# STATE OF MICHIGAN

# COURT OF APPEALS

---

JAMES S. MCCORMICK,

Plaintiff/Counter Defendant - Appellant,

and ELIZABETH A. HOCHSTADT,

Plaintiff/Counter Defendant,

v

REBECCA MCCORMICK and SCOTT GRIFFIN,

Defendants/Counter Plaintiffs/Third Party Plaintiffs/Cross Plaintiffs-Appellees/Cross-Appellees,

v

MARTHA FRENCH, a/k/a MARTHA JEAN MCCORMICK,

Defendant/Cross Defendant/Cross-Appellant,

v

WILLIAM MCCORMICK,

Defendant/Cross-Defendant-Cross-Appellant,

v

HOCHSTADT FAMILY TRUST, UAD 11/22/2005, by LAWRENCE R. HOCHSTADT and ELIZABETH A. HOSCHTADT, Trustees,

Third Party Defendants.

---

UNPUBLISHED
March 16, 2010

No. 283209
Livingston Circuit Court
LC No. 06-022144-CZ

Before: K. F. Kelly, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

In this property dispute, plaintiff/counter defendant James McCormick[1] appeals as of right the trial court's order granting summary disposition in favor of defendants/counter plaintiffs Rebecca McCormick and Scott Griffin.[2] We affirm.

## I. Basic Facts

The property at the center of this litigation is a peninsula, about 25 acres large that extends into Bennett and Hoisington Lakes, located in Livingston County, Michigan. The land is largely non-developable because much of it consists of protected wetlands, sits partially on a flood plain, or is under water. The McCormicks used the property for their family residence and, prior to 1987, rented out cabins located on the property to vacationers. In December 1988, Beulah McCormick, who continued to reside on the property after her children moved away, created her last will and testament. With regard to the subject property, Article V of her will stated:

> I devise to my daughter, Rebecca Lynne McCormick, all that [Livingston County real property] . . . for her life . . . , provided, however, that her life interest in the property shall terminate upon either her death or the unanimous agreement of all my then living children and in such event, I devise the property to my then living children.

Beulah passed away in May of 2002. Her five children survived her: Rebecca McCormick, who currently resides on the property, Elizabeth Hochstedt, William McCormick, Martha French, and James McCormick.

Beulah's will was entered into probate and a petition was filed for construction of the will. In September 2004, probate court Judge Susan L. Reck determined that Article V "clearly creates a life estate in favor of Rebecca . . . subject to termination upon either death of Rebecca or unanimous agreement of all five beneficiaries of the estate." See *In re Estate of McCormick*, order of the Livingston County Probate Court, issued September 29, 2004 (file no. 02-05960-DE). This order was not appealed.

Consistent with Beulah's will, the representative of Beulah's estate executed a quitclaim deed granting a tenancy in common to all five siblings, and all as remaindermen, for the property, subject to Rebecca's life estate. Specifically, the deed, dated March 3, 2005, stated,

> Robert E. Parker, Personal Representative of the Estate of Beulah I. McCormick, Deceased . . . Quit Claims to Rebecca McCormick, a single woman, Elizabeth A.

---

[1] Plaintiff/counter defendant James McCormick is referred to as plaintiff throughout this opinion.

[2] Defendants/counter plaintiffs, Rebecca McCormick and Scott Griffin, are referred to singly as defendant or jointly as defendants.

> Hochstadt, a married woman, William M. McCormick, a single man, Martha J. French, a single woman, and James S. McCormick, a single man, all as tenants in common, . . . respectively, all as remaindermen with a Life Estate reserved unto Rebecca McCormick, a single woman [f]or [the subject] land . . . .

A second page of the deed further stated that the land was being conveyed under certain terms and conditions. It stated,

> Subject to an Order entered by Livingston County Probate Judge Susan L. Reck on September 29, 2004 in the Estate of Beulah L. McCormick, deceased, file no. 02-05960-DE wherein it states as follows: "It is further ordered that Article V, paragraph 2 of decedents' will, previously admitted, clearly creates a life estate in favor of Rebecca Lynne McCormick subject to termination upon either death of Rebecca Lynne McCormick or unanimous agreement of all five beneficiaries of the estate.

