

96-CA-2295-MR

FRANK DEWEESE, Administrator of  
the Estate of George Ivan Deweese,  
Deceased

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 91-CI-0078

JOHN D. ANNIS, Executor of the  
Estate of Garland S. Taylor, Jr.

APPELLEE

**OPINION**

**REVERSING AND REMANDING**

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BEFORE: BUCKINGHAM, KNOPF, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. This is the second appeal from a judgment of the Butler Circuit Court determining title to a parcel of land formerly used as the Taylor's Lake Fish Club (Fish Club) to be held by the estate of Garland S. Taylor, Jr. (Taylor). For the reasons set forth hereinafter, we reverse and remand.

This case originated in the Butler District Court as a forcible detainer action by Taylor against the Fish Club in 1991 when Taylor refused to renew the Fish Club's written lease to the property. The case was transferred to the Butler Circuit Court for determination of the issue of title to the property,

and George Ivan Deweese (Deweese) was allowed to intervene in the action and assert a counterclaim to quiet title to the property. Deweese alleged that he was the owner of an undivided one-third interest in the property. In the fall of 1991, the trial court entered summary judgment against the Fish Club on Taylor's forcible detainer action.<sup>1</sup>

In January 1992, Deweese's attorney was allowed to withdraw due to the conflict created by his representation of the Fish Club, and the case was scheduled for trial on May 21, 1992. New counsel for Deweese entered his appearance in February 1992. A bench trial commenced on the scheduled date despite Deweese's motion for a continuance, in which he alleged that his attorney had inadequate time to prepare. Following the trial, the trial court entered a judgment in favor of Taylor's estate.<sup>2</sup>

Deweese appealed the trial court's judgment to this court, which remanded the case for further findings of fact to be made by the trial court. Additional findings were made by the trial court, and Deweese's estate<sup>3</sup> now appeals the trial court's amended findings of fact, conclusions of law, and judgment.

As grounds for its appeal, Deweese's estate alleges that the trial court erred by (1) denying his motion for a

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<sup>1</sup> That judgment has no relevance to this appeal.

<sup>2</sup> Taylor died during the pendency of the action.

<sup>3</sup> Deweese died during the pendency of the first appeal.

continuance, (2) finding record title in Taylor's estate, (3) not entering judgment for Deweese, (4) finding that Taylor's estate established title through adverse possession, and (5) awarding Taylor loss of rentals damages.

We are not persuaded that the trial court erred in denying Deweese's motion for a continuance.<sup>4</sup> The Deweese estate cites no authority in support of its position and does not specifically explain how the trial court's denial of Deweese's motion prejudiced him. "The decision whether to grant or deny a motion for continuance lies within the sound discretion of the trial court." Kentucky Farm Bureau Mut. Ins. Co. v. Burton, Ky. App., 922 S.W.2d 385, 388 (1996). We perceive no abuse of discretion by the trial court in denying the motion.

The next issue is whether the trial court erred in determining that the estate of Garland S. Taylor, Jr., was the sole owner of the subject property. The trial court determined that the property was originally conveyed to S. L. Taylor, Sr., S. L. Taylor, Jr., and R. T. Taylor by deed dated December 26, 1881. The court then determined that R. T. Taylor acquired sole title to the property, as well as adjacent property, through the following deeds: (1) by deed from S. L. Taylor, Sr., and his wife, M. B. Taylor, dated March 9, 1889, (2) by deed from S. L. Taylor, Sr., M. B. Taylor, S. L. Taylor, Jr., and Lizzie Taylor,

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<sup>4</sup> We note, however, that the trial judge stated during the trial that he probably should have granted Deweese's motion.

dated August 25, 1889, (3) by deed from S. L. Taylor, Sr., dated January 16, 1902, and (4) by deed from J. D. Taylor and Mattie Taylor dated April 22, 1918. The trial court thus concluded that R. T. Taylor was the sole owner of the property when he died intestate in 1930.

R. T. Taylor's three heirs were Garland S. Taylor, Sr., Elizabeth Cragon, and Anna Taylor Grubb, who each took a one-third interest in his property under the law of intestate succession. The trial court then followed the chain of title which indicated that Garland S. Taylor, Sr., died on August 16, 1979, and devised all of his property to Garland S. Taylor, Jr., including his one-third interest in this property. The Cragons conveyed their interest in the property by deed dated September 1, 1962, to Barbara Nell Forsythe and G. A. Forsythe, who conveyed the property to Garland S. Taylor, Jr., by deed dated September 18, 1969. Anna Taylor Grubb conveyed her interest to her three children who subsequently conveyed their interest in the property to Garland S. Taylor, Jr., by deed dated September 7, 1989. Thus, according to the trial court, Garland S. Taylor, Jr., had complete and sole ownership of this property as of September 7, 1989.

Deweese's estate contends that the trial court erred in finding record title in Taylor's estate because the aforementioned deeds relied upon by the trial court do not describe the subject property. Specifically, the Deweese estate

contends that the December 26, 1881, deed does not contain a description of land located on the east bank of Taylor's Lake, which is where the subject property is located, but rather describes land located around Lake Creek, which allegedly lies on the north end of the west arm of Taylor's Lake. The Deweese estate argues that there is no testimony or evidence in the record to support the trial court's conclusion that the property described in the 1881 deed includes any land located on the east bank of Taylor's Lake.

We have examined the description of the property in the 1881 deed and compared it to the description of the property as set forth in the trial court's amended findings. There is simply no indication that the property described in the 1881 deed encompasses the subject property, nor have we been directed to any testimony indicating such. Taylor's estate directs our attention to the testimony of Danny Cook, the Butler County surveyor, who testified that a prior survey was a true and accurate representation of the subject property. However, Cook also testified that the property matched the descriptions on the deeds in the chain of title presented by Deweese and did not match the descriptions on the deeds in the chain of title presented by Taylor.

