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FILED

Ronald [REDACTED])
Plaintiff)
vs.)
Paula [REDACTED])
Defendant)

2012 OCT -8 A 9 42

In the Court of Common Pleas
Case # 2008-CP-32 [REDACTED]

SETH A. CARRIGG
CLERK OF COURT
LEXINGTON, VA

VW

ORDER

This case requires the court to interpret a late World War II deed.

In February 1945, Thaxton [REDACTED] and Bessie [REDACTED], were both 29 years old, married with children. Two months earlier during the 1944 Christmas season, Hitler tried to split the Americans and British during his Ardennes offensive (the "Battle of the Bulge"). Once this attack was contained, matters stabilized on the western front. In the east, the Russians advanced in Poland, Hungary, and Czechoslovakia. News reels showed long lines of German soldiers surrendering and walking in columns towards prison camps as allied tanks, men and equipment sped in the opposite direction to the front. It seemed that Hitler would soon be defeated.

The Pacific War against the Japanese was different.

There were no corresponding films of surrendering Japanese soldiers. Most Japanese soldiers did not surrender; they fought to the death. Suicidal Japanese defensive actions at Guadalcanal, Tarawa, waves of Kamikaze planes plunging into Allied shipping during the Battle of Leyte Gulf off the Philippines, steered the American public with the knowledge that the Pacific War was a battle still to be won at great cost.

On February 17, 1945, American naval and marine forces attack Iwo Jima to secure the island for airfields that would allow fighter planes to protect the unescorted American bombers being savaged over Japan. Plans to invade Japan were still unsettled.

Six days later on February 22, 1945, TC executed a deed with this language:

"Know All Men by These Presents, That I, Thaxton [REDACTED] in the State aforesaid, of Lexington County, for and in consideration of the sum of Five Dollars, and the love and affection I have for my wife, Bessie [REDACTED], and the children I have begotten by her, and with the expectancy of entering the service of my Country in the present war to me paid by my Wife, Bessie [REDACTED], reserving to myself a life interest and estate in and to the lands and premises conveyed, in the State aforesaid of Lexington County, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Bessie [REDACTED], my said wife, as trustee of my said children begotten by her, for the use and benefit of my said children until the youngest shall attain the age of twenty-one years:" (Deed dated February 22, 1945, recorded February 23, 1945 in Deed Book 5-T at [REDACTED])

The next day, February 23, 1945, the United States Marines raised the American Flag on the summit of Mount Suribachi on the southern end of Iwo Jima and TC recorded the subject deed in the Office of the RMC for Lexington County in Deed Book 5-T at [REDACTED]

Plaintiff argues this deed reserved a life estate to TC and conveyed a remainder interest to his children. Defendants argue that Plaintiff has no interest in the property since the deed did not contain proper remainder/fee granting language.

The court requested an Amicus Brief concerning this unique legal dispute regarding trust deeds from University of South Carolina Law School Professor [REDACTED]

Professor [REDACTED] graciously agreed and filed his brief which was distributed to the parties for review and comment. Medlin's excellent brief frames and addresses the issues. A portion is repeated verbatim below:

Facts Assumed

Based on the documents provided to me by Judge Spence, I assume the following facts:

1. That the deed was validly executed and recorded, that the grantor thereof was competent at the time of execution and not subject to undue influence, fraud, or improper coercion, and that the strikethroughs in the document were made by the grantor.
2. That the grantor died on October 7, 1999, survived by the wife named in the deed and nine children from their marriage, all of whom had attained the age of 21 by the time of the grantor's death.
3. That the grantor's will was valid and, as probated, devised all of his probate property to his wife, with no specific reference to the property that is the subject of the deed.
4. That the grantor's wife died on January 23, 2004.¹

Question Presented

As I understand the question presented for purposes of this amicus brief, did the deed create a trust and, if so, what are the various interests of the parties?

Grantor's Intent

A basic rule of determining the estate created by a grant is to construe the grantor's intent, to the extent his intention can be accomplished under the law.²

Words of Inheritance

¹ I could not determine whether the grantor's wife died testate or intestate. The caption of the case lists the Estate of Grover [REDACTED] as a defendant; both memoranda list in the Factual Background Grover E. Chaney as one of the grantor's children. I cannot determine whether the defendant estate is that of the grantor or of his son Grover, with the son's initial being mis-rendered in the caption or in the body of the memoranda.

