

[Cite as *McCarthy v. Lippitt*, 2004-Ohio-5367.]

STATE OF OHIO, MONROE COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

|                            |   |                  |
|----------------------------|---|------------------|
| BRUCE G. McCARTHY, ET AL., | ) |                  |
|                            | ) |                  |
| PLAINTIFFS-APPELLANTS,     | ) |                  |
|                            | ) |                  |
| - VS -                     | ) | CASE NO. 04-MO-1 |
|                            | ) |                  |
| THOMAS W. LIPPITT, ET AL., | ) | OPINION          |
|                            | ) |                  |
| DEFENDANTS-APPELLEES.      | ) |                  |

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court  
Case No. 2001-56

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiffs-Appellants: Bruce G. McCarthy, Pro Se  
Kathleen M. McCarthy, Pro Se  
33563 SR 537  
Rinard Mills, Ohio 45734

For Defendants-Appellees: Thomas W. Lippitt, Pro Se  
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JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro

Dated: September 29, 2004

[Cite as *McCarthy v. Lippitt*, 2004-Ohio-5367.]  
DONOFRIO, J.

{¶1} Plaintiffs, the McCarthys, Bruce G. McCarthy, et al, appeal a decision of the Monroe County Common Pleas Court affirming a partition sale, granting defendants, the Lippitts', Thomas W. Lippitt, et al, motion to correct two errors, striking the Lippitts' October 21, 2003 deed transfer from the record, and denying the McCarthys' "Emergency Notice of Property Interest Transfer \* \* \* and Motion for Show Cause Hearing."

{¶2} This appeal arises out of a partition action involving a 55-acre parcel of real estate in Monroe County.<sup>1</sup> The record shows that in 1995, Laverne and Darlene Winland owned a 55.641 acre parcel of real property in Rinard Mills, Ohio. On June 29, 1995, the Winlands sold the property for \$56,000 to the Lippitts as trustees of the "L.L. Trust" and to a third party, Darrell Gamiere, giving each a one-half interest.

{¶3} On July 17, 2000, Gamiere and the McCarthys entered into a purchase agreement which would transfer the following portion of the property to the McCarthys: a two-story building, a lean-to building, and an area of land between the two structures. Soon thereafter, Gamiere transferred the remainder of his interest in the property to the McCarthys by quit-claim deed. The deed did not state that Gamiere was transferring an undivided one-half interest. Instead, it purported to transfer the entire 55.641 acres. Conveyance records indicate that the McCarthys paid \$10,000 for the property.

{¶4} On December 15, 2000, the Lippitts, as trustees of the L.L. Trust, transferred their interest in the property to themselves individually by quitclaim deed.

{¶5} On June 13, 2001, the McCarthys filed a pro se complaint seeking declaratory relief in the Monroe County Court of Common Pleas and later amended that complaint to request a partition of the property. The complaint alleged that they were owners of an undivided one-half interest in the real estate but that the buildings on the property had been previously partitioned, by oral agreement, among the parties. The McCarthys claimed sole ownership of two barns and a two-story

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<sup>1</sup> The facts and procedural history of this case are borrowed, in part and, at times, verbatim, from this Court's previous decisions regarding this case in *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 2002-Ohio-6435, 781 N.E.2d 1023, and *McCarthy v. Lippitt*, 7th Dist. No. 03 MO 04, 2003-Ohio-5157.

apartment building. They alleged that the Lippitts were the sole owners of a mobile home and a third barn. The McCarthys also alleged that the parties had agreed orally to lease the various structures to each other. The McCarthys ultimately requested that the property be sold and that the parties be paid according to their interests in the property.

{¶16} Subsequently, the Lippitts filed a pro se answer and counterclaim. They argued that, as co-tenants, they were entitled to equal access to all buildings on the property. The Lippitts argued that there were no valid oral agreements to allocate the buildings to the various parties, and that there were no valid oral leases on the property. They requested that the property be sold to pay off the interests of each party and that they be reimbursed for improvements which they made on the property.

{¶17} On August 1, 2001, the case was heard at a bench trial where the parties appeared pro se. The trial court heard extensive testimony about improvements made on the property, an oral agreement to divide the ownership of the buildings, oral leases on the buildings, and about the failure to record any of these transactions in writing. Gamiere and Mr. Lippitt testified about the improvements they made to the property while they were co-tenants. The parties also testified the property was appraised at \$48,000.

