

RENDERED: October 31, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001725-MR

RAY NICKELL AND  
SHEENA NICKELL

APPELLANTS

v. APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 01-CI-90228

MEDFORD PENNINGTON AND  
FLORA PENNINGTON

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: PAISLEY, TACKETT, JUDGES; AND HUDDLESTON, SENIOR JUDGE<sup>1</sup>.  
PAISLEY, JUDGE. This is an appeal from a summary judgment  
entered by the Rowan Circuit Court regarding the parties'  
respective interests in certain real estate. For the reasons  
stated hereafter, we affirm.

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Appellees Medford Pennington and Flora Pennington owned and resided on a small Rowan County farm which they used for farming and livestock grazing. At some point prior to March 1999, appellees decided to divide the property into eight parcels and to convey remainder interests in the parcels to their children, retaining life estate interests for themselves.

In early 1999 appellees executed a general warranty deed conveying a remainder interest in a 1.38-acre tract to their daughter and son-in-law, appellants Sheena Nickell and Ray Nickell. The deed provided that appellees "retain and reserve exclusive use and control of the above described real property for and during their lifetimes, and this conveyance is not to take affect [sic] until" appellees' deaths. The deed valued the property at \$5,000 but stated that the ownership interest was being conveyed for "no monetary consideration."

In June 1999 appellants mortgaged their remainder interest in the tract to Morehead National Bank (bank) as security for a loan which they used to finance the purchase of a doublewide mobile home. Attached to the mortgage instrument was the following rider signed by appellees:

27. WAIVER OF LIFE ESTATE INTEREST. The Mortgagors, MEDFORD PENNINGTON and FLORA PENNINGTON, join this Instrument specifically to convey the interest in and to the life estate retained and reserved for the exclusive use and control, of the above described real property for

and during their lifetimes, to Morehead National Bank, under the terms of this Mortgage.

Appellants moved the mobile home onto the tract, and they paid appellees \$500 for their loss of use of the property for farming and grazing. A dispute subsequently arose as to whether the parties had agreed that appellants would use only so much of the tract as was needed for the trailer and a small yard, or whether no restrictions had been placed on appellants' use of the tract. Appellees filed this action in August 2001 seeking a permanent injunction prohibiting appellants from interfering with appellees' "use of the property for which they reserved a life estate." In August 2002 the trial court entered a summary judgment granting the requested relief and directing appellants to immediately vacate the property. This appeal followed.

Appellants contend that the trial court erred by failing to find that a genuine issue of material fact exists as to whether appellees were estopped from asserting their life estate interest in the tract. We disagree.

Appellants specifically acknowledge on appeal that appellees "reserved a life estate in their Deed of Conveyance," that appellees "could not effectively convey that life estate unless they do so by deed," and that "a party to a deed is estopped from challenging the wording or statements contained in the deed." However, they assert that appellees' conduct

subsequent to the deed's execution estopped them "from asserting their life estate and amounted to a waiver of the life estate."

Appellants refer to numerous cases in support of their assertion that title to real estate may pass by equitable estoppel. However, those cases clearly involve factual situations which are not comparable to the one now before us. See, e.g., Huddleston v. Huddleston, Ky., 265 S.W.2d 942 (1954) (involved allegations that executed deed had been rescinded and revoked by parties' mutual oral agreement and that, because of his conduct, the grantee was estopped from asserting his title under the deed); Martin v. Gayheart, Ky., 264 S.W.2d 653 (1954) (party to a boundary line dispute who knowingly permitted the other party to erect improvements on the disputed property was estopped from asserting title to the disputed tract); Wright v. Wright, 312 Ky. 843, 229 S.W.2d 996 (1950) (purchaser's mistaken belief regarding the property was not caused by misrepresentation and did not constitute extraordinary circumstances which justified the passage of title by equitable estoppel); Bates v. Hall, 305 Ky. 467, 204 S.W.2d 487, 489 (1947) (parties were estopped from claiming title to land where they watched and permitted purchaser to make significant improvements to the land over a period of years "under circumstances which would call for protest"); Greene v. Eversole, 296 Ky. 437, 177 S.W.2d 559 (1944) (plaintiff who was

entitled to use passway but who did not timely protest owner's construction of expensive wall blocking the passway was estopped from compelling removal of the wall); Wood Oil Co. v. Ferguson-Willis Oil Co., 256 Ky. 579, 76 S.W.2d 632 (1934) (oil company was estopped from asserting title and possession to leasehold after tacitly or actively encouraging another to develop the property based on the belief that the company had abandoned the lease).

Moreover, Jones v. Tavis, 302 Ky. 367, 194 S.W.2d 841 (1946), which both parties cite in support of their respective positions, in fact supports appellees' position that they were not estopped from asserting their life estate. In Jones, 194 S.W.2d at 842-43, Kentucky's highest court addressed the limited circumstances under which title to real property may be established through equitable estoppel as follows:

In extraordinary circumstances title to real property may pass by an equitable estoppel where justice requires such action. In order to establish an equitable estoppel against one asserting title to real property, the party attempting to raise it must show an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to his injury. In all instances a clear strong case of estoppel must be made out in order to pass title by reason itself.

Here, it is undisputed that all parties were aware that appellees retained a life estate interest in the tract when

the remainder interest was deeded to appellants, and the record clearly shows that appellees executed only a limited waiver of that interest to the bank as security for appellants' mortgage indebtedness to the bank. Simply put, there is no basis for concluding that appellees' joinder in the mortgage instrument acted in any way to terminate their life estate interest or to transfer ownership of that interest to appellants. Moreover, although the record shows that appellants initially treated the entire tract as their own after they moved onto the property, it is undisputed that appellees soon mounted an active challenge to appellants' use of the entire tract. Clearly, there is nothing in the record to suggest that a genuine issue of material fact exists as to whether appellees engaged in "an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law" so as to estop them from enforcing their life estate interest in the tract. Jones, 194 S.W.2d at 842. Hence the court did not err by entering summary judgment on this ground.

Further, we are not persuaded by appellants' contention that a genuine issue of material fact exists as to whether appellees waived their life estate interest in the tract. It is clear from the language of the mortgage itself that appellees' "waiver" was executed only under the terms of the mortgage and for the purpose of providing security for

appellants' indebtedness to the bank. That "waiver" did not in any way, shape or form purport to provide appellants with any interest in the property beyond the remainder interest which they already possessed, and there is nothing in the record to suggest that appellees, by permitting appellants to move onto the tract or otherwise, intended in any way to waive their life estate interest in the property. Thus, it is clear as a matter of law that there is no genuine issue of material fact as to whether appellees waived their life estate interest in the tract. Moreover, as the owners of that interest in the property were entitled, for any reason, to revoke their prior consent to appellants' occupation of any portion of the tract, the court did not err by granting summary judgment in appellees' favor.

The court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Earl Rogers III  
Morehead, Kentucky

BRIEF FOR APPELLEES:

Gordon B. Long  
Salyersville, Kentucky