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No. 59223-8-1

King County Superior Court Cause No. 05 4 04942 9 SEA

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

ARTHUR R. GILROY,

Appellant,

vs.

ESTATE OF JEANNETTE L. BORGHI,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAR 29 PM 4:16

Brief of Respondent

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ORIGINAL

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RESPONSE TO ASSIGNMENTS OF ERROR

1. The Court Commissioner did not err in entering the Order Granting Declaratory Judgment Determining Title to Real Property.
2. The Court Commissioner did not err in entering Findings of Fact and Conclusions of Law Nos. 12 through 26, inclusive.
3. The Judge did not err in entering an Order Denying Motion for Revision.

STATEMENT OF THE CASE

Jeanette Borghi, the decedent (“Mrs. Borghi”) died intestate on June 25, 2005. CP 11. Her surviving heirs were her husband, Bobby G. Borghi (“Mr. Borghi”) and Arthur R. Gilroy (“Mr. Gilroy”), her son by a former marriage. CP 12. Mr. Borghi was appointed as Personal Representative of the Estate of Jeanette L. Borghi and qualified. CP 21. At the time of Mrs. Borghi’s death, she and Mr. Borghi lived in Yavapai County, Arizona. CP 11. The only asset of Mrs. Borghi’s estate subject to probate in Washington is real property located at 20922 Ninety-Third Street E., Bonney Lake (Puyallup), Pierce County, Washington (“the Property”). CP 13. The Property was Mr. and Mrs. Borghi’s residence from 1975 until they moved to Nevada in 1990. CP 73.

Mr. and Mrs. Borghi were married on March 29, 1975. CP 75, 78. On June 12, 1975, Cedarview Development Co. executed a Special Warranty Deed (“the Deed”) to “Robert G. & Jeanette L. Borghi, husband and wife” as grantees. The Deed was recorded August 13, 1979.¹ The Deed recites that it is given in fulfillment of a Real Estate Contract dated 3/16/66 (“the Real Estate Contract”). CP 75, 80. The Real Estate Contract was not recorded, and no copy of the Real Estate Contract has been located. Mrs. Borghi was previously married and the Real Estate

¹ A copy of the Deed is Appendix 1 to Respondent’s Brief.

Contract would have been executed either by Mrs. Borghi and her former husband or Mrs. Borghi as a single person.

On August 2, 1979, Mr. and Mrs. Borghi executed a Mortgage in favor of Washington Mutual Savings Bank secured by the Property (“the Mortgage”) to finance the purchase of a mobile home to be located on the Property. The Mortgage was recorded August 8, 1979. CP 75-76, 82-83. Mr. and Mrs. Borghi made all payments due under the Mortgage, CP 76, 85-90, and a Satisfaction of Mortgage was recorded July 27, 1999. CP 76, 92.

Mr. Borghi as Personal Representative obtained a title report on the Property. The title report shows that title is vested as follows: “Robert G. Borghi, also appearing of record as Bobby G. Borghi, as his separate estate and the Heirs and Devisees of Jeanette L. Borghi, deceased.” CP 22-23, 36. Due to his awareness of a potential claim by Mr. Gilroy, despite clear title appearing to be vested appropriately in both Mr. and Mrs. Borghi, Mr. Borghi, as Personal Representative of the Estate of Mrs. Borghi, filed a Petition for Declaratory Judgment Determining Title to Real Property. CP 20 *et. seq.*

At the hearing on September 25, 2006, Court Commissioner Carlos Velategui ruled that the Property was the community property of Mr. and Mrs. Borghi and that it therefore passed to Mr. Borghi by intestate

succession upon Mrs. Borghi's death. Accordingly, an Order Granting Declaratory Judgment Determining Title to Real Property was entered. CP 127-132.² On October 3, 2006, Mr. Gilroy filed a Motion for Revision of the Commissioner's ruling. CP 133-134. At a hearing on November 3, 2004, Judge Michael Fox entered an Order denying Mr. Gilroy's Motion for Revision. CP 139-140. This appeal followed.

Mr. Borghi died in October, 2006. *See* CP 139. On November 16, 2006, the Court appointed Mrs. Borghi's sister, Alice Montano-Guerrero, as Successor Personal Representative of Mrs. Borghi's Estate. CP 141-143. Both the successor Personal Representative of Mrs. Borghi's Estate and the Personal Representative of Mr. Borghi's Estate opposed Mr. Gilroy's Motion and maintained that the Property was the community property of Mr. and Mrs. Borghi. CP 135-136, 137-138.

