

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000932-MR

DONALD G. HOUSTON

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 89-CI-00286

MARGARET D. HOUSTON

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

CAPERTON, JUDGE: Donald Houston (Donald) appeals from a Greenup Circuit Court order which authorized and directed the Master Commissioner to execute a deed of conveyance from Donald to his former wife, Margaret Houston (Margaret). We affirm.

On March 7, 1975, the parties obtained a deed which conveyed property to Donald and his wife Margaret "for and during their natural lives, with remainder in fee simple unto the survivor of either of them, their heirs and assigns forever, with covenants of General Warranty."

On October 15, 1990, a decree of dissolution of marriage was entered that incorporated the parties' settlement agreement. The decree stated that "[Margaret] shall be the owner of the parties' trailer and lot, and the furnishings therein."

On November 18, 2005, Margaret filed a motion for the circuit court to authorize and direct the Master Commissioner to execute a deed of conveyance to her from her former husband, Donald, based on the October 15, 1990, decree of dissolution. Donald objected to the motion and filed a response setting up adverse possession as a defense to the motion. The court granted the motion, giving two reasons. First, a co-owner of property cannot acquire title by adverse possession since they have the right of possession until a deed of conveyance is executed. Second, the court felt that if it found Donald to have acquired title by adverse possession, this finding would commit violence against the court's prior approval of the division of property in the decree of dissolution. It is from this order that Donald appeals.

The court's specific awards of property in a dissolution decree determine the property rights of the parties. *Napier v. Jones by and through Reynolds*, 925 S.W.2d 193 (Ky.App. 1996). Margaret was entitled to enforce her judgment under CR 70 from the date the dissolution of marriage was entered. Margaret is not entitled to sleep on her rights; thus it is possible that her late enforcement has resulted in an adverse

possession claim by Donald. However, here we have a motion to enforce a judgment and not an action to determine property rights. Adverse possession is a claim that may give rise to a civil action and not a defense to a motion to enforce a judgment.

*Sanderson v. Saxon*, 834 S.W.2d 676, 678 (Ky. 1992) recognized three real property estates with multiple owners in Kentucky:

[1] "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.

[2] "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.

[3] "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).

*Id.*

The interpretation of a deed is a matter of law and the court is bound by the four corners of the document. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky.App. 2006). In *Nelson v. Mahurin*, 994 S.W.2d 10 (Ky. App. 1998), the Court determined that dissolution of marriage acts to revoke the estate of tenancy by the entirety and if legal title to the property remains jointly, then the new relationship is that of tenants in common.

Further, a co-tenant normally takes possession of land with implied permission of the other tenant. However, the actions of the co-tenant may be so hostile as to amount to an adverse possession claim. As stated in *Moore v. Gaines*, 213 S.W.2d 990 (Ky. 1948),

[T]he rule is thoroughly established that the possession of one joint owner is presumptively the possession of all, and that to oust his cotenants his possession must not only be of the adverse character required by law as against strangers, but such as to bring home to his cotenants notice that he is holding and claiming adversely to them.

*Id.* at 993 (citation omitted). Additionally, when the parties involved in an adverse possession claim have familial ties, “[s]tronger evidence of hostile possession with a clear, positive assertion of an adverse right is required.” *Phillips v. Akers*, 103 S.W.3d 705, 710 (Ky. App. 2002).

It appears from the appellate briefs that the parties are attempting to litigate an adverse possession claim that this Court feels would best be brought in an appropriate action in circuit court. Without proper litigation, a court cannot make the determination of whether or not Douglas has title to the property through adverse possession. Margaret’s insistence that Douglas has occupied the property with her permission may be a defense, but the validity of this will need to be determined in litigation.

For the aforementioned reasons, we affirm the trial court’s order.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Lyon, Jr.  
Lyon & Lyon  
Greenup, Kentucky

BRIEF FOR APPELLEE:

John R. McGinnis  
McBrayer, McGinnis, Leslie,  
Kirkland  
Greenup, Kentucky