STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Dana Waid Young, Johnny R. Young, and Jaron Young, Defendants Below, Petitioners

vs.) No. 11-0823 (Greenbrier County 10-C-181)

Brian Waid, Dana Waid, and Brandon Waid, Plaintiffs Below, Respondents

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Greenbrier County, wherein the circuit court granted partial summary judgment in favor of the respondents and denied the petitioners' motion for partial summary judgment. The appeal was timely perfected by counsel, Jesseca R. Church and Christine B. Stump, with petitioners' appendix accompanying the petition. The respondents have filed a response by counsel, Joseph Aucremanne.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On September 4, 1995, Calvin C. Waid, the father of the late Roger C. Waid and Petitioner Dana Young Waid, created a deed with reservation of a life estate on this date. The deed conveyed to the children, Roger and Dana, certain real estate situate in Greenbrier County, West Virginia. Following Calvin's death on July 31, 1996, the deed in question was placed of record in Deed Book 438 at page 445 in the office of the Clerk of the Greenbrier County Commission in August of 1996. The deed in question was captioned as follows:

> THIS DEED WITH RESERVATION OF LIFE ESTATE**,** made and entered into on this the *4th* day of *September 1995,* 1995 [sic], by and between CALVIN C. WAID**,** widower, party of the first part, and ROGER C. WAID and DANA WAID YOUNG, brother and sister, parties of the second part, or the survivor.

The grantees are identified as Roger C. Waid and Dana Waid Young, and the habendum clause stated "TO HAVE AND TO HOLD unto the party of the first part for his life only and at his death the remainder over unto the parties of the second part, their heirs and assigns forever." Lastly, the

granting language of the deed is found in the premise clause and states as follows: "That for and in consideration of love and affection the party of the first part has for the parties of the second part, the party of the first part being the parent of the parties of the second part, the said party of the first part does hereby grant, and convey unto the parties of the second part, with COVENANTS OF GENERAL WARRANTY of title, a remainder interest in and to that certain real estate situate ANTHONY CREEK DISTRICT, GREENBRIER COUNTY, WEST VIRGINIA."

The matter below was initiated following the death of Roger C. Waid. Following Roger's death, Petitioner Dana Young Waid executed a deed dated January 28, 2010, in which she conveyed the same property to Johnny R. Young, her husband, and Jaron R. Young, her son, as joint tenants with right of survivorship, with the reservation of a life estate for herself. Following execution of this deed, respondents herein filed a verified complaint in the circuit court alleging that petitioners were wrongfully withholding from respondents the possession of an undivided one half interest in the property that descended or passed to the respondents when Roger passed away on November 29, 2009, since all the respondents are his heirs. Respondents argued that Calvin's original deed conveyed the property to the siblings as tenants in common, while petitioners asserted that the deed created a joint tenancy with right of survivorship between them in the remainder interest in the subject property. According to petitioners, Dana became the sole owner upon her brother's death. Upon motions for partial summary judgment from both the petitioners and the respondents, the circuit court, by order entered April 20, 2011, found that the deed did not create a joint tenancy with right of survivorship, but instead created a tenancy in common for lack of a clear and convincing showing that the intention of the grantor was to create a joint tenancy with right of survivorship, as required by *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992). It is from this order that the petitioners appeal.

On appeal, petitioners argue that the circuit court erred in the following three ways: in its finding that the words "or the survivor" were not sufficient to show the intent of the parties to create a joint tenancy with the right of survivorship; in severing the premise of the deed from the rest of the document, thus ignoring the intent of the grantor by not interpreting the deed as a whole; and, in determining that there is a separate "parties" section of a deed that is separate and apart from the rest of the document. In support, petitioners state that the inclusion of the words "or the survivor" establishes the tenor of the instrument and shows the grantor's intention to create a joint tenancy with a right of survivorship. As such, they argue that this deed overcomes the presumption found in West Virginia Code § 36-1-19 to construe joint tenancies as tenancies in common. As provided for in West Virginia Code § 36-1-20(a), petitioners argue that the tenor of the deed in question manifestly appears to have intended for the part of the dying party to belong to the others. They further argue that the four unities of time, interest, possession, and title are present, as required by *Herring v. Carroll*, 171 W.Va. 516, 300 S.E.2d 629 (1983), and that the respondents admit that the same are satisfied.