{¶18} The trial court entered judgment following trial. It found that the McCarthys and the Lippitts each owned a one-half undivided interest in the property. It ordered that the property be appraised and sold. The trial court ordered the sale proceeds first be used to pay certain legal obligations. It then ordered that the McCarthys receive the first \$10,000 from the sale and the Lippitts receive the remainder.

{¶19} The McCarthys appealed the trial court's decision. This court reversed the trial court's partition of the sale proceeds. See *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 2002-Ohio-6435, 781 N.E.2d 1023. We determined that the trial court's decision was inequitable because it did not distribute the proceeds proportionate to

the interest each owned in the property. “Of course, the trial court may order equitable adjustments to this division, but the co-tenants still continue to own their respective proportional interests after allowing for those adjustments.” *Id.* at ¶63. This court found that the trial court’s decision “for all intents and purposes, divested [the McCarthys] of their proportional share of the excess proceeds.” *Id.* We found that “[t]he trial court may have factored unspecified equitable adjustments into the judgment”, but that any such adjustment would “need to be specified in the order.” *Id.* at ¶65. This court then remanded this case back to the trial court “for a redetermination of the amounts of any equitable adjustments and for a division of any excess proceeds according to the parties’ proportional interests in the property.” *Id.* at ¶66.

**{¶10}** The trial court entered its judgment on remand after a non-oral hearing. It concluded that it could not “with any certainty establish any equitable adjustments in favor of either the plaintiffs-the McCarthys or the defendants-the Lippitts.” It then ordered that the parties split the sale proceeds equally after paying the legal obligations. Soon thereafter, the Lippitts filed a motion for a new trial, claiming the trial court’s decision was against the manifest weight of the evidence, and a request for separate findings of fact and conclusions of law. The trial court responded to these filings the next day. It denied the Lippitts’ motion for a new trial and stated that its findings of fact and conclusions of law were outlined in its earlier judgment entry.

**{¶11}** The Lippitts appealed arguing that the trial court erred by not equitably adjusting the partition of the proceeds in their favor due to improvements they made to the property. See *McCarthy v. Lippitt*, 7th Dist. No. 03 MO 04, 2003-Ohio-5157. The Lippitts also challenged the trial court’s decision not to grant a new trial and its response to their request for separate findings of fact and conclusions of law. This Court held that the trial court’s finding that it could not establish any equitable adjustments in favor of either party with any certainty provided an adequate basis upon which to decide the narrow legal issues presented. *Id.* This Court also found that the trial court did not abuse its discretion when denying the motion for a new trial

since its judgment was not against the manifest weight of the evidence or contrary to law. Id.

**{¶12}** On October 16, 2003, the trial court, based on the affirmation of this Court, ordered the sale in partition with the appraised value of the property set at \$75,000. On October 21, 2003, the Lippitts executed a quitclaim deed to transfer their 1/2 interest in the property back to LL Trust.

**{¶13}** On December 8, 2003, the McCarthys filed a motion for an emergency hearing to determine the legality of the Lippitts' October 21, 2003 deed transfer and a motion to show cause for contempt proceedings.

**{¶14}** On December 12, 2003, Mrs. McCarthy, purchased the entire interest in the property at public auction for \$60,000.

**{¶15}** On January 2, 2004, the trial court approved and confirmed the sale at public auction, issuing a survivorship deed to Mrs. McCarthy. The trial court further found the October 21, 2003 deed transfer of the Lippitts' 1/2 interest to LL Trust was inaccurate and ordered the quitclaim deed stricken from the record of the Monroe County Official Records. After deducting taxes and costs, proceeds of the sale were divided between the McCarthys and the Lippitts. The trial court also denied all pending motions.

**{¶16}** On January 5, 2004, the Lippitts filed a "MOTION TO CORRECT TWO ERRORS" requesting the trial court to strike the deed transfer from LL Trust to the Lippitts on December 15, 2000. The Lippitts alleged that the legal description used in the October 21, 2003 deed transfer was the same as the description used in the December 15, 2000 deed transfer. Therefore, if the October 21, 2003 deed was inaccurate, the December 15, 2000 deed was inaccurate for the same reasons.

**{¶17}** On January 8, 2004, the trial court granted the Lippitts' motion, finding that the December 15, 2000 deed was inaccurate and should be stricken from the Monroe County Official Records. Thus, title in the property reverted back to LL Trust. The court further ordered the Monroe County Sheriff's Department to issue

the partition sale proceeds to LL Trust in lieu of the Lippitts directly. This appeal followed.

