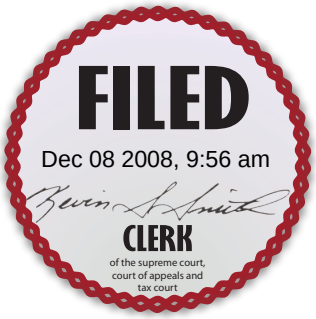

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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE ESTATE OF DAVID E. HILLSAMER, BY MURIEL C. HILLSAMER, PERSONAL REPRESENTATIVE, Appellant-Plaintiff, vs. SUN TRUST BANK, AS TRUSTEE OF REITA R. HUTCHINS TRUST; CONNIE RAUTENKRANZ; ARLIE JOHN HILLSAMER, THROUGH HIS ATTORNEY-IN-FACT, PHOEBE M. HILLSAMER; PATRICIA SPAHN; AND RE/MAX REALTY, Appellees-Defendants.	)	No. 53A01-0803-CV-141

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Stephen R. Galvin, Judge
Cause Nos. 53C04-0506-PL-01183, 53C06-0506-PL-01183 & 53C07-0506-PL-01183

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

The Estate of David E. Hillsamer ("the Estate of David"), by his widow and personal representative Muriel C. Hillsamer, appeals the trial court's grant of summary judgment in favor of Sun Trust Bank as trustee of the Reita R. Hutchins Trust, Connie Rautenkranz, Patricia Spahn, and Re/Max Realty. An agreement three siblings entered into in 1974 regarding ownership of approximately 150 acres of land in Monroe County, Indiana, limits the exercise of an option to purchase that land to the siblings while they were alive. The siblings are now dead. Accordingly, the estate of one of those siblings cannot now exercise his option to purchase the land. We therefore affirm the trial court.

Facts and Procedural History

In 1974, three siblings owned as tenants in common a 153.72-acre tract of land in Monroe County, Indiana, in the following shares:

Vera Hillsamer Hutchins 40%

David E. Hillsamer 30%

A. John ("A.J.") Hillsamer 30%

This property was deeded to them upon the death of their father, John G. Hillsamer. On May 6, 1974, the three siblings entered into a Family Agreement, which contains the following pertinent terms and conditions:

> The parties . . . are mutually desirous of continuing the ownership of the property and among themselves have agreed as follows:
>
> The ownership of each of the parties shall be as a tenancy in common which the parties understand gives their heirs and legal representatives rights of inheritance. . . .
>
> Subject to the right of the parties to mutually rescind this agreement by the unanimous consent of all three, it is now agreed that *the property shall be held intact during the lifetimes of all three parties*. The survivors or survivor, should two of the parties die in or as a result of a common catastrophe or accident, shall have the first right and option to buy the interest of the deceased parties under the following terms and conditions:
>
> The 40% share of Vera Hillsamer Hutchins may be purchased at a price of $20,000.00; the 30% share of David E. Hillsamer may be purchased at a price of $15,000.00; and the 30% share of A. John Hillsamer may be purchased at a price of $15,000.00, or in the alternative, the respective shares may be purchased at the appraised value fixed as of the date of death of one of the decedents if the appraised value is less than the proposed purchase price. Putting it another way, the parties have agreed to place a maximum price as indicated for each of their respective shares and also a lesser price if the appraised value of the interest is below the maximum price which the parties have agreed upon.
>
> The parties mutually agree that each shall have the right to occupy agreed upon portions or parcels of the property during the continuance of this agreement.
>
> The parties agree to confine the use of the property to farming, forestry, residential and similar uses . . . .
>
> The parties agree not to alienate their respective interests in the property . . . without the consent of each of the other parties.
>
> The parties agree to share the income or net proceeds and to contribute to the costs of maintaining the property in proportion to their respective proportionate ownerships.

> In making this agreement the parties express their desire to continue in the ownership of their father's land each believing that land is important and that this family common interest is well worth preserving. By the same reasoning, these parties understand that this is not likely to be a profitable venture for them individually or as a group but, nevertheless, believe that it will provide a sense of security and peace of mind.

Appellant's App. p. 31-33 (emphasis added).

On May 25, 1976, the three siblings received a deed to an additional 7.04 acres, which was made subject to the Family Agreement by the terms of the deed. In March 1979, A.J. conveyed by deed his 30% interest in thirty-five of the original 153.72 acres to Vera and David. This left Vera owning a 55% interest and David owning a 45% interest in the thirty-five acres. However, the three siblings still owned their 40%, 30%, and 30% respective shares of the remaining 120 acres of the property.

In February 1999, the three siblings deeded a five-acre tract to A.J. and his wife, Phoebe, so that they could own the land free and clear and build a house upon the land.

Vera died on September 23, 2000, leaving her interest in the property in trust for the benefit of her daughter, Reita R. Hutchins, during her lifetime, to be administered by Sun Trust Bank as the personal representative of Vera's estate.