The Taylor estate has not pointed to any other deed reference or testimony that would indicate that the Fish Club property was described in any deed in its chain of title. The

only reference in this regard is the statement in the Taylor estate's brief that "[t]his 1962 deed specifically refers to the Taylor's Lake Fish Club property and to the fact that R. T. Taylor owned same at the time of his death." However, the property description in that deed (the deed from Cragon to Forsythe to which reference was made earlier herein) refers to R. T. Taylor owning a one-third interest in the property at the time of his death in 1930 and does not state that he owned the entire property. That R. T. Taylor held a one-third interest in the property at his death is not inconsistent with the record title as alleged by the Deweese estate.

To quiet title to property, one must show title back to the Commonwealth or at least back to a common grantor through whom both parties claim title. Brown v. Martin, 239 Ky. 146, 148, 39 S.W.2d 245 (1931). Neither the Taylor estate nor the trial court traced ownership of the Fish Club property back to the Commonwealth or to a common grantor through whom both Deweese and Taylor claim ownership so as to quiet title to the property.

Further, the Deweese estate contends that it has record title to an undivided one-third interest in the property. It traces ownership of the property back to an 1873 deed by which one John Gidcumb's property was partitioned into seven tracts following his death. The Deweese estate traces ownership of tract three of the Gidcumb property by deed from Isaac M. Gidcumb (heir of John Gidcumb) to J. J. Borah dated March 24, 1882,

wherein an exception was carved out describing property which later was used as the Fish Club. This exception, with the same description, was then conveyed by I. M. Gidcumb and wife to S. L. Taylor, Sr., R. T. Taylor, and S. L. Taylor, Jr., by deed dated March 24, 1882. S. L. Taylor, Jr., and Lizzie Taylor then conveyed S. L.'s interest to J. H. Deweese by deed dated January 6, 1911.

Subsequent deeds in the chain of title within the Deweese family culminated in George Ivan Deweese taking title to the one-third interest originally held by S. L. Taylor, Jr. Thus, S. L. Taylor, R. T. Taylor, and S. L. Taylor, Jr., became tenants in common with each owning an undivided one-third interest in the record title, with S. L. Taylor, Jr.'s interest being conveyed to J. H. Deweese and eventually to George Ivan Deweese. As the Deweese estate claims, there is apparently no evidence that S. L. Taylor, Sr., ever conveyed his one-third undivided interest or that R. T. Taylor had more than an undivided one-third interest which eventually vested in Garland S. Taylor, Jr., after a series of conveyances. In other words, the trial court erroneously found that Garland S. Taylor, Jr., had title to the entire Fish Club property when, in fact, he only had an undivided one-third interest.

Based upon this terribly complex set of facts, we conclude that the trial court clearly erred in finding that Taylor had record title to the entire Fish Club property and that

Deweese did not have record title to an undivided one-third interest. The trial court's findings were not supported by substantial evidence because there is no evidence that the deeds relied upon by Taylor describe the disputed property, while there is clear evidence that the deeds relied upon by Deweese do describe the property.

The trial court found that Taylor's title could alternatively be established by adverse possession. The trial court noted "that as of 11/1/87, Garland S. Taylor was receiving two-thirds of the rent for the Fish Club grounds (\$1400.00) and beginning in 1990 (after Taylor purchased the remaining one-third interest) he was paid the total \$2100.00 annual rent." This statement by the trial court overlooks the fact that Deweese likewise received annual rental payments from the Fish Club at the same time Garland Taylor received his rental payments.<sup>5</sup> The trial court also noted that Deweese "testified that he feared Garland S. Taylor's response should he attempt to assert any interest in the property." Our review of that portion of the testimony reveals that Deweese did not state that he feared Taylor's response but said that he minded his own business and did not attempt to find out if and why Taylor obtained much

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<sup>5</sup> Deweese testified that he received rental payments from the Fish Club for his interest in the property, and copies of cancelled checks indicating this were introduced into evidence at the trial. The Taylor estate's brief does not direct us to any evidence to refute this but merely states that there is no dispute that the property was leased to Taylor.



greater rents on the Fish Club property than he did. The court also noted that all property taxes had been paid by the heirs of May Taylor or Garland S. Taylor, Jr., for the past twenty-two years.

"[T]here must be something more than an intention and claim to constitute adverse possession against a co-tenant." East Kentucky Energy Corp. v. Niece, Ky. App., 774 S.W.2d 458, 462 (1989). "That intention and claim must be brought to the knowledge and attention of the person against whom it is sought to be exercised, and . . . it must be hostile to the point of expulsion and exclusion." Cary-Glendon Coal Co. v. Warren, 303 Ky. 846, 851-52, 198 S.W.2d 499, 502 (1946).

Although Taylor and his predecessors paid the property tax bills and received much higher rents on the property than Deweese, the Taylor estate cites no evidence indicating that any steps were taken to actively exclude Deweese or his predecessors from the use of the property. The mere payment of taxes and receipt of higher rents by Taylor are little evidence of ouster of his cotenant, Deweese. We conclude that the trial court's finding of adverse possession was not supported by substantial evidence.

As the trial court erred in granting judgment for Taylor rather than Deweese, its award of damages to Taylor must also be reversed.

The judgment of the Butler Circuit Court is reversed and remanded with instructions to enter judgment quieting title to an undivided one-third interest in the property to Deweese and to vacate the award of damages to Taylor.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Harold D. Ricketts  
Morgantown, KY

BRIEFS FOR APPELLEES:

Brent Travelsted  
Bowling Green, KY