

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

ROBERT LYNN SEEBER,

Plaintiff-Appellee,

Vs.

JULIA ANN SEEBER,

Defendant-Appellant.

Blount Circuit No. E-16377

C.A. No. 03A01-9508-CV-00290

FILED

April 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

FROM THE BLOUNT COUNTY CIRCUIT COURT

THE HONORABLE W. DALE YOUNG, JUDGE

Arthur B. Goddard, Goddard & Gamble of Maryville
For Appellee

G. Kevin Hardin, Butler, Vines & Babb of Knoxville
Thomas D. Dossett, Todd & Dossett of Kingsport
Thomas C. Jessee, Jessee & Jessee of Johnson City
For Appellants, Estate of Julia Ann Seeber by
its co-personal representatives, John A. Thomas, Robert
M. Johnston, Ruth Billingsley and Betty Glascock

REVERSED AND DISMISSED

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This appeal involves the disposition of real property as affected by a Marital Dissolution Agreement between Robert Lynn Seeber and Julia Ann Seeber. The facts are as follows.

Robert Lynn Seeber (Husband) and Julia Ann Seeber (Wife) were divorced by Final Decree entered December 10, 1993, in the Circuit Court for Blount County, Tennessee, Equity Division. Prior to obtaining a divorce, the parties executed a Marital Dissolution Agreement (MDA) on October 6, 1993. The MDA, which was drafted by Husband,¹ provided for the distribution of the parties' property and specifically listed the real and personal property which Wife was to receive. The MDA provided that Husband was to receive "as his separate property . . . all other real estate . . . and any and all other assets, real or personal, either in the joint name of the parties or in the individual name of . . . [Husband] not hereinabove set out to be the separate property of . . . [Wife]." Part of the real property which was not specifically designated as Wife's separate property included two condominiums located in the Virgin Islands which were titled in the joint names of Robert Lynn Seeber and Julia Ann Seeber.

The MDA also provided that the entry of a decree of divorce was a condition precedent to the agreement taking effect. The Final Decree entered December 10, 1993, states:

[T]he Marital Dissolution Agreement entered into between the parties hereto is a fair and equitable agreement, and the same is ratified and confirmed and incorporated in this decree by reference, and each of the parties is ordered to carry out the provisions of said agreement and to execute all necessary documents to consummate the same.

On November 22, 1993, between the time the MDA was executed and the Final Decree was entered, Husband conveyed by deeds to Wife his undivided one-half interest in the "Sapphire Hill Village Condominium" and his undivided one-half interest in the "marina slip condominium." Both deeds were prepared by Husband, and both conveyed Husband's undivided one-half interest in the respective condominiums "in fee simple absolute forever." Both deeds were recorded in the tax assessor's office in St. Thomas, Virgin Islands and were properly certified.

On February 14, 1994, Wife died from injuries she sustained in an automobile accident. Appellants, John A. Thomas and Robert M. Johnston, the co-personal representatives of Wife, were issued Letters Testamentary pursuant to the Amended Order Admitting Will of Julia Ann

¹Mr. Seeber was an attorney, but he apparently was not practicing law at the time he drafted the MDA as he had not renewed his law license for a number of years prior to drafting the MDA.

Seeber to Probate entered in the County Court for Blount County, Tennessee, Probate Division. On June 14, 1994, Husband filed a claim in Blount County Probate Court against Wife's estate requesting that the personal representatives convey the condominiums to him based upon the MDA, or in the alternative, provide him with the proceeds from the sale of the condominiums. Thereafter, on December 13, 1994, Husband filed his Petition to Enforce Marital Dissolution Agreement in the Circuit Court for Blount County, Equity Division. Counsel for Husband served a copy of the petition on the beneficiaries of Wife's will, and counsel appended a "notice" to the petition informing the beneficiaries of the time, place, and date of the hearing on the petition.

The appellant personal representatives filed a response to the petition to enforce the MDA asserting that the circuit court lacked personal and subject matter jurisdiction to entertain Husband's petition. Husband filed a motion to strike the personal representatives' response on the ground that the estate of Wife was not made a party to the petition. The trial court granted Husband's motion to strike the response tendered by the personal representatives on the ground that the personal representatives were not proper parties to the action.

The only witness to testify at the hearing on the petition was Husband. Husband testified that he authored and conveyed the deeds to the condominiums in order to remove his name from the chain of title and thereby protect himself from any legal liability as a result of Wife's actions while she was using the condominiums. Husband also testified that he did not reveal the existence of the deeds to the circuit court at the time the final divorce decree was entered, because the property was to revert back to him pursuant to an oral agreement with Wife.

