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Court of Appeals
Division III
State of Washington
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Case No. 361837

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

NATIONSTAR MORTGAGE, LLC,

Appellant,

vs.

DANNY R. SCHULTZ, et. al.,

Respondents.

APPELLANT'S OPENING BRIEF

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17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 1.4, at 6 (2d ed. 2004) 6

I. INTRODUCTION

This action involves an ambiguous deed and where the extrinsic evidence demonstrates an issue of fact as to the grantor's intent. The Superior Court erred in finding, on summary judgment, that the deed is unambiguous, and further finding the deed was a life estate deed. The Superior Court's order should be reversed.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in finding the deed is unambiguous and not considering extrinsic evidence of the grantor's intent.
2. Alternatively, if the deed is unambiguous, the Superior Court erred in finding the deed was a life estate deed.

III. STATEMENT OF THE CASE

This action concerns a residential parcel of real property (the "Property") in Yakima County commonly known as 1011 Coach Ct. Grandview, WA 98930-9461.

In January 11, 2010, the owner of the Property, Danny Schultz, purportedly executed what is titled a "Survivorship Conveyance Deed" (the "Deed") to the Property, which Deed provides, in relevant part:

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)¹

The Deed was drafted by attorney Eric Gustafson of the Yakima law firm of Lyon Weigand & Gustafson, PS (“LWG”)².

In December of 2010, Schultz, who continued to reside in the Property, encumbered it with a Deed of Trust securing repayment of a loan³. Appellant Nationstar Mortgage LLC d/b/a Champion Mortgage Company (“Nationstar”) was subsequently assigned the Deed of Trust⁴.

Shultz defaulted on the loan secured by the Deed of Trust, and in February of 2014, Nationstar filed the underlying Deed of Trust foreclosure action in Yakima County Superior Court⁵. Nationstar joined Respondents Small and Duke as defendants to the action⁶. Small and Duke appeared through Gustafson and LWG and answered the complaint opposing the foreclosure, and also counterclaimed for quiet title⁷.

In July of 2014, Shultz filed for bankruptcy and the Superior Court case was stayed⁸. The bankruptcy case was dismissed in 2017⁹.

¹ CP at 62, 108

² CP at 165-166

³ CP at 27-38

⁴ CP at 44

⁵ CP at 13-48

⁶ *Id.*

⁷ CP at 49-63

⁸ CP at 102

⁹ *Id.*

Following dismissal of the bankruptcy case, Small and Duke, through their attorneys Gustafson and LWG, moved for summary judgment on all claims¹⁰. In the motion, Gustafson – the same attorney who drafted the Deed – could not tell the Superior Court what exactly his Deed did, but he argued that it should be interpreted either as creating a joint tenancy with a right of survivorship in favor of Small and Duke, or alternatively, in favor of Small, Duke *and* Schultz¹¹.

Small and Duke submitted declarations in connection with the motion admitting that they, too, did not know what exactly the Deed did, only that they “understood” they were receiving an “absolute vested interest in the Property that [Shultz] could not thereafter encumber¹².”

In the motion, Gustafson also requested sanctions against Nationstar for daring to assert superior rights to the Property, which request itself was frivolous in light of the significant title uncertainty and ambiguity Gustafson created¹³.

Nationstar opposed the motion, pointing out that the Deed’s language was nonsensical and ambiguous¹⁴, and Nationstar introduced the following extrinsic evidence indicating Schultz did *not* intend to transfer a superior vested interest to Small and Duke:

¹⁰ CP at 75-97

¹¹ CP at 85-89.

¹² CP at 68-74

¹³ CP at 89-97, 147

¹⁴ CP at 142-147

- In his sworn bankruptcy schedules from 2014, Schultz scheduled the Property as his and his alone in fee simple¹⁵.
- A bankruptcy pleading filed by Shultz’s attorney in June of 2016 identifies an existing “dispute” between Shultz and Small over ownership of the Property¹⁶.
- In the Deed of Trust signed by Shultz, he represented and warranted that that he alone had the “right to grant and convey the Property”¹⁷.

Nationstar’s undersigned counsel also filed a declaration in opposition detailing his ongoing attempts to reach Schultz to obtain additional sworn testimony as to the intent behind the Deed and his ownership dispute with Small and Duke¹⁸.

On summary judgment, the Superior Court ruled that the Deed was unambiguous and was a life estate deed, with Schultz as the life tenant and Small and Duke as the remaindermen¹⁹. This interpretation was not one of the possibilities offered to the Superior Court by Gustafson in his summary judgment moving papers. The request for sanctions against Nationstar was denied, with the Court calling the Deed “in-artfully drafted” and the litigation a “self-inflicted wound²⁰.” This appeal followed.

