

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

September 19, 2006 Session

JACK T. McKINNEY, ET AL. v. JEANETTA K. KIMERY, ET AL.

**Appeal from the Chancery Court for Unicoi County
No. CV006995 G. Richard Johnson, Chancellor**

No. E2005-02510-COA-R3-CV FILED SEPTEMBER 28, 2006

Jack T. McKinney and his wife Brenda McKinney, obtained a judgment against Charles T. Kimery. After the judgment was recorded in the Register of Deeds' office, Mr. Kimery and his wife conveyed property they owned as tenants by the entirety to Mr. Kimery's mother. The McKinneys filed this action to execute upon the property and have it sold to satisfy the judgment lien. The issue presented is whether the McKinneys may levy against the entire interest in the property and have the property sold to satisfy their judgment lien, or whether the McKinneys' lien attached only to Mr. Kimery's separate, alienable interest in the property at the time of recording of the judgment lien, which consisted of Mr. Kimery's right of survivorship. The trial court held that the McKinneys' judgment lien attached to Mr. Kimery's survivorship interest in the property at the time the judgment was recorded, and that the subsequent transfer of the property by both tenants by the entirety (the Kimerys) did not augment the interest to which the judgment lien attached, so that the McKinneys continued to hold a lien against the survivorship interest only after the transfer. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Arthur M. Fowler and Arthur M. Fowler, III, Johnson City, Tennessee, for the Appellants, Jack T. McKinney, Brenda McKinney, and Unicoi County Insurance Agency and Diversified Services, Inc.

M. Stanley Givens, Johnson City, Tennessee, for the Appellee, Jeanetta K. Kimery.

David E. Fielder, Michael P. Sayne, and Preston A. Hawkins, Knoxville, Tennessee, for the Appellee, First Tennessee Bank National Association.

Douglas K. Shults, Erwin, Tennessee, for the Appellee, Erwin National Bank.

OPINION

I. Background

On March 5, 2002, the McKinneys obtained a judgment in Unicoi County Chancery Court against Mr. Kimery in the amount of \$203,262.04.¹ The McKinneys' judgment was recorded in the Unicoi County Register of Deeds' office on June 11, 2002. Sixteen days later, Mr. Kimery and his wife sold their marital residence on Galax Drive in Erwin, Tennessee (the "Galax property") to Mr. Kimery's mother, Jeanetta Kimery. First Tennessee Bank loaned Jeanetta Kimery \$142,000 to purchase the Galax property. On June 2, 2003, the McKinneys' judgment was reduced on appeal to \$162,262.04. *Kimery v. Unicoi County Ins. Agency, C/A No. E2002-00849-COA-R3-CV, 2003 WL 21297314* (Tenn. Ct. App. E.S., filed June 2, 2003).

On July 16, 2003, the Kimerys transferred another parcel of real estate (the "Apartment property") owned by them as tenants by the entirety to Jeanetta Kimery. The Apartment property was at that time encumbered by a lien in favor of Erwin National Bank, and it is undisputed that this prior lien is senior to the judgment lien. Jeanetta Kimery was aware of the judgment lien against her son at the time of the transfers from the Kimerys to her.

On October 14, 2004, the McKinneys filed this action to execute upon the Galax and Apartment properties, to have them sold and the proceeds applied to satisfy the judgment lien and Erwin National Bank's lien. After a bench trial, the trial court entered its final judgment holding that: (1) at the time the McKinneys recorded their judgment lien against Mr. Kimery, the lien attached to Mr. Kimery's survivorship interest in the properties then held as tenants by the entirety; (2) the judgment lien was not destroyed by the subsequent transfers of the properties to Jeanetta Kimery, and she took the land subject to the lien; and (3) the Kimerys' subsequent transfers of the properties did not enlarge or mitigate the interest to which the judgment lien had attached, i.e., Mr. Kimery's survivorship interest.

II. Issue Presented

The McKinneys appeal. The issue presented is whether the McKinneys may have the entire interest in the property sold to satisfy their judgment lien, or whether their judgment lien attached only to Mr. Kimery's separate, alienable right of survivorship in the property at the time of recording of the judgment lien and was not augmented by the subsequent transfers.

