

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001969-MR

CHARLES MESSER; CLARA MESSER, HIS
WIFE; AND MARGARET CARROLL

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CI-00055

MONNIE MESSER

APPELLEE

OPINION
VACATING and REMANDING
** **

BEFORE: KNOFF, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: Appellants appeal a judgment of the Greenup Circuit Court allowing Appellee to intervene in the sale of property belonging to her late husband. We vacate and remand.

Appellee's late husband, Carl Messer, was a resident of Ohio, and his will was probated in Scioto County, Ohio in 1997. In that will, all of Messer's property, including the disputed property located in Greenup County, was bequeathed to the Appellants, who are Messer's three children. Appellee was not mentioned as a beneficiary in Messer's will, so she elected to take her statutory share of Messer's estate under Ohio law.

Appellants later filed a complaint for sale of the disputed property for indivisibility, and an order of sale was entered by the circuit court. Just days after the sale took place, Appellee sought to intervene and share in the proceeds of the sale.

Appellants filed objections to Appellee's motion to intervene arguing that Appellee had already elected to take her statutory share under Ohio law, thus rendering her unable to participate in the sale of the remaining property. The circuit court disagreed and allowed Appellee to intervene, stating that under Kentucky law, Appellee was entitled to a statutory share of the property sold. After a failed motion to alter, vacate or amend filed by the Appellants, this appeal followed.

Appellants argue that the circuit court erred in allowing Appellee to intervene. We disagree.

CR 24.01¹ clearly states the following:

[A]nyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.01(1).

Under this rule, it seems clear that Appellee did indeed claim an interest in the property that was the subject of the action, and the disposition of that action could have

¹ Kentucky Rules of Civil Procedure.

impaired Appellee's ability to protect that interest. Further, Appellee's interest was not represented by any of the existing parties. Therefore, we agree the circuit court was correct in allowing Appellee to intervene in the matter.

However, we also agree that both parties should have been able to present evidence regarding whether or not Appellee had any legal right to the proceeds of the sale before the circuit court ruled on the matter.

In the order, the circuit court opined that Kentucky law governed the devolution of the property in question, and that Appellee was automatically entitled to her statutory share of that property. However, the Appellants point out in their motion to alter, vacate or amend found in the record that Appellee released her rights to the Kentucky property in return for an increased statutory share. We believe the parties should have had an opportunity to present evidence on this and any related matters before the circuit court ruled on Appellee's rights to the proceeds of the sale. Therefore, we vacate the circuit court's order and remand for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John R. McGinnis
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BRIEF FOR APPELLEE:

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