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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001170-MR

KATHY RICE — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE GARY D. PAYNE, SPECIAL JUDGE
ACTION NO. 05-CI-00052

JACKIE GRIFFIN, individually
and as administratrix of the estate of
CURTIS W. RICE — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Kathy Rice appeals from two orders of the Harlan Circuit Court, but her appeal primarily involves the interpretation and application of Kentucky Revised Statute (KRS) 392.090(2), the statute that bars an adulterous spouse from receiving his or her dower or curtesy rights. In the first order at issue,

dated May 9, 2008, the circuit court denied Kathy summary judgment on the question of whether KRS 392.090(2) barred her from receiving a dower interest from the estate of her husband, Curtis Rice. In the second order, dated June 4, 2009, the circuit court declared that KRS 392.090(2) did indeed bar her from receiving a dower interest from that estate. After a careful review of the record, we find that Kathy was entitled to summary judgment as a matter of law and accordingly reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

This controversy arises from the tragic death of Curtis Rice, who died intestate on September 12, 2004, after being struck by a piece of equipment in a work-related accident. Curtis was married to Kathy Rice; however, Kathy began living separately and apart from him on June 1, 2004. On August 25, 2004, Kathy had also petitioned to dissolve their marriage, but her petition was still pending at the time of Curtis's death.

In Action No. 04-P-165, the Harlan District Court, Probate Division, appointed Curtis's mother, Jackie Griffin, as the administratrix of Curtis's estate. In this capacity and in her individual capacity, Griffin petitioned the Harlan Circuit Court for a declaration of rights relating to Curtis's estate on January 19, 2005. Specifically, Griffin asked the circuit court to hold, as a matter of law, that Kathy had forfeited any interest in Curtis's estate pursuant to KRS 392.090(2).

In her answer, Kathy denied that KRS 392.090(2) barred her from receiving an interest in Curtis's estate.[1] Kathy also moved for summary judgment regarding this issue on August 2, 2007, based upon Griffin's failure to: 1) specifically allege in the petition that Kathy was living in adultery; and 2) produce any evidence in support of her petition for a period of over two years following the filing of that petition.

On September 6, 2007, the circuit court held a hearing on her motion, but it made no ruling upon it until May 9, 2008. On September 12, 2007, Griffin filed a "supplemental response" to Kathy's motion. In relevant part, Griffin's supplemental response alleged that Kathy began living with Billy Halcomb shortly after Curtis's death; it also included an affidavit from Billy Halcomb. In relevant part, Halcomb's affidavit states:

> 2. That prior to the death of Mr. Curtis Rice, the Affiant had an adulterous relationship with the Defendant, Kathy Rice;
>
> 3. That the Affiant went on a date with the Defendant on the Friday prior to the death of Mr. Curtis Rice. The next day, the Saturday prior to Mr. Rice's death, the Affiant and the Defendant again went out. The Affiant and the Defendant went to a bar, became intoxicated, and the Defendant went home with the Affiant where she spent the night, and the two had sexual intercourse;

[1] In her brief, Griffin alleges that Kathy's motive for opposing her declaratory action revolves around "a workers' compensation settlement of nearly $60,000.00," which the estate purportedly received after Curtis Rice "was killed on the job." The record and pleadings contain no information about this settlement and this Court is unaware of whether this settlement, if it exists, was ever made a part of Curtis Rice's estate, properly or otherwise. Regardless, however, the issue presented in this case is whether, by virtue of her marriage to Curtis Rice, Kathy is entitled to any share of Curtis Rice's estate; the issue is not what is contained in that estate.

> 4. That the Defendant told the Affiant that she was in the process of getting a divorce from Mr. Rice when they began seeing each other;
>
> 5. That the Affiant and the Defendant continued to see each other, and began living together[.]