According to petitioners, the circuit court improperly applied this Court's standard for interpreting a deed as found in Syllabus Point 1 of *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921), when it struck the language "or the survivor" from the deed, instead of considering the

document as a whole in order to uphold the intent of the parties. If that language was ambiguous or the deed inconsistent, then petitioners argue that the circuit court would not have been permitted to rule on the four corners of the deed and extrinsic evidence would be required to determine the parties' intent. Lastly, petitioners argue that all of the language in the deed is significant and necessary to show the parties' intent, and the significance of the premise in a deed and how it relates to the habendum was well-established by this Court in *Freudenberger Oil Co. v. Simmons*, 75 W.Va. 337, 83 S.E. 995 (1914). Based upon that precedent, the petitioners argue that even if the circuit court had found that the habendum and premise of the deed in question were irreconcilable and inconsistent, the premise would have to prevail. As such, the petitioners assert that the only purpose for the words "or the survivor" is to preserve survivorship, and the circuit court erred in selecting the language of the deed to be used in construing the document.

In response, respondents argue that the circuit court did not err in its finding that the words "or the survivor" were insufficient to show the intent of the parties to create a joint tenancy with the right of survivorship, and argue that nothing in the deed, aside from these words, conveys such an intention. Respondents argue that the tenor of the document shows an intention for the two siblings to be co-owners, and point out that there is no usual and customary language found in survivorship deeds, such as "grant and convey unto the parties of the second part as joint tenants with right of survivorship and upon the death of either of them, the whole of the premises to the survivor." Further, they state that the language in the habendum clause is consistent with the language of the premise and entirely inconsistent with the creation of a joint tenancy. Respondents cite to the sibling relationship between the grantees to argue that the inference to be made is that the grantor did not intend to arbitrarily dispossess the children of whichever grantee died first. Respondents argue that the language "or the survivor" is mere surplusage, and suggest that such language is not uncommon when the drafter follows a template. In short, the respondents suggest that to construe the instrument as creating a joint tenancy is to entirely disregard the lack of any language in the premise and habendum indicating that it created a joint tenancy, and further to disregard what would have been a father's natural and equal affection for each of his two children and their respective descendants.

"'This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.' Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 1, *State v. Spade*, 225 W.Va. 649, 695 S.E.2d 879 (2010). The Court has carefully considered the merits of these arguments as set forth in the petition for appeal and in the response, and it has reviewed the appendix designated by the petitioners. The Court finds no error in the denial of petitioners' motion for partial summary judgment or in the circuit court's decision to award partial summary judgment in favor of the respondents, and fully incorporates and adopts, herein, the circuit court's detailed order dated April 20, 2011. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:
Justice Margaret L. Workman

Rec. 4/26/11

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

BRIAN WAID, DANA WAID
AND BRANDON WAID,
Plaintiffs,

v. Civil Action No. 10-C-181

DANA WAID YOUNG, JOHNNY R. YOUNG
AND JARON YOUNG,
Defendants.

ORDER

This matter is before this Court pursuant to the Defendants' Motion for Partial Summary Judgment filed on February 9, 2011, and the Plaintiffs' Motion for Partial Summary Judgment, filed on February 11, 2011. The Plaintiffs also filed a Response to the Defendants' Motion for Partial Summary Judgment on February 24, 2011.

For the reasons stated below, this Court finds that the Defendants' Motion for Partial Summary Judgment should be denied. The Court further finds that the Plaintiffs' Motion for Partial Summary Judgment should be granted.

Factual Background

A deed dated September 4, 1995, was created by the late Calvin C. Waid. In this deed, Calvin Waid conveyed real property to his children, Roger Waid and Dana Waid Young. Calvin Waid died on July 31, 1996. Thereafter, Roger Waid died on November 29, 2009. Dana Waid executed a deed on January 28, 2010, in which she conveyed the same property to Johnny R. Young and Jaron Young as joint tenants with right of survivorship, with a reservation of a life estate for Ms. Young. The Complaint in this matter was filed by the Plaintiffs on August 26, 2010. The Plaintiffs allege that Roger Waid and Dana Waid Young were conveyed the property

Stump

as tenants in common and not as joint tenants with a right of survivorship. As such, argue the Plaintiffs, the Defendant, Dana Waid Young, improperly conveyed property that she did not fully own.

The Plaintiffs and Defendants then filed their opposing motions for partial summary judgment requesting this Court to determine if the deed executed by Calvin Waid created a joint tenancy with right of survivorship or a tenancy in common.

Defendants' Motion for Partial Summary Judgment

The Defendants argue that their motion for partial summary judgment should be granted because the deed created a joint tenancy with a right of survivorship between Roger Waid and Dana Waid Young. Specifically, the Defendants assert that the habendum clause of the deed is not in conflict with the granting clause. The Defendants maintain that the language in the habendum clause "their heirs and assigns forever" is not, in any way, in conflict with the granting of a joint tenancy with a right of survivorship. Instead, Defendants argue that the focus of the habendum clause was the retention of the life estate by Calvin Waid and that the interest of Roger Waid and Dana Waid Young was a remainder interest which vested in Calvin's children upon his death.