{¶18} Since the McCarthys' first and fourth assignments of error both involve questions of due process, they will be addressed together.

{¶19} The McCarthys' first assignment of error states:

{¶20} "The court erred when ordering the Lippitts to remove their 21 OCT '03 request (transferring title back to LL Trust) from the record, and concealing their request and the court's order of removal from the Clerk of Courts Docket Sheet."

{¶21} The McCarthys argue that it was the Clerk of Courts' duty to file "all documents" related to the litigation in the court records, including the Lippitts' quitclaim deed of October 21, 2003. The McCarthys argue that because the Clerk of Courts did not file the Lippitts' quitclaim deed with the court records, the McCarthys had no mechanism by which they could receive notice of the transfer. The McCarthys further claim that this lack of notice from the court records was a violation of due process for lack of notice and opportunity to be heard. Finally, the McCarthys argue that the trial court judge knew that the Lippitts intended to transfer the property back to the LL Trust and consciously concealed this information.

{¶22} The McCarthys' fourth assignment of error states:

{¶23} "The court erred on 8 JAN '04 when granting Appellees' (Lippitts') 5 JAN '04 Motion To Correct Two Errors[.]"

{¶24} The McCarthys argue that the trial court denied the McCarthys due process by granting the Lippitts' Motion to Correct Two Errors. The McCarthys claim that the trial court granted the motion in three days, which denied the McCarthys adequate time to research and present grounds for a motion hearing. The McCarthys further claim that the trial court's short time frame and lack of motion hearing denied adequate notice and opportunity to be heard before granting the motion.

{¶25} The allegation of denial of due process implicates Section 16, Article I, Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

The standard of review for legal rulings where constitutional issues are involved is de novo. *Liposchak v. Admr., Ohio Bur. of Workers' Comp.* (2000), 138 Ohio App.3d 368, 385, 741 N.E.2d 537.

{¶26} Procedural due process requires reasonable notice and an opportunity to be heard before deprivation of a recognized property interest. *Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. Of Edn.* (1994), 68 Ohio St.3d 175, 176, 624 N.E.2d 1043. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that the defendant has reasonable opportunity to prepare for the specific issues presented. *In re Gault* (1967), 387 U.S. 1, 33-34, 87 S.Ct. 1428, 18 L.Ed.2d 527.

{¶27} There are two reasons the McCarthys' due process argument fails. First, due process involves defects in the procedure leading to the deprivation of a recognized property interest of the McCarthys. *Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO*, 68 Ohio State.3d at 177. Here, the McCarthys have no property interest in the Lippitts' 1/2 interest in the joint tenancy. That 1/2 share is the Lippitts' property in fee simple and the Lippitts are free to transfer the property without regard to the the McCarthys. Furthermore, under R.C. 5302.20(C)(2), a unilateral transfer of property cannot terminate a joint tenancy. A unilateral transfer merely transfers ownership of the interest held to a new party, while the underlying structure of the joint tenancy remains intact. Thus, the Lippitts' transfer has no effect on the property interest of the McCarthys and without a deprivation of a recognized property interest, the McCarthys' due process cannot be violated.

{¶28} With regard to the first assignment of error, even if the McCarthys had a property interest in the Lippitts' 1/2 interest, the McCarthys received constructive notice of the transfer from the Monroe County Official Records and actual notice by publication from the Monroe County Beacon on December 4, 2003. Due process does not require the court records to be the only source of notice. Instead, due process requires notice in general, which the McCarthys actually received from publication and constructively received from recordation. In fact, appellant even had

an opportunity to be heard by filing an emergency motion on December 8, 2003 to stay the sale. The fact that the trial judge denied the motion cannot be equated to denial of an opportunity to be heard. Finally, with regard to the claim that Judge Harris concealed the Lippitts' "request", the McCarthys have offered no evidence to show that either the Clerk of Courts or Judge Harris consciously concealed any information.

**{¶29}** With regard to the fourth assignment of error, because the McCarthys have no property interest in the Lippitts' 1/2 interest transferred to L.L. Trust, the trial court need not consider the McCarthys' due process when granting the Lippitts' motion.

**{¶30}** Therefore, the McCarthys' first and fourth assignments of error are without merit.

**{¶31}** The McCarthys' second assignment of error states:

**{¶32}** "The court erred when it failed – in some meaningful way – to act upon Appellants' Emergency Notice of Property Interest Transfer... and Motion For Show Cause Hearing."

