

RENDERED: AUGUST 26, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000277-MR

DEBORAH THEISEN, INDIVIDUALLY

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 99-CI-00994

ESTATE OF CLAYTON C. WILSON  
A/K/A CLEO WILSON; JUNE WILSON,  
ADMINISTRATRIX OF THE ESTATE OF  
CLAYTON C. WILSON; ANNA LEE MCKEE,  
SHERRILL MCKEE, BETTY BOYD,  
GARY BOYD, STANLEY THEISEN, JR.,  
DEBORAH F. THEISEN, PAUL WILSON, and  
EDMOND JONES, HEIRS OF CLAYTON WILSON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER AND BUCKINGHAM, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

BUCKINGHAM, JUDGE: Deborah Theisen appeals from an order of the  
Pulaski Circuit Court dismissing a civil complaint filed by her  
father, Dewey Jones, against the representative of the estate of

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

Clayton Wilson and Wilson's heirs. The unique facts in this case involve the title to real property and an allegation that a signature was forged on a deed. We affirm.

Deborah Theisen is the daughter of Dewey Jones. In a deed dated November 20, 1989, Clayton Wilson and others deeded certain real property located in Pulaski County, Kentucky, to Dewey Jones. The deed was recorded in the Pulaski County Clerk's office nine days later on November 29, 1989. Also on November 29, 1989, a deed was recorded in the Pulaski County Clerk's office, whereby Jones deeded the property to Clayton Wilson, one of the persons who had deeded the property to him.

Approximately nine years later, on October 10, 1998, Clayton Wilson died intestate. The Pulaski District Court appointed an administrator for the Wilson estate. The administrator subsequently filed a petition in the district court, seeking authority to sell the property that is the subject of this case. On November 1, 1999, the district court entered an order allowing the administrator to sell the property.

Claiming that his signature had been forged on the deed, Jones filed a civil complaint in the Pulaski Circuit Court on December 1, 1999. The complaint named the administrator of Wilson's estate as well as Wilson's heirs as defendants.

Deborah Theisen, who was a niece of Wilson as well as Jones's daughter, was named as one of the defendants.

In June 2000, the circuit court conducted a bench trial to resolve the issue of whether Jones's signature had been forged on the deed. The case was finally submitted to the court for ruling in February 2001. Jones died on July 16, 2001, approximately five months after the case had been submitted for ruling.

On October 19, 2001, the circuit court judge sent a letter to an attorney in the case, advising him that the case could not proceed since no motion to revive the action in the name of the estate of Dewey Jones had been filed. Copies of the letter were sent to three other attorneys as well as to Theisen individually.<sup>2</sup> On September 17, 2002, approximately fourteen months after the death of Dewey Jones, the appellees herein moved the circuit court to dismiss Jones's complaint on the ground that the claim had not been revived as required by the revival statute. The court entered an order on October 28, 2002, dismissing Jones's complaint with prejudice on the ground that it "was not revived within one year after the death of Dewey Jones, pursuant to KRS 395.278." Theisen, one of the named defendants, filed a motion to alter, amend, or vacate the

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<sup>2</sup> Theisen claims in her reply brief that she did not receive a copy of this letter.

order. The motion was denied, and Theisen's appeal herein followed.<sup>3</sup>

KRS 395.278, the statute upon which the court relied in dismissing Jones's complaint, states that "[a]n application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." Citing Norfolk & W. Ry. Co. v. McCoy, 288 Ky. 458, 156 S.W.2d 493 (1941), Theisen argues that this is a property rights case and, as such, it is not subject to the revival statute. Based on the Norfolk case, Theisen asserts that Jones's civil complaint stated a cause of action relating to the title to real property and that the cause of action thus passed directly to her as a surviving heir at his death. Thus, Theisen maintains that the cause of action survived Jones's death and was not subject to the revival statute.

On the other hand, the appellees argue that Jones's cause of action was "personalty, not the descent of realty" and that the cause of action was sustainable only by a personal representative of his estate and not by his heir or heirs. In support of this argument, the appellees cite Baker v. McDonald, 185 Ky. 470, 215 S.W. 292 (1919); Snyder v. Snyder, 769 S.W.2d

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<sup>3</sup> Theisen is listed as both an appellant and an appellee in this case.

70 (Ky.App. 1989); and Osborne v. Kenacre Land Corp., 65 S.W.3d 534 (Ky.App. 2001), in support of its argument. Further, the appellees argue that Theisen lacks standing to appeal the order dismissing Jones's complaint.

Assuming Jones's claim was extinguished at his death and thus subject to the revival statute, then the court properly dismissed the complaint because the action was not revived within one year of Jones's death. KRS 395.278. On the other hand, assuming the claim was not extinguished at Jones's death but continued to survive with the claim passing directly to Theisen as his heir, then the complaint was nonetheless properly dismissed by the court pursuant to CR<sup>4</sup> 25.01(1) due to the failure of Theisen to move the court to substitute her as the plaintiff in Jones's place.

CR 25.01(1) provides:

If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5, and upon persons not parties as provided in Rule 4 for the service of summons.

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<sup>4</sup> Kentucky Rules of Civil Procedure.

