NO. 98069-1

SUPREME COURT
OF THE STATE OF WASHINGTON

NATIONSTAR MORTGAGE, LLC

Plaintiff / Petitioner

v.

DANNY SCHULTZ, et al.

Defendants / Respondents

ANSWER TO PETITION FOR REVIEW

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Table of Contents

Table of Authorities

Cases

Statutes

Other

I. IDENTITY OF RESPONDENTS

Patricia J. Small and Margaret A. Duke (sometimes hereinafter "Respondents") submit this Answer to the Petition for Review filed by Nationstar Mortgage, LLC.

II. STATEMENT OF FACTS

On November 12, 2009, Danny R. Schultz gave a Deed to his sister and niece for a house located at 1011 Coach Ct., Grandview, Washington. (CP 62-63; CP 108-109; CP 171; CP 69; CP 73). The Deed read, in part, as follows:

> GRANTOR, DANNY R. SCHULTZ, a single person, for and in consideration of love and affection, grants and conveys to PATRICIA J. SMALL, a married person as her separate estate, and MARGARET A. DUKE, a single person, a complete and unlimited right of survivorship jointly between them, in all of his interest in the following described real estate, situated in the County of Yakima, State of Washington
>
> **Lot 62, Carriage Square, Yakima County, Washington.**
>
> **ASSESSOR'S PARCEL NO. 230923-33461**
> *
> *
> *

> **The rights of Grantees hereunder shall be superior to all interests created by Grantor hereafter, or imposed by law hereafter, if any.**
>
> Grantor hereby warrants and agrees to defend Grantee against any defects appearing in title to said real estate to the extent that such defects are insured against under a title insurance policy for said real estate where the Grantor is a nominal insured.
>
> The Grantor, for it and its successors in interests, does by these presents expressly limit the covenants of this deed to those herein expressed, and excludes all covenants arising or to arise by statutory or other implication.

(CP 62-63; CP 108-109; emphasis added).

This Deed was recorded on January 11, 2010, under Yakima County Auditor's File No. 7679045. (CP 62-63; CP 108-109).

Thereafter, on November 23, 2010 the Deed's Grantor, Danny R. Schultz, executed a Fixed Rate Home Equity Conversion Deed of Trust (a reverse mortgage) in favor of Genworth Financial Home Equity Access, Inc., unbeknownst to Respondents Small and Duke. (CP 69; CP 73; CP 27-38). The deed of trust was then twice assigned, winding up in the hands of the Petitioner Nationstar in July of 2012. According to Nationstar it had registered to do business under the fictitious name, Champion Mortgage Company, which is the d/b/a

listed in their Petition. (CP 15-16; CP 40-42, 44, 46-48). Soon after acquiring the mortgage assignment in February of 2014, Nationstar commenced this foreclosure action in Yakima County Superior Court claiming that Danny Schultz had failed to pay taxes and insurance for the property so the bank accelerated payment of the principal balance of $81,848.16 and sought to collect interest, late charges and other advances totaling $20,597.16, and sued to foreclose its deed of trust naming Respondents Small and Duke whose deed came before the bank's reverse mortgage as holders of a future interest in the property. (CP 13-19).

Respondents Small and Duke counter and cross-claimed contending that "Defendant Danny Schultz lacked either an interest in the Property or lawful authority to grant a security interest in all or a portion of the Property" and that "Title to the property ... should be declared, quieted, and cleared in favor of Small and Duke as to any ownership, lien, or other interest that Schultz claims in the Property." (CP 49-57; 53, lines 23-25; 57, lines 1-3).

In the trial court Respondents Small and Duke moved for summary judgment seeking an order: (1) dismissing Nationstar's

claims against them; (2) declaring theirs as superior interests in the property; and (3) quieting title in them as to an interest of Nationstar's, Mr. Schultz's or of any other defendant. (CP 76).

Nationstar defended by calling the Deed "nonsensical" and not conveying any recognized interest to Small and Duke or, alternatively that with resort to extrinsic evidence Mr. Schultz could be found to own the property outright free of any concurrent interest with Small and Duke based upon what he might say. (CP 142-147).