² See, e.g., *Windham v. Riddle*, 672 S.E.2d 578 (S.C. 2009); *Crystal Pines Homeowners Ass'n, Inc. v. Phillips*, 716 S.E.2d 682 (S.C. App. 2011). For example, even if a grantor intended to create an estate that violated the Rule Against Perpetuities, the grantor's intentions could not be honored; the Rule Against Perpetuities is a rule of law regardless of whether a grantor intends to violate it.

Prior to 1994, when the common law rule was changed by statute,³ a grantor had to include "words of inheritance" to convey a fee simple interest.⁴ Without these words of inheritance, the general rule was that the grantor conveyed only a life estate, even if the grantor intended to convey a fee simple estate. In effect, then, these words of inheritance created a rule of law, which could not be overcome by a grantor intending a different result if the grantor failed to include words of inheritance.

However, certain exceptions existed to the general rule requiring words of inheritance for the conveyance of an estate in fee simple. One such exception involved a deed in which the grantor intended to create a trust.

The South Carolina case law describing the "trust exception" to the words of inheritance requirement is sparse and not of recent vintage. The best exposition of the "trust exception" is contained in a law review article by the beloved and esteemed Professor David H. Means.⁵

In short, the "trust exception" to the general rule requiring words of inheritance for the conveyance of a fee simple provided that a grantor, who intended to do so, could convey a fee simple interest without using words of inheritance. As observed by Professor Means, this trust exception was recognized in England and in other American states.⁶ Professor Means also observed that the dearth of modern case law dealing with this issue resulted from "the abolition of words of inheritance in England and practically all American jurisdictions [rendering] the subject obsolete for the practitioner."⁷

The trust exception is based on the theory that trust issues are determined by courts sitting in equity, which are "not bound by the technicality of the common law, and in equity the trustee will be deemed to have whatever estate is necessary to fulfill the purposes of the trust."⁸

³ See S.C. Code Ann. § 27-5-130.

⁴ See S.C. Code Ann. § 27-7-10 for sample deed language. Although the common law required only the use of the term "heirs" to satisfy the "words of inheritance" rule, South Carolina grantors typically used the term "heirs and assigns," as shown in section 27-7-10. These are the words stricken through by the grantor in both the habendum clause and the warranty clause; nor did the granting clause contain words of inheritance.

⁵ *Words of Inheritance in Deeds of Land*, 5 S.C.L.Q. 313, 328-336 (1953) (hereinafter "Means article"). Although not needed by anyone familiar with Professor Means' reputation, the accuracy of the "trust exception" portion of the article is buttressed by the fact that Professor Means acknowledges the contribution thereto by his colleague, the equally esteemed and beloved Professor Coleman Karesh. See Means article, footnote 72.

⁶ Means article, p. 328.

⁷ Means article, p. 330.

⁸ Means article, p. 333, citing *Hunt v. Jolen*, 24 S.E.310 (S.C. 1896), and *Holder v. Melvin*, 91 S.E. 97 (S.C. 1917) (in which the court cites PERRY ON TRUSTS, section 312).

Thus, if the grantor of the deed *sub judice* intended to create a trust and to convey a fee simple legal estate⁹ to the trustee (his wife), the lack of words of inheritance do not prevent the accomplishment of his goal.

In construing the grantor's intent, the court might resort to a basic rule of deed construction,¹⁰ limiting its analysis to the language on the face of the deed if it is determined to be unambiguous, or it might resort to the use of extrinsic evidence if the deed is determined to be ambiguous.¹¹

Thus, the factual question becomes whether the grantor intended to convey a fee simple legal title to the trustee. That, in turn, depends on the extent of the beneficial estate the grantor intended to convey to the beneficiaries — his children by his wife.

Extent of Beneficial Interest Intended to Be Conveyed by the Grantor

The question of whether the grantor intended to create a trust is merely one matter for a factual determination. The related question is, assuming the grantor intended to create a trust, the extent of the beneficial interest the grantor intended to convey to the beneficiaries.¹² A corollary to the trust exception is that the estate conveyed to the trustee “shall not be carried further than the complete execution of the trust necessarily requires.”¹³

The language of the deed *sub judice* reserves a life estate in the grantor and grants to his wife “as trustee of my said children begotten by her, for the use and benefit of my said children until the youngest shall attain the age of twenty-one years.” If the court concludes that the grantor intended to create a trust, then the deed appears to expressly attempt to create a beneficial or equitable interest in the children, that follows the grantor's reserved life estate, “until the youngest....reaches twenty-one years.”

⁹ When a trust is created, the trustee holds the legal title and the beneficiaries hold the equitable or beneficial title. See, *Neel v. Clark*, 8 S.E.2d 740 (S.C. 1940).