The rule clearly provides that if the substitution of the proper party or parties is not made, then the action may be dismissed.

See Hammons v. Tremco, Inc., 887 S.W.2d 336, 338 (Ky. 1994)

("[W]hen a plaintiff dies any action pending on the part of the deceased plaintiff must be revived by the decedent's successor or personal representative within one year, and the successor or personal representative must be substituted as the real party in interest.").

In short, we agree with the appellees that Theisen did not have standing to bring this appeal. Theisen was a party to the case only in her capacity as a defendant based on the fact that she was a niece of Clayton Wilson. She never moved the court to substitute her as the plaintiff in the case following the death of her father. Her failure to do so led the court to properly dismiss the complaint.

Finally, we address two additional points raised by Theisen in her briefs. First, she complains that the circuit court did not enter a judgment based on the merits following the bench trial. She cites KRS 454.350(1) which states that

"[e]very Circuit and District Judge shall, when at all possible, issue a written judgment or order in all civil actions which have been submitted for final adjudication within ninety (90) days from the date the action was taken under submission." She notes that the case had been submitted to the court for ruling

for approximately five months when her father died. While we do not condone the tardiness of the court, such does not render its later dismissal of the case void. See Dubick v. Dubick, 653 S.W.2d 652, 655 (Ky.App. 1983).

Second, Theisen claims a right to the property based on a quitclaim deed apparently executed by her father to her the month before he died. It appears that this matter was first brought to the court's attention in Theisen's motion to alter, amend, or vacate filed following the order of dismissal. Her argument in this regard is without merit for two reasons. First, she claims in her brief that she owns the property as a surviving heir of her father rather than as a grantee in the quitclaim deed. Second, she never filed a claim as an intervening plaintiff or in any other capacity in the circuit court in an attempt to assert her ownership interest.

The order of the Pulaski Circuit Court is affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BARBER, JUDGE, DISSENTING: I respectfully dissent.

The real question of import is whether the action had to be revived in the name of the estate of Dewey Jones. Theisen argues that it does not while the appellees (truly only the estate of Clayton C. Wilson) contends that the interest of Dewey

Jones that Theisen is attempting to pursue is one of personalty and that she does not have standing to maintain the appeal.

I believe that the question can be stated simply as whether an action for title or possession of real property is subject to the revival statute, KRS 395.278.

KRS 395.278 requires that actions by a plaintiff or against a defendant be revived within one year of the party's death. This statute has generally been interpreted as meaning that the personal representative must revive the deceased's cause of action in the name of his or her estate within the prescribed time period or it will be dismissed. Snyder v. Snyder, 769 S.W.2d 70, 72 (Ky.App. 1989).

This general rule is applicable to actions for personal injuries, injury to property, monies - essentially any claim that is personal in nature. These interests are of the type that the personal representative of an estate is charged with marshalling and administering. KRS 395.195.

However, actions concerning the title or possession of real property are not within the personal representative's realm of authority. See KRS 395.195(6). The title to real property passes immediately to the heirs of the decedent pursuant to KRS 391.010. Kentucky has historically recognized the difference between personal property which is administered by the personal representative and real property that passes directly to the

decedent's heirs. Wood v. Wingfield, 816 S.W.2d 899, 902 (Ky. 1991). See also Levin v. Ferrer, 535 S.W.2d 79, 82 (Ky. 1975)(heirs are necessary parties to appeal where the question involves title to real property and administrator of estate has no interest in the outcome); Norfolk & W.Ry.Co. v. McCoy, 288 Ky. 458, 156 S.W.2d 493, 495 (Ky. 1941)(causes of action relating to title or possession of real property pass to the heirs); Russell v. Hogan, 282 Ky. 764, 140 S.W.2d 615, 617 (Ky. 1940)(personal representative does not have control over real estate without express authority); Skidmore v. Harris, 157 Ky. 756, 164 S.W. 98, 100 (Ky. 1914)(mother's petition to pursue suit after death of son in her own name is essentially the same as her originally bringing the action since she is the son's heir); John Shillito Co. v. Keith, 25 Ky.L.Rptr. 770, 76 S.W. 371, 372 (Ky. 1903)(suit was properly brought against heir of decedent claiming that transfer of real property was fraudulent); Marrett v. Babb's Ex'r., 12 Ky.L.Rptr. 652, 91 Ky. 88, 15 S.W. 4, 5 (1891)(real estate passes immediately to heirs).

It is the heirs who must sue to recover real property. Wood, supra at 902. The administrator or personal representative of the estate of the decedent has little or nothing to do with the decedent's real estate. The action of concern here clearly has to do with the title to real property,

thus, any personal representative of the estate of Dewey Jones would not be able to maintain the action. Theisen, as an heir of Dewey Jones, does have the ability to prosecute the case. CR 25.01(1) allows the court to substitute the "successors" or "representatives" of the deceased. Therefore, Theisen should have been allowed to continue this suit in her own name since she is Dewey Jones's heir. Therefore, I would reverse the circuit court's judgment dismissing this case.

BRIEF FOR APPELLANT:

Deborah Theisen, *Pro Se*  
Georgetown, Kentucky

BRIEF FOR APPELLEES:

D. Bruce Orwin  
Somerset, Kentucky