

RENDERED: JANUARY 6, 2006, 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2003-CA-001411-MR

MATTHEW L. DARPEL,  
EXECUTOR OF THE ESTATE  
OF PATTI BYRL STEFFEN

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT  
v. HONORABLE WILLIAM J. WEHR, JUDGE  
ACTION NO. 00-CI-00359

JEFFREY C. ARZEN,  
EXECUTOR OF THE ESTATE  
OF ANTHONY P. STEFFEN

APPELLEE

### OPINION AND ORDER

(1) AFFIRMING

(2) DENYING MOTION TO DISMISS

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BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

KNOPF, JUDGE: Matthew L. Darpel, executor of the estate of Patti Byrl Steffen (Byrl) appeals from a judgment of the Campbell Circuit Court ordering partition of real property owned by Byrl and her husband Anthony Phillip Steffen. Byrl's estate argues that the trial court's entry of a dissolution decree *nunc*

*pro tunc* could not affect her right to the entire property which accrued upon Anthony's death, prior to entry of the decree.

While we agree with Byrl's estate, we must conclude that the procedural posture of this case precludes granting any effective remedy. Hence, we affirm the circuit court's judgment.

Byrl and Anthony Steffen were married in 1941 and separated on August 17, 1998. During the marriage, Byrl and Anthony acquired several tracts of real property. This case concerns a tract located on Murnan Road in Cold Spring, Kentucky, and which was the site of the marital residence.

Byrl filed a petition for dissolution of the marriage on April 28, 1999.<sup>1</sup> She also filed a separate petition for legal separation on March 17, 2000.<sup>2</sup> On March 22, 2000, the circuit court in the dissolution action entered an order reserving a ruling on Anthony's motion to enter a final decree, stating that it would rule on the motion after the domestic relations commissioner heard evidence and reported findings to the court. The circuit court added that, if necessary, it would enter a decree *nunc pro tunc* effective as of March 17, 2000.

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<sup>1</sup> Action No. 99-CI-00483.

<sup>2</sup> Action No. 00-CI-00335.

On March 21, 2000, Anthony filed a separate action<sup>3</sup> requesting partition of the marital realty pursuant to KRS 381.135 and KRS 389A.030. However, Anthony died on April 2, 2000, before the partition complaint was served on Byrl. Anthony's estate was substituted as a party to the partition action on June 6, 2000.

On November 14, 2000, Byrl filed a motion to dismiss the partition action, arguing that title to the marital property vested automatically to her upon Anthony's death. Susan Pearman, the residual beneficiary under Anthony's will, intervened, asserting an interest in the real property.

The matters raised in the partition action and the dissolution action were heard together by the trial court. Following unsuccessful attempts at mediation, Byrl renewed her motion to dismiss both actions. On May 8, 2002, the circuit court entered a consolidated order covering both the partition and the dissolution actions.

The court determined that it was appropriate to enter a dissolution decree *nunc pro tunc* as of March 17, 2000. The court separately entered the decree in the dissolution action. In the partition action, the circuit court determined that the survivorship aspect of the title was terminated retroactively to

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<sup>3</sup> Action No. 00-CI-00359.

the date of the decree. Accordingly, the circuit court ordered the real property to be sold and the proceeds divided equally. Byrl died on July 29, 2002. Thereafter, her estate was substituted as a party to this action. On July 5, 2003, the circuit court entered an order declaring its May 8, 2002, order to be final and appealable with respect to the partition action. Byrl's estate now brings this appeal.

As an initial matter, we question the circuit court's entry of a *nunc pro tunc* decree in the dissolution action. The circuit court had the inherent authority to enter the dissolution decree *nunc pro tunc*.<sup>4</sup> However, the purpose of the *nunc pro tunc* rule is to record some act of the court done at a former time which was not carried into the record. The power of the court to make such entries is restricted to placing into the record evidence of judicial action which has been actually taken. It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. Hence, a court in entering a judgment *nunc pro tunc* has no power to construe what the judgment means, but only to enter of record such judgment as had been formerly rendered, but which had not been entered of record as rendered.<sup>5</sup>

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<sup>4</sup> Muncie v. Muncie, 303 S.W.2d 257, 258 (Ky. 1957).

<sup>5</sup> Carroll v. Carroll, 338 S.W.2d 694 (Ky. 1960). See also Powell v. Blevins, 365 S.W.2d 104, 106 (Ky. 1963); James v. Hillerich &

Furthermore, the *nunc pro tunc* rule cannot be used to make an order that it might or should have made.<sup>6</sup> In its March 22, 2000, order, the circuit court expressly declined to enter a decree at that time because the necessary proof had not been taken. While the circuit court could have, and perhaps should have entered a decree at that time, it failed to take any action to enter a decree prior to Anthony's death. The *nunc pro tunc* rule did not allow the court to correct that omission after his death.