In 2002, A.J. listed his five-acre tract for sale with Re/Max Realty. Title Plus, the title company handling the sale, prepared a document entitled Termination of Family Agreement to be executed by the two surviving siblings, David and A.J., as well as by the local personal representative of Vera's estate. Title Plus required this document to be signed in order for A.J. and the buyers to close on the sale of the five acres. A.J. signed the document at the closing on October 12, 2002, and the local personal representative of

Vera's estate signed it with court approval on November 12, 2002. Re/Max realtor Patricia Spahn went to David's house on October 17, 2002, to acquire his signature. However, David's wife, Muriel—at David's direction—signed David's name to the Termination of Family Agreement because his handwriting was poor and there was no clipboard upon which to sign the document. Re/Max realtor Connie Rautenkranz then notarized the document after Spahn returned to the Re/Max office. Five months later, in March 2003, a doctor deemed David no longer able to make wise decisions regarding his health, finances, and other matters. In May 2003, Muriel was appointed guardian over David.

David passed away on November 6, 2003, leaving his property to Muriel.

On June 16, 2005, the Estate of David by Muriel filed a Complaint to Set Aside Termination of Family Agreement due to Misrepresentation, Inaccuracy of Notary, and Lack of Mental Capacity ("Complaint") against Sun Trust Bank as trustee of the Reita R. Hutchins Trust ("Sun Trust"), Connie Rautenkranz, Patricia Spahn, Re/Max Realty (collectively, "the Re/Max defendants"), and A.J. Hillsamer through his attorney-in-fact, Phoebe M. Hillsamer. A.J. passed away on September 1, 2005, and Phoebe was substituted in place of A.J.

In the Complaint, the Estate of David alleged, among other things:

> 6. That in October, 2002, an individual later known as Patricia Spahn, came to the home of David E. Hillsamer and represented to Mr. Hillsamer that she had a Quit Claim Deed for him to sign. It was represented that the Quit Claim Deed was for him to quit claim any interest he may have in 5 acres of real estate, which was originally part of the 153.72 acres, and which was to be quit claimed to A. John Hillsamer and his wife, Phoebe Hillsamer. All that Patricia Spahn had with her at the time that she came to the home of David E. Hillsamer was the back page of a

> document that just had a place for David E. Hillsamer to sign above his name. No other writing was contained on the page, and no other pages were presented.
>
> 7. That David E. Hillsamer did not sign the document, but his wife, Muriel C. Hillsamer, did sign his name to the document. The only other person in the room besides David E. Hillsamer at the time that Muriel Hillsamer executed the document, was Patricia Spahn. No notary was present at the time that the document was signed.
>
> * * * * *
>
> 16. That due to the above allegations, the Termination of Family Agreement document should be set aside, as, it was presented to David E. Hillsamer, under the representation that it was the back page of a Quit Claim Deed, that the document was not signed by David E. Hillsamer, but rather by Muriel Hillsamer, his wife. Further, the document was not signed in the presence of a notary . . . .

Id. at 29-30. Accordingly, the Estate of David requested that the Termination of Family Agreement be set aside, the Family Agreement be reinstated in its entirety, the Estate's attorney fees and costs be paid, those responsible for the intentional misrepresentation be subject to punitive damages, and for all other proper relief. The Estate of David also filed a motion for summary judgment, which it eventually withdrew. The Re/Max defendants filed their own motion for summary judgment, as did Sun Trust. A summary judgment hearing was held on February 21, 2007.

On March 7, 2007, the trial court granted the Re/Max defendants' and Sun Trust's motions for summary judgment. The order provides, in pertinent part:

> 5. The Estate [of David] contends that the Family Agreement gives the Estate the right to purchase the interests of the other two signatories for the amounts set forth above. This interpretation of the Family Agreement is erroneous. The Agreement clearly states that "the survivors or survivor" shall have the first right and option to buy an interest of a deceased party. It does not provide that the <u>estate</u> of a party has the right to purchase the interest of another deceased party. If contract language is clear and

> unambiguous, the court will give the language its plain and ordinary meaning. The applicable language in the Family Agreement is clear and unambiguous.
>
> 6. It should also be noted that acceptance of the Estate's interpretation of the Family Agreement would lead to absurd consequences not intended by the parties. For instance, the estates of the other two parties would have an equal right to purchase the Estate's interest if they elected to do so. If all three of the estates elected to buy the interests of the other estates, whose claim would have precedence?
>
> 7. In order to state a cause of action, a plaintiff must establish that the plaintiff has been damaged by a defendant. However, none of the Defendants' alleged acts could possibly affect the Estate's ability to purchase the property. The Estate's counsel concedes that, if the Court does not interpret the Agreement to allow the estate of a party to purchase the interest of another deceased party at the price set forth in the Family Agreement, then the Estate has not been damaged. Therefore, the Motion for Summary Judgment should be granted.
>
> 8. The ruling on the issue of the interpretation of the Family Agreement is dispositive. However, the Court also accepts the arguments set forth in the Defendants' Memorandum as additional rational[e] for granting the Motion for Summary Judgment.[1]

Id. at 25-26.

