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NO. 68109-5-1

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

In re the Estate of)
EDDIE KANYER)
Decesased)
MARY ELLEN KANYER,)
Respondent)
vs.)
KEVIN KANYER)
Appellant)

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The trial court erred in granting respondent's cross motion for Summary Judgment by concluding that Respondent could put the Indianola Property into the Survivor's Trust.
2. The trial court erred in granting respondent's cross motion for Summary Judgment when it concluded the Indianola property could be sold without evidence of the need being shown.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Revocable Trust ambiguous as to the power of Mary Ellen Kanyer to substitute and then sell property that was to remain in the Family Trust upon the death of Eddie Kanyer.

2. If an asset intended to be in the family trust may be sold or exchanged for property in the survivor's trust, can it be done without evidence of the health, education, support and maintenance needs of Mary Ellen Kanyer.

STATEMENT OF THE CASE

This is an appeal arising from a TEDRA petition filed by Mary Ellen Kanyer. Appellant Kevin Kanyer is one of three surviving sons of Eddie and Mary Ellen Kanyer. (hereinafter sometimes referred to as "Kanyers"). The Kanyers signed a community property agreement in 1965 (CP 76) and subsequently a Revocable Trust Agreement on April 5, 2000. (CP 11-47).(hereinafter referred to as "Trust" or "Kanyer Trust"). Eddie Kanyer passed away on August 9, 2000.

Mary Ellen was gifted property in Indianola, WA from her mother in 1974.(CP 84) Her son, Kevin Kanyer maintained

and improved the Indianola property for many years and resided on the Indianola property between 2000-2006 when a fire destroyed the existing residence. (CP 66-73 at 68) The respondent and her late husband resided at an Alki condominium during the time that Appellant maintained, improved and lived at the Indianola property. (CP 66-72,,CP 477-484)

The Kanyer trust established three trusts upon the death of one spouse. Specifically a family trust, a survivors trust and a marital trust. All parties seem to agree that the Marital trust is not applicable

Under the terms of the family trust it states:

“11.4 Trust for Children. If we shall have a child, ...the Family trust shall be administered and distributed for the benefit of our children....as follows:

11.4.1 KEVIN KANYER, JEFFREY M. KANYER, AND ROBERT S. KANYER. We give

the rest and remaining property of the Family Trust to our children as their separate property when they attain the age of twenty-one (21) or when they complete their second year of college. To our son, KEVIN KANYER, we give the **right of first refusal** to receive our cabin as his fair share. The legal description of the cabin is lots 17,18, and the West 31.03 feet of Lot 19, Block 1 of Lots 17.18 and the West 31.03 feet of Lot 19, Block A, Plat of Indianola Beach, recorded in Volume 4 of plats, page 59, Records of Kitsap County, Washington.” (CP 74and CP 25 , Emphasis added)

The purpose of the Family Trust is found in paragraph 11. It states:

“11.1 Distributions of Income. As long as Survivor is living, Trustee shall pay all income of the Family Trust estate to Survivor, preferably

monthly, but in no event less frequently than quarterly.

11.2 Principle. As long as survivor is living, Survivor shall be the sole beneficiary of the Family Trust, and shall principle (sic) for Survivor's health, education, support and maintenance to the extent the assets of the trust estate are sufficient to permit the same." (CP 25 , Emphasis added)

Under the terms of the Survivor's Trust, it was to contain the Survivor's one-half interest in community property and the survivor's separate property (CP 21).

The Indianola real estate was originally deeded solely into Mary Ellen Kanyer's name as a gift. (CP 52) However, it was never conveyed to the trust. (CP at 84)

Mary Ellen Kanyer's TEDRA petition sought relief declaring the Indianola property to be her separate property presumably for purposes of placing it in the Survivor's Trust.

Kevin Kanyer then presented evidence of a recorded three pronged community property agreement and filed a partial summary judgment declaring the Indianola property to be community property. (CP 173-216)

Mary Ellen filed a cross -motion for summary judgment to dismiss the claims of Kevin Kanyer supported by declarations of Thomas Keller and Richard Head who asserted the terms of the trust allow Mary Ellen to distribute an equal value of assets to fund a particular trust and not a particular asset (CP 288-290 and 292-294)

Kevin Kanyer filed a declaration in opposition to Mary Ellen's cross-motion noting that there were 4 amendments to the trust with the latter being prepared by his sibling Jeffery, forgiving \$376,400 of the sale price for the Indianola property to his

brother Jeffrey. The declaration asserted the gifting was inconsistent with Mary Ellen's financial needs that allegedly required the Indianola property to be put into the Survivor's trust, and the sale of the property was designed to meet the needs of his brother Jeffrey. (CP 352-465)

Oral argument on the partial summary judgment of Kevin Kanyer and the cross motion of Mary Ellen Kanyer was conducted on November 18, 2011 (RP, 1-44).

