

Estate of Whitaker v. Bennett, Trustee of Earnest Whitaker Family Trust, No. 559-12-06 Wmcv (Howard, J., Apr. 24, 2008)

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**STATE OF VERMONT
WINDHAM COUNTY, SS.**

**ESTATE OF NORMA
SEDERQUIST WHITAKER,
Plaintiff,**

v.

**WINDHAM SUPERIOR COURT
DOCKET NO. 559-12-06 Wmcv**

**JANICE BENNETT, TRUSTEE
OF ERNEST WHITAKER
FAMILY TUST,
Defendant.**

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Norma Whitaker and Ernest Whitaker, now both deceased, lived together as a married couple at [*address redacted for electronic publication*], Brattleboro, a residence conveyed to the Ernest Whitaker Family Trust (Trust) during Ernest's lifetime. After Ernest died and Norma was a terminally ill patient at Thompson House Nursing Home, Norma initiated this action for injunctive relief to secure her access to the residence.¹ She also filed a Notice of Claim which was recorded in the Brattleboro land records to establish her homestead interest in the property. After Norma died, her executor initially sought to dismiss the suit but, before any action was taken, Defendant filed a

¹ The Court denied Norma's request for a temporary restraining order on 12/8/06 and again on 12/21/06 but ordered discovery on the remaining issue of Plaintiff's request for an accounting.

counterclaim for declaratory judgment to quiet title.² On that counterclaim, both parties have now filed motions for summary judgment.

Undisputed Facts

Ernest and his first wife Delores purchased the home at [redacted] in 1955. Delores died and Ernest originally established the Trust on May 3, 2000. Pursuant to the terms of the original agreement, Ernest was settlor, trustee and lifetime beneficiary, and he retained full powers to amend or revoke. The Trust provided that following Ernest's death and payment of his legal debts and final expenses, the assets would be distributed in equal shares to David Whitaker, Mark Whitaker and Erik Whitaker.

Ernest and Norma married on October 13, 2001 and lived together in the [redacted] home. On November 15, 2001, Ernest amended the Trust adding provisions to provide Norma after his death with "as near the same standard of living as she had while the Settlor was alive" provided the couple remained married during Ernest's lifetime. Ernest also increased the number of ultimate beneficiaries from three to four-adding Janice Bennett to the three already named. Ernest continued as settlor, trustee and lifetime beneficiary, with full powers to amend or revoke. Shortly thereafter, on December 6, 2001, Ernest conveyed the [redacted] residence to the Trust in a warranty deed which Norma also signed. On March 9, 2006, Ernest died and Janice Bennett became Trustee under the Trust terms. Prior to her death on February 9, 2007, Norma filed a homestead claim which the Trust declined to pay.

² On 8/14/07, the Court granted a preliminary injunction to facilitate the sale of the [redacted] property by ordering a release of the homestead claim and directing the homestead portion of the proceeds be placed in escrow pending final judgment.

Analysis

According to statute, the homestead of a natural person, whether for purposes of exemption from debt or for a spousal claim, “consists of a dwelling house, outbuildings and the land used in connection therewith, not exceeding \$75,000.00 in value, and owned and used or kept by such person as a homestead together with the rents, issues, profits and products thereof.” 27 V.S.A. § 101. When a person dies leaving a surviving spouse, the survivor is entitled to receive that interest in the decedent’s homestead, up to a value of \$75,000, of which the decedent “dies seised.” 27 V.S.A. § 105. To provide further protection for homestead interests, 27 V.S.A. § 141 provides that the conveyance of a person’s homestead interest during marriage is inoperative against a spouse’s homestead claim “unless the wife or husband join[ed] in the execution and acknowledgement of such conveyance.”

The statutes cited are part of a “remedial scheme to protect home ownership from loss to creditors, to conserve family homes and to save families from disintegration and secure their permanency.” *Estate of Girard v. Laird*, 159 Vt. 508, 510(1993)(citation and internal quotations omitted).³ However, although they are to be interpreted liberally to accomplish their remedial purpose, any construction of the homestead statutes beyond their terms is not justified. *Mercier v. Partlow*, 149 Vt. 523, 524-25 (1988); *In re Avery*, 41 B.R. 224, 225(D.Vt. 1984)(although liberal construction necessary to accomplish remedial purpose, should not be applied so as to permit fraud or imposition).

³ Although *Girard* opined that the then current homestead limit of \$30,000, which was already too small to conserve even modest homes, signaled an emphasis in modern times on preserving assets from creditors rather than conserving them for families, see *id.* at 515, the Court notes that the Legislature has raised the homestead limit to \$75,000. Another increase to \$180,000 is under consideration by the 2007-08 Legislative Session. See H21.