The Defendants further assert that the language in the granting clause of the deed could not be more clear, so as to overcome the statutory presumption in favor of construing joint tenancies and tenancies in common without a right of survivorship. The Defendants state that the grant was to "Roger C. Waid and Dana Waid Young, brother and sister, parties of the second part, or the survivor". The Defendants argue that this language clearly expresses the intent of Calvin Waid to create a joint tenancy with a right of survivorship.

The Defendants conclude that the granting clause of the deed sets forth a reservation unto the grantor of a life estate and grants a joint tenancy with a right of survivorship. The Defendants assert that the use of the words "or the survivor" simply can have no other meaning. Further, the Defendants argue that the habendum clause reiterates the reservation of the life estate with the remainder unto the parties of the second part, their heirs and assigns forever. The addition of the language "heirs and assigns forever" is not repugnant to the granting clause and the estate granted in the granting clause cannot be divested by the habendum.

Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs argue that their Motion for Partial Summary Judgment should be granted. The Plaintiffs allege that the deed in this matter was a conveyance of considerable family real estate from a father to his two children. The Plaintiffs maintain that there is nothing in the instrument except for the "or the survivor" in the heading of the deed which would lead anyone to consider the deed a survivorship deed. The Plaintiffs assert that there is none of the usual and customary language found in survivorship deeds.

Further, the Plaintiffs assert that the habendum clause of the deed is consistent with the language of the deed and entirely inconsistent with the creation of a joint tenancy. The Plaintiffs argue that the language "or the survivor" found in the heading or caption of the deed is mere surplusage, not uncommon where a secretary follows a template or types over an earlier deed.

The Plaintiffs assert that to construe the deed as creating a joint tenancy is to entirely disregard the lack of any language in the body of the deed and in the habendum clause indicating that it created a joint tenancy and further to disregard what would have been a father's natural and equal affection for each of this two children and their respective descendants. The Plaintiffs

submit that the strong statutory presumption in favor of construing a joint tenancy as a tenancy in common without right of survivorship has not been overcome by a clear and convincing showing that it was the intention of the late Calvin Waid to create a joint tenancy with right of survivorship in his two children.

The Plaintiffs conclude that the burden of proof is upon the Defendants to show that the deed manifestly creates a joint tenancy with right of survivorship before the presumption is overcome. As such, the Plaintiffs argue that the Court grant the Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment

The Plaintiffs also filed a response to the Defendants' motion for partial summary judgment. In their response, the Plaintiffs argue that the Defendants have misidentified the preamble of the September 4, 1995 deed, as the granting clause. The Plaintiffs assert that in the Waid deed, there is no inconsistency or repugnancy between the granting clause and the habendum clause. In fact, argue the Plaintiffs, the only unharmonious notes in the deed are the three words "or the survivor" in the preamble. The Plaintiffs note that common law survivorship no longer exists and W.Va. Code § 36-1-20 requires that an instrument must manifestly show that it creates a joint tenancy with survivorship. The Plaintiffs maintain that the Waid deed does not manifestly show this creation.

The Plaintiffs further argue that the Defendants have not carried the burden of proof in their motion and that the deed at issue conveyed the subject real estate to the late Roger Waid and his sister, Dana Waid Young, as tenants in common.

Summary Judgment Standard

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." On a Motion for Summary Judgment, the question to be decided is whether there is a genuine issue of fact, not how that issue should be determined. If there is no genuine issue as to material fact, summary judgment should be granted. But where there is a genuine issue as to material fact, summary judgment must be denied. A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact. Any doubt as to the existence of such issue is to be resolved in favor of the nonmoving party. Syllabus Point 6, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 133 S.E.2d 451 (1995) provides:

> Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

"Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329

(1995).

While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer "some 'concrete evidence from which a reasonable...[finder of fact] could return a verdict in...[her] favor' or other 'significant probative evidence tending to support the complaint.'" *Wriston v. Raleigh County Emergency Services Authority*, 518 S.E.2d 650, 662 (1999) (citations omitted).

The West Virginia Supreme Court of Appeals has explained the methods available to the nonmoving party once the burden of production shifts: "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule(f) of the West Virginia Rules of Civil Procedure." Syl. pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Analysis

West Virginia Code § 36-1-19 provides:

> When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descent or be disposed of as if he had been a tenant in common.

