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Division III
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NO. 361837

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

NATIONSTAR MORTGAGE, LLC

Appellant

v.

DANNY SCHULTZ, et al.

Respondents

BRIEF OF RESPONDENTS
PATRICIA J. SMALL and MARGARET A. DUKE

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the lower court properly ruled that the Survivorship Conveyance Deed which is the subject of this case (CP 62-63; CP 108-109) conveyed an interest in real estate to Respondents Patricia J. Small (“Small”) and Margaret A. Duke (“Duke”) superior to any interest claimed by the Appellant, Nationstar Mortgage, as a matter of law.

2. Whether the Survivorship Conveyance Deed to Respondents Small and Duke reserved a life estate to Respondent Danny R. Schultz.

II. STATEMENT OF THE CASE

On November 19, 2009, Respondent Danny R. Schultz, as GRANTOR, executed and delivered a Deed to his sister Small, and his niece Duke, as grantees, for certain Yakima County, Washington residential real property located at 1011 Coach Ct., Grandview. (CP 62-63; CP 108-109; CP 171; CP 69; CP 73). The Deed reads in pertinent 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).

About ten months later the Deed's Grantor, Danny R. Schultz, and only Danny R. Schultz, executed a Fixed Rate Home Equity

Conversion Deed of Trust (a reverse mortgage) on November 23, 2010 in favor of Genworth Financial Home Equity Access, Inc. The deed of trust was recorded with the Yakima County Auditor on December 2, 2010 under Auditor's File No. 7712286. (CP 27-38).

The deed of trust was then assigned twice, apparently ending in the hands of Appellant Nationstar which had registered to do business under the fictitious name, Champion Mortgage Company. (CP 15-16; CP 40-42, 44, 46-48). According to Nationstar, its assigned reverse mortgage loan to Danny Schultz went into default when he failed to pay taxes and insurance for the property at which point they accelerated payment of the principal balance of \$81,848.16, sought collection of interest, late charges and other advances of \$20,597.16, and sued to foreclose the deed of trust naming Respondents Small and Duke, whose Deed preceded the loan transaction as holders of a future, inferior property interest. (CP 13-19). Respondents Small and Duke counter and cross-claimed that their interests in the subject real property were superior to Nationstar, and their title should be quieted free and clear of the interests of Nationstar, Mr. Schultz or any of the other defendants. (CP 49-57).

Respondents Small and Duke moved for summary judgment to adjudicate their claims seeking an order: (1) dismissing Nationstar's claims against Small and Duke; (2) declaring Small and Duke's interest as superior; and (3) quieting title in them as to any interest of Nationstar's, Mr. Schultz's or of any other defendant. (CP 76).

Appellant defended the motion for summary judgment by: (1) calling the Deed "nonsensical" and incapable of conveying any recognized interest to Small and Duke; (2) that the Deed violated the statute of frauds; and (3) alternatively, that with resort to extrinsic evidence Mr. Schultz should be found to own the subject property free of any concurrent interest with Small and Duke based upon his self-serving representations. (CP 142-147).

The lower court ruled that Respondents Small and Duke's interest in the property was superior to any interest claimed by Nationstar and that the Deed in question implicitly reserved a life estate to Mr. Schultz with a remainder interest in fee simple to Small and Duke. (CP 173-175).

In its appeal, Nationstar has wisely jettisoned the statute of frauds argument and instead argues: (1) that the Deed is ambiguous

and that apparently a trial is needed to consider extrinsic evidence of Mr. Schultz's intent; or, (2) if the Deed is not ambiguous it nevertheless did not reserve a life estate to Mr. Schultz.

III. ARGUMENT

A. The Survivorship Conveyance Deed is Not Ambiguous and There Should Be No Resort to Extrinsic Evidence to Contradict it.