¹⁰ See, e.g., *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 682 S.E.2d 252 (S.C. 2009).

¹¹ I will refrain from offering my opinion about factual matters, such as whether the deed is ambiguous, as I believe that is beyond the scope of this amicus brief.

¹² As noted above, the extent of the legal title conveyed to the trustee will be commensurate with the equitable title conveyed to the beneficiaries.

¹³ *Holder*, citing PERRY ON TRUSTS, section 312.

What is problematic, however, is that the grantor does not include express language concerning any interest in the property after the occurrence of both (1) the grantor's death and (2) the youngest child reaching 21. This again requires a construction of the grantor's intent.

Depending on the relevant facts, the grantor could have intended, among other possibilities, to:

1. Convey to the children the beneficial interest in the remainder after the youngest reached the age of 21 and the grantor died;¹⁴ or
2. Convey to the children a fee simple absolute interest (legal and beneficial interest, free from trust) in the remainder after the youngest reached the age of 21 and the grantor died;¹⁵ or
3. Reserve for himself or his estate the legal and equitable interest after the youngest child reached the age of 21;¹⁶ in other words, he never conveyed the legal or beneficial title remaining after the youngest child reached 21. In that event, the reserved "remainder" interest would pass as part of his probate estate to his wife, and would then pass according to her estate.¹⁷

¹⁴ This would raise the question of the time of vesting of this "remainder" interest. Again, this is a matter of construction of the grantor's intent, informed by the general rule of construction that prefers early vesting. See, e.g., *Holcombe-Burdette v. Bank of America*, 640 S.E.2d 480 (S.C. App. 2006), citing *Black v. Gettys*, 119 S.E.2d 660 (S.C. 1961). Unless other evidence is admissible and shows a different intention, based on the language of the grant the earliest vesting opportunity could be either at the execution and delivery of the deed or at the grantor's death, depending on whether he wanted children born after his death, if any, to take a share. This brief assumes that the nine children were members of the class whenever it closed.

¹⁵ According to Professor Means, if intended by the grantor, this result would also be possible even without the words of inheritance. Means article, p.333. This would be the result if the grantor intended that, regardless of when he died and the youngest child reached 21, the children took a fee simple interest in the estate remaining after both events occurred.

¹⁶ This depends on what the grantor was intending to accomplish, which presumably would be influenced by his stated concern about going to war. He may have wanted to protect the children only if he died (terminating his reserved life estate) before the youngest reached 21, or regardless of when he died (even after the youngest reached 21). In the former event, he may have intended that the children, the youngest of which having reached 21 before he died, had a contingent beneficial interest that never actually benefitted them because they all reached 21 before he died.

¹⁷ In that event, if the wife died intestate, the "remainder" she received from the grantor's estate would pass to the children surviving her, or their issue by representation. If, as discussed in footnote 1, *supra*, the Estate of Grover [redacted] is the estate of their son, and that son predeceased the wife but was survived by issue, the issue would take that son's share by representation; if, however, he survived the wife, then his interest would have vested during his lifetime and passed pursuant to his estate. If the wife instead died testate, her will would direct the disposition of the "remainder." If her will devised her estate equally to her children, then if her son Grover survived her, his share would vest and pass pursuant to his estate, or if he predeceased her, his share would pass to his issue by representation in accordance with section 62-2-603, South Carolina's anti-lapse statute, unless she indicated a contrary intent in her will.

201 et seq. , 1976 as amended). Similarly at BUC's death in 2004, her Personal Representative did not claim this property as BUC property. There is no evidence of Deed of Distribution to this property. BUC/Mom did not claim the property.

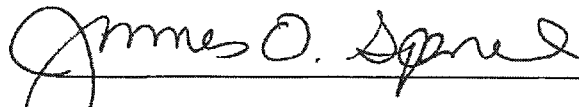
RULING:

- (1) TC reserved a life estate, with property conveyed in trust to TC & BUC children until youngest reached 21, with BUC as trustee. Remainder interest to children.
- (2) This interpretation treats the all children equally. "Equality is the court's application of natural justice of what is right... Courts apply this maxim in wide circumstances." Randolph Lowell et al, South Carolina Equity: A Practitioner's Guide , South Carolina Bar-CLE Division , 32,33 (2010).

AND IT IS SO ORDERED.

Lexington, South Carolina.

October 5 2012


James O. Spence/Lexington Master-in-Equity

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KATH A. CARRIG
CLERK OF COURT
LEXINGTON