ARGUMENT

1. A real estate contract is an executory contract, subject to modification by the parties, prior to delivery of a fulfillment deed when the contract has been fully performed by the buyer. Because a real estate

² In connection with the Petition, Mr. Borghi was represented in his capacity as Personal Representative by Sheila C. Ridgway and the Law Office of Mary Anne Vance and Sheila C. Ridgway, P.S. Because Mr. Borghi was also an heir, Mr. Borghi was represented in his individual capacity by Paulette Peterson of the Law Office of Paulette Peterson PLLC.

contract is executory, legal title to the property is determined by the fulfillment deed and not by the real estate contract if the fulfillment deed names new or additional grantees.

The status of property as either separate or community is generally determined as of the date of its acquisition. However, the general rule is subject to long-recognized exceptions: “. . . the status of property [as community or separate], whether real or personal, becomes fixed as of the date of its purchase or acquisition, and remains so fixed *unless changed by deed*, by due process of law, or by the working of some form of estoppel.” *E.g. Conley v. Moe*, 7 Wn.2d 355, 360, 110 P.2d 172 (1941) (emphasis added).

Mr. Gilroy argues that the character of the property purchased under a real estate contract is fixed when the obligation becomes binding.” (Appellant’s Brief at 5). However, the cases he cites as authority for this proposition, *Stokes v. Polley*, 145 Wn.2d 341, 37 P.3d 211 (2001) and *Beam v. Beam*, 18 Wn. App. 444, 453, 569 P.2d 719 (1979), are distinguishable from the facts in this case. Both *Stokes* and *Beam* involved disputes that arose between spouses in the context of dissolution of their marriage.

Beam v. Beam addressed the question of whether payment of community funds on a separate obligation, or payment of separate funds

on a community obligation, effected a change in ownership of the property acquired by real estate contract. *Stokes v. Polley* concerned the effect of an award to the wife of an interest in the equity of property purchased pursuant to a real estate contract entered into by the husband prior to marriage. Neither case dealt with the scenario where a fulfillment deed had been issued to both spouses upon full performance of a real estate contract which had been entered into by one spouse, which is the issue here.

The dissolution cases are further distinguishable because, in those cases, the parties seeking a determination as to the character of the ownership of the property were the parties who owned, or potentially owned, the property. Here, those parties would be Mr. and Mrs. Borghi. There is no evidence that Mrs. Borghi ever raised any issue as to the ownership of the property during her lifetime.

Both spouses in this case are grantees of the deed issued in fulfillment of the contract in this case. It is the fulfillment deed, and not the real estate contract, that determines legal title to property under Washington law. A "real estate contract" is a "written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price." RCW 61.30.010(1). Unlike the more common financing arrangement in which property is

deeded to the purchaser, subject to a deed of trust, no legal title to the property is conveyed until the fulfillment deed is delivered. A real estate contract, insofar as legal title is concerned, is executory until the fulfillment deed is delivered. "It has long been the general rule of the law in this state that the provisions of a contract for the sale of real estate, and all prior negotiations and agreements, are considered merged in a deed made in full execution of the contract of sale." *Black v. Evergreen Land Developers*, 75 Wn.2d 241, 450 P.2d 470 (1969). A fulfillment deed given upon full execution of a real estate contract which names additional or different grantees constitutes a change in title to property by deed.

Mr. Gilroy ignores the fact that title was *never* previously conveyed to Mrs. Borghi, in any fashion. Legal transfer of title to the Property did not occur until the sellers executed and delivered the Deed that was given to Mr. and Mrs. Borghi, naming both of them as grantees. The language of the Deed vesting title in both Mr. and Mrs. Borghi establishes that the Deed specifically states that it is given in fulfillment of that certain real estate contract dated 3/16/66 wherein the above named are Purchasers, and the *Grantee herein by acceptance of this deed* represents that he has succeeded to all purchasers rights under said contract and is lawfully entitled to such fulfillment deed." CP 79. Because the Deed vests title in both Mr. and Mrs. Borghi, it is clear that the Borghis made

known the fact of their marriage to the sellers, the Cedarview Development Co., in order for it to execute the Deed naming them both as Grantees.

“Where there is no mistake or fraud, a deed executed subsequent to the making of an executory contract for the sale of land is generally regarded as conclusive evidence of a previous modification of the executory contract.” 77 Am. Jur. 2d “Vendor and Purchaser” Section 286 at 317 (1997). “In the absence of fraud or mistake, and in the absence of contractual provisions or agreements which are not intended to be merged into the deed, the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed, and thereafter the deed regulates the rights and liabilities of the parties.” *Id.* at 316.

“The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicate an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.” *Snyder v. Roberts* 45 Wn.2d 865, 871, 278 P.2d 348 (1955) (remanding for determination of

whether merger occurred when grantee recorded deed with objectionable provision).