Yakima County Superior Court Judge Michael McCarthy determined the Deed was not ambiguous, that it effectively granted a life estate to the Defendant Danny Schultz with a remainder interest to Small and Duke. The ruling meant that Nationstar could seek foreclosure only upon Mr. Schultz's life estate interest. (CP 173-178; RP 27-28).

The Court of Appeals affirmed, agreeing with Respondents Small and Duke's position that the Deed granted them fee title without a life estate in favor of Mr. Schultz, but because the Respondents had not cross-appealed and had indicated to the Court of Appeals they were satisfied with the lower court's ruling, the appellate court did not

disturb the lower court's order. *Nationstar Mortgage v. Danny R. Schultz, et al.,* Division III, No. 36183-7-III, Unpublished Opinion Filed December 10, 2019.

Defendant Danny Schultz, brother to Patricia, uncle to Margaret, never responded to Respondents Small and Duke's cross-claim, did not participate in the summary judgment, nor in Nationstar's appeal for that matter. (*See*, CP 77, lines 14-16; CP 173-176). According to information introduced in the summary judgment proceedings, Defendant Danny Schultz would now be 74-years old, has suffered from PTSD since the Vietnam War, suffers from severe diabetes, has been diagnosed with congestive heart failure, and as of June, 2016 was subsisting on Social Security payments and food stamps of approximately $1,000 a month. (CP 112, 152).

III. APPLICABLE REVIEW STANDARDS

This case arrived in the Court of Appeals via CR 54(b) because the lower court's Order did not dispense with all the parties' claims. (*See*, CP 175, Para. 3). Nevertheless, the Petitioner is treating the Court of Appeals' decision as one "terminating review" so Respondents Small and Duke will, similarly, treat the Petition as

falling under RAP 13.4 and subject to the considerations governing acceptance of review from a decision terminating review. RAP 13.4(b) provides that a petition for review will only be granted by the Supreme Court if one of four conditions are met: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with the decision of another division of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) if the Petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of the issues presented by Nationstar meet any of these requirements and Nationstar does not even address these requirements in its Petition. Interpretation of this one-of-a-kind Deed does not conflict with any Supreme Court or Court of Appeals' decision. No Constitutional question nor any issue of substantial public interest is presented. The Court of Appeals correctly analyzed an unambiguous deed and there is no basis under RAP 13.4(b) for this Court to accept review.

IV. ARGUMENT

A. The Court of Appeals Correctly Determined that the Deed was Unambiguous.

The Survivorship Conveyance Deed (CP 62-63; CP 108-109) has one Grantor, Danny R. Schultz. The Deed "grants and conveys to" somebody, namely Patricia J. Small and Margaret A. Duke, "a complete and unlimited right of survivorship jointly between them." The Deed is not from Danny to Patricia, Margaret and Danny because Danny is not listed amongst the deed's Grantees. The deed conveys "all of his interest", that would be Danny's, to Patricia and Margaret, the sole Grantees. Simple application of rules of common English produce this one and only construction of the Deed.

The Deed's Grantor and Grantees are separated by the word "to". One person is giving something "to" some other people. The Grantor, Danny Schultz, is the subject doing the action, granting the object (a property interest by right of survivorship) "to" the recipients, Patricia and Margaret. Since the object (the property interest by right of survivorship), is granted "to" "them" there is separation of the subject (the Grantor) from the recipients thereby making the recipients (Patricia and Margaret) the antecedents for the pronoun "them".

This is merely the common English application of the antecedent pronoun test. The pronoun "them" stands in for the antecedent nouns, Patricia and Margaret. Or, as former Justice Antonin Scalia referred to it, the "Last-Antecedent Canon" in his treatise, *Reading Law: The Interpretation of Legal Text*, by Antonin Scalia and Bryan A. Garner, 1st Edition, 2012. Justice Scalia's Eighteenth Canon is that "A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." In addition, the words "between them" indicates two parties, Patricia and Margaret, as the recipients of the object (the property interest by right of survivorship). "Among" is ordinarily used with three or more entities, whereas "between" involves two, as in this case. *See, A Writers Reference,* Diana Hackers and Nancy Sommers, 2016 update, Eighth Edition, pg. 162. The only other pronoun in the Deed, "his" clearly relates to Danny Schultz as it is all of "his" interest (he is the only male antecedent noun) who gives all "his" interest to "them", Patricia and Margaret. All of this is to say, that the Court of Appeals' legal construction of the Deed's language is absolutely correct. As concluded in the Appellate Court's ruling:

> Nationstar claims the Deed issued by Mr. Schultz to Ms. Small and Ms. Duke was ambiguous. According to Nationstar, the use of the word "them" in the first paragraph of the Deed, CP at 62, could refer to: (1) Ms. Small and Ms. Duke, or (2) Mr. Schultz, Ms. Small and Ms. Duke. In the first circumstance, Mr. Schultz would have retained no interest in the property and, therefore, he was unable to encumber the property through a subsequent deed of trust. But in the second, Mr. Schultz would have retained a joint tenancy with Ms. Small and Ms. Duke. Under such circumstances, Nationstar would be able to proceed with foreclosure against Mr. Schultz's interest.
>
> We disagree with Nationstar's assertion of ambiguity. The Deed identifies Mr. Schultz as the sole "Grantor." *Id.* The operative language then states the Deed conveys "*all of his*" interest in the subject property. *Id.* (emphasis added). Mr. Schultz is the only male party to the transaction. The Deed's remaining language distinguishes between the rights of the "Grantees" and those of the "Grantor." *Id.* at 62-63. The sum total of the language used makes clear the parties did not intend Mr. Schultz to stand on equal footing as Ms. Small and Ms. Duke. The word "them" very clearly refers only to Ms. Small and Ms. Duke. Given this unmistakable reference, the Deed can only be read as conveying all of Mr. Schultz's property interests to Ms. Small and Ms. Duke.

Nationstar Mortgage v. Danny R. Schultz, et al., Division III, No. 36183-7-III, Unpublished Opinion Pg. 5-6.

This construction conforms with all the rules summarized in *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW, Inc.*, 168 Wn. App. 56, 277 P.3d 18 (2012), as follows:

> 1. "In general, we determine the intent of the parties from the language of the Deed as a whole. . . . '[I]f the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence for the purpose of ascertaining their intention.'" *Id.* at 64-65.
>
> 2. "[T]he language of the written instrument is the best evidence of the intent of the original parties to a deed." *Id.* at 65. And, as the Court of Appeals also so aptly pointed out if there were any doubt, the deed will generally be construed against the grantor, a grantor cannot derogate from his grant. *Id.* at 65.

Nationstar tries to create an ambiguity by arguing that the very bolded language used in the Deed which should have warned off any lender from making a loan to the Deed's Grantor, Danny Schultz, secured by this property, was maybe meant to show that Mr. Schultz retained an interest in the property. The bolded language is as follows:

> **The rights of Grantees hereunder shall be superior to all interests created by Grantor hereafter, or imposed by law hereafter, if any.**

(CP. 62-63; CP 108-109).

The bold language is a simple warranty that the Grantor, Mr. Schultz, was not to encumber or affect the interest he conveyed to Respondents Small and Duke. He warranted that no title defects had arisen our would arise due to his own acts or omissions. As Respondents Small and Duke pointed out to the Court of Appeals in their briefing, there are several cases holding that a Grantor who allows a third party to establish an adverse possession claim to become perfected violates warranties by, through or under the Grantor. A similar situation could arise in the case of mechanic's or materialmen's liens for work commissioned by a grantor either prior to his conveyance or during his post-closing occupancy. Cf., *Egli v. Troy*, 602 NW2d. 329, 332 (Iowa Sup. Ct. 1999) (special warranty deed warrants against adverse possession acquiesced in by the grantor and warrants against encumbrances such as mechanic's liens imposed by others); *State Bank & Trust of Kenmare v. Brekke*, 602 NW2d. 681, 685 (N.D. Sup. Ct. 1999) (special warrant deed warrants title against adverse possession claim arising by, under, or through the grantor). The warranties found in a bargain and sale deed (RCW 64.04.040) were the type expressly set forth in the bold language warranting Mr.