Subsequently, in May of 2006, Rebecca sought to sell her life estate and one-fifth remaindermen interest to Scott Griffin. As part of the agreement, Griffin indicated an intention to acquire the remainder interests of Rebecca's other siblings and it was agreed that Griffin would pay the costs of partition litigation.

Plaintiff, joined by Elizabeth, brought suit seeking to block the sale of the property to Griffin and moved for summary disposition seeking partition of the property. They argued that a unanimous agreement to terminate the life estate had been reached because all the siblings unanimously agreed to sell the property. Defendants counterclaimed and moved for summary disposition in their favor.[3] They argued that Rebecca was entitled to partition or judicial sale of the property and that plaintiffs could not bring an action for partition because they have no possessory interest in the subject land. Defendants also asserted that there had been no unanimous agreement to terminate Rebecca's life estate.

Sometime before the trial court issued its ruling, plaintiffs filed a petition to reopen the probate proceedings.[4] Plaintiffs requested that the probate judge clarify or amend the deed to state that a unanimous agreement to sell the property is the same as a unanimous agreement to terminate Rebecca's life estate. Apparently, plaintiffs had discovered a letter written by now Judge Archie C. Brown, the drafter of Beulah's will, which described the meaning of Article V. The letter was a typical client letter meant to explain the meaning of the will to Beulah. With regard to Article V, Judge Brown wrote, "In the event that Rebecca were to die or in the event she agrees with her brothers or sisters to sell the property, then her life estate shall terminate and

---

[3] Defendants' counterclaim asserted claims against William and Martha, who were both named as defendants in plaintiffs' original complaint, and also against the Hochstadt Family Trust and its trustees, which was not named in the initial complaint.

[4] The probate court proceedings are not part of the lower court record. However, the parties indicate in their briefs on appeal, and during oral argument below, that there was a motion to reopen the probate proceedings.

the property will be owned in equal share by the then living children . . . ." In addition, a *de benne esse* deposition of Judge Brown was conducted on June 14, 2007, during which he confirmed his understanding of the will to mean that if the siblings unanimously agreed to sell the property the life estate would terminate. The probate court had not considered the letter or Judge Brown's testimony when it issued its order of partial construction in September 2004. Nonetheless, the probate court refused to grant plaintiffs' request.

On December 28, 2007, the trial court in the instant action entered a judgment dismissing plaintiffs' partition suit, ruling that they lacked standing to bring such an action, and granted summary disposition in defendants' favor. Because the land could not be physically divided, the trial court ordered that the property be sold consistently with MCR 3.403. This appeal followed.

## II. Standards of Review

We review a trial court's ruling on a motion for summary disposition de novo. *Transou v City of Pontiac*, 283 Mich App 71, 72-73; 769 NW2d 281 (2009). A motion under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009). In conducting this review, we must view all the admissible evidence, including admissions, depositions, and other documentary evidence, in the light most favorable to the non-moving party. *Transou*, *supra* at 73. A genuine issue of material fact exists if the record leaves open an issue upon which reasonable minds could differ. *Cummins*, *supra* at 689.

## III. Agreement to Terminate Life Estate

Plaintiff first argues that there was a question of fact as to whether the parties had agreed to terminate Rebecca's life estate and, therefore, the trial court erred by granting summary disposition. According to plaintiff, the language in the deed requiring a unanimous "agreement to terminate" Rebecca's life estate is synonymous with a unanimous agreement to sell the property, and thus both circumstances would trigger the condition in the deed. In support of his argument, plaintiff points to the drafter's letter that indicated that a unanimous agreement to sell the property would amount to an agreement to terminate the life estate. We cannot agree with plaintiff.

Plaintiff's argument requires us to look to the language of the deed. We must read a deed as a whole in order to determine the grantor's intent. *In re Rudell Estate*, ___ Mich App ___ ; ___ NW2d ___ (2009). "The general rule is that the controlling intent is that which is expressed in the instrument, rather than any belief or secret intention of the party or parties which may have existed at the time of execution." *Id*. (quotation marks and citation omitted). If the language of a deed is clear and unambiguous, then we must apply it as written. *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 216; 731 NW2d 472 (2007).