In sum and to add clarity to this affidavit as supported by the record, Halcomb alleged that he went on a date with Kathy on Friday, September 10, 2004--two days before Curtis died--and that he went on another date with Kathy and had intercourse with her on Saturday, September 11, 2004--one day before Curtis died. Kathy made no objection to the fact that Griffin had introduced this affidavit into the record after the September 6, 2007 hearing date.[2] Consequently, when the circuit court entered its May 9, 2008 order relating to Kathy's motion, it considered Halcomb's affidavit. Furthermore, the circuit court denied Kathy's motion on the basis of that affidavit, stating in its order: "[T]he court cannot find that Kathy Rice did not live in adultery due to the affidavit of Billy R. Halcomb who stated that he had sexual intercourse with Kathy Rice and that they began living together."

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[2] Rice also appears to argue that it was an abuse of discretion for the circuit court to grant Griffin additional time to submit evidence, including Halcomb's affidavit, following the summary judgment hearing held on September 6, 2007. However, while the circuit court did make an oral pronouncement during that hearing to the effect that Griffin would be allowed additional time to submit further evidence, and while the record contains no indication that Rice objected to that pronouncement, the circuit court never reduced that oral pronouncement to writing. Thus, it never became an effective, let alone appealable, order. *See Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994); *see also Allen v. Walter*, 534 S.W.2d 453, 455 (Ky. 1976) ("It is elementary that a court of record speaks only through its records. An order is not an order until it is signed. Until then the judge can change his mind and not enter it.")

The trial on this matter was held on May 15, 2009. There, Kathy testified that she had never engaged in sexual intercourse with any man during her separation from Curtis. Halcomb, however, testified consistently with his affidavit. On June 9, 2009, the circuit court entered its order based upon those proceedings. Finding Halcomb's testimony persuasive, it held that KRS 392.090(2) barred Kathy from receiving any interest from Curtis's estate. This appeal followed.

As stated above, the subjects of this appeal are the circuit court's May 9, 2008 order denying Kathy summary judgment, and its June 4, 2009 order declaring that Kathy had forfeited her interest in Curtis's estate. However, because our conclusion regarding the trial court's May 9, 2008 order is dispositive to this matter, we address only that order in our analysis.[3]

II. ANALYSIS

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only where the movant shows that the adverse party could not prevail under any circumstances. *Id*. (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). Thus,

[3] We pause to note that even reviewing the order entered after the trial would not change the outcome of this case as we decide that the circuit court misinterpreted KRS 392.090(2).

Kentucky's stringent standard governing a court in reviewing the propriety of summary judgment dictates that it may be granted only where it appears impossible for the non-moving party to produce evidence at trial warranting judgment in his favor. *Id*. at 482.

In the case at bar, however, Kathy appeals the trial court's decision to deny, rather than grant, summary judgment in her favor. In this circumstance,

> [t]he general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact. *Bell v. Harmon*, Ky., 284 S.W.2d 812 (1955).
>
> However, there is an exception to the general rule found in *Gumm v. Combs*, Ky., 302 S.W.2d 616 (1957), and subsequently approved in *Loy v. Whitney*, Ky., 339 S.W.2d 164 (1960), and *Beatty v. Root*, Ky., 415 S.W.2d 384 (1967). The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal, under *Gumm*.

Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave, 751 S.W.2d 36, 37 (Ky. App. 1988).

Here, the latter two elements of the exception allowing for review of a denial of summary judgment, as stated in *Leneave*, are present. Furthermore, we conclude that the two remaining elements of *Leneave* are present as well: the relevant facts relating to this claim are not in dispute and the basis for the trial

court's ruling was a matter of law. The reasons that these remaining elements of *Leneave* are also present warrant further explanation and regard KRS 392.090(2), the circuit court's holding, and the specifics of Kathy's argument.

In total, KRS 392.090(2) provides that "[i]f either spouse voluntarily leaves the other and lives in adultery, the offending party forfeits all right and interest in and to the property and estate of the other, unless they afterward become reconciled and live together as husband and wife." Furthermore, there is no dispute that at the time of the May 9, 2008 order, the only evidence of record demonstrated that Kathy may have committed, at most, one act of adultery two days prior to Curtis's death. In light of the above, the obvious basis of the circuit court's decision to deny summary judgment in favor of Kathy was its holding as a matter of law that the evidence presented in Halcomb's affidavit of only one act of adultery met the statutory criteria of KRS 392.090(2), *i.e.*, that Kathy was *living* in adultery.

