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No. 98069-1

COA No. 36183-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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NATIONSTAR MORTGAGE LLC,

Appellant,

vs.

DANNY R. SCHULTZ, et al.,

Respondents.

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**PETITION FOR REVIEW OF APPELLANT NATIONSTAR  
MORTGAGE LLC d/b/a CHAMPION MORTGAGE COMPANY**

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**IDENTITY OF PETITIONER**

Petitioner Nationstar Mortgage LLC d/b/a Champion Mortgage Company.

**COURT OF APPEALS DECISION**

Nationstar seeks review of the unpublished opinion in *Nationstar Mortgage LLC d/b/a Champion Mortgage Company v. Danny R. Schultz, et al.*, Court of Appeals (Division Three), No. 36183-7-III, filed on July 13, 2018. The Appendix provides a copy of the decision at pages A-1 through A-9.

**ISSUES PRESENTED FOR REVIEW**

1. Whether the court of appeals erred in holding the survivorship conveyance deed unambiguous and not considering extrinsic evidence of the grantor's intent.
2. Whether the court of appeals erred in affirming the superior court's holding the deed created a life estate.

**STATEMENT OF THE CASE**

This appeal concerns the property located at 1011 Coach Ct., Grandview, Washington 98930-9461 in Yakima County (**property**). On

January 11, 2010, a survivorship conveyance deed was recorded in the real property records of Yakima County (**deed**) (CP 62, 108). It is dated November 19, 2009 and signed by Danny R. Schultz. It states:

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 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**

TOGETHER WITH all water rights and appurtenances including after acquired title, if any, thereunto belonging.

SUBJECT TO rights reserved in federal patents, state or railroad deeds; building or use restrictions general to the area; zoning regulations; all rights of way, easements, reservations, restrictions, agreements, covenants and conditions appearing in the record of title or apparent on inspection of said premises and/or plat.

**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 named 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).

The deed was drafted by attorney Eric Gustafson (CP 165-66).

On November 23, 2010, Mr. Schultz executed a fixed rate home equity conversion closed end note promising to repay a loan which he secured with a home equity conversion deed of trust (CP 27-38). The deed of trust was subsequently assigned to Nationstar (CP 44).

Mr. Schultz defaulted on the loan in February 2014 and Nationstar filed the underlying foreclosure action in the superior court of Yakima County. Patricia J. Small and Margaret A. Duke were added as defendants to the foreclosure action (CP 13-48). Ms. Small and Ms. Duke were represented by the same attorney which drafted the deed (CP 49-63). They counterclaimed to quiet title (*Id.*).

The foreclosure action was stayed due to Mr. Schultz's bankruptcy in July 2014 (CP 102). It was later dismissed in 2017 (*Id.*). Ms. Duke and Ms. Small moved for summary judgment on all claims (CP 75-97). Despite having drafted the deed, Ms. Duke and Ms. Small's attorney could not articulate the exact meaning of the deed (CP 85-89). He argued it should be construed either as creating a joint tenancy with right of survivorship in his clients' favor or in favor of his clients and Mr. Schultz

(*Id.*). Ms. Small and Ms. Duke submitted declarations in support of their motion demonstrating it was unclear what the deed did but claiming they received an "absolute interest in the Property that [Mr. Schultz] could not thereafter encumber" (CP 68-74). They also requested sanctions (CP 89-97, 147).

Nationstar opposed their motion for summary judgment arguing the deed is ambiguous and nonsensical (CP 142-147). Due to the ambiguity, Nationstar introduced extrinsic evidence demonstrating Mr. Schultz did not intend to transfer a superior vested interest to Ms. Duke and Ms. Small. *Id.* Nationstar provided the following extrinsic evidence:

- Mr. Schultz's sworn bankruptcy schedules demonstrating his sole ownership of the property (CP 150);
- Bankruptcy pleading filed by Mr. Schulz in June 2016 identifying a dispute with Ms. Small over the ownership of the property (CP 151-52);
- The deed of trust signed by Mr. Schultz representing his "right to grant and convey the Property" (CP 28).

Nationstar also submitted a declaration detailing ongoing attempts to reach Mr. Schultz to obtain sworn testimony concerning the deed and the dispute with Ms. Duke and Ms. Small (CP 148-49).

The Superior Court held the deed is unambiguous wherein a life estate was reserved for Mr. Schultz with the remainder to Ms. Duke and Ms. Small (CP 173-76.) This result was not one of many presented to the superior court by Ms. Small and Ms. Duke. The Superior Court stated the deed was "in-artfully drafted" and the litigation was a "self-inflicted wound" (Report of Proceedings 28-29). Nationstar appealed.