Here, the quitclaim deed was executed after the probate court had entered its order of partial construction. The first page of the deed states:

> Robert E. Parker, Personal Representative of the Estate of Beulah I. McCormick, Deceased . . . Quit Claims to Rebecca McCormick, a single woman,

> Elizabeth A. Hochstadt, a married woman, William M. McCormick, a single man, Martha J. French, a single woman, and James S. McCormick, a single man, all as tenants in common, . . . respectively, all as remaindermen with a Life Estate reserved unto Rebecca McCormick, a single woman [f]or [the subject] land . . . .

The second page of the deed states that the land was being conveyed under certain terms and conditions and incorporates the probate court's language interpreting Beulah's will. It states:

> Subject to an Order entered by Livingston County Probate Judge Susan L. Reck on September 29, 2004 in the Estate of Beulah L. McCormick, deceased, file no. 02-05960-DE wherein it states as follows: "It is further ordered that Article V, paragraph 2 of decedents' will, previously admitted, clearly creates a life estate in favor of Rebecca Lynne McCormick subject to termination upon either death of Rebecca Lynne McCormick or unanimous agreement of all five beneficiaries of the estate.

Clearly, the language of the deed grants a tenancy in common to all five siblings, all as remaindermen, of the property, subject to Rebecca's life estate. The deed also specifically incorporates the language from the probate judge's order, indicating that Rebecca's life estate is "subject to termination upon either death of Rebecca or unanimous agreement of all five beneficiaries of the estate." This language is plain and unambiguous. Rebecca must pass away or all five siblings must unanimously agree to terminate Rebecca's life estate in order for it to end. Although the deed says nothing about how, or in what form, this unanimous agreement may arise, it is plainly obvious that there must be a unanimous agreement between all the siblings to terminate her life estate. It does not state, nor can it be inferred, that a unanimous agreement to sell the property would suffice as a unanimous agreement to terminate Rebecca's possessory interest. Thus, plaintiff's attempt to create a question of fact out of the language of the deed must fail. Moreover, while all the siblings may have agreed to sell the property, although not on the same terms, it is unequivocal that Rebecca never agreed to terminate her life estate. Thus, there is also no question of fact remaining with regard to whether the siblings reached a unanimous agreement to terminate Rebecca's life estate.

Further, plaintiff's reliance on the drafter's letter fails for the same reasons. The crux of the drafter's letter and his *de bene esse* deposition with regard to Beulah's will, was that if Rebecca agreed with her brothers and sisters to sell the property, then the life estate shall terminate and the property would be owned in equal shares between the siblings. However, this Court is not permitted to look outside the four corners of a deed if its language is plain. *In re Rudell Estate*, *supra* at ___ ; *Minevera Partners*, *supra* at 216. It would be inapposite to our judicial role to view the drafter's letter and deposition testimony as evidence that an unanimous agreement to sell is synonymous with a unanimous agreement to terminate the life estate. We will not reach so far in order to create a question of fact.

## IV. Partition

Plaintiff next argues that the trial court was without legal authority to grant summary disposition in defendants' favor as to defendants' counterclaim for partition. According to plaintiff, defendants could not move for partition because remainder interests cannot be forced

into sale and the current dispute is not over possession, which partition is meant to address. We disagree.

An action for partition is appropriate where a person has "an estate in possession," such as a life estate. MCL 600.3308. Further, a person who holds all of the current possessory interests and an expectancy interest, like Rebecca, may maintain an action for partition. MCL 600.3316. Thus, because Rebecca has a life estate and is a remaindermen of the subject property, she is entitled to maintain an action for a partition. MCL 600.3308; MCL 600.3316.

Further, *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990) does not support plaintiff's argument as he contended below and on appeal. That case is factually distinguishable from the present matter. In *Albro*, the Michigan Supreme Court noted that the dual contingent remainders of a joint tenancy with full rights of survivorship are indestructible. *Id*. at 276. However, the principles governing joint tenancies with full rights of survivorship are inapplicable here; that type of possessory interest is simply not implicated in this case. Here, the remainderman interests are clearly defined and the type of possessory interest involved, a life estate, does not create indestructible dual contingent remainders. The trial court did not exceed its authority.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ William C. Whitbeck