**{¶33}** First, it should be noted that the court did act in "some meaningful way" towards both of the McCarthys' motions – it denied all pending motions in its judgment entry on January 2, 2004. The McCarthys simply disagree with the trial court's decision to deny the motions.

**{¶34}** The Emergency Notice of Property Interest Transfer was essentially a motion to stay execution of the distribution of proceeds to the Lippitts from the judicial sale on December 12, 2003. A trial court's decision regarding a motion for a stay of proceedings is reviewed under an abuse of discretion standard. *State ex rel. Zellner v. Cincinnati Bd. of Edn.* (1973), 34 Ohio St.2d 199, 200, 63 O.O.2d 310, 310-311, 297 N.E.2d 528. An abuse of discretion is more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.



{¶35} In addition, when the judgment on which the stay is based has been fully executed, the issue becomes moot. The Eleventh District discussed the standard of review when a denied motion to stay is moot in *Hagood v. Gail* (1995), 105 Ohio App.3d 780, 791, 664 N.E.2d 1373:

{¶36} “Although the authority on this point is slight, those courts which have addressed this issue have consistently held that the issuance of a stay order has no affect upon any enforcement proceedings which have already taken place. See *Dibert v. Ross Pattern Foundry & Dev., Inc.* (App.1957), 81 Ohio Law Abs 4, 160 N.E.2d 862; 4 American Jurisprudence 2d (1962) 846, Appeal and Error, Section 372. \* \* \* Since the appealed judgment in this case has already been fully executed prior to the disposition of this appeal, the merits of appellant's assignments of error have been rendered moot.”

{¶37} Appeals courts normally have no jurisdiction over moot issues. *Citizens Word v. Canfield Twp.*, 152 Ohio App.3d 252, 256, 2003-Ohio-1604, 787 N.E.2d 104, ¶8. However, courts are vested with the jurisdiction to address moot issues when such issues are capable of repetition yet evade review or involve an important public right or interest. *Id.*

{¶38} Because the record does not state when or if the Monroe County Sheriff distributed the proceeds of the December 12, 2003 sale, both prongs of analysis are necessary. If the McCarthys received the proceeds from the sale, then the judgment has been fully executed and the motion to stay is moot. *Hagood*, 105 Ohio App.3d at 791. Furthermore, this issue does not fall within the two exceptions for appellate review of moot issues. The distribution of proceeds from the severance of a joint tenancy is private and contains no matters of great public interest. In addition, this issue does not consistently evade review. The Supreme Court of Ohio specifically adopted App.R. 7 to allow for review of a trial court's decision denying a motion to stay pending an appeal. In fact, the McCarthys did receive appellate review from this court on a motion to stay distribution filed January 20, 2004.

However, because the McCarthys failed to first file the motion with the trial court, in accordance with App.R. 7, this court denied that motion.

{¶39} If the McCarthys have not received the proceeds of the sale, then the decision of the trial court is reviewed under an abuse of discretion. The McCarthys predicated their motion on the legitimacy of the Lippitts' property transfer to LL Trust. The McCarthys further claim that the Lippitts' sale clouded title, which may decrease the sale price of the property at the December 12, 2003 sale. In spite of these assertions, the McCarthys only claim for relief sought to hold the Lippitts' proceeds in a "capias bond" for further hearings. In other words, the McCarthys did not seek to remedy the alleged defects or prevent harm to themselves, they merely attempted to delay the distribution of proceeds to the Lippitts. Given the nature of the remedy sought, the trial court did not abuse its discretion by denying the the McCarthys' motion to stay distribution to the Lippitts.

{¶40} Furthermore, looking at the merits of the motion, this court reviewed the McCarthys' post-judgment motion to stay distribution of proceeds filed January 20, 2004. In denying that motion on February 9, 2004, this court stated "the McCarthys have now acquired full ownership of the property in question and have not demonstrated any irreparable harm which may occur if a stay is not granted."

{¶41} The McCarthys' second prong of this assignment of error is the trial court's denial of the motion to show cause. The Supreme Court of Ohio discussed the relevant law for denying a motion for contempt in *Denovchek v. Board of Trumbull County Commrs.* (1988), 36 Ohio St.3d 14, 17, 520 N.E.2d 1362. There the Supreme Court stated:

{¶42} "Absent a showing of prejudice to the party making the contempt motion, contempt is essentially a matter between the court and the person who disobeys a court order or interferes with court processes. Therefore, we hold that there is no right of appeal from the dismissal of a contempt motion when the party making the motion is not prejudiced by the dismissal." *Id.*

{¶43} The McCarthys have demonstrated no grounds on which they were prejudiced by dismissing the contempt motion. The McCarthys merely assert that the trial court should have punished the Lippitts for contempt. Accordingly, appellant has no right of appeal on this matter. *Id.*

{¶44} Therefore, the McCarthys' second assignment of error is without merit.

