

[Cite as *Estate of Pavelzik v. Pavelzik*, 2010-Ohio-5318.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESTATE OF ROBERT E. PAVELZIK

Plaintiff-Appellee

-vs-

NORMA J. PAVELZIK

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2010 CA 00071

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Domestic Relations Division, Case
No. D87-2157

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

October 25, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, J.

{¶1} Appellant Norma J. Pavelzik appeals from the decision of the Stark County Court of Common Pleas, finding her in contempt of court. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and Robert E. Pavelzik, Sr. were married in 1951.

{¶3} On December 30, 1987, Robert filed a complaint for divorce. On December 20, 1988, the Stark County Court of Common Pleas, Domestic Relations Division, issued a divorce decree. Among other things, the court ordered Robert to pay appellant alimony in the amount of \$200.00 per month for a period of nine years. Furthermore, appellant was ordered to convey to Robert her interest in the parties' undeveloped real estate lots, one in El Paso, Texas and one in Albuquerque, New Mexico.

{¶4} On August 17, 1989, the parties appeared before a domestic relations referee upon appellant's motion for contempt. At that time, Robert was found to have paid only one payment toward his alimony obligation. Robert was found in contempt and given a thirty-day jail sentence, with twenty-seven days suspended. Following an objection by Robert, the court issued an agreed judgment entry on October 19, 1989 stating that appellant would agree to release Robert from further alimony obligations in exchange for a lump sum payment of \$13,000.00.

{¶5} Robert has since passed away.

{¶6} On November 24, 2009, Appellee Estate of Robert E. Pavelzik, Sr., via Patricia J. Pavelzik, Executrix, filed a motion for contempt of court against appellant based on failure to comply with the deed transfer portion of the 1988 divorce decree.

{¶7} The matter proceeded to a hearing on March 24, 2010. Appellee Estate maintained that appellant should be forthwith ordered to quitclaim her interest in the Texas and New Mexico properties. The trial court, via a judgment entry filed March 30, 2010, held that appellant had a duty to transfer ownership of the two properties and found appellant in contempt, implicitly rejecting appellant's assertion of the doctrine of laches. Appellant at that time was sentenced to thirty days in jail, but was afforded an opportunity to purge the contempt by quitclaiming the two properties before April 21, 2010. The court stayed imposition of sentence pending appeal.

{¶8} On March 31, 2010, appellant filed a notice of appeal. She herein raises the following sole Assignment of Error:

{¶9} "I. THE TRIAL COURT ERRED IN GRANTING THE MOTION IN CONTEMPT AND CONCLUDING THAT THE DOCTRINE OF LACHES DID NOT BAR THE APPELLEE."

I.

{¶10} In her sole Assignment of Error, appellant contends the trial court erred in declining to apply the doctrine of laches as a defense to appellee's contempt action. We disagree.

{¶11} Laches has been defined by the Ohio Supreme Court as "an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35, 472 N.E.2d 328 quoting *Smith v. Smith* (1959), 168 Ohio St. 447, 156 N.E.2d 113. Issues of waiver, laches, and estoppel are "fact-driven." *Riley v. Riley*, Knox App.No. 2005-CA-27, 2006-Ohio-3572, ¶ 27, citing *Dodley v. Jackson*, Franklin App.

No. 05AP11, 2005-Ohio-5490. Delay in asserting a right does not of itself constitute laches. *Zartman v. Swad*, Fairfield App.No. 02CA86, 2003-Ohio-4140, ¶ 51, citing *Connin*, supra, at 35-36, 472 N.E.2d 328.

{¶12} The decision of a trial court concerning the application of the equitable doctrine of laches will not be reversed on appeal in the absence of an abuse of discretion. *Payne v. Cartee* (1996), 111 Ohio App.3d 580, 590, 676 N.E.2d 946, 952-953. An abuse of discretion is more than just an error in judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028, 1030-1031.

