

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of TIMMER.

DICK SCHIPPER, Personal Representative of the
ESTATE OF HERMINA JOSIE TIMMER, a/k/a
HERMINA SCHIPPER TIMMER, TIMOTHY
SCHIPPER, BONNIE SLENK, and LUANN
COLE,

Appellants,

v

KENNETH TIMMER, Trustee of the PETER J.
TIMMER TRUST,

Appellee.

UNPUBLISHED
November 22, 2011

No. 296154
Ottawa Probate Court
LC No. 09-056267-DE

AFTER REMAND

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Appellant estate appeals as of right from the trial court's judgment after bench trial concluding that the condominium at issue was held with rights of survivorship. This Court previously remanded this case to the probate court with instructions to "make findings of fact and a determination of the parties' intent based upon those findings." *In re Estate of Timmer*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 296154), op at 7. On remand, the court again held that the parties intended to hold the condominium as a tenancy by the entireties with right of survivorship. Having reviewed the record, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The issues and testimony were summarized in our previous opinion as follows:

At issue in this case is the construction of language in the prenuptial agreement between Hermina Timmer and Peter Timmer, entered into when they

were married later in their lives and each had children of their own. Their agreement, which they entered into on December 18, 1990, contained an ambiguity about the couple's intent regarding their decision to jointly purchase a condominium after marriage. Specifically, the paragraph at issue reads:

Jointly Held Property. Any property acquired by Husband and Wife during their marriage, and expressly held as tenant by entireties or as joint tenants with full rights of survivorship shall pass to the survivor of them by operation of law and shall not be subject to any of the terms and conditions of this Agreement, no matter by whom purchased or acquired. Husband and Wife each promises to act in good faith toward the other in the management of their joint property, if any. Husband and Wife contemplate that they will be purchasing a condominium after marriage. It is their intent that the condominium be held by them as tenants by the entireties or joint tenants and that the surviving spouse shall have a life estate in said condominium as long as the surviving spouse shall occupy said condominium.[¹]

When the couple subsequently purchased their condominium on May 31, 1991, the deed simply contained a conveyance to "Peter J. Timmer and Hermina J. Timmer, husband and wife," without conditions, life estates, or any other identification of how the property was to be held.

Hermina died on January 17, 2008. On February 14, 2008, Peter deeded the condominium to the "Peter Timmer Declaration of Trust."² In January 2009, Hermina's heirs sought informal probate of her will. Peter died on June 21, 2009. Hermina's heirs (appellants) requested a 50 percent interest in the condominium. Peter's heirs (as his trust) moved for summary disposition with regard to this claim, but the court denied the motion, stating that summary disposition was inappropriate because the prenuptial agreement was ambiguous.

¹ The agreement contained another provision the significance of which was questioned during the litigation. It reads, "Termination. Husband and Wife may terminate this Agreement only by a written document, dated, witnessed and signed by both. It shall automatically terminate upon the deaths of both Husband and Wife, unless revoked sooner under the specific terms of this Agreement." The agreement was drafted by Peter's brother, an attorney.

² This deed contained what appears to be a fee simple conveyance from Peter as survivor of himself and Hermina to Peter as trustee of the trust; but had the following further language:

Grantor herein reserves unto himself an exclusive life estate in the property conveyed by this deed. Grantor also reserves unto himself the right to dispose of the property during his lifetime by sale or gift free and clear of the rights of the other joint tenants.

A bench trial was held on December 9, 2009. Hermina's son, Dick Schipper, testified regarding ledgers that Peter Timmer kept of Hermina's assets. The ledgers showed Hermina's interest in the condominium as "one half." He also testified that his mother had an eighth-grade education, and that his parents together had owned a restaurant at which his mother worked. The restaurant was sold before his father, Harold Schipper, died.

An expert in probate law, called as a witness for plaintiff, testified that the agreement was "totally conflicting," containing "obvious[] ambiguity and confusion arising out of the jointly held property provision." He stated that the paragraphs providing for separate property, for jointly held property, and for termination led him to conclude that the likely intent of the parties was that the property they owned was to be retained as separate property. He maintained that if the paragraph on jointly held property ended before the last sentence, there would not be an ambiguity, but the added provision about what was essentially a life estate in the condominium was "entirely inconsistent with tenancy by the entireties or joint tenants." The expert also noted that the prenuptial agreement's termination provision would be unnecessary unless the parties intended that there be "continuing rights and obligations after the death of the first person." Thus, the intent to keep the condominium as separate property could be "logically construed;" otherwise the termination provision "doesn't make any sense." He concluded:

[W]hen they have a paragraph specifically addressing condominium and that paragraph references that the survivor shall have a life estate, and when you have the separate property provision with an exhibit showing that the parties had property and they sold that property to invest in the condominium, I believe the expectation and the intent is that is not be in a legal form of joint tenancy or tenancy by the entireties, but they're really talking about individually held, undivided interest with the protection for the survivor of the life estate.