The Survivorship Conveyance Deed has one grantor, Danny R. Schultz, and two grantees, Patricia J. Small and Margaret A. Duke. The Deed "grants and conveys" all of "his", Danny R. Schultz's, interest in the described real estate to "them", Patricia J. Small and Margaret A. Duke. The words "grants" and "conveys" have substantially the same meaning, that is to transfer an ownership interest by deed. *See Blood v. Sielert*, 38 Wn. 643, 646-47, 80 P. 799 (1905). The term "convey" is common to all the statutory deed forms; for warranty deeds, bargain and sale deeds, and quit claim deeds, RCW 64.04.030-.050. The Deed speaks to a conveyance of all of Danny Schultz's interest conveying a "complete and unlimited right of survivorship jointly" between Ms. Small and Ms. Duke. The Deed

granted all of Mr. Schultz's interest to Small and Duke as joint tenants with right of survivorship.

In the lower court, Nationstar argued that the Deed's failure to use the words "joint tenancy" together negated its construction as such, citing RCW 64.28.010. However, the key language in the Deed in this respect is that it conveys "a complete and unlimited right of survivorship." The distinctive characteristic of joint tenancy is survivorship. *The Estate of Oney*, 31 Wn. App. 325, 328, 641 P.2d 725 (1982) rev. den. 97 Wn.2d 1023. "[T]he distinguishing feature of joint tenancy: [is] the right of survivorship." *Holohan v. Melville*, 41 Wn.2d 380, 398, 249 P.2d 777 (1952). The *Holohan* case summed up the attributes of joint tenancy as follows:

Where the necessary four unities exist and the intention is satisfactorily evidenced that the right of survivorship shall also exist ... the estate created possesses the essential attributes of a joint tenancy as known to the common law and will be treated as such.

Id. at 394. So, we have an unambiguous expression of intent in the Deed that it grants an unlimited right of survivorship between Patricia J. Small and Margaret A. Duke, jointly, and the four unities also exist here. The four unities are simply explained by Professor Boyer in his

Greenbook treatise, Survey of the Law of Property, 3rd edition (1981),
as follows:

Joint tenants...always take either by deed or will, never by descent. There are always four unities, (1) time – meaning that the tenants take their interests at the same moment, (2) title – meaning the tenants acquire their interests from the same source, the same deed or will, (3) interest – meaning each must have the same identical interest as every other joint tenant, and (4) possession – meaning the possession of each is the possession of all and the possession of all is the possession of each, for, after all, they all constitute a single person. ...The so-called *grand incident of joint tenancy is survivorship*.

Boyer, Survey of the Law of Property, 3rd ed. (1981), pg. 29. The four unities are met here, (1) Small and Duke took their interest at the same moment in the November 19, 2009 Deed from Mr. Schultz, (2) they acquired their interest from the same source, the November 19, 2009 Survivorship Conveyance Deed, (3) they acquired identical interests, jointly between them, and (4) they both have an interest in the whole of the real estate described. *See also* Joint Tenancy Property, 19 Wash. Prac. Fam. and Community Prop. L. Section 9:4 (November 2018 update) and 2 Tiffany Real Prop. § 418 (3rd ed.)(September 2018 update).

A joint tenancy with right of survivorship is also the form of deed that Nationstar seems to consider appropriate with a “four corners” evaluation acknowledging that it harmonizes the technical terms “jointly” and “survivorship”. (Appellant’s Opening Brief, pgs. 7-8). Where the parties disagree is with respect to Nationstar’s suggestion that the bold language following the Deed’s habendum clause and legal description must somehow mean that the grantor, Mr. Schultz, despite not being identified as one of the grantees and despite conveying “all of his interest” in the conveyance portion of the Deed, must have retained an interest. The bold language used in the Deed 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). Nationstar argues this language would be superfluous if Mr. Schultz did not retain an interest in the property and cites the case of *Hodgins v. State*, 9 Wn. App. 486, 513 P.2d 304 (1973) for the proposition that a court must give meaning to every word if reasonably possible.

The Court should give meaning to the language used, but the bold language does not reserve a property interest to Mr. Schultz. The bold language stands as a simple warranty by the Grantor, not as some kind of reservation of an unexplained interest. Nationstar's attorney during argument on the summary judgment motion correctly identified the language following the legal description as a warranty. Nationstar's counsel said "the bolded warranty on the bottom [**"the rights of Grantees hereunder shall be superior to all interests created by Grantor hereafter"**]" says Schultz is not to encumber or to affect the interest." (RP 20). Counsel's error is to suggest that the language is superfluous if Mr. Schultz did not retain an interest. This is a special warranty deed by virtue of this language. The difference between a special warranty deed and a general warranty deed is that grantors of special warranty deeds only promise that no title defects have arisen or will arise due to the acts or omissions of the grantor, whereas grantors of general warranty deeds promise to defend all claims. 98 ALR 5th, 665, Defects in Title Encompassed by Warranty of Special Warranty Deed (originally published in 2002).