An Order by the Honorable Beth Andrus granting both Kevin Kanyer's partial summary judgment and the cross-motion of Mary Ellen Kanyer to dismiss was entered on November 22, 2011. (CP 477-484)

Kevin Kanyer filed an appeal on December 19, 2011 on the cross-motion of Mary Ellen Kanyer for summary judgment to dismiss all claims on December 19, 2011. (CP 485-496)

ARGUMENT

The Kanyer Trust states that upon the death of one spouse, the survivor shall fund the survivors trust with a one-half interest of the survivor's community property and all separate property of the survivor. (CP 23) (paragraph 9.4 of Kanyer Trust). However, the trial court ruled that all property was community property but Kevin Kanyer is not entitled to a first right of refusal as a result of paragraph 4.3 of the Trust which gives the surviving grantor rights of revocation, withdrawal, alteration and amendment as to the trust. (CP 14 and CP 477-484). However, the trial court did not consider the limitations on Mary Ellen's rights under this paragraph. Specifically those rights were limited only to her share of community and any separate property per the terms or paragraph 4.3.(CP 14). Hence, once Eddie Kanyer died, his one-half of the community property became irrevocable, including the Indianola property, and the rights of Mary Ellen were limited to her one-half

interest in community property excluding the Indianola property. (CP 14)

There was absolutely no evidence presented in granting Mary Ellen's summary judgment motion as to the total value of the estate upon the death of Eddie Kanyer that would allow one to conclude that the value of the Indianola property was or was not a viable substitution for the assets to be placed in the survivor's or family trust even if she had such rights. For example, the TEDRA petition claimed there was an overfunding of the family trust of 19.62% interest based on Mary Ellen's claim that Indianola was separate property, (CP 5), and Mary Ellen claimed that her funds had dwindled to \$100,000. (CP 322). Yet these claims were unsupported. Mere argumentative assertions Mere argumentative assertions are insufficient for summary judgment purposes. Grimwood v. University of Puget Sound 110 Wn. 2d 355, 753 P. 2d 517 (1988).

The trial court further concluded that the intent of the parties (both Eddie and Mary Ellen) was to put the Indianola property into the Family Trust based on paragraph 11.4.1. (CP 25 and CP 477-484) However, the trial court also concluded that the power granted in paragraph 4.3 of the Kanyer Trust still gave Mary Ellen authority to substitute properties notwithstanding the stated intent. (CP 477-484). Motions for summary judgment are reviewed de novo. Wash. State Grange v. Brandt, 136 Wn. App 138, 145, 148 P.3d 1069 (2006). The facts are reviewed in a light most favorable to the party against whom the judgment was entered. Mastro v. Kumakichi Corp. 90 Wn. App 157,162, 951 P. 2d 817 (1988)

If the intent of the grantors , as affirmed by the trial court, was for the Indianola property to be in the family trust, then the trial court should first determine the value of the entire community estate before it determines whether the substitution of property is appropriate under Article 4.3. It did not do so from the record. Both experts for Mary Ellen concluded that value of the

Alki property and the Indianola property were about equal but they did not take into consideration other assets available to Mary Ellen. Further, the motion for the summary judgment on the cross motion indicates that the Mary Ellens's liquidity is dwindling but there is no supporting evidence of that fact or accounting of that fact other than self- serving statements. (CP 322)

As noted during the oral argument on the respective motions for summary judgment, it is seemingly inconsistent to contend that funds were needed to justify Mary Ellen's actions to exchange properties between the survivor's and family trusts when Mary Ellen gifted significant funds to Jeffrey in the sale of the Indianola property to him. (RP 10). If funds are needed to maintain her health, education, support and maintenance they would not be gifting significant funds nor providing interest only loans. A material fact upon which the outcome of litigation depends for summary judgment purposes was thus

overlooked by the trial court. Greater Harbor 2000 v. City of Seattle 132 Wash 2d 267, 937 P.2d 396 (1967.)

The Kanyer trust through the family trust provided Kevin Kanyer with a first right of refusal as to the Indianola property. However, upon the death of Eddie Kanyer this right of first refusal became irrevocable as to his one half community interest. Without any evidence that the Indianola property was needed to support the needs of Mary Ellen or the value of the entire estate, the trial court erred in deciding that the first right of refusal did not matter. Thus, the trial court concluded that once the Indianola property is in the Survivor's trust, Mary Ellen could do anything. However, this ignores material facts upon which the outcome of litigation depends as to whether the Indianola property should have been in the Survivors trust at the outset as opposed to the Family trust. Given the trial court conclusion that the intent was to put the Indianola property into the family trust, the first right of refusal still stands and Kevin

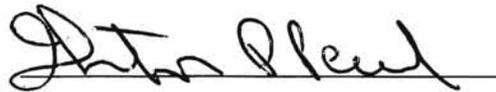
Kanyer should have been offered the right of first refusal before it was sold to his brother.

A right of first refusal for purposes of an inheritance is an enforceable preemptive option. Saunders v. Callaway 42 Wa. App. 29, 708 P. 2d 652 (1985). Allowing the property to be sold without offering it to Kevin Kanyer for purchase is in direct conflict with the stated intentions of the decedent.

CONCLUSION

The Summary Judgment granted to Mary Ellen Kanyer should be reversed and remanded for trial as to a determination as to whether the Indianola property is subject to a first right of refusal and whether it should have remained in the family trust pursuant to the Kanyer Trust lacking evidence as to the entire estate value upon the death of Eddie Kanyer.

RESPECTFULLY SUBMITTED this 6th day of August, 2012

A handwritten signature in black ink, appearing to read "Thornton Percival", written over a horizontal line.

THORNTON P PERCIVAL

Attorney for Appellant

WSBA # 4755