The expert also testified that to a lay person the language of the last sentence would have been seen as an attempt to protect his or her spouse. However, he also admitted that, if this had been their intent, the deed was inconsistent with that, and that the agreement itself did not create an interest in property.[] His opinion was that the language in the prenuptial agreement was a "contract between the parties that expressed an intent as to how they were going to handle the condominium."

Kenneth Timmer, Peter's son, testified that his father "was pretty sharp . . . [e]ven up until his death," and that he understood the tenancy terms used in the prenuptial agreement and the deed. Peter told Kenneth that he understood that if he died first, the condominium would go to Hermina. As to the records Timmer, an accountant, testified that it would be proper to account for joint property as "half-and-half" in Hermina's ledgers even if the parties believed that the survivor would receive the property. He also admitted, however, that it would be also

accurate to report 100 percent of the property to each Hermina and Peter under such circumstances. [*Id.* at 1-3.]

On remand, the trial court noted that the deed for the condominium indicated no reservation of a life estate and no reference to the pre-nuptial agreement. It found the language from the pre-nuptial agreement ambiguous and considered extrinsic evidence to determine the parties' intent. The probate court then made the following findings:

6. . . . [Hermina Timmer] entered into the marriage with Peter Timmer in good health and with separate assets which included a cabin in Northern Michigan and a mobile home in Florida.

7. Peter Timmer worked as an accountant. He understood the concepts of joint ownership and survivorship. When he married Hermina Timmer, he was also in good health, but was six years older than she was. Kenneth Timmer testified that his father, Peter, expressed soon after the marriage that ownership of the condominium would pass to Hermina Timmer upon his death. Thus, he viewed the property as jointly owned with a right of survivorship. The Court believes this testimony and finds that the intention of Peter Timmer in signing the pre-nuptial agreement was to create a tenancy by the entireties with right of survivorship.

8. A ledger showing the value of assets owned separately and jointly by the parties listed the value of the condominium as owned 50 percent by each of the parties. Kenneth Timmer, who works as an accountant, testified that this is not an unreasonable method of showing assets of the parties if they are held jointly with a right of survivorship. The Court finds his testimony to be credible.

9. The evidence concerning the ledger does not contradict the conclusion that the parties intended to own the property with a right of survivorship. It is just as accurate to list half of a jointly-held asset in each person's ledger as it is to list 100 percent of it in both ledgers. Either method would be a valid way for parties to keep track of a jointly-held asset. Each method has its own drawbacks.

10. There was no evidence presented that Hermina Timmer, during her life, ever expressed her intention that the survivor would own a life estate in the property, or that the property would be sold and the proceeds divided between the estates of Hermina Timmer and Peter Timmer. The Court also finds that Peter Timmer never expressed anything like this. The only expression of intent was the one made by Peter Timmer to his son, Kenneth Timmer, that the property was held jointly as an entireties estate, with the survivor owning it in fee. The Court finds this to be the intention of both Peter Timmer and Hermina Timmer.

11. Mr. Robert Brouwer testified as an expert witness for the petitioners in the field of estate planning. He testified that his opinion was that the parties "likely" intended to take title to the condominium with each holding a separate interest subject to a life estate in the survivor. He based this testimony on his experience that most couples in this situation would want to do this. Thus, most pre-nuptial

agreements which he has seen follow this plan. It was his opinion that the Court should construe the ambiguous provision as creating a tenancy in common for Mr. and Mrs. Timmer, subject to a life estate in the survivor.

12. The Court notes that Mr. Brouwer did not hear the testimony of Kenneth Timmer and was not aware of the absence of testimony about Hermina Timmer's intentions. He based his opinions only on his review of the documents, and was not aware of any other testimony considered by the Court.

13. The Court respectfully disagrees with the opinion of Mr. Brouwer. These documents need to be evaluated based on the facts of this case, and without significant weight being given to what other marital couples might have intended.

Based on the foregoing findings, the probate court concluded that

[t]he language in the pre-nuptial agreement indicating that the condominium would be held "as tenants by the entireties or as joint tenants" expressed the intention of the parties. The additional language concerning a life estate is surplusage which must be disregarded by the Court in order to effectuate the intent of the parties.