A special warranty deed includes a warranty against the grantor causing a defect in title which can arise after the conveyance. For example, there are 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 mechanics or materialmen's liens for work commissioned by a grantor prior to his conveyance but where the lien is filed after. Cf., *Egli v. Troy*, 602 NW 2d. 329, 332 (Iowa Sup. Ct. 1999)(special warranty deed warrants against adverse possession acquiesced in by the grantor and warrants against encumbrances such as mechanics liens imposed by others); *State Bank & Trust of Kenmare v. Brekke*, 602 NW 2d. 681, 685 (N.D. Sup. Ct. 1999)(special warranty deed warrants title against adverse possession claim arising by, under, or through the grantor). This is the same type of warranty found in bargain and sale deeds (RCW 64.04.040), warranting property free from encumbrances, done or suffered from the grantor. However, the language "bargain" and "sale" wasn't appropriate here because this Deed was a gift. Therefore, the warranties normally implicit in a bargain and sale deed were expressly

set forth in bold language following the habendum clause (defining the extent of the grant) and the legal description, warranting Mr. Schultz's title only against claims made by, through, or under him, or against encumbrances made or suffered by him. *See Central Life Insurance SOC v. Impelmans*, 13 Wn.2d 632, 645, 126 P.2d 757 (1942). This warranty language is followed by two other paragraphs of warranty. The paragraph immediately following indicates that the grantor also warrants and agrees to defend the grantees interest against defects that might appear in a title insurance policy, if Mr. Schultz had procured one, and the last paragraph of the Deed makes it clear that this is not a general warranty deed, because it only warrants what is expressly covenanted.

In sum, the Deed in question is a deed to Small and Duke, in joint tenancy with right of survivorship with a special warranty from Mr. Schultz that there would be no interests in the property arising by, through, or under him superior to Small and Duke's after the conveyance. It goes without saying that this would include the warranty that Mr. Schultz would not grant a superior lien interest to a reverse mortgage lender.

Small and Duke understood what they were receiving by virtue of the Deed, they both attested that they considered it to give them “an absolute vested interest in the Property that Danny could not thereafter encumber.” (CP 69; CP 73). There can be no argument that Nationstar’s predecessor-in-interest took free of the Deed, Nationstar has admitted its predecessor possessed actual and constructive notice of the Deed. (CP 55; CP 64). The title policy that Nationstar was issued identified the subject Deed as an exception, specifically reciting the special warranty made by Mr. Schultz against the creation of any lien interest superior to Small and Duke’s rights. (CP 125, Exception 13). In Washington it is axiomatic that a party cannot convey an interest in real property that the party no longer owned. Mr. Schultz parted with his interest before the mortgage, and the mortgage lender and all its assignees, including Nationstar, knew it.

Washington law provides for the recording of interests in real property in the office of the county auditor in which the real property is located. RCW 65.08.070. A proper recording of a document in the real property records is notice to the world of the conveyance of that particular property interest. Essentially, if one has notice of another’s

recorded interest in real property one takes an interest which is inferior to the other persons previously recorded interest. *Allen v. Graaf*, 179 Wash. 431, 439, 38 P.2d 236 (1934).

The extrinsic evidence which Nationstar wishes to introduce is not to illuminate the written word. Instead, Nationstar wishes to introduce extrinsic evidence to contradict the fact that Mr. Schultz conveyed anything to Small and Duke. Based upon unilateral statements of Mr. Schultz, Nationstar wishes to argue that he did not mean to give Small and Duke anything by virtue of the Survivorship Conveyance Deed. (Appellant's Opening Brief, pg. 4). Extrinsic evidence is not allowable for that purpose. Extrinsic evidence is only to be used to explain what was written, not what was intended to be written, and not to contradict what was written. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW, Inc.*, 168 Wn. App 56, 70-71, 277 P.3d 18 (2012) (citing and quoting *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999)); also citing, *Bloome v. Haverly*, 154 Wn. App. 129, 138-39, 225 P.3d 330 (2010)). The Survivorship Conveyance Deed recorded ten months prior to the reverse mortgage loan transaction could produce no other result than that Small and

Duke's interest in the property is superior to Nationstar's, as a matter of law, which the lower court properly held.