Against the backdrop of these statutes, the Court must determine whether Ernest died seized of any interest in the [redacted] home such that Norma's Estate may claim a homestead interest in it. Defendant contends that Norma gave up her homestead claim when she consented to allow Ernest to convey the home to the Trust. Plaintiff argues that Ernest died seized of the home notwithstanding its transfer because he retained virtually all powers of ownership as trustee and lifetime beneficiary with full power of revocation. Plaintiff does not contend that she was unduly influenced to sign the deed conveying the home to the Trust nor that Ernest acted with a fraudulent intent to deprive her of her homestead claim. Rather, Plaintiff's focus is on the nature of the controls Ernest retained after the conveyance. Alternately, relying on *In re Mainolfi*, 2005 VT 61, 178 Vt. 588(mem.), Plaintiff contends that Norma's consent was invalid because she did not yet have any vested right in the homestead to waive. The Court considers the last argument first.

Mainolfi involved a series of realty transactions. In the first, husband and wife both conveyed their interests in their own home to two nephews reserving a life estate for themselves. By a second deed, husband and nephews transferred title to the same home back to wife with a life estate for husband. Finally, wife's will, signed at the same time as the second deed, devised her estate to the nephews as tenants in common. After his wife died, the husband asserted a homestead claim pursuant to 27 V.S.A. §§ 101 and 105. Reasoning that husband had waived his homestead rights by signing the second deed, the nephews appealed when the superior court concluded that husband was entitled to his homestead interest. The Vermont Supreme Court affirmed explaining that the husband's homestead interest came into being only when his wife died seized of the marital

residence and that prior to her death, the husband could not waive his inchoate future interest in it. *Id.* at ¶¶ 6-7(citing *Mann v. Mann's Estate*, 53 Vt. 48, 54(1880)).

The Trust contends, and the Court agrees, that *Mainolfi* is distinguishable from the current case because it is undisputed that Ernest clearly owned the [redacted] home when he sought to convey it to the trust. In *Mainolfi*, neither spouse had any interest to convey at the time of the second deed. In contrast, Norma's signature on the conveyance must be considered in light of 27 V.S.A. § 141 and not as a naked waiver of her future interests. In this sense, the transfer in the current case is more akin to the first transfer the Mainolfis made to their nephews when they held full rights to the property and not like the second one in which the nephews sought to transfer the property back to wife without creating any future homestead rights in her husband.

Returning to the first issue of the effect of Ernest's retained powers on the outcome, Vermont courts have long recognized that a homestead right may exist in premises based only on equitable title. See *In re Avery*, 41 B.R. at 226 citing *Executor of Doane v. Doane and Trustee*, 46 Vt. 485(1874)(debtor may claim homestead exemption in property held for his benefit by trustee). In dower cases, the Vermont Supreme Court has also had occasion to consider the application of a surviving spouse's rights against property conveyed in trust by the deceased spouse during life. Of dower, the court explained, "[t]he statute gives the widow, at least, one-third of the personal estate, after the payment of debts, &c.; and this she cannot be deprived of by the will of her husband, not by jointure, *except at her election.*" *Thayer v. Thayer*, 14 Vt. 107, 120(1842)(emphasis added). Thus, as in homestead matters where a wife may give or withhold consent when the spouse seeks to convey property, although the statute

guarantees a widow certain rights, by her own actions she may elect a different distribution of family property. Instead of guaranteeing a surviving wife a certain measure of her husband's property, both schemes guarantee a survivor the choice to elect a statutory allotment or to agree to alternative testamentary arrangements.

In *Thayer*, a widow sought to recover her dower interest from property previously conveyed in trust to her husband's son. The trial court found that the husband had, with the expectation of soon dying, conveyed all his interest in real estate and personalty without consideration to his son in trust for that son and his siblings, all children by a former marriage, with an intent to defeat his present wife's interest in her share of the estate. *Id.* at 107. At the same time, the husband took back a lease from his son and secured to himself the possession and use of all the property so conveyed for use during his lifetime upon a nominal annual rent. *Id.* Reasoning that the conveyance operated as the husband's will because it was designed to devise his property at death and that the wife was denied her right of election thereby, the court concluded that "[t]he husband, so far as respects the widow, must be regarded, at the time of his death, as being the owner and having the seizin of the property in question." *Id.* at 123.⁴ See also *Nichols v. Nichols*, 61 Vt. 426(1889)(holding conveyance by deceased husband to children of former marriage inoperative against widow, even though it was given for consideration and without evidence husband retained any rights of control, because trial court found

⁴ *Thayer* includes an important discussion of the history and mechanics of coverture, the former system of law which defined and limited married women's rights, including the historic origins for both dower and homestead claims. As it explains, "[d]uring coverture the wife can acquire no property of her own, and if, when married, she has real estate, it thereby vests in the husband during coverture, and her personal estate in possession becomes his absolutely, and such as is in action is subject to his control. If she has no real estate of her own, she may, by his death, be left the object of common charity, unless provided for out of the husband's estate. Though, under our law, dower is limited to such lands as the husband died *seized of*, yet, if the right has existed during coverture, then it should be protected, and a conveyance, *with the intent* to defeat such right, would be fraudulent and void as against the widow, and as to her, the husband would die seized." *Id.* at 118(emphasis in the original).

husband conveyed the property in anticipation of imminent death and with intention to deprive wife of her rights of dower in property conveyed).

