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