During the course of the hearing, counsel for the appellant personal representatives made an oral motion to intervene in the hearing pursuant to Tenn.R.Civ.P. 24. The court denied the motion, holding that the personal representatives were not parties to the petition to enforce the MDA. The attorney for beneficiary appellants Ruth Billingsley and Betty Glascock also made an oral motion to adopt the pleadings submitted by the attorney for the appellant personal representatives so that the attorney for Billingsley and Glascock could cross-examine Husband. The court denied the motion and refused to allow counsel for the beneficiaries to cross-examine Husband.

At the close of the hearing, the court, without elaborating, stated that Husband was entitled to the relief sought, and on March 17, 1995, the court entered the following order:

This cause came on to be heard on the 7th day of March, 1995, before the Honorable W. Dale Young, Judge of the Circuit Court for Blount County, Tennessee, and after hearing opening statements and argument of counsel, the Court was of the opinion that the Court had jurisdiction to enforce its Decrees, and was further of the opinion that the Motion of the Plaintiff to strike the Response of the Personal Representatives of the Estate of Julia Ann Seeber was well taken. The Court then heard proof of the Plaintiff and the various exhibits introduced, and announced that he found that the Plaintiff was entitled to the relief sought in his Motion and it is accordingly ordered, adjudged and decreed by the Court as follows:

1. That the Motion of the Plaintiff to strike the Response of the Personal Representatives was well taken and accordingly sustained.

2. That the Plaintiff was entitled to the relief sought in his Motion and it is ordered that the Clerk & Master shall execute a deed conveying to the Plaintiff, Robert Lynn Seeber, all of the right, title, interest, claim and demand of all of the beneficiaries of the Last Will and Testament of Julia Ann Seeber in and to the condominium and boat slip in The Virgin Islands, all as more particularly described in Exhibits filed with the Motion and the exhibits filed by the Plaintiff in the introduction of his proof.

3. The costs of the cause are taxed to the plaintiff, Robert Lynn Seeber, SS#412-48-3111, whose address is in care of Arthur B. Goddard, Attorney, 101 W. Broadway, Suite 208, Maryville, TN 37801, and who is retired, for which execution will issue if need be.

The appellants present seven issues for our review:

1. Whether the Circuit Court for Blount County, Tennessee had subject matter jurisdiction to enforce the Marital Dissolution Agreement filed by the plaintiff, Robert Lynn Seeber, on December 13, 1994?

2. Whether the Circuit Court had subject-matter and personal jurisdiction over the persons who are the beneficiaries of the Estate of Julia Ann Seeber where the plaintiff failed to substitute such beneficiaries as parties defendants in accordance with T.R.Civ.P. 25.01 (1) by failing to effectuate service of process in the manner provided by T.R.Civ.P. 4?

3. Whether the trial judge erred as a matter of law in refusing to permit the appellants, John A. Thomas, and Robert M. Johnston, the co-personal representatives of the Estate of Julia Ann Seeber, to enter a suggestion of death and motion for substitution in accordance with T.R.Civ.P. 25.01(1) and to intervene in accordance with T.R.Civ.P. 24?

4. Whether the trial court erred as a matter of law in refusing to permit the counsel for the appellants, Ruth Billingsley and Betty Glascock, to adopt the pleadings and arguments submitted on behalf of the appellants, John A. Thomas, and Robert M. Johnston, the co-personal representatives of the Estate, so as to appear and cross-examine the only witness in these proceedings?
5. Whether the trial court erred as a matter of law in permitting the plaintiff, Robert Lynn Seeber, to testify as to transactions with and involving the decedent, Julia Ann Seeber?
6. Whether the trial court erred as a matter of law in determining that the plaintiff, Robert Lynn Seeber, had established an oral trust in certain real property that was the subject of warranty deeds by and between the plaintiff and the decedent whereby the plaintiff had conveyed his entire interest in the same?
7. Whether the evidence preponderates against the trial court's determination that the plaintiff, Robert Lynn Seeber, had established an oral trust in certain real property that was the subject of warranty deeds by and between the plaintiff and decedent whereby the plaintiff had conveyed his entire interest in the same?