Though it maybe tempting to interpret *Thayer* to conclude that a widow's statutory rights will trump an end-of-life transfer by the deceased spouse when it reduces the survivor's share without reducing the transferor's lifetime control, in *Dunnett v. Shields*, 97 Vt. 419, 123 A. 626(1924), the Vermont Supreme Court plainly characterized *Thayer* as a case which depended on the trial court's opinion that the transfer "was made with the intent to defraud the oratrix of her dower in the lands." 97 Vt. at 425, 123 A. at 630(same construction applies to *Nichols*)overruled on other grounds, *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 264-67(1990). As the court explained,

...the *intent* in all such cases being the true test of the validity of the transaction. If it be done with a *fraudulent intent* as to the wife, the transaction is invalid, and she may assail the same under the statute. The *intended fraud* works the invalidity." [emphasis in original]

Id. at 428(citing *Green v. Adams*, 59 Vt. 602(1887)).⁵ Moreover, as the court emphasized, the intent to defraud cannot be inferred from the deceased spouse's knowledge that some diminishment of the survivor's interest would occur and must be found as a matter of fact. *Id.*

Dunnett, another dower case, reversed a decision to set aside a deceased husband's deed of trust even though he was diagnosed with an incurable disease, a stated purpose of the trust was to keep the greater part of the husband's estate intact for his own use during his lifetime, and the husband reserved the right to revoke the trust, in whole or

⁵ 14 V.S.A. § 473, a statute which has been in existence in some form at least since 1896, makes a voluntary conveyance by a husband of any of his real estate made during coverture and not to take effect until after his decease, and made with the intent to defeat his widow in her claim to her share of such real estate, void and inoperative to bar her claims. Under this statute, the husband dies seised of the real estate for the purpose of assigning and setting out the widow's portion.

in part, through out the remainder of his life. As in the present case, the trust instrument also contained provisions for providing an income to the settlor's wife during her lifetime while reserving the disposition of remaining assets under the settlor's direction until after her death.⁶ Holding that an improper purpose could not be inferred simply from the fact that the settlor had intended the trust property not be included in his estate and would avoid the exercise of his widow's statutory rights, and noting that it was within a husband's legal rights to provide for his widow by a transfer of property to trustees, the court concluded that the widow had no claim to invalidate the transfer because her husband had otherwise planned for her support. *Id.*; see also 14 V.S.A. § 465(providing means by which widow's dower may legally be barred including where husband settles jointure, or life estate, on spouse during life or provides alternative testamentary provisions). It made no difference to the court that Mr. Dunnett was able to retain virtual control and the full benefit of his assets until his death. The court's focus on the fact that Mr. Dunnett did not intend to leave his wife without any means, is also instructive because it emphasizes the statutory goal of protecting widows from impoverishment rather than ensuring them specific rights to marital property.

Applying the standards drawn from the precedents discussed herein, the Court rejects Plaintiff's focus on Ernest's retained powers as controlling. While it is undisputed that Ernest retained almost all of the incidents of ownership of the family home after it was conveyed to the Trust, the crucial relevant inquiry is whether Ernest intended to defraud Norma, an allegation she has clearly declined to make and which the parties' conduct contradicts. In the absence of an allegation of this kind, the Court notes that

⁶ Unlike the present case, the parties' homestead was specifically omitted from the transfer of other assets to the trust and Mrs. Dunnett's homestead claim would have been unaffected.

Ernest's intention not to defraud Norma can be inferred from his decision to amend the Trust to provide her lifetime support as well as from his decision to solicit Norma's consent to the transfer. Because Vermont's homestead laws do not guarantee the surviving spouse any homestead interest and permit the survivor to consent, as Norma did, to a transfer of homestead property beyond her reach, Ernest's actions did not violate the spirit of the law. Moreover, while it may now seem that Norma's consent was ill advised, the Estate makes no effort to withdraw it and the Court sees no reason to imply the withdrawal.

For the reasons set out above, and as a matter of law, the Court concludes that Plaintiff Estate cannot claim a homestead interest in the [redacted] home because Ernest did not die owning the property and there is no evidence he intended to defraud Norma of her rights by his conveyances. Accordingly Defendant's motion for summary judgment is **GRANTED** and Plaintiff's motion for summary judgment is **DENIED**.

Dated at Newfane, Vermont, this _____ day April, 2008.

David Howard
Presiding Judge