Schultz's conveyance against claims made by, through, or under him, or from encumbrances suffered by him. *See, Central Life Insurance SOC. V. Impelmans*, 13 Wn.2d 632, 645, 126 P.2d 757 (1942). Indeed, Nationstar's attorney in oral argument conceded the identified language was a warranty (RP 20). It is not, however, a warranty dependent upon Mr. Schultz retaining a property interest. There is no requirement that a grantor must retain a property interest in order to warrant his conveyance against future encumbrances, especially if he continues to reside on the premises at the pleasure of the Grantees.

This was yet another argument of Nationstar's, that by Respondents Small and Duke allowing their brother/uncle who suffered from severe diabetes, heart disease, riddled with PTSD as a Vietnam war veteran and living on social security payments and food stamps to remain on the property after the conveyance deed, that somehow demonstrated his retention of a fee interest. Respondents' kindness does not create a property interest. "A valid gift of real estate may be made *inter vivos* even though the donor may retain the use, management and control of the property during his lifetime."

Holohan v. Melville, 41 Wn.2d 380, 400 249 P.2d 777 (1952), *citing In Re Cunningham Estate*, 19 Wn.2d 589, 143 P.2d 852 (1943).

B. <u>The Lower Court's Construction Granting a Life Estate to Defendant Schultz is Not a Basis for Review by the Supreme Court</u>.

Respondents Small and Duke argued to the Court of Appeals that the proper legal construction of the Deed in question was that it conveyed a fee simple interest to them in joint tenancy, with right of survivorship with a special warranty from Mr. Schultz that no title defects would appear due to any acts or omissions on his part. Respondent Small and Duke also represented to the Appellate Court, however, that they were perfectly willing to live with the lower court's construction of the Deed as reserving a life estate to Mr. Schultz, but without question their interest was still superior to Nationstar's as a matter of law. Respondent Small and Duke asked the Appellate Court to either affirm the trial court's ruling (because they were willing to abide a ruling allowing their brother/uncle a continuing life estate) or they invited the Appellate Court to modify its decision pursuant to RAP 12.2 to indicate that the Deed really granted them their absolute,

vested fee title interest as joint tenants with right of survivorship with no remaining property interest vested in Mr. Schultz.

The Court of Appeals agreed with Respondents Small and Duke's legal construction of the Deed. That it did grant them a fee simple interest, with right of survivorship, and with no remaining property interest in the hands of Mr. Schultz. However, because Respondents Small and Duke had not cross-appealed, the Court left the lower court's ruling intact. Under these circumstances, Petitioner's argument appears to be that because Respondents Small and Duke did not cross-appeal to secure the Appellate Court's confirmation that the Deed granted them absolute fee title that this merits reversal and remand. Petitioner strives for a Pyrrhic victor to eliminate the life estate component to the Deed the Court of Appeals has already correctly ruled unambiguously grants a fee simple interest to Respondents Small and Duke, only. Again, seeking such a Pyrrhic victory in the Supreme Court meets none of the RAP 13.4(b) requirements for triggering Washington State Supreme Court review.

V. CONCLUSION

This is a case of some extraordinarily careless lenders. With title report in hand disclosing the existence of the preceding Deed to Respondents Small and Duke containing the express, bolded warning that the rights of Respondents Small and Duke were to be "**superior to all interests created by [the] Grantor**," Danny Schultz, the lenders involved, Genworth Financial Home Equity and its ultimate assignee Nationstar, ignored these warnings and apparently staked Mr. Schultz to a $181,650 loan. (CP 124). Now, after the fact, they want to secure extrinsic evidence from Mr. Schultz in the hope that he will derogate from the express grant and warranty he made in his Deed to Respondents Small and Duke. (*See* Nationstar's Petition for Review, pg. 7, last sentence). The function of the Washington State Supreme Court is not to relieve negligent lenders from reading previously recorded instruments which deprive them of collateral. There is no merit to Petitioner's request for review by this Court. Nationstar's Petition for Review should be denied.

//

DATED this 7th day of February, 2020.

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By: _____

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 7th day of February, 2020.

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