

FILED  
Court of Appeals  
Division III  
State of Washington  
3/1/2019 1:52 PM

Case No. 361837

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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NATIONSTAR MORTGAGE, LLC,

Appellant,

vs.

DANNY R. SCHULTZ, et. al.,

Respondents.

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APPELLANT'S REPLY BRIEF

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## I. REPLY

### A. Nationstar's Challenge to the Life Estate Interpretation is Unrebutted.

In its opening brief, Nationstar explains the many reasons why the Deed is incapable of being interpreted as creating a life estate. In their response, Duke and Small (who are represented by new counsel) simply state they are happy with the life estate interpretation *outcome*, but offer no legal rebuttal for why the interpretation should be sustained.

On the law, Duke and Small, through new counsel, favor the joint tenancy interpretation (which, as explained below, is still problematic).

In any event, it appears the parties implicitly agree that the life estate interpretation is untenable and needs to be removed from consideration.

### B. Deed Does Include Joint Tenancy Language Required by RCW 64.28.010.

RCW 64.28.010 provides, in no uncertain terms and without ambiguity, that a “[j]oint tenancy shall be created only by written instrument, which instrument **shall expressly declare the interest created to be a joint tenancy.**” (emphasis added).

The Deed does not “expressly declare the interest created to be a joint tenancy,” which is required by the statute. Instead, the Deed (drafted by an expert attorney, Gustafson) very confidently declares that the specific interest being created and conveyed is a “right of survivorship.” The Deed plainly fails to comply

with RCW 64.28.010, which is a mandatory-language statute this Court cannot ignore.

Nationstar's alternative argument is that, *if* the Deed had to be interpreted within its four corners (which is what the Superior Court believed was appropriate), of all the possible interpretations, joint tenancy would be the *least* remote because the "right of survivorship" is an "attribute" or "feature" of a "joint tenancy," so some connection is established through the technical terms. But Nationstar does not concede that the Deed's language complied with RCW 64.28.010. It clearly does not. The joint tenancy interpretation is favored by Nationstar only because it is far less problematic than the other interpretations, particularly the Superior Court's life estate interpretation.

**C. If the Deed Created a Joint Tenancy, Shultz Was Included.**

1. "Them" in the Deed is Ambiguous / Could Include Schultz.

THE 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 [Property]...(emphasis added)

Duke and Small's new counsel argues that "them," bolded above, refers only to Duke and Small. "Them" is not defined in the Deed, and could be interpreted as including Schultz. In fact, the Deed's drafter, Gustafson, previously

argued in favor of including Schultz in “them”<sup>1</sup>.

“Them” is ultimately ambiguous, which ambiguity is resolved in favor of including Schultz, for reasons discussed below.

2. Bolded Warranty Conclusively Establishes an Intent for Schultz to Keep an Interest.

The bolded warranty in question is custom, and unique, and is repeated again below:

**The rights of Grantees hereunder shall be superior to all INTERESTS CREATED by Grantor hereafter, or imposed by law hereafter, if any. (emphasis added)**

If Shultz transferred and divested all his interest in the Property, he could *not* subsequently “create” an “interest” in the Property, and the above custom warranty (which was drafted by an expert attorney) would be clearly superfluous.

Duke and Small’s new counsel makes the novel argument (which is made for the first time on appeal) that the intent behind the custom warranty was to protect against an “interest created” by Shultz by virtue of his continued possession of the Property. This argument was not advanced to the Superior Court by Gustafson, the creator of the warranty, and for good reason. In Washington, one cannot “create” an “interest” in real property solely by virtue of possession. Duke and Small raise the possibility of a mechanic’s lien, but under the Washington

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<sup>1</sup> CP 87-89

statute governing mechanic's liens, only the "owner" of the property, or his agent, can authorize the lien. RCW 60.04.051.

Duke and Small also raise the possibility of protecting against an adverse possession "claim" by a neighbor which arises and perfects after Shultz transfers his interest but remains in possession. Two out-of-state cases are cited in support, *Egli v. Troy*, 602 N.W.2d 329 (Iowa 1999) and *State Bank & Tr. v. Brekke*, 1999 ND 212, 602 N.W.2d 681. In both cases, the warranty in question (which is similar to Washington's bargain-and-sale deed) specifically protected against "claims" arising from when the grantor was in possession (*Id.* at 331; *Id.* at 684), and said warranty was triggered when the neighbors asserted adverse possession "claims" against the new owners. In this case, Schultz's warranty is not limited to a "claim" arising after he divests his interest, but while he remains in possession, such as one for adverse possession. Rather, Schultz's warranty is much broader, including protecting against an "interest" in the Property which he affirmatively "creates."

3. Intent for Schultz to Keep an Interest is Corroborated by Possession.

It is undisputed Shultz remained in possession of the Property after the Deed, which corroborates an intent that he kept a possessory interest.

Duke and Small now assert, for the first time on appeal, and without citation to the record, that (1) the Deed was a "gift" from Schultz to Duke and Small<sup>2</sup>, and

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<sup>2</sup> Response page 10

(2) "...Small and Duke did not object to Mr. Schultz using and living on the [P]roperty ... during his lifetime<sup>3</sup>." These fact statements are without support in the record and should be stricken.

**D. Nationstar Agrees the Deed is Superior.**

As a point of clarification, Nationstar agrees the Deed recorded before Nationstar's Deed of Trust was created, and Nationstar takes subject-to the Deed, whatever the Deed does, if anything. This is not an issue on appeal. The construction of the Deed will determine the rights of the parties to this case.

**II. CONCLUSION**

The Deed is significantly ambiguous, and, based on the existing record, genuine issues of material fact exist as to intent which prevent entry of summary judgment in favor of Duke and Small. Nationstar does not necessarily assert a trial is required – additional testimony and evidence introduced into the record may disclose no genuine issue of material fact entitling one of the parties to summary judgment down the road. But, based on the record, summary judgment in favor of Duke and Small was, at the least, premature.

However, if this Court, like the Superior Court, is inclined to construe the Deed based on its four corners, and without resort to extrinsic evidence, the most appropriate interpretation is a joint tenancy in favor of all three parties to the Deed.

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<sup>3</sup> Response pages 14-15

DATED March 1, 2019



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**March 01, 2019 - 1:52 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36183-7  
**Appellate Court Case Title:** Nationstar Mortgage, LLC, et al v. Danny R. Schultz, et al  
**Superior Court Case Number:** 14-2-00696-8

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