

O P I N I O N

The complaint in this case contends that the transfer of funds represented by a \$37,500 certificate of deposit by Mr. Carrick to himself, rendered the father's estate insolvent and therefore was fraudulent as to creditors.

The suit seeks to set aside the transfer to aid the Co-Administrators of the estate of Lonnie Mae Lane in collecting Ms. Lane's claim against the estate of Mr. Carrick's father in the amount of \$19,500, which had been previously sustained by the Probate Court in a contested hearing.

Although the certificate of deposit was in the joint names of Mr. Carrick and his father, the funds were entirely those of his father.

The Trial Court sustained Mr. Carrick's motion for summary judgment, finding the suit was barred by the ten-year statute of limitations set out in T. C. A. 28-3-110(3) and also by the doctrine of *res judicata*.

The Co-Administrators appeal, insisting the Trial Court was in error in both instances.

As to the statute of limitations, we first note that both parties agree the ten-year statute is applicable to this suit.

It appears from the depositions and affidavits in the record that when the certificate of deposit matured on September 6, 1984, Mr. Carrick endorsed the certificate, received the proceeds, and used them in the construction of his home. Because the present suit was not filed until October 3, 1994, the Trial Court found ten years had expired, thus barring the claim. The critical question in resolving this feature of the appeal is when Mr. Lane, or the Co-Executors, knew or should have known of the transfer and the further fact that the transfer had rendered the father's estate insolvent. Hoffman v. Hospital Affiliates, Inc., 652 S.W.2d 341 (Tenn. 1983); McCroskey v. Bryant Air Conditioning Company, 524 S.W.2d 487 (Tenn. 1975); Gosnell v. Ashland Chemical, Inc., 674 S.W.2d 737 (Tenn. App. 1984).

Our inquiry, then, is whether the record discloses without dispute that Mr. Lane or the Co-Executors knew or should have known of their cause of action prior to October 3, 1984, ten years prior to the date the present suit was filed.

The complaint alleges that Mr. Lane did not know of the transfer, much less that it rendered the father's estate insolvent, and there is nothing in the record to the contrary. Indeed, a document filed by Mr. Carrick in the Probate Court

would lead one to believe the estate was solvent. We say this because the Petition of Probate, filed April 2, 1987, listed "real property owned by the decedent - \$220,000." Moreover, the Notice of Insolvency pursuant to T. C. A. 30-5-102 was not filed in the Probate Court until June 18, 1991.

Clearly, the undisputed proof does not show that M. Lane or the Co-Executors knew or should have known of the transfer rendering the father's estate insolvent before October 3, 1984, (a date ten years prior to the filing of the present suit), which was less than 30 days after the fact.

As to the issue of *res judicata*, the record discloses that there was a prior suit between the same parties seeking to set aside three separate real estate conveyances and alleging that they were fraudulent because these transfers rendered the estate insolvent. In that suit, the Trial Court found in favor of M. Carrick on the ground that at the time of the transfer of realty, the father still owned the certificate of deposit which is central to this suit.

The prior suit involved three transfers of realty and not the certificate of deposit. It appears that in the prior suit the Co-Administrators were allowed to re-open their proof and explore the circumstances surrounding the transfer of the certificate of deposit as it impacted their suit seeking to set aside the conveyances of real estate, which prompted them to seek an amendment to their complaint also alleging its

fraudulent transfer. The Trial Court, however, denied their motion to amend, finding that the Co-Administrators were attempting to "add a new cause of action."

It thus appears that the issue in question in this case was neither tried nor, in light of the Trial Court's ruling, could have been tried in the prior action.

For the foregoing reasons, the judgment of the Trial Court is vacated and the cause remanded for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged against M. Carrick.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Don T. McMurray, J.