We will first address the arguments relating to the subject matter jurisdiction of the Blount County Circuit Court to entertain the Petition to Enforce the Marital Dissolution Agreement. The appellants assert that by filing the Petition to Enforce the Marital Dissolution Agreement ten months after the death of Wife, Husband instituted an action against a deceased person; therefore, pursuant to Tenn.R.Civ.P. 25.01(1) and T.C.A § 30-2-320 (1995), Husband was required to obtain an order of revivor as a jurisdictional prerequisite to maintaining the enforcement action. The appellants argue that the action to enforce the MDA is one “which by law may survive against the personal representative,” and therefore, in order to maintain the action, Husband was required to “revive the action” by substituting Wife’s personal representatives as parties to the action. The appellants argue that Husband should have obtained an order of substitution of parties pursuant to Tenn.R.Civ.P. 25.01(1), and then should have filed a copy of that order with the clerk of the court in which the estate of Wife was being administered. The appellants contend that since the personal representatives were never substituted as parties, Husband’s cause of action in this case abated.

Subject matter jurisdiction may never be waived and may be challenged at any stage of the proceedings. *Wunderlich v. Fortas*, 776 S.W.2d 953, 957 (Tenn. Ct. App. 1989). This court is required to determine the existence of subject matter jurisdiction *sua sponte*, that is, even when

subject matter jurisdiction is not raised as an issue by the parties. T.R.A.P. 13(b).

The requirements of T.C.A. § 30-2-320 are mandatory and jurisdictional. *Mid-South Pavers, Inc. v. Arnco Constr. Co.*, 771 S.W.2d 420 (Tenn. App. 1989). T.C.A. § 30-2-320 provides:

30-2-320. Pending actions considered legally filed demands - Manner of revival. - All actions pending against any person at the time of his death, which by law may survive against the personal representative, shall be considered demands legally filed against such estate at the time of the filing with the clerk of the court in which the estate is being administered of a copy in duplicate of the order of revivor, one (1) of which copies shall be certified or attested, a notation of which shall be entered by the clerk in the record of claims, as in the case of other claims filed. Pending actions not so revived against the personal representative within the period prescribed in § 30-2-307(a) shall abate.

Tenn.R.Civ.P. 25.01(1) provides:

Rule 25.01 Death

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

In the case *sub judice*, the failure to substitute the co-personal representatives as parties did not cause Husband's claims to abate, because T.C.A. § 30-2-320 is not applicable to a suit for specific performance of a contract for the conveyance of real property. *Wright v. Universal Tire, Inc.*, 577 S.W.2d 194 (Tenn. App. 1979). A marital dissolution agreement is essentially a contract between a husband and wife in contemplation of divorce proceedings. *See Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993). In this proceeding, Husband seeks specific performance of the MDA agreement. Specifically, he seeks deeds to the two condominiums based upon the provision of the agreement requiring each party "to sign any and all documents necessary to carry into effect this marital dissolution agreement." The general rule is that absent a showing that an estate is insolvent, real estate is not subject to administration by an estate's representatives, because title passes by operation of law to the devisees or heirs upon the death

of the owner. *First Southern Trust Co. v. Sowell*, 683 S.W.2d 680 (Tenn.App. 1984). Therefore, in a suit for specific performance of an agreement to convey realty, a personal representative is not a necessary party to the action, because the personal representative has no interest in the subject real property.² In *Wright, supra*, this Court stated:

[S]uits for specific performance may be maintained against the heirs or those who acquire the subject property by will. While the personal representative is a proper party in a suit of this kind, he is not a necessary party; the heirs or one acquiring the property by will are necessary parties.

Wright, 577 S.W.2d at 196.

In the instant case, it is undisputed that Mrs. Seeber is deceased. According to Husband's theory, as expressed in his petition, Mrs. Seeber, had she lived, would have been obligated under the terms of the MDA to execute deeds conveying to him the subject property. Since Husband's claim was not extinguished by Wife's death, the parties must comply with Tenn.R.Civ.P. 25.01. The record does not reflect that a "statement of the fact of death" has been served, and, therefore, technically the case was not in a proper posture to be heard and decided in the trial court. The personal representatives are proper party defendants to Husband's petition, and the heirs or devisees, as the case may be,³ are necessary party defendants to the petition. The proper procedural steps should have been taken to substitute the necessary parties and thereby comply with Rule 25.01(1). Because there was no "service of a statement of the fact of the death" as required by Rule 25.01(1), the 90 day limitation period for making a motion for substitution of parties never commenced. Therefore, Husband's action did not abate under Rule 25.01(1). However, the hearing on Husband's petition should have been postponed until an order of substitution of parties was entered and the case was in a proper posture for hearing. It is undisputed that the controversy in this case concerns real property in the Virgin Islands that was conveyed in fee simple to Wife by valid warranty deeds. Husband's petition seeks, in effect, to

²This holding effectively disposes of appellant's issue number three. Since the personal representatives were not necessary parties to the action, it was within the trial judge's discretion whether to allow the representatives to intervene. Tenn.R.Civ.P. 24.02. We find no abuse of that discretion by the judge's refusal to allow the representatives to intervene.

