

RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001033-MR

BETH ANN CARNETT

APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
CIVIL ACTION NO. 01-CI-00428

LINDA WRIGHT, MARY DELL
CARNETT, ANTHONY M. CARNETT,
LARRY D. CARNETT and TREVOR CROCKER

APPELLEES

OPINION

REVERSING AND REMANDING

** **

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: This appeal arises from the sale for
division of a piece of property in Marshall County, Kentucky.

The parties have agreed on a statement of the facts and procedural history of the case, which we set forth below:

Walter Carnett and wife, Margaret Carnett, owned a home in Marshall County, Kentucky, as tenants in common. Walter Carnett died intestate on February 13, 1995. His one-half interest in the property passed to Margaret Carnett and his five children, Beth Carnett, Linda Wright, Mary Carnett, Anthony Carnett, and Larry Carnett. Margaret Carnett died testate on August 20, 1999, devising her interest in the property to one daughter, Beth Carnett.

After the death of both parents, Beth possessed a $\frac{4}{5}$ interest in the property and each of the other four children possessed a $\frac{1}{20}$ interest. Beth brought this action for division or sale, alleging that the property could not be divided without materially impairing its value. The defendants failed to respond and the facts recited herein, as alleged in the complaint, were deemed admitted and a default judgment and order of sale was entered January 7, 2002.

Pursuant to the order of sale, the master commissioner proceeded with a sale of the property. The property was advertised and a "[n]otice of [s]ale"

was placed of record. The terms of sale included a notice that "the property will be sold subject to the statutory right of redemption."

On February 8, 2002, the commissioner conducted the sale as advertised. Pursuant to the report of sale, the property was appraised at \$54,300.00 and sold for \$22,000.00.

[Beth] moved to set aside the sale on the grounds that there is no statutory right of redemption for property sold as a result of a suit for division. By order entered March 8, 2002, the court denied [the] motion because "any objections to statements that the property would be sold subject to a right of redemption should have been made prior to the hearing."

The court then entered a [j]udgment and [o]rder [c]onfirming [s]ale on March 13, 2002. This order provided that the sale was with a right of redemption in accord with the terms of the sale. Appellee Trevor Crocker then moved to alter or amend. The court entered another order on April 24, 2002. This order amended the March 13 order by deleting the reference to the right of redemption.

We will first address the question of whether Beth properly presented her objection to the commissioner's advertisement. This case is analogous to the case of Sizemore v. Bennett,¹ in which a series of advertisements published regarding a judicial sale of property listed the incorrect date on which the sale was to occur. It was uncontroverted that although the dissatisfied party's attorney knew of the inaccuracy before the sale took place, he took no action to stop the sale or alter its terms, but instead sought to have the circuit court set aside the sale after the fact.

Kentucky's highest court noted that "[n]othing that [the] plaintiff's attorney could have said at the sale could have had any legal effect on the sale. The commissioner was in charge of the sale and he was acting as an arm of the court and his actions were not subject to the control of either or any of the parties to [the] action."² "Furthermore, as the trial court pointed out, [the dissatisfied parties] sought to obtain the relief they contended they were entitled to from the only source which was empowered by law to pass upon their motion to vacate the sale."³ Having found that the sale was properly contested,

¹ Ky., 408 S.W.2d 449 (1966).

² Id. at 451.

³ Id.

the Court upon reaching the merits, concluded that the sale was properly set aside on the basis of the inaccurate advertisements.

Like the aggrieved parties in Sizemore, Beth or her attorney were without the ability to challenge the incorrect advertisement or commissioner's sale until after their occurrence. Therefore, the challenge to the sale was properly brought before the circuit court in an attempt to have it set aside.

It is well established in Kentucky that "the [c]ommissioner of the court must conduct a sale according to the terms and conditions of the judgment. If he does not, the sale must be set aside unless it is clear that no rights of an interested party were prejudiced by the deviation."⁴ Here, the order of sale reflected that the property would be sold without a right of redemption because a sale for division carries no right of redemption.⁵ Therefore, the commissioner's error in advertising the property requires that the sale be set aside unless it is clear that no prejudice resulted.

Beth points to the appraised value of the property as an indication of the amount it would have brought had the

⁴ Miller v. Halsey, Ky., 327 S.W.2d 943 (1959).

⁵ See KRS 389A.030.

advertisement not reflected a right of redemption. While it is true that appraisal is not required as part of a sale for division,⁶ there is no reason we should not consider that information, if available, in determining whether prejudice resulted from the commissioner's error.

There is a substantial difference between the appraised value and the amount realized at the commissioner's sale. While it is true that property sold at judicial sale often brings less than its full retail value, we cannot ascribe all of the discrepancy to that factor alone and none to the commissioner's error. Because it is not clear that no party was prejudiced, the sale must be set aside.

The judgment confirming the sale is reversed and this case is remanded to Marshall Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Prince
PRINCE & BRIEN, P.S.C.
Benton, Kentucky

BRIEF FOR APPELLEES:

Tom Blankenship
Benton, Kentucky

⁶ See Maynard v. Boggs, Ky. App., 735 S.W.2d 342 (1987).