Nevertheless, the circuit court's decision to enter the decree *nunc pro tunc* is not before the Court in this appeal.<sup>7</sup> The issue before the Court concerns the collateral effect of that decree in the partition action. A *nunc pro tunc* judgment entered after the death of a party relates back to a day during

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Bradsby Co., 299 S.W.2d 92, 94 (Ky. 1956); Benton v. King, 199 Ky. 307, 250 S.W. 1002, 1003 (Ky. 1923).

<sup>6</sup> Hankins v. Hankins' Adm'r, 173 Ky. 475, 191 S.W. 258 (1917).

<sup>7</sup> Apparently, Anthony's estate was never substituted as a party in the dissolution action. Consequently, when Byrl's estate attempted to appeal from the dissolution decree, this Court dismissed the appeal for failure to name a necessary party. Matthew L. Darpel, Executor of the Estate of Patti Byrl Steffen v. Anthony P. Steffen, No. 2002-CA-001853-MR (Order Dismissing Appeal September 23, 2003). By the same reasoning, however, it would seem that there was no adversarial party before the circuit court when it actually entered the decree. Nevertheless, a judgment granting dissolution of marriage is not appealable or subject to appellate jurisdiction. KRS 22A.020(3); Clements v. Harris, 89 S.W.3d 403, 404 (Ky. 2002).

the term when the party was alive.<sup>8</sup> Anthony's estate argues, and the circuit court agreed that the *nunc pro tunc* decree operated to terminate the survivorship aspect of the parties' deed prior to Anthony's death.<sup>9</sup> Furthermore, Anthony's estate asserts that, since the dissolution judgment is now final, Patti's estate is now precluded from challenging it in the appeal from the partition action.

However, a *nunc pro tunc* decree cannot alter the vested rights of innocent persons.<sup>10</sup> Anthony and Byrl owned the Murnan Road property as tenants by the entirety, meaning they each owned the property by the undivided whole. A distinguishing feature of a tenancy by the entirety is that the survivor takes the entire estate at the death of the deceased co-tenant not by virtue of that death, but because, in law, each was viewed to own the entire estate from the time of its creation.<sup>11</sup> Since Byrl took possession of the entire estate immediately upon Anthony's death, the *nunc pro tunc* decree could

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<sup>8</sup> 46 Am. Jur. Judgments §§ 115, 120 (pp. 465, 466) (1994 & 2005 Supp.).

<sup>9</sup> See Nelson v. Mahurin, 994 S.W.2d 10 (Ky.App. 1998), holding that dissolution of marriage terminates the survivorship right to the entire estate. Id. at 14-15.

<sup>10</sup> Benton v. King, 199 Ky. 307, 250 S.W. 1002, 1004 (Ky. 1923).

<sup>11</sup> Sanderson v. Saxon, 834 S.W.2d 676, 678 (Ky. 1992).

not operate to divest an interest that had already passed to her.

Furthermore, the partition action did not remain viable following Anthony's death. KRS 389A.130(5) provides that "[t]he death of any party pending the [partition] action and prior to distribution of the proceeds of sale or setting apart a divisible share shall not affect the action but the court may direct distribution or apportionment to the successors in interest of the decedent upon application therefore." However, this statute does not apply to "tenants by the entirety in residential property actually occupied by them as a principal residence."<sup>12</sup> Although Byrl moved out of the Murnan Road residence in 1999, the property retained its character as a marital residence until Anthony's death. And since the entire estate passed to Byrl automatically, there was no interest remaining for the court to partition.

The difficulty in this case concerns the appropriate remedy. Even if this Court holds that the partition action should have been dismissed, the dissolution judgment is now final. Consequently, our holding in this case cannot affect the property division in that action or in the separation action. The Murnan Road property has already been sold and the assets

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<sup>12</sup> KRS 389A.030(1).

distributed. Despite the circuit court's error in construing the legal effect of its *nunc pro tunc* dissolution decree, the procedural posture of this case precludes granting any relief to Byrl's estate. Therefore, we must affirm the circuit court's judgment. As we are affirming the trial court's judgment, Anthony's estate's motion to dismiss this appeal is now moot.

Accordingly, the judgment of the Campbell Circuit Court is affirmed.

IT IS FURTHER ORDERED that the motion by Jeffrey C. Arnzen, Executor of the estate of Anthony P. Steffen, to dismiss this appeal is DENIED AS MOOT.

ALL CONCUR.

January 6, 2006\_\_\_\_\_  
ENTERED:

\_\_\_\_\_/s/ Wm. L. Knopf\_\_\_\_\_  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Matthew L. Darpel  
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEE:

Jeffrey C. Arnzen  
Covington, Kentucky