{¶13} The record in the case sub judice reveals that in January 1989, appellant filed a contempt action against Robert for failure to pay alimony, among other things. On August 17, 1989, the matter was heard by a family court referee, who proceeded to find Robert in contempt of court, stating that he had “willfully and flagrantly violated this courts (sic) prior orders ***.” Referee’s Report at 2. On the same day, Robert filed an objection to the referee’s report. The matter was set for a hearing before the judge on September 11, 1989, at which time it was continued for a pending settlement. On October 19, 1989, appellant and Robert submitted a proposed judgment entry, which the court approved, stating that the alimony issue had been settled via a lump sum payment by Robert of \$13,000.00, and that the contempt was dismissed with prejudice. No mention was made in this judgment entry of any real estate issues.

{¶14} The record reveals no additional post-decree litigation in this matter until Robert’s estate (appellee herein) filed its present contempt action in 2009. On December 10, 2009, the eldest son of the marriage, Robert E. Pavelzik, Jr., filed a

statement with the court asserting in pertinent part that during the 1989 contempt settlement negotiations, Robert had also agreed to not require appellant to remove herself from the Texas and New Mexico deeds. Robert's four other children provided a joint affidavit to the same effect. Appellant presently maintains that Robert's and/or appellee's twenty-plus-year delay in pursuing resolution of the deed issue has resulted in lost evidence and witnesses and has created material prejudice.

{¶15} Nonetheless, as appellee responds in its brief, prejudice in a laches defense is generally not inferred merely from inconvenience or the passage of time. See *Smith, supra*, at 457; *State ex rel. Polo v. Cuyahoga County Bd. of Elections* (1995), 74 Ohio St.3d 143, 145. Nothing in the record gives any indication that the Texas and New Mexico properties are presently restrained from deed transfer.¹ While appellant makes a worthy argument that Robert's passing has now hampered a de hors analysis of the 1989 settlement discussions, we must question why a purported alteration of appellant's duty to relinquish her interest in said properties was not memorialized in some way in a court entry. Upon review, we are unable to find an abuse of discretion in the court's implicit conclusion that there was no unreasonable and prejudicial delay by Robert or appellee in asserting the property division rights at issue, thus denying appellant a laches defense under the circumstances of this case.

¹ Additionally, it appears undisputed that there has been no development of either parcel. See Tr., March 24, 2010, at 11-12.

{¶16} Appellant's sole Assignment of Error is therefore overruled.

{¶17} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, J., concurs.

Hoffman, P. J., dissents.

JUDGES

JWW/d 1004

{¶18} I respectfully dissent from the majority opinion.

{¶19} While I recognize delay in asserting a right does not of itself constitute laches, the length of the delay is nevertheless one of the factors in determining whether laches should apply. Robert could have asserted his right to have Appellant transfer the properties in 1988. He certainly could have asserted it in 1989, as a counter measure when he was cited for contempt. The fact he did not do so lends some credence to his childrens' statements Robert agreed to leave the property in Appellant's name as part of the consideration for entering into the 1989 agreed judgment entry regarding alimony. Over 17 years passed without Robert asserting his claim. Thereafter, an additional three to four years passed before Appellee, as executrix of Robert's estate, initiated enforcement of Robert's right.

{¶20} While I recognize Appellee had no right to assert Robert's right until her appointment as executrix, Robert's failure to pursue the right during his lifetime cannot be discounted.

{¶21} Although I recognize the factual distinctions between this case and *Boyko v. Pries* (Feb. 14, 2001), 2001 WL 123470, I find the *Boyko* court's underlying rationale still persuasive. To deny laches in this situation allows the estate to benefit from the principal's death. As a result of Robert's failure to assert the right during his lifetime, Robert is no longer available to deny or confirm the oral agreement.

{¶22} The fact Robert did not assert his right during the last 17 years of his life, coupled with his children's statements lead me to conclude the trial court abused its discretion in not finding laches applied in this case.

HON. WILLIAM B. HOFFMAN