On appeal, the Court of Appeals affirmed, holding the deed is unambiguous and "can only be read as conveying all of Mr. Schultz's property interests to Ms. Small and Ms. Duke." Although the Court of Appeals disagreed with the Superior Court concerning the life estate, it affirmed as Ms. Duke and Ms. Small failed to cross appeal.

### **ARGUMENT**

#### **I. THE LOWER COURTS ERRED IN HOLDING THE DEED IS UNAMBIGUOUS AND NOT CONSIDERING EXTRINSIC EVIDENCE.**

The Court of Appeals and Superior Court both erred in holding the deed is unambiguous and by ignoring the extrinsic evidence tendered by Nationstar. "[C]onstruction of deeds is a matter of law for the court". *Niemann v. Vaughn Cmty. Church*, 154 Wn. 2d 365, 374, 113 P.3d 463, 467 (2005). "In other words, '[i]t is a factual question to determine the intent of the parties' with the court then 'apply[ing] the rules of law to



determine the legal consequences of that intent.' " *Id.* at 374-375 (quoting *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

As this Court has held, if ambiguity exists, extrinsic evidence should be considered to show the intentions of the original parties. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369, 372 (2003). The lower courts failed to adhere to this. A simple review of the deed makes clear it is replete with ambiguity, and as much as found by the Superior Court. The language confused the drafting attorney as demonstrated by his many possibilities of meaning of the deed. It confused Ms. Small and Ms. Duke. Ambiguity is further demonstrated by the disagreement by the Superior Court and Court of Appeals. They disagreed concerning whether a life estate exists. The Court of Appeals held it did not and opined all of Mr. Schultz's interest was conveyed to Ms. Small and Ms. Duke. The holding of the Court of Appeals and Superior Court conflict with the opinions of this Court.

## **II. THE DEED DOES NOT CREATE A LIFE ESTATE**

If the deed is unambiguous (which it is not), it does not create a life estate and such a finding goes against the precedent of this court. "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 requires ". . . [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 . . ."

The evidence does not support a life estate. The deed does not create an interest measured by and terminating at the death of an identified individual, and with a future interest. Rather, the deed contemplates the conveyance of a single present interest, not limited in duration, and does not terminate, but rather "survives." The drafting attorney practices in estate planning and failed to use life estate language in the deed. He also used technical terms: "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). The drafting attorney also presented two theories to the Superior Court which did not contain a life estate.

The most accurate "four corners" interpretation, is the alternative possibility offered by Ms. Small and Ms. Duke in their summary judgment motion: the deed created a joint tenancy with the right of survivorship between Mr. Schultz, Ms. Small, and Ms. Duke.

This interpretation harmonizes the technical terms "jointly" and "survivorship". Mr. Schultz would need to be included as a joint tenant with Ms. Small and Ms. Duke, because contemplates Mr. Schultz keeping an interest that he could encumber:

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

This provision is superfluous if Mr. Schultz 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).

Also, Mr. Schultz did remain in possession of the property, showing 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).

### **CONCLUSION**

The Court of Appeals erred in holding the deed is unambiguous and failing to consider the extrinsic evidence provided by Nationstar and affirming the Superior Court's ruling of a life estate. This Court should undo this error by issuing a decision reversing the Court of

Appeals and remanding the case with instructions to the Superior Court to analyze the intent of the parties with extrinsic evidence.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of January, 2020.

WITHERSPOON · KELLEY

*s/ Christopher G. Varallo*  
\_\_\_\_\_  
Christopher G. Varallo, WSBA No. 29410

Counsel for Appellant Nationstar Mortgage,  
LLC dba Champion Mortgage Company

**DECLARATION OF SERVICE**

I declare that I sent a true and correct copy of the foregoing PETITION FOR REVIEW OF APPELLANT NATIONSTAR MORTGAGE LLC d/b/a CHAMPION MORTGAGE COMPANY by the method indicated below and addressed to the following:

<p>Michael Frederick Shinn Halverson Northwest Law Group PC PO Box 22550 Yakima, WA 98907-2550</p> <p><i>Counsel for Respondent</i></p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail: <a href="mailto:mshinn@halversonNW.com">mshinn@halversonNW.com</a></p>
<p>Joseph Ward McIntosh McCarthy &amp; Holthus, LLOP 108 1<sup>st</sup> Ave S, Ste. 300 Seattle, WA 98104-2104</p> <p><i>Counsel for Nationstar Mortgage LLC dba Champion Mortgage Company</i></p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail: <a href="mailto:jmcintosh@mccarthyholthus.com">jmcintosh@mccarthyholthus.com</a></p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9<sup>th</sup> day of January, 2020.