Kathy contends the trial court erred in its application of KRS 392.090(2) because its denial of summary judgment as a matter of law was entirely dependent upon an underlying misinterpretation of the law, *i.e.*, the meaning of "lives in adultery," per KRS 392.090(2). She urges that the phrase "lives in adultery," for the purpose of that statute, means that more than one act of adultery must take place; as such, she contends that it is irrelevant whether she engaged in one act of adultery with Halcomb two days prior to Curtis's death and that

Griffin's failure to adduce evidence of additional acts of adultery prior to Curtis's death entitled her to judgment as a matter of law.

In light of the above, we find that the remaining conditions set forth in *Leneave* have been met and that we may properly review the denial of Kathy's summary judgment motion because: 1) defining the phrase "lives in adultery" is a matter of statutory interpretation and a question of law that we review *de novo*; and 2) if KRS 392.090(2) does require more than one act of adultery in order to apply, then the trial court's May 9, 2008 order misapplied the law. That said, based on the plain language given to the statute by the General Assembly, we are compelled to agree with Kathy that the evidence presented was insufficient to prove that she met the statutory definition of living in adultery at the time of Curtis's death.

As we are reviewing statutory interpretation, we review this issue under a *de novo* standard. *Commonwealth v. Garnett*, 8 S.W.3d 573, 575-76 (Ky.App.1999). Courts are bound by a number of statutory construction principles. One of the most basic precepts is that we "may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky.App. 2001). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). Further, and important to the present analysis, we cannot add or subtract from the language used in a statute. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

Turning to how "living in adultery" has been interpreted in this Commonwealth, we begin with *Bond v. Bond's Adm'r, et al.*, 150 Ky. 389, 150 S.W. 363, 364 (1912). There, the former Court of Appeals analyzed the identical language of the predecessor statute of KRS 392.090, Kentucky Statute (Ky. St.) § 2133, and stated:

> This statute does not mean that [the wife] shall constantly live with one man in adultery during her abandonment of the husband in order to forfeit her right of dower or distributable share; but if she admits any man or men to her periodically, or whenever it is convenient or opportunity is afforded, during said abandonment, such conduct constitutes a living in adultery within the meaning of the statute.

While *Bond* provides some guidance, it does not speak to the issue of whether the General Assembly intended one act of adultery to constitute living in adultery for purposes of KRS 392.090(2). Nor, for that matter, does any other case in Kentucky at present. *See* James R. Merritt, 2 Ky. Prac., Prob. Prac. & Proc § 210 (2d ed. 1984). Thus, for the purpose of resolving how the General Assembly intended to define how a spouse may live in adultery, we turn to Ky. St. § 2117, a statute that existed contemporaneously with Ky. St. § 2133 and *Bond*, which used substantially the same language, *i.e.*, the phrase "living in adultery."

By way of its history, Ky. St. § 2117 was formerly Kentucky's fault-based divorce statute, became KRS 403.020, and was subsequently repealed altogether by 1972 Kentucky Acts, Chapter 182 § 29, when the Kentucky General Assembly enacted KRS 403.110 *et seq.* following a national trend to permit no-

fault divorces. At the time of *Bond*, and in relevant part, it stated that a party not at fault could obtain a divorce if the other was "living in adultery with another man or woman."

The value of Ky. St. § 2117, for the purpose of our analysis, is that it demonstrates that the General Assembly illustrated its patent declaration of its intent that there is a difference between "living in adultery" and a single act of adultery. Indeed, the former Court of Appeals recognized the General Assembly's choice of words to show this intent in *Baker v. Baker*, 136 Ky. 617, 124 S.W. 866, 867 (1910):