A deed executed in fulfillment of a contract controls the title to property even though it may include a grantee not a party to the contract or makes other changes to the vesting compared to the contract. *Miller v. Kemp*, 157 Va. 178, 160 S.E. 203 (1931) (cited with approval in *Snyder v. Roberts, supra.*).

Like the contract considered in *Miller v. Kemp*, the Borghi real estate contract was executory at its inception, and did not become an executed contract until the purchase price had been paid and the seller delivered its deed conveying the lots. Prior to that time, the contract could be rescinded, waived, or abandoned by an independent agreement, oral or written, before it was fully executed. In *Miller v. Kemp*, the buyers did so by providing that deeds would be granted, not to the two original buyers jointly, but instead three lots were deeded to one original buyer only, one lot deeded to the other original buyer, and two lots were deeded to a third party. The *Miller* court noted that the deeds so given “must necessarily be construed to be the conclusive evidence of a previous modification of the original contract before it became executed by either, made by consent of all those having the slightest interest in the land, of which modification,

consent, and consummation the signatures to the deeds are the incontestable and sure evidence.” *Id.* at 194.

Delivery of the Deed in this case to Mr. and Mrs. Borghi as husband and wife, in fulfillment of the earlier real estate contract entered into by one of them, represents a “change by deed,” establishing the property to be their community property.

2. The grantees’ mortgaging of the property establishes grantees’ acceptance of the deed.

In order for a deed to govern their rights, it must be accepted by the grantees. 77 Am. Jur.2d “*Vendor and Purchaser*” Section 286 at 317 (1997). Acceptance of a deed is presumed if the conveyance is a benefit to the grantee. *Clearwater v. Skyline Construction Co., Inc.*, 67 Wn. App. 305, 319, 835 P.2d 257 (1992). To establish acceptance, “intention to accept may be inferred from such conduct as conveying or mortgaging the property . . .” 23 Am. Jur. 2d “*Deeds*” Section 151 at 174 (2002). Execution of a mortgage secured by the property constitutes acceptance of the deed. *Blackwell v. Blackwell*, 196 Mass. 186, 81 N.E. 910 (1907).

Mr. and Mrs. Borghi clearly accepted the Deed to themselves as husband and wife. Their acceptance of the Deed is confirmed by their use of the Property to secure a Mortgage under which they, as husband and wife, were jointly liable. The Mortgage financed the purchase of a mobile

home which they placed on the Property and used as their principal residence for more than 11 years, after having lived on the Property for 4 years previously. Their actions accepted title to the Property in the form set forth in the Deed.

Mr. Gilroy's reliance on *Guye v. Guye*, 63 Wash. 340, 352-53, 115 P. 731 (1911) for the proposition that the post-marriage mortgaging of the Property did not change its character is misplaced. The Personal Representative does not contend that mortgaging the property changed title to the property; rather, the mortgage confirmed the grantees' acceptance of title granted to both Mr. Borghi and Mrs. Borghi under the Deed.

The facts in *Guye v. Guye* are readily distinguished from this case. In 1870, Mr. Guye and a partner purchased property from an estate. There was evidence that the purchase price was paid in 1870, and no evidence of any later payments. Mr. Guye married Mrs. Guye in 1872. The sellers executed a deed to Mr. Guye and his partner in 1873. After Mr. Guye's death, Mrs. Guye claimed that the property was community property. She based that claim in part on the fact that the property had been mortgaged and both spouses' names appeared on the mortgage. But in *Guye*, unlike the case here, the deed was never issued in both spouses' names.

The *Guye* court quite properly held that the property was Mr. Guye's separate property and the fact of the mortgage in both names did not convert its character to community property. Unlike the Borghis' deed, the purchasers of the property were named as grantees in the deed in *Guye v. Guye*. There was no evidence of modification of the original contract prior to the delivery of the deed to Mr. Guye and his partner. Therefore the property remained Mr. Guye's separate property.

3. A fulfillment deed to a husband and wife establishes that the property is community property. Upon the death of one spouse without a will, the deceased spouse's interest passes to the surviving spouse by intestacy.

Assets acquired during marriage are presumed to be community property. *E.g. Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Even gifts during marriage, though presumed to be the separate property of a spouse who is the sole donee, RCW 26.16.010, RCW 26.16.020, are presumed to be community property if made to both husband and wife. *In re Salvini's Estate*, 65 Wn.2d 442, 447-48, 397 P.2d 811 (1964) (deed). Since the property was deeded to both Mr. and Mrs. Borghi, and the Deed accepted by them, the Property is presumed to be their community property and not one-half the separate property of each of them.

