the circuit court proceedings.

In *Kesler*, the Supreme Court of Kentucky also referred to *Land v. Salem Bank*, 279 Ky. 449, 130 S.W.2d 818 (1939), which held that for purposes of appeal, a person is an indispensable party if that person would be necessary to further proceedings in the circuit court if the judgment were reversed. If the beneficiaries omitted by Vera would be necessary parties in the event of a reversal of the judgment on appeal, they would be indispensable to the appeal.

As we noted, the exception recognized in *West, supra*, does not apply in this case since the beneficiaries whom Vera omitted retain interests in the decedent's estate under the provisions of the 1996 joint will. Vera has not waived any claim against the omitted parties and has not released them or acquiesced in their receipt of any benefit under the challenged will. Consequently, the omitted parties would be necessary to the additional proceedings that would result from our

reversal of the trial court's partial summary judgment. Thus, we conclude that Vera's appeal is fatally defective because she failed to include those parties in her notice of appeal.

On cross-appeal, Carr contends that the trial court erred by concluding that the decedent's mobile home had not been converted to real property – even though it had been permanently affixed to the land. In concluding that it remained the decedent's personal property, the trial court relied upon the provisions of Kentucky Revised Statute[s] (KRS) 186A.297.

KRS 186A.297 provides as follows:

(1) When a manufactured home *is or is to be permanently affixed to real estate*, the owner *may execute* and file an affidavit of conversion to real estate with the county clerk of the county in which the real estate is located. The affidavit shall attest to the fact that the home has been or will be permanently affixed to the real estate and be accompanied by a surrender of the Kentucky certificate of title. The county clerk shall file the affidavit of conversion to real estate in the miscellaneous record book. (Emphasis added.)

(2) A county clerk shall not accept a surrender of a Kentucky certificate of title which displays an unreleased lien unless it is accompanied by a release of the lien. When the county clerk files the affidavit of conversion to real estate, the county clerk shall furnish a copy to the property valuation administrator for inclusion in the real property tax rolls of the county. A filing of an affidavit of conversion to real estate and a surrender of a Kentucky certificate of title shall be deemed a conversion of the property as an improvement to the real estate upon which it is located.

The parties acknowledge that Herman did not execute an affidavit of conversion of the mobile home from personal property to real estate by having it removed from the motor vehicle title records. It is noteworthy, however, that the statute does not purport to be the exclusive indicator of the transition of the status of a mobile home from personalty to realty. The statutory language of (1) directly addresses the permanent affixing of the mobile home to real estate and employs the precatory “may”: “the owner *may execute* and file an affidavit of conversion to real estate” (Emphasis added.) Thus, the absence of the mandatory “shall” indicates that such a filing is not the sole or exclusive test or indicator of the change in status from personalty to realty.

A review of the language of (2) reveals that the primary purpose of the filing of the affidavit of conversion is dual in nature: first, to protect the interests of outstanding lien holders; second, to furnish the property valuation administrator information necessary for inclusion of the property in the county’s real property tax rolls.

No aspect of the statute addresses the intent or legitimate expectations of the property owner as to the nature of his property – a factor that is increasingly important in the context of testamentary disposition of property, which is the subject matter of this case.

The trial court considered the following activities: Herman’s preparation of a poured-concrete foundation and mortar footer for the mobile home; his construction of concrete front and back porches; his installation of a roof on the

mobile home. Nonetheless, the court concluded that these measures did not reflect a deliberate effort to convert the mobile home from personal property to real property. Instead of weighing these factors as to Herman's intent, the court relied solely on the statutory language and concluded that the failure to execute the affidavit of conversion trumped all other activities, leaving the mobile home an item of personalty rather than rendering it realty.

We conclude that the court erred in its analysis by failing to consider case law that has focused on intent (beyond and in addition to the statutory affidavit of conversion) as indicative of his desire to create realty. The appellee's brief contains a persuasive and thorough list of several cases dating from 1889 to 1998, all standing for the rule that the actions of property owners must be examined to determine their *intent* in converting chattel from personalty to realty. *See Hill v. Mundig*, 12 S.W. 956 (Ky. 1889). *Batson v. Clark*, 980 S.W.2d 566, 573-576 (Ky. 1998), relied upon and cited *Tarter v. Turpin*, 291 S.W.2d 547, 548 (Ky. 1956), which set forth the three factors serving as a test for permanency:

First, annexation to realty, either actual or constructive; second, adaptation or application to the use or purpose that the part of the realty to which it is connected is appropriated; and third, the intention of the parties to make the article a permanent accession to the freehold with title to the article in the one owning the freehold.

We are persuaded that all of Hammon's actual activities with respect to his mobile home as recited above indicate a clear intention that his mobile home was

to become a permanent home affixed to his land by a concrete footer meant to serve as his family's residence; *i.e.*, that it evolved from personalty to realty.

In summary, we dismiss the appeal. We vacate the judgment of the trial court as to the cross-appeal and remand for entry of a judgment consistent with this opinion.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. Although the majority accurately states the applicable law, I do not believe it is proper for this Court to make findings of fact regarding whether the mobile home is personal or real property.

I agree the trial court erred when it relied on KRS 186A.297 and concluded, as a matter of law, that the mobile home is personal and not real property because an affidavit of conversion was not executed. As the majority correctly notes, the trial court was required to apply the three factors set forth in *Tarter v. Turpin*, 291 S.W.2d 547 (Ky. 1956). The ultimate determination is whether Hammond's intent was for the mobile home to be converted from personal property to real property. *Batson v. Clark*, 980 S.W.2d 566, 574 (Ky.App. 1998).

Determining Hammond's intent depends on the facts. Here, the trial court was the fact-finder. However, because the trial court erroneously applied the law, it did not engage in the fact-finding process pursuant to *Tarter*. As an appellate court, we must refrain from assuming the role as fact-finder and should

remand this case to the trial court to make findings of fact using the factors set forth in *Tarter* to determine whether the mobile home is personal or real property.

I would dismiss the appeal for the reason stated by the majority.

However, I would remand the case to the trial court for a determination regarding whether the mobile home is personal or real property.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Jerry Anderson
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS:-
APPELLANT

Brian Cumbo
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