{¶45} The McCarthys' third and fifth assignments of error can be analyzed concurrently.

{¶46} The McCarthys' third assignment of error states:

{¶47} "The court erred when, on 2 JAN '04 (AFTER the sale), it found/STRUCK the Appellees'/Lippitts' 21 OCT 03 quitclaim deed as 'inaccurate' - absent specificity as to WHY."

{¶48} Appellant's fifth assignment of error states:

{¶49} "The court erred on 8 JAN '04 when granting Appellees' (Lippitts') 5 JAN '04 Motion to Strike on grounds that a second and prior deed of 15 DEC 2000 was also 'inaccurate.'"

{¶50} The McCarthys argue that a trial court commits reversible error when, sitting without a jury, it does not specifically enumerate its findings of facts and conclusions of law. Although the McCarthys make no mention of Civ.R. 52, these assignments of error are predicated on the applicability of that rule. Civ.R. 52 states:

{¶51} "When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

{¶52} "\* \* \*

{¶53} "*Findings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.*" (Emphasis added.)

{¶54} In this case, the McCarthys never filed a motion for separate findings of fact and conclusions of law pursuant to Civ.R. 52. Therefore, the McCarthys waived any possible error in the trial court's failure to issue such findings. *Wray v. Deters* (1996) 111 Ohio App.3d 107, 112, 675 N.E.2d 881.

{¶55} Accordingly, the McCarthys' third and fifth assignments of error are without merit.

{¶56} The McCarthys' sixth assignment of error states:

{¶57} "The court erred by substituting LL Trust – AFTER the sale – as the other party of interest with legal standing in a case where opposing party was barred from naming said LL Trust in their suit."

{¶58} The McCarthys argue that the trial court erred by striking the quitclaim deed transfer of the Lippitts to L.L. Trust on October 23, 2003 and the quitclaim deed transfer of L.L. Trust to the Lippitts on December 12, 2000. This resulted in L.L. Trust being the named party eligible to receive proceeds from the judicial sale of the property. The McCarthys claim this act was in error for two reasons. First, the McCarthys argue that the court should not have the authority to retroactively rescind deed transfers after the sale of property and apply payment of sale proceeds to a previously unnamed party. Second, the McCarthys claim that the trial court barred L.L. Trust from being named in this lawsuit during a pre-trial conference held May 15, 2001.

{¶59} However, regardless of this alleged error, the McCarthys lack standing to raise this issue on appeal. The common-law doctrine of standing states that only those parties who can demonstrate a present interest in the subject matter of the litigation and who have been prejudiced by the trial court's decision have the right to file an appeal. *Still v. Hayman*, 153 Ohio App.3d 487, 2003-Ohio-4113, 794 N.E.2d 751, at ¶26. Additionally, in *Olmsted Falls v. Jones*, 152 Ohio App.3d 282, 2003-Ohio-1512, 787 N.E.2d 669, at ¶21, the Tenth District Court of Appeals observed:

{¶60} "The party must demonstrate 'that the challenged action has caused, or will cause, the appellant injury in fact, economic or otherwise, and that the interest

sought to be protected is within the realm of interests regulated or protected by the statute' or constitutional right being challenged. \* \* \* This court has stated that '[t]he alleged injury must be concrete, rather than abstract or suspected; a party must show that he or she has suffered or will suffer a "specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction."' (Internal citations omitted.)

**{¶61}** While the McCarthys can demonstrate an interest in the litigation, they failed to assert how they have been prejudiced or injured by the trial court's decision to undue the quitclaim deed transfers of the Lippitts. This lack of prejudice or injury is further highlighted by the fact that the McCarthys now own the entire undivided interest in the property purchased at the judicial sale. Accordingly, the McCarthys have no standing to raise this issue on appeal and the error is not reviewable.

**{¶62}** Therefore, the McCarthys' sixth assignment of error is overruled.

**{¶63}** The judgment of the trial court is hereby affirmed.

Vukovich, J., concurs.

DeGenaro, J., concurs.