

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001012-MR

RICHARD DONALD HARRIS, EXECUTOR
OF THE ESTATE OF QUENTIN HARRIS

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 99-CI-00660

DAVID MAY AND LOIS MAY

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Richard Harris, as executor of the estate of Quentin Harris, appeals from an order of the Floyd Circuit Court awarding attorney's fees to the counsel for David and Lois May in an action to compel the sale of jointly owned land which could not feasibly be partitioned. We affirm.

Quentin Harris and the Mays jointly owned a 205 acre plot of land in which Harris had a one-fourth

interest. During previous court proceedings, the Mays petitioned the trial court to appoint commissioners to determine the value of the property and whether it could be partitioned without substantially impairing its value. The commissioners appraised the value of the land in the amount of \$250,000.00 and were further of the opinion that it was not feasible to divide the land.

After reviewing the evidence, the trial court entered a judgment ordering the land to be sold and the proceeds divided with one-fourth going to Harris and the remainder to the Mays. Harris opposed the sale and appealed the trial court's decision. When Quentin Harris died, his estate's interests were represented by his executor, Richard Harris. Subsequently, the trial court's order to sell the property was affirmed by this Court, and the Kentucky Supreme Court denied Harris' motion for discretionary review.

The property sold for \$450,000.00 and Harris' share was over \$100,000.00. The Mays then by motion sought to have the trial court award them a portion of their attorney's fees. They argued that since their attorney's work had led to the economically advantageous sale of the property, Harris should be ordered to contribute a pro rata share toward his fees. Harris objected to the Mays'

request; nevertheless, the trial court ordered Harris to pay \$4,824.22 which represented one-fourth of the attorney's fees. In its order, the trial court directed the Master Commissioner to withhold this sum from Harris' share of the profits on the property's sale and pay it directly to the Mays' attorney. This appeal followed.

Harris advances several arguments which, include the lack of legal authority for ordering him to pay a portion of the Mays' attorney's fees, the impropriety of the procedure which led to the sale of the jointly owned property, that Harris' appeal of the trial court's order to sell the property was not frivolous, and that the Mays should have been required to show the reasonableness of their attorney's fees. The issues which Harris raised concerning the procedure used to sell the land will not be addressed here due to this Court's prior decision affirming the sale. With regard to the remaining issues, the Mays respond by arguing that we should dismiss Harris' appeal for failure to name a necessary and indispensable party.

Turning to the Mays' argument, the requirement that an attorney who is awarded fees to be paid by an opposing party be named in any appellate proceedings is well established in Kentucky law, and Harris' failure to name the Mays' attorney is dispositive in the case at bar.

Tyler v. Bryant, Ky., 394. S.W.2d 454 (1965); Citizens Fidelity Bank and Trust Company v. Fenton Rigging Co., Ky., 522 S.W.2d 862 (1975); State Farm Mutual Automobile Insurance Company v. Patton, Ky. App., 631 S.W.2d 850 (1982); Boyle County Fiscal Court v. Shewmaker, Ky. App., 666 S.W.2d 759 (1984). We have previously analyzed the rationale behind this requirement in Franklin County Fiscal Court v. Stewart, Ky. App., 757 S.W.2d 194 (1988), where we stated as follows:

Mr. Stewart has moved this Court to dismiss the appeal for failure of the appellant to name his attorneys as parties to the appeal. He relies on the case of Boyle County Fiscal Court v. Shewmaker, Ky. App., 666 S.W.2d 759, 762 (1984), which specifically states: "An order concerning an award of attorney fees is not reviewable if the attorney is not made a party by designation in the notice of appeal." The Shewmaker case involved a challenge by the Boyle County Fiscal Court for an award of attorney's fees it was ordered to pay to a public defender. In addition to the authority relied upon by this Court in Shewmaker, there are other cases which hold that failure to name the attorney forecloses the possibility of review of any award of such fees. See State Farm Mutual Automobile Insurance Company v. Patton, Ky. App., 631 S.W.2d 850 (1982) and Citizens Fidelity Bank and Trust Company v. Fenton Rigging Co., Ky., 522 S.W.2d 862 (1975). The Franklin County Fiscal Court responds that the appeal does not involve a question of reasonableness of Mr. Stewart's

attorney's fees but whether the regulation mandating such fees is constitutional and/or whether it is within the scope of the enabling legislation. It argues that the appellee's attorneys are not necessary for a resolution of these issues. We believe, however, that Mr. Stewart's attorneys are clearly the beneficiaries of the judgment appealed from and therefore are necessary parties as a matter of law. The holding of our former Court of Appeals in Tyler v. Bryant, Ky., 394 S.W.2d 454, 455 (1965), appears to us to be dispositive of this issue:

We conclude the attorney should be made a party in either instance. Although the fee for the services performed was not adjudged to be paid directly to him; nevertheless, *the award was made for his benefit, with the result that he is the real party in interest* as regards the allowance.
[Emphasis added.]

Franklin County Fiscal Court at 195-196. In the case sub judice, the trial court actually ordered Harris' share of the attorney's fees to be withheld from his share of the proceeds from the sale and be paid directly to the Mays' attorney. In making this award the trial court unquestionably benefited the attorney directly and in order to appeal the court's decision it was necessary for Harris to make him a party. Consequently, we are unable to address any of Harris' arguments regarding the propriety of

the trial court's decision awarding the Mays' attorney one-fourth of his fees.

For the foregoing reasons, the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John W. Kirk
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Earl Martin McGuire
Prestonsburg, Kentucky