III. Standard of Review

¹The judgment was also entered in favor of Unicoi County Insurance Agency and Diversified Services, Inc., a business owned by the McKinneys and a party counter-plaintiff in the action against Mr. Kimery. For sake of simplicity, we refer to the holders of the judgment lien as "the McKinneys."

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993). As this appeal involves only a question of law, our review is *de novo* without a presumption of correctness as to the trial court's legal conclusions. *Id.*

IV. Analysis

At the time the McKinneys recorded their judgment lien, the properties at issue were held by the Kimerys as tenants by the entirety. Tenancy by the entirety is a form of property ownership unique to married persons. *Grahl v. Davis*, 971 S.W.2d 373, 378 (Tenn. 1998); *Griffin v. Prince*, 632 S.W.2d 532, 534 (Tenn. 1982). The Supreme Court in *Grahl* noted the following characteristics of a tenancy by the entirety:

The essential characteristic of a tenancy by the entirety is that “each spouse is seized of the whole or the entirety and not of a share, moiety, or divisible part.” *Sloan v. Jones*, 192 Tenn. 400, 241 S.W.2d 506, 507 (1951). Upon the death of one spouse, ownership of tenancy by the entirety property immediately vests in the survivor, and the laws of descent and distribution do not apply.

Grahl, 971 S.W.2d at 378. Each tenant by the entirety is an owner, and “the title or right of neither is superior to that of the other.” *Barry v. Woods*, 594 S.W.2d 687, 688 (Tenn. 1980). The Supreme Court has clearly stated that the only alienable ownership right of a spouse in property held by the entirety is the right of survivorship:

Either spouse does have a salable or transferable interest, but, in effect, all that either could transfer to a third party by his or her sole deed would be a right of survivorship. As against third parties, the non-conveying tenant by the entirety would still be entitled to possession and enjoyment of the property during his or her life.

Barry, 594 S.W.2d at 688-89; *see also Weaver v. Hamrick*, 907 S.W.2d 385, 388 (Tenn. 1995); *Robinson v. Trousdale County*, 516 S.W.2d 626, 632 (Tenn. 1974) (stating that “[f]rom this date forward each tenant [by the entirety] shall have a joint right to the use, control, incomes, rents, profits, usufructs and possession of property so held, and neither may sell, encumber, alienate or dispose of any portion thereof *except his or her right of survivorship*, without the consent of the other.”) (emphasis added).

The McKinneys argue that the interest to which their judgment lien attached at the time they recorded it was the fee simple interest in the entire properties owned by the Kimerys. The McKinneys cite the Tennessee judgment lien statute, T.C.A. § 25-5-101, which provides that judgments and decrees in any court of record “shall be liens upon the debtor’s land from the time a certified copy of the judgment or decree shall be registered in the lien book in the register’s office of the county where the land is located,” and argue for an expansive construction of the term “the debtor’s land.” Jeanetta Kimery and First Tennessee Bank argue that the trial court was correct in holding that the interest to which the judgment lien attached was Mr. Kimery’s right of survivorship only. Our review of the caselaw cited by the parties indicates that the case law supports the ruling of the trial court.

The case of *Covington v. Murray*, 416 S.W.2d 761 (Tenn. 1967) is particularly instructive on the present issue. In that case, the creditors of the Nashville Baseball Club brought an action against T.L. Murray, former president and director of the club. It was admitted for purposes of appeal that Mr. Murray had fraudulently conveyed to his wife real property that they had held as tenants by the entirety. The *Covington* court, denying the creditors’ request to set aside the fraudulent conveyance, stated as follows:

The rights of the creditors of the deceased in the property prior to his conveyance to his wife were only a contingent interest in the husband's right of survivorship. The lien created by the filing of the bill could only attach to the interest owned by the deceased as a tenant by the entirety.

* * *

The deed, though fraudulent as to the creditors of the deceased, did not create a greater right in his creditors than that which existed prior to its execution.

Covington, 416 S.W.2d at 764-65 (emphasis added).

Similarly, in *Weeks v. Gress*, 474 S.W.2d 424 (Tenn. 1971), a case involving a transfer of property owned by the entirety and encumbered by a judgment lien against the husband only, the Court stated that “the assignee of the husband, or purchaser at execution sale, can acquire no other or greater interest than was vested in the husband; and, consequently, he holds in subordination to the contingent right of the wife, who, in case she survives the husband, becomes the absolute owner of the whole estate.” *Id.* at 426 (quoting *Ames v. Norman*, 36 Tenn. (4 Sneed) 683, 1857 WL 2544, at *5 (Tenn. 1857)).