> While the statute (section 2117, Ky. St.) will allow the husband a divorce upon proof by two witnesses, or one and strong corroborating circumstances, of a single act of adultery on the part of the wife, or such lewd, lascivious behavior on her part as proves her to be unchaste, without actual proof of adultery, to entitle the wife to a divorce on the ground of the husband's adulterous conduct it must be proved by two witnesses, or one and strong corroborating circumstances, that he is living in adultery with another woman. Why this distinction is made, if, indeed, any sound reason for it exists, we need not stop to inquire, but in view of the statute it must be recognized; hence, *we can but admit that a single act of adultery on appellee's part would not entitle appellant to the divorce asked. To authorize it there must be proof that he was "living in adultery with another woman*." As previously indicated, this was made apparent by the evidence introduced in appellant's behalf, which, as a whole, we regard convincing. *While to constitute a living together in adultery there must be more than a single act, there need not be a living together continuously, or for a given time, nor is it necessary for the man to abide in the same house with the woman; but if he at stated periods, or frequently, spend the day or night, or any considerable*

> *part of his time with a woman, not his wife, at such times having carnal knowledge of her at will, though at other times he be domiciled with his wife, it constitutes the offense against the wife's marital rights which the statute declares a ground for divorce.*

(Emphasis added).

Under *Baker* and its interpretation of Ky. St. § 2117, women were not treated the same as men regarding adultery; fortunately, that has since been rectified. Nonetheless, the historical analysis of living in adultery as compared to that of a single act of adultery as used by the General Assembly aids our analysis herein. In sum, we glean three things regarding the General Assembly's intent over the years to use the phrase "lives in adultery" or "living in adultery" rather that just using the term "adultery" from the combination of *Baker*, *Bond*, Ky. St. 2117, and Ky. St. 2133: first, that in *Baker*, the former Court of Appeals analyzed "living in adultery," per Ky. St. 2117, in exactly the same way as it later analyzed "living in adultery" per Ky. St. 2133 in *Bond*; second, that the General Assembly intended that a single act of adultery does not constitute an offense against a spouse's marital rights sufficient to constitute "living in adultery" (*see Baker*, 124 S.W. at 867); and third, the General Assembly made a deliberate choice to include that same phrase in KRS 392.090(2), rather than a single act of adultery. "A universally accepted rule of statutory construction is that the General Assembly is presumed to know the status of the law and the constructions placed on it by the courts." *Butler v. Groce*, 880 S.W.3d 547, 550 (Ky. (1994), J. Lambert dissenting (citing *Baker v. White*, 251 Ky. 691, 65 S.W.2d 1022 (1933); *Commonwealth,*

Dept. of Banking & Secur. v. Brown, 605 S.W.2d 497 (Ky.1980)). Courts construe statutes, not rewrite them. Thus, in light of the absence of any other authority addressing the circumstance of only one act of adultery within the context of KRS 392.090(2), we are constrained by the patent language used by the General Assembly to interpret "living in adultery" in exactly the same manner as in *Baker*. Accordingly, we have no choice but to conclude that one act of adultery is not "living in adultery" within the meaning of that statute. As a consequence, Griffin's action against Kathy, based upon that statute and supported only by evidence of one act of adultery prior to Curtis's death, should not have progressed beyond summary judgment as a matter of law.

III. CONCLUSION

For these reasons, the decision of the Harlan Circuit Court to bar Kathy from any interest in the estate of Curtis Rice, by virtue of KRS 392.090(2), is REVERSED.

TAYLOR, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS in result only and files separate opinion.

THOMPSON, JUDGE, concurring in result only: Respectfully, I concur in result only. I believe this antiquated statute deserves constitutional scrutiny or legislative revision. It is premised on archaic common law. The only

legal guidance are decisions by our court which were rendered prior to the time when women had the right to vote.

This is now the twenty-first century. Our courts have now abolished the use of fault to deny property in a divorce proceeding because a party is adulterous. If the legislature so desired, they could continue this statute by adequately defining cohabitation with a sufficient period of time to strip someone of their dower or curtesy rights.

However, the description of adultery within this statute is so broad that it cannot be defined and should not be defined. The opinion by the majority gives legitimacy to this statute which should be repealed or struck down on constitutional grounds. I cannot agree with this obsolete statute.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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Harlan, Kentucky