s/ Christopher G. Varallo  
CHRISTOPHER G. VARALLO

**APPENDIX**

**UNPUBLISHED OPINION OF  
COURT OF APPEALS, DIV. III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

NATIONSTAR MORTGAGE LLC d/b/a )  
CHAMPION MORTGAGE COMPANY, )

No. 36183-7-III

Appellant, )

v. )

DANNY R. SCHULTZ; STATE OF )  
WASHINGTON, DEPARTMENT OF )  
ECOLOGY; SECRETARY OF )  
HOUSING AND URBAN )  
DEVELOPMENT; DOES 1-10 )  
INCLUSIVE; UNKNOWN OCCUPANTS )  
OF THE SUBJECT REAL PROPERTY; )  
PARTIES CLAIMING A RIGHT TO )  
POSSESSION OF THE SUBJECT )  
PROPERTY; ALL OTHER UNKNOWN )  
PERSONS OR PARTIES CLAIMING )  
ANY RIGHT, TITLE, ESTATE, LIEN, )  
OR INTEREST IN THE REAL ESTATE )  
DESCRIBED IN THE COMPLAINT )  
HEREIN, )

UNPUBLISHED OPINION

Defendants, )

PATRICIA J. SMALL; )  
MARGARET A. DUKE, )

Respondents. )

PENNELL, J. — Nationstar Mortgage LLC doing business as Champion Mortgage Co. (Nationstar) appeals a summary judgment order dismissing its claims and denying its

No. 36183-7-III

*Nationstar Mortg. LLC d/b/a Champion Mortg. Co. v. Schultz*

request for a trial and introduction of extrinsic evidence as to the proper construction of a real property deed. We affirm.

## BACKGROUND

The deed at issue in this case reads as follows:

### **SURVIVORSHIP CONVEYANCE DEED**

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 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**

TOGETHER WITH all water rights and appurtenances including after acquired title, if any, thereunto belonging.

SUBJECT TO rights reserved in federal patents, state or railroad deeds; building or use restrictions general to the area; zoning regulations; all rights of way, easements, reservations, restrictions, agreements, covenants and conditions appearing in the record of title or apparent on inspection of said premises and/or plat.

**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 named 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.

DATED this 19th day of November, 2009.

s/ Danny R. Schultz  
DANNY R. SCHULTZ

Clerk's Papers (CP) at 62-63 (boldface in original).

Approximately one year after the survivorship conveyance deed (Deed) was signed,<sup>1</sup> the grantor, Danny Schultz, entered into a reverse mortgage loan agreement utilizing the previously-deeded property as security and assigned the lender a deed of trust.

Mr. Schultz ultimately defaulted on that loan and Nationstar initiated foreclosure proceedings in Yakima County Superior Court. Mr. Schultz and the grantees of the Deed (Patricia Small and Margaret Duke) were named as defendants in the foreclosure action. Ms. Small and Ms. Duke answered Nationstar's complaint and asserted a counterclaim against Nationstar, claiming they held interests in the property superior to Nationstar. They also filed a cross claim against Mr. Schultz to quiet title in their favor.

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<sup>1</sup> Patricia Small and Margaret Duke recorded the Deed in January 2010.

Ms. Small and Ms. Duke then moved for summary judgment. They argued the Deed conveyed the property to them in fee simple absolute as joint tenants, meaning Mr. Schultz could not have had an interest to encumber when he sought his loan. In opposing summary judgment, Nationstar claimed the Deed was ambiguous and argued the matter should be resolved at trial using extrinsic evidence to properly construe the Deed.

The superior court granted summary judgment in favor of Ms. Small and Ms. Duke. It determined the Deed was not ambiguous, and that neither a trial nor extrinsic evidence was necessary to construe it. But the court did not find the Deed conveyed the property to Ms. Small and Ms. Duke in fee simple. The court held the plain meaning granted Mr. Schultz a life estate in the deeded property and conveyed the remainder to Ms. Small and Ms. Duke. That ruling meant Nationstar could seek foreclosure only on Mr. Schultz's life estate, not the entire property.

Nationstar appeals the superior court's summary judgment order. Ms. Small and Ms. Duke have not cross appealed any portion of the order.