Further, West Virginia Code § 36-1-20 provides, in part:

> The preceding section [§ 36-1-19] shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons

> in their own right, when it *manifestly appears* from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others. (Emphasis added)

In *Lieving v. Hadley,* 188 W.Va. 197, 423 S.E.2d 600 (1992), the Supreme Court of Appeals of West Virginia found that there is a strong presumption in favor of construing joint tenancies as tenancies in common without a right of survivorship; however, that presumption can be overcome by a clear and convincing showing that the intention of the parties was to create a joint tenancy with right of survivorship.

Further, the Supreme Court has held that what is in effect a presumption of tenancy in common does not control if there are words indicating survivorship was intended as provided for in § 36-1-20. *Rastle v. Gamsjager*, 151 W.Va. 499, 153 S.E.2d 403 (1967). Additionally, the Supreme Court has found that tenancy is presumed to be tenancy in common instead of joint tenancy unless contrary intention to create joint tenancy sufficiently appears. *DeLong v. Farmers Building and Loan Association*, 148 W.Va. 625, 137 S.E.2d 11 (1964).

In this matter, the deed conveyed by Calvin Waid to his children, Roger Waid and Dana Waid Young, has a granting clause which states:

> That for an in consideration of love and affection the party of the first part has for the parties of the second part, the party of the first part being the parent of the parties of the second part, the said party of the first part does hereby grant, and convey unto the parties of the second part, with COVENANTS OF GENERAL WARRANTY of title, a remainder interest in and to that certain Real estate situate Anthony Creek District, Greenbrier County, West Virginia. . .

The habendum clause further provides:

> TO HAVE AND TO HOLD unto the party of the first

> part for his life only and at his death the remainder over unto the parties of the second part, their heirs and assigns forever.

The Defendants maintain that the granting clause reads:

> This deed with reservation of life estate, made and entered into on this 4th day of September, 1995, by and between Calvin C. Waid, widower party of the first part, and Roger C. Waid and Dana Waid Young, brother and sister, parties of the second part, or the survivor;

The Defendants ask this Court to find that the above-stated clause clearly expresses the intent of the Grantor, Calvin Waid, to create a joint tenancy with a right of survivorship. However, the clause "or the survivor" only appears once in the "Parties" section of the deed, and this is not sufficient to create a manifest intention of Calvin Waid to create a joint tenancy with right of survivorship. Instead, in the granting clause in body of the deed, it appears that the grantor wished to provide the estate to Roger Waid and Dana Waid Young, and their heirs and assigns forever.

This Court must find that the presumption of a tenancy in common has not been overcome in this matter. There is only one instance of language which could possibly be construed to create a joint tenancy. This is insufficient to rebut the statutory presumption, and as such, this Court determines that the deed conveyed by Calvin Waid created a tenancy in common and not a joint tenancy with right of survivorship. For this reason, this Court must grant the Plaintiffs' Motion for Partial Summary Judgment. Further, this Court must deny the Defendants' Motion for Partial Summary Judgment.

Ruling

This Court finds that the Defendants have failed to make a clear and convincing showing

that Calvin C. Waid intended for the deed to convey property to Roger Waid and Dana Waid Young as joint tenants with right of survivorship. As such, this court must presume that Calvin Waid intended the property conveyed to the parties as tenants in common. For this reason, this Court must GRANT the Plaintiffs' Motion for Partial Summary Judgment and DENY the Defendants' Motion for Partial Summary Judgment.

The Clerk is ORDERED to forward a copy of this Order to the parties and their Counsel at their respective addresses of record.

Entered this 20th day of April, 2011.

James J. Rowe, Judge
Eleventh Judicial Circuit

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA
IN RE:

BRIAN WAID, DANA WAID
& BRANDON WAID,
Plaintiffs,

And

C.A. No.: 10-C-181(R)

DANA WAID YOUNG, JOHNNY R. YOUNG
& JARON YOUNG,
Defendants,

ORDER

On this the 3rd day of May, 2011 came the Defendants, Dana Waid Young, Johnny R. Young and Jaron Young and moved the Court to make the April 20, 2011 Order, granting the Plaintiff's Motion for Partial Summary Judgment a Final Order. Finding that there is no just reason to delay and that a final determination on the issues presented would be in the best interest of the parties for a final resolution of all the issues presented.

The Court does hereby order and designate the Court's April 20, 2011 Order a Final Judgment on the issues presented and ruled upon.

SO ORDERED,

CIRCUIT COURT GREENBRIER CO., W.VA.
MAY 06 2011
LOUVINORE ARBUCKLE, CLERK

May 6, 2011
DATED

JAMES J. ROWE, JUDGE

A True Copy:
ATTEST:

Louvinore Arbuckle
Clerk, Circuit Court
Greenbrier County, WV

By _____
Deputy

C. Stump