On April 3, 2007, the Estate of David attempted to appeal this ruling; however, the appeal was dismissed for lack of a final, appealable order. *Estate of Hillsamer v. Sun Trust*, Cause No. 53A01-0704-CV-172 (Ind. Ct. App. July 9, 2007) (unpublished order). Sun Trust then pursued a partition of the land as part of its counterclaim to the Estate of David's Complaint. On March 10, 2008, the trial court issued its order on partition, ordering that the 113-acre and 7-acre parcels be sold and the proceeds be divided pursuant to the three estates' ownership interests and that the 35-acre parcel be

[1] The Estate of David challenges this additional reason the trial court gave for granting summary judgment. However, we find paragraph eight to be mere surplusage. The preceding paragraphs are sufficient to support the trial court's grant of summary judgment in favor of the Re/Max defendants and Sun Trust, and we limit our analysis to those paragraphs.

partitioned according to the two estates' ownership interests. The partition order is stayed pending the Estate of David's appeal of the earlier summary judgment order.

Discussion and Decision

The Estate of David contends that the trial court erred in granting summary judgment to the Re/Max defendants and Sun Trust. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). When reviewing a trial court's grant of summary judgment, we apply the same standard used by the trial court. *Carlson v. Warren*, 878 N.E.2d 844, 850 (Ind. Ct. App. 2007) (citing *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1282 (Ind. 2006)). Summary judgment "shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). Where, as here, the question presented is a pure question of law, we review the matter *de novo*. *See Isanogel Ctr., Inc. v. Father Flanagan's Boy's Home, Inc.*, 839 N.E.2d 237, 242 (Ind. Ct. App. 2005), *trans. denied*.

Specifically, the Estate of David argues that the trial court erred, as a matter of law, in construing the Family Agreement to limit exercise of the purchase option to the parties while they were alive. Rather, the Estate asserts that interpreting the Family Agreement to allow it to purchase a deceased sibling's share well below current market value facilitates the Family Agreement's stated purpose of keeping the property in the

family and maintaining its rural character. This requires us to analyze the Family Agreement, which siblings Vera, David, and A.J. executed in 1974.

The goal of contract interpretation is to ascertain and give effect to the parties' intent as reasonably manifested by the language of the agreement. *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008). "[I]f the language is clear and unambiguous, it must be given its plain and ordinary meaning." *Id.* "Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions." *Shorter v. Shorter*, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006).

Here, the Family Agreement defines the "parties" as Vera, David, and A.J. and then specifies "that the property shall be held intact *during the lifetimes of all three parties.*" Appellant's App. p. 31-32 (emphasis added). Additionally, the agreement provides that "the survivors or survivor, should two of the parties die in or as a result of a common catastrophe or accident, shall have the first right and option to buy the interest of the deceased parties under the following terms and conditions . . . ." *Id.* at 32.

By the plain and unambiguous language of the Family Agreement, the option to purchase could only be exercised by Vera, David, or A.J., *i.e.*, the survivors, and not by their estates. The Estate of David, which is represented by David's widow Muriel, was not a party to the Family Agreement, and the Estate of David does not qualify as a "survivor" under the Family Agreement. Accordingly, the Estate of David is not entitled to purchase Vera's and A.J.'s former interests in the 153 acres at the greatly reduced prices of $20,000 and $15,000, respectively. In addition, by the very language of the

Family Agreement, the parties only intended to keep the property intact during their lifetimes and not any longer.

Nevertheless, the Estate of David attempts to insert an ambiguity into the Family Agreement by asking if one of the three siblings died and both surviving siblings wanted to purchase the deceased sibling's share, which sibling would receive precedence? However, just because there might be ambiguity in some hypothetical situation does not make the Family Agreement ambiguous for our purposes. Rather, the Family Agreement is clear: the parties could only exercise the purchase option while they were alive, and none of the parties did so. The parties' estates cannot do so now.

Because under the terms of the Family Agreement, the estates of the parties may not exercise the option to purchase, the Estate of David simply cannot prove that it has been damaged by the improper execution of the Termination of Family Agreement. As such, the facts surrounding David/Muriel's execution of that document are irrelevant to this appeal. Put another way, it makes no difference whether the Termination of Family Agreement actually terminated the Family Agreement because the Family Agreement ended by its own terms. We therefore affirm the trial court's grant of summary judgment in favor of the Re/Max defendants and Sun Trust.[2]

Affirmed.

KIRSCH, J., and CRONE, J., concur.

[2] Given our ruling, we do not need to reach the defendants' Rule against Perpetuities argument as well as the Estate of David's argument regarding damages against Sun Trust.