³The will of Mrs. Seeber is not in the record.

set aside the deeds based upon his interpretation of the Marital Dissolution Agreement and undisputed facts surrounding the entry of the final decree incorporating the agreement. Although technically the case was not in a posture to be heard, the material facts are undisputed and the decision of the trial court turned on an interpretation of the Marital Dissolution Agreement which is a question of law. Under these circumstances, we feel that in the interest of judicial economy, we should attempt to dispose of this case on its merits.

As previously noted, a Marital Dissolution Agreement is essentially a contract between a husband and wife in contemplation of divorce proceedings. See *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993). “A property settlement agreement between a husband and wife is ‘within the category of contracts and is to be looked upon and enforced as an agreement, and is to be construed as other contracts as respects its interpretation, its meaning and effect.’” *Bruce v. Bruce*, 801 S.W.2d 102 (Tenn.App. 1990) (quoting *Mathews v. Mathews*, 24 Tenn.App. 580, 593, 148 S.W.2d 3, 11-12 (1940)).

The Marital Dissolution Agreement was executed prior to the date of entry of the divorce decree and specifically provided that it would not take effect until the entry of the final decree incorporating the agreement. Wife was given certain described property in the agreement, and the provision for Husband is as follows:

The party of the first part [Husband] will receive as his separate property all of his retirement benefits, all other real estate, all household goods, furnishings, equipment, automobiles, vehicles, bank accounts, cash, notes, stocks, and bonds, and any and all other assets, real or personal, either in the joint name of the parties or in the individual name of the party of the first part [Husband] not hereinabove set out to be the separate property of the party of the second part [Wife].

Subsequent to the execution of the Marital Dissolution Agreement and prior to the entry of the final decree, Husband conveyed his interest in the condominium properties to Wife.

Under the clear language of the property settlement agreement, when the agreement became effective upon the entry of a Final Decree of Divorce, Husband was to receive all property which was held in the joint name of the parties or held in Husband’s individual name which was not set out to be the “separate property” of Wife. Wife was to receive all real property which was set out in the MDA as her “separate property.” At the time of the entry of

the decree, Wife held title to the two condominiums in her individual name. Thus, at the time the agreement became effective, the condominiums were neither real property held in “the joint name of the parties” or “in the individual name of . . . [Husband],” nor were the condominiums listed in the MDA as “separate property” of Wife. Thus, by the clear and unambiguous language of the MDA, its provisions did not dispose of the two condominiums.

By conveying title to the two condominiums to Wife “in fee simple absolute forever,” Husband effectively amended the MDA with respect to the disposition of the condominiums. Husband drafted the MDA and was or should have been well apprised of its provisions regarding disposition of his and Wife’s property. Husband knew or should have known that the provisions of the MDA would provide him with the condominiums following divorce, because the condominiums were held in the joint names of Robert Lynn and Julia Ann Seeber. Despite this knowledge, Husband conveyed his one-half interest in the condominiums to Wife who thereby held title to the two condominiums in fee simple absolute in her individual name. By transferring the title to the condominiums to Wife, Husband effectively removed the condominiums from the disposition provisions of the MDA. We think these actions evidence an unequivocal intent on the part of Husband to amend the MDA.⁴

⁴This conclusion is supported by a letter written from Mr. Seeber to Mrs. Seeber after he transferred title to the condominiums into Mrs. Seeber’s name. In the letter, dated February 6, 1994, Mr. Seeber refers to one of the condominiums as “your [Mrs. Seeber’s] condominium.” The letter reads in pertinent part:

Dear Julie:

You may be so angry with me that you would rather that I not write you. If you are, just let me know and I will only contact you when it is necessary.

Now is one of those necessary times. I am sure that you would like to have my “stuff” removed from your condominium at Sapphire Village. There are 2 ways to do this:

(1) If you don’t mind, please hire someone to pack it up and mail it to me (or Federal Express it) at 5044 Harbortown Lane, Ft. Myers, FL. 33919. I will be glad to reimburse you for the expense.

(2) If you don’t want to do it that way I will fly down

There is no evidence that the deeds were invalid, thus, when the MDA became effective upon the entry of the Final Decree, it became effective as amended. Therefore, the condominiums were the property of Julia Ann Seeber subject to descent, devise, or conveyance.

Accordingly, the order of the trial court is reversed and appellee's petition is dismissed. The remaining issues are pretermitted. Costs of this appeal are assessed against the appellee.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

when you are not there and pick it up. I would not stay in your condominium. Please let me know when you plan to be there if this is the alternative you choose.