RCW 11.04.015(1)(a) provides that if the decedent dies without a will, the surviving spouse shall receive “[a]ll of the decedent’s share of the net community estate.” Accordingly, the Property, as community property, passed to Mr. Borghi by the laws of intestate succession upon the death of Mrs. Borghi.

CONCLUSION

The trial court properly determined the Property to be the community property of Mr. and Mrs. Borghi. Thus the Property passed to Mr. Borghi upon Mrs. Borghi’s death. The Order Granting Declaratory Judgment Determining Title to Real Property should be affirmed.

ATTORNEY’S FEES

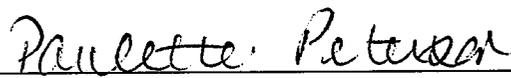
The Estate requests an award of fees on appeal. RAP 18.1. Applicable law authorizing an award of fees is found in RCW 11.96A.150(1), which provides, in pertinent part: “Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys’ fees to be awarded to any party: (a) From any party to the proceedings; [or] (b) from the assets of the estate or trust involved in the proceedings;”

DATED THIS 29th day of March, 2007.

THE LAW OFFICE OF
MARY ANNE VANCE &
SHEILA C. RIDGWAY, P.S.


SHEILA C. RIDGWAY, WSBA #14759
Attorney for Respondent

LAW OFFICE OF
PAULETTE E. PETERSON


PAULETTE E. PETERSON,
WSBA # 17274 *Per Electronic*
Attorney for Respondent *Authorization*

APPENDIX 1

Excise Tax Paid
Rec. No. 206485
Date 3/31/66

2983334

CEDARVIEW DEVELOPMENT CO.

CHICAGO TITLE AUG 13 1979

Special Warranty Deed

A-3031-1

The grantor, CEDARVIEW DEVELOPMENT CO. for and in consideration of Ten Dollars and other valuable consideration in hand paid bargains, sells and conveys to the grantees

ROBERT G. & JEANETTE L. BORGHI, husband and wife

the following described real estate, with appurtenances situate in Pierce County, Washington

Lot 58, Block 1, Plat of Cedarview, Addition to the town of Bonney Lake as recorded in Vol. 24, Page 59 of Plats, records of Pierce County, Washington.

PURCHASERS COVENANT and agree that the above described real estate shall be subject to the charges and assessments as provided for in, and for the purposes set forth in the Articles of Incorporation and the By-Laws of the

Cedarview Maintenance Co. a non-profit, non-stock Washington corporation and that said corporation shall have a valid first lien against the above described real estate for said charges and assessments; and, in addition to the remedies set forth in said Articles of Incorporation and By-Laws, that if said charges and assessments levied by said corporation shall not be paid within four (4) months after they shall become due and payable, then said corporation may proceed by appropriate action to foreclose its lien together with such sum as the court may adjudge reasonable attorney's fee in such action. The undersigned hereby acknowledges receipt of copies of said Articles of Incorporation and By-Laws of the Cedarview Maintenance Co. This provision is a covenant running with the land and is binding on the grantor, his heirs, successors and assigns.

- SUBJECT TO (a) Restrictions, reservations and easements of record and as shown on the face of said recorded plat.
- (b) Use of said property for residential purposes only.
- (c) Reservation of all gas, oil and mineral rights.

GRANTOR COVENANTS and agrees to warrant and forever defend the premises herein conveyed to Grantees, subject to the items set forth above, against all and every person or persons who lawfully claiming or to claim the same or any part thereof through or under the said Grantor.

This deed is given in fulfillment of that certain real estate contract dated 3/16/66 wherein the above named are Purchasers, and the covenants and warranties herein contained, express or implied, shall not be construed to cover any act or thing done or suffered by said purchasers, their successors and assigns; and the Grantor herein by the acceptance of this deed represents that he has succeeded to all purchasers rights under said contract and is lawfully entitled to such fulfillment deed.

DAVED this 12th day of June, 1975

LAUREL FAX CO. None
REC # 50045-4 DATE 8-10-79
MAIL ROOM
R. Dorothy Jackson

CEDARVIEW DEVELOPMENT CO.
J. V. SWANSON, JR. Authorized Purchaser

STATE OF WASHINGTON }
COUNTY OF KING }

On this day personally appeared before me, J. F. SWANSON, JR., to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 12th day of June, 1975

Notary Public in and for the State of Washington, residing at Seattle.

3-1-79
STATE OF Washington
DEPT. OF MAY-879 REVENUE
Tax 02.00
PB. 10589

A-1

RECORDED AUG 13 1979
DATE TIME 8:30 am
RICHARD A. GRIED PIERCE COUNTY AUDITOR