

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002023-MR

DON GIBSON; JOAN SMITH;
ROSE PASCHALL; SHARON NELSON;
CATHY HANEY; MARILYN GIBSON;
ROBIN SMITH; JAMES PASCHALL;
BUDDY NELSON; AND DAVID HANEY

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 96-CI-00374

BONNIE SHOULTA AND
PHILIP SHOULTA

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

DYCHE, JUDGE: George Moss Gibson, through "straw man" or trustee deed, conveyed a tract of land to himself and to Bonnie Gibson, now Shoulta, in "fee simple and in survivorship."

Although the deed indicated that George and Bonnie were husband and wife, it is undisputed that at the time of the conveyance

they were not married. They subsequently married, and years later divorced. The divorce decree did not mention the real estate.

Following George's death in 1992, Shoulta and her new husband spent in excess of \$35,000 developing a subdivision on the property. Being informed that there might be cloud on their title to the property, the Shoultas began this quiet title action against George's heirs, known and unknown, which resulted in a decision in the Shoultas' favor. This appeal followed.

George's heirs argue that the divorce terminated any tenancy by the entirety or joint tenancy with right of survivorship, that the divorce decree awarded him all of the property and debt, and that the property was therefore a part of his estate. The trial court found that the pre-marital deed created a joint tenancy with right of survivorship which was non-marital, and therefore not affected by the divorce.

We agree with the trial court, and we affirm.

Sanderson v. Saxon, 834 S.W.2d 676 (Ky. 1992) provides:

There are essentially three estates in real property involving more than one owner: tenancy in common, joint tenancy, and tenancy by the entirety. An understanding of all three is essential to the resolution of the issue presented by this case.

A tenancy in common is an estate in which two or more persons hold title to land in such fashion as to give each of them undivided possession. The rights of no

tenant are enlarged by virtue of the death of another, that is, no tenant accedes to full, or even increased, ownership by virtue of the death of another tenant. The only "unity" involved in a tenancy in common is the possession of the entire property, to which each tenant is equally entitled. *McLeod v. Andrews*, 303 Ky. 46, 196 S.W.2d 473 (Ky.1946); 20 Am.Jur.2d, Cotenancy and Joint Ownership, Section 22.

A tenancy by the entirety is an estate in land shared by husband and wife, whereby at the death of either the survivor is entitled to full fee simple ownership. Under the common law, five unities were essential to the creation and existence of a tenancy by the entirety: interest, time, title, possession and marriage. Kentucky still recognizes the estate known in common law as tenancy by the entirety. *Alford v. Rogers*, Ky., 262 S.W.2d 676 (1953); *Cowan v. Pleasant*, Ky., 263 S.W.2d 494 (1954); *Hoffmann v. Newell*, Ky., 60 S.W.2d 607, 249 Ky. 270 (1933). 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.

A joint tenancy, as distinguished from the tenancy by the entirety, is an estate held by two or more people who (in the case where the estate is held by only two) are not husband and wife. Each is jointly entitled to the enjoyment of the estate so long as all live; however, the interest of a joint tenant, at his or her death, passes to the survivor. *McLeod, supra*; *Stambaugh v. Stambaugh*, 288 Ky. 491, 156 S.W.2d 827 (1941).

834 S.W.2d at 678. The trial court found that when George executed the deed before he was married to Bonnie, a joint tenancy was created which survived the divorce, and that this non-marital property was not affected by the decree.

Based upon the above-quoted authority from our state's highest court, we must agree with the trial court. If George and Bonnie had actually been married at the time of the execution of the deed, an argument could be made that a tenancy by the entirety had been created. There is no allegation of that union pre-dating the deed, however, and we therefore affirm the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David B. Wrinkle
Paducah, Kentucky

BRIEF FOR APPELLEES:

Robert C. Manchester
Paducah, Kentucky