The Court in *Third National Bank v. Knobler*, 789 S.W.2d 254 (Tenn. 1990), was presented with a factual situation similar in many respects to the present one. In *Knobler*, the Knoblers owned real property by the entirety. Before the dissolution of that tenancy, but during the pendency of their divorce action, a creditor bank levied on Mr. Knobler’s right of survivorship in one of the properties. *Knobler*, 789 S.W.2d at 254. The court, reversing the Court of Appeals’ holding that “the sale of

the property destroyed the survivorship interest of Mr. Knobler,” stated that “the right of survivorship, previously conveyed or attached by a judgment creditor, is not destroyed by the dissolution of the tenancy by the entirety.” *Id.* at 255. The *Knobler* court allowed the judgment creditor to have the survivorship interest sold and the proceeds applied to satisfy its lien. The same result was reached in *Tom Denton Ford, Inc. v. Stoehr*, No. 01A01-9406-CH-00288, 1995 WL 3684, at *2 (Tenn. Ct. App. M.S., filed Jan. 4, 1995) (stating “[t]he judgment lien binds the survivorship interest of [husband] Paul Donald Davis in the property. The right of survivorship which has been attached by a judgment creditor is not destroyed by the dissolution of the tenancy by the entirety.”).

We are of the opinion that under the authorities cited and discussed above, the trial court was correct in holding that the McKinneys’ judgment lien attached, at time of recording, only to Mr. Kimery’s survivorship interest in the properties, and that the interest to which the lien attached was not augmented or increased by the Kimerys’ subsequent transfers of the properties. The McKinneys rely on the case of *ATS, Inc. v. Kent*, 27 S.W.3d 923 (Tenn. Ct. App. 1998) in support of their argument, but the debtor in that case was an individual who owned the property at issue. There was no tenancy by the entirety involved in *ATS, Inc.*, and this is an important distinction, as further discussed below.

The McKinneys describe the transfers of the properties to Jeanetta Kimery as “surreptitious” and argue that they were made “in order to shield the properties from Plaintiffs’ judgment.” A close analysis of the caselaw reveals, however, that the transfers arguably put them, as judgment lien creditors, in a *better* position (precisely what the McKinneys argue in this case), but certainly did not put them in a worse position than at the time of the judgment and its recordation. It is clear that had the Kimerys not transferred the properties and continued to hold them by the entirety, the only interest the McKinneys could have executed upon would have been Mr. Kimery’s survivorship interest. *Robinson*, 516 S.W.2d at 632; *Barry*, 594 S.W.2d at 688-89; *Knobler*, 789 S.W.2d at 255-56. The Supreme Court has recognized this incident “immunity” benefit of holding property by the entirety:

Tenancy by the entirety, however, both in real and personal assets, is one of the most popular forms of ownership in this and in several other states. *Admittedly one of the incidents thereof is substantial immunity of marital assets from individual creditors of a spouse* (subject to the laws against fraudulent conveyancing, not here involved).

Griffin v. Prince, 632 S.W.2d 532, 537 (Tenn. 1982) (emphasis added; footnote omitted); *accord Gillia v. Gillia*, No. 02A01-9411-PB-00250, 1995 WL 702790, at *4 (Tenn. Ct. App. W.S., filed Nov. 28, 1995). Further, the McKinneys did not allege fraud in this case and presented no proof that the transfers were made with fraudulent intent. Jeanetta Kimery testified that the reason she bought the Galax property was that an acquaintance told her that Mr. Kimery, her son, was four months behind on mortgage payments and that imminent foreclosure was a possibility.

V. Conclusion

For the aforementioned reasons, the judgment of the trial court is affirmed. The McKinneys shall have the right to execute upon the survivorship interest previously held by Mr. Kimery in the Galax and Apartment properties to satisfy their judgment lien, subject to Erwin National Bank's senior lien in the Apartment property. Costs on appeal are assessed to the Appellants, Jack T. McKinney, Brenda McKinney, and Unicoi County Insurance Agency and Diversified Services, Inc.

SHARON G. LEE, JUDGE