#### ANALYSIS

When construing a deed, "our principal aim is to effect and enforce the intent of the parties." *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 156 Wn.2d 253, 262, 126 P.3d 16 (2006). While intent is a factual question, our case

law disfavors resorting to extrinsic evidence to discern intent. *See Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 68-69, 277 P.3d 18 (2012) (noting Washington Supreme Court has declined to use extrinsic evidence for unambiguous deeds outside the context of railroad right-of-way disputes). If a deed's language is unambiguous in light of relevant case law, intent must be derived solely from the four corners of the written document. *Hanson Indus., Inc. v. Spokane County*, 114 Wn. App. 523, 527, 58 P.3d 910 (2002). We review de novo whether a deed is ambiguous. *See Hogle v. Omak Wood Prods., Inc.*, 81 Wn. App. 501, 504, 914 P.2d 1197 (1996); *Newport Yacht*, 168 Wn.2d at 64. If a deed is not ambiguous, and therefore not interpreted through extrinsic evidence, our assessment of the parties' intent is also de novo. *See 4518 W. 256th LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 435, 382 P.3d 1 (2016).

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.<sup>2</sup>

Nationstar nevertheless argues that because the Deed includes a clause stating "[t]he rights of Grantees hereunder shall be superior to all interests created by Grantor hereafter, or imposed by law hereafter, if any," CP at 62 (boldface omitted), the Deed must be read in a manner that retains a property interest for Mr. Schultz. This position is

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<sup>2</sup> Even if the Deed were ambiguous, the extrinsic evidence identified by Nationstar would not be helpful in construing the Deed. Extrinsic evidence is relevant only to discern the meaning of terms used in a deed. It is not relevant to determine unstated intent. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999) ("Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.").

akin to arguing the tail wags the dog. Whatever was meant by the aforementioned sentence, it was not a central component of the Deed. The sentence appears to convey some sort of warranty,<sup>3</sup> the intent of which need not be resolved by this court. Regardless of the sentence's meaning, it does not undermine the Deed's clear statement that Mr. Schultz had conveyed all his interest in the property to Ms. Small and Ms. Duke. We strive to give effect to every word used in a deed where "reasonably possible." *Hodgins v. State*, 9 Wn. App. 486, 492, 513 P.2d 304 (1973). It is not reasonably possible to read this specific sentence as a limitation on Mr. Schultz's conveyance. This is particularly true in light of the rule that deeds are to be construed against the grantor. *Newport Yacht*, 168 Wn. App. at 65-66.

Our assessment of the type of conveyance effected by the Deed is at odds with that of the superior court, which held that the Deed created a life estate. We disagree the Deed can fairly be read in this manner. The use of the word "survivorship," CP at 62, describes the relationship of the grantees, Ms. Small and Ms. Duke, as joint tenants with the right of survivorship. It does not convey an intent to reserve an interest in the property for Mr. Schultz for the remainder of his life.

While we do not read the Deed as creating a life estate, Ms. Small and Ms. Duke

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<sup>3</sup> Perhaps Ms. Small and Ms. Duke were prescient and the sentence warranted that Mr. Schultz would not try to illegally mortgage the property.

have not cross appealed the superior court’s summary judgment order construing the Deed as such. Only Nationstar has appealed the superior court’s order. Ms. Small and Ms. Duke represent that, despite their criticisms of the superior court’s ruling, they are satisfied with the judgment granting them the remainder of Mr. Schultz’s life estate. Though we disagree with the superior court’s interpretation, we do not grant Ms. Small and Ms. Duke greater relief than they received in the superior court because they have not cross appealed the decision. Because the life estate construction is more favorable to Nationstar than the alternative of a fee simple with joint tenancy to Ms. Small and Ms. Duke, the equitable resolution of this case is to affirm the superior court’s order finding Mr. Schultz retained a life estate and conveyed the remainder to Ms. Small and Ms. Duke.

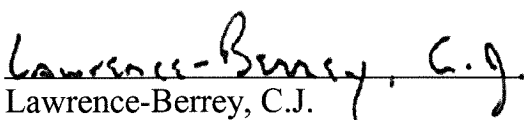
CONCLUSION

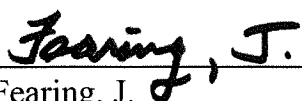
The superior court’s order granting summary judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Pennell, J.

WE CONCUR:

  
\_\_\_\_\_  
Lawrence-Berrey, C.J.

  
\_\_\_\_\_  
Fearing, J.

**WITHERSPOON KELLEY**

**January 09, 2020 - 4:53 PM**

**Transmittal Information**

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