B. Construing the Survivorship Conveyance Deed as Reserving a Life Estate to Danny Schultz with the Remainder Interest in Fee Simple Vested in Small and Schultz Can Be Upheld.

The proper legal construction of the Survivorship Conveyance Deed is that it is a fee simple conveyance to Small and Duke in joint tenancy, with right of survivorship with a special warranty from Mr. Schultz that no title defects would subsequently arise due to his acts or omissions. Nationstar argues that because Mr. Schultz remained in possession of the property after execution of the Deed this indicated an intent for him to retain some kind of possessory interest. Neither of the cases cited for that proposition at page 8 of Appellant's Opening Brief, says that. Instead, we note that, "[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's Estate*, 19 Wn.2d 589, 143 P.2d 852 (1943).

Respondents Small and Duke did not object to Mr. Schultz using and living on the property at 1011 Coach Court in Grandview

during his lifetime. However, legally the result of the Deed was to make Mr. Schultz a tenant at will. Where occupancy is with the consent of the owner but no monthly or other periodic rent is reserved the relationship created is the common law tenancy at will. *Najawitz v. Seattle*, 21 Wn.2d 656, 658-59, 152 P.2d 722 (1944). Respondents are perfectly willing to live with the lower court's construction of the Deed as reserving a life estate to Mr. Schultz. Respondents' interest is still superior to Nationstar's as a matter of law. It is easy to see from the arguments during summary judgment and the responses of counsel how the lower court reached the result it did. Respondent's previous counsel conjectured that a life estate might make sense if Mr. Schultz intended to keep a present-possessory interest in the property, yet warranted that he could not encumber the future remainder interests of Small and Duke. (RP 11).

Respondents Small and Duke accepted the lower court's construction although their understanding was that the Deed conveyed them "an absolute vested interest" that Mr. Schultz could not thereafter encumber. (CP 69; CP 73). The Court's construction, leaving Mr. Schultz with a life estate, granted him 'an interest' in the

property that could also theoretically be mortgaged. However, the value of a mortgage in a life estate subject to a remainder interest in favor of non-parties to the loan would be of virtually no marketable value. Either interpretation is acceptable to Small and Duke, granting them current fee title in joint tenancy with right of survivorship, or a future remainder interest with life estate reserved for Mr. Schultz; either way their interests are superior to Nationstar's as a matter of law. Nationstar has no claim against Small or Duke or their interest in the property. Nationstar only has what its predecessor lenders obtained; a property that their debtor had no right to pledge as security for a reverse mortgage to the detriment of Small and Duke's superior interest in the property.

IV. CONCLUSION

The trial court correctly found, as a matter of law, that Small and Duke's interest in the subject real property was superior to any interest claimed by Nationstar and could not be foreclosed by Nationstar. The Survivorship Conveyance Deed in favor of Small and Duke was executed and properly recorded ten months before the deed of trust Nationstar seeks to judicially foreclose. By ruling that the

Grantor, Danny Schultz, at most only retained a life estate, the lower court correctly ruled that Mr. Schultz still could not impair the ultimate fee interest belonging to Small and Duke. Respondents' position is Mr. Schultz was a tenant at will and they were the holders of fee title, as joint tenants with right of survivorship, beneficiaries of the special warranties made by Mr. Schultz in the Deed itself.

As the lower court determined, Appellant's attempts at resorting to extrinsic evidence to contradict the property interests transferred to Respondents Small and Duke was improper. Respondents respectfully request this Court either affirm the trial court's ruling, or modify the decision pursuant to RAP 12.2 to indicate that the Deed in question granted them their absolute, vested fee title interest as joint tenants with right of survivorship.

RESPECTFULLY SUBMITTED this 27th day of February, 2019.

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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 27th day of February, 2019.



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