¹⁵ CP at 150

¹⁶ CP at 151-52

¹⁷ CP at 28

¹⁸ CP at 148-49

¹⁹ CP at 173-176

²⁰ Report of Proceedings pages 28-29

IV. ARGUMENT

A. Standard of Review.

An order granting summary judgment is reviewed de novo. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 69 (2007).

B. Issues of Fact Prevent Summary Judgment.

Extrinsic evidence can be considered if a deed is ambiguous. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 65 (2012) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003)).

Here, it was legal error for the Superior Court to find the Deed unambiguous and ignore the extrinsic evidence of Schultz's intent. The Deed's language is nonsensical and has befuddled not just the undersigned attorney, but other practitioners²¹. Even the drafting attorney, Gustafson, does not know what exactly the Deed does, and he offered multiple possibilities to the Superior Court. And the Superior Court found the Deed did something entirely different than what was argued in the summary judgment moving papers. This is the definition of ambiguity.

²¹ CP at 139

Extrinsic evidence of Schultz's intent should have been considered, and the extrinsic evidence before the Court on summary judgment established that Schultz did not intend to transfer any vested interest to Small and Duke, and that he disputes their claims to the Property. This is an issue of fact for a trier, and summary judgment on the record before the Superior Court was inappropriate.

C. Deed is *Not* a Life Estate Deed.

“A life estate is limited in duration to the life of a named person or persons.” *See v. Hennigar*, 151 Wn. App. 669, 673 (2009) (citing 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 1.4, at 6 (2d ed. 2004)). *Washington Practice* further advises that “[t]o convey a life estate, the grantor needs to add language to the granting clause, the words “for his life” or “for the life of X” being sufficient...”

Here, if the Deed is deemed unambiguous, a life estate deed is not the appropriate interpretation, for the following reasons:

- The Deed plainly does not create an interest measured by and terminating at the death of an identified individual, and with a remainderman (a future interest). If anything, the Deed contemplates the conveyance of a single present interest which is not limited in duration, and does not terminate, but rather “survives.”
- The drafting attorney, Gustafson, specializes in estate planning and

he touted his skill and experience to the Superior Court²², and he is presumably knowledgeable of life estates and yet chose *not* to utilize life estate language (e.g. “for his life” or “for the life of X,” and “and then to”).

- Gustafson used the technical terms, specific to his field of expertise, “jointly” and “survivorship” indicative of a “joint tenancy with the right of survivorship,” which is a recognized form of co-ownership of real property. RCW 64.28 (authorizing and governing joint tenancies with a right of survivorship); *Berg v. Hudesman*, 115 Wn.2d 657, 669 (1990) (technical language is to be given its technical meaning).
- Gustafson argued two possible Deed interpretations to the Superior Court in his summary judgment moving papers, neither of which were a life estate deed.

In sum, *if* the Deed was effective in conveying an interest which can be determined from its face, a life estate is not the appropriate interpretation. The cleanest “four corners” interpretation, if there can be one, is the alternative possibility offered by Gustafson in his summary judgment motion – that the Deed created a joint tenancy with the right of survivorship between Schultz, Small and Duke. This interpretation harmonizes the technical terms “jointly” and

²² CP at 165-166

"survivorship" used by Gustafson, which terms are not utilized by practitioners to create a life estate.

Schultz would need to be included as a joint tenant with Small and Duke, as the Deed contemplates that Schultz keeps an interest which he could subsequently encumber:

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

The above provision, which was bolded by Gustafson, would be superfluous if Shultz did not retain any interest in the Property. *Hodgins v. State*, 9 Wn. App. 486 (1973) (in the construction of a deed, a court must give meaning to every word if reasonably possible).

Plus, Shultz did remain in possession of the Property, further indicating an intent for him to retain a possessory interest. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 65 (2012) (citing *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 126 (1949)) (court will consider the subsequent conduct of the parties in determining their intent at the time the deed was executed).

This interpretation is not without its issues²³, but it is less problematic than the others, particularly a life estate.

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²³ CP at 143.

V. CONCLUSION

The Deed is ambiguous. Extrinsic evidence of the grantor's intent should have been considered, which creates a genuine issue of material fact preventing summary judgment.

Alternatively, if this Court agrees that the Deed is unambiguous, the most appropriate interpretation is the creation of a joint tenancy with a right of survivorship between all three parties to the Deed.

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