Appellants renew their argument that the probate court erred in concluding that Peter and Hermina Timmer intended to own the condominium with a tenancy by the entireties with right of survivorship.

II. ANALYSIS

This case presents an issue of contract interpretation which we review de novo, *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006), but we review the probate court's underlying factual findings for clear error. MCR 2.613(C). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). We previously acknowledged that the prenuptial agreement was ambiguous and that consideration of extrinsic evidence was appropriate. *In re Timmer Estate*, Docket No. 296154, op at 5. However, extrinsic evidence is admitted "not to add or detract from the writing, but merely to ascertain what the meaning of the parties is." *Klapp v United Ins Group Agency*, 468 Mich 459, 470; 663 NW2d 447 (2003). In addition, "courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468. Accordingly, the probate court's conclusion shows its error on its face, rendering specific language in the prenuptial agreement "surplusage." Instead of interpreting the ambiguous agreement in a manner that was consistent with the extrinsic evidence, without having to render any language in the agreement surplusage or nugatory, the

court admittedly reached a conclusion that rendered language of the contract surplusage and then elected to rewrite the agreement to conform with its conclusion.

The probate court noted that the deed to the condominium appeared to convey a tenancy by the entireties and did not evidence any intent to reserve a life estate or reference the prenuptial agreement. However, the evidence was undisputed that the condominium was purchased after the prenuptial agreement was executed and the agreement specifically references the purchase of a condominium and states: “It is their intent that the condominium be held by them as tenants by the entireties or joint tenants and that the surviving spouse shall have a life estate in said condominium as long as the surviving spouse shall occupy said condominium.” Accordingly, the deed conveying to them as “husband and wife” is not inconsistent with the intent referenced in the prenuptial agreement.

The expert testified that lay people seldom understand such terms; and that the language used, when coupled with the provision concerning separate property and the fact that the two used separate property to purchase the condominium, indicated to him that the Timmers’ intent was to place the property in a form that would enable them to hold the property jointly, albeit while retaining its character as separate property similar to the assets used to purchase it, and in such a way as to ensure protection for the survivor of the life estate. This opinion was certainly consistent with the ambiguity in the prenuptial agreement, as well as the evident ambiguity in Peter’s subsequent deed to his trust. Even if we disregard this testimony, as did the probate court, because there is no external evidence that *this couple* intended to do that, the fact is that they wrote a prenuptial agreement with the life estate language in it. Thus, the contrary language written to specifically address the condominium itself provides the evidence that the couple intended something other than a standard tenancy by the entireties. Moreover, had the parties intended to hold the condominium with rights of survivorship, no additional language describing the condominium would have been necessary. It would instead have been treated as joint property with rights of survivorship under the remainder of the jointly held property provision, unless the couple specifically took the property as tenants in common. Likewise, the termination provision supports the conclusion, as the expert noted, that some rights and obligations were to pass to the estate of the first-deceased spouse. In addition, a conclusion that the parties intended the property to be held as tenants in common explains both Hermina’s will, which leaves her property equally to her children, and Peter’s deed transferring the condominium to the trust, which explicitly references a life estate. Finally, the ledger shows that the property was evenly divided between Hermina and Peter.¹ Thus, the question of there not being any “percentage” language in the agreement is answered by this evidence of what the parties understood their agreement to be.

¹ Although we accept the probate court’s finding that the 50 percent ownership in the ledger was not inconsistent with representation of tenancy by the entireties ownership, the notation is also consistent with ownership of the property as tenants in common.

The evidence presented did not support a contrary finding concerning the parties' intent at the time they entered into the prenuptial agreement. Although Kenneth Timmer provided hearsay testimony that his father later told him he understood that if he died first, Hermina would get the entire property, there is no evidence regarding what the parties intended at the time the provision was drafted, and particularly what Hermina believed the provision to mean. The trial court's finding that, in the absence of any other evidence, Peter's statement to Kenneth constituted evidence of *Hermina's* intent was clearly erroneous. In addition, the probate court's findings make no mention of the testimony of Hermina's son, Dick Shipper, that Hermina and Peter each paid for one-half of the condominium, that Peter had informed Dick that Hermina owned a one-half interest in the condominium, and that Peter had assigned each party a 50 percent interest on the valuation sheets because Peter believed that they each owned one-half of the property. Moreover, Dick Schipper testified that Hermina had only an eighth-grade education. Contrary to appellees' implication, there is no evidence that she had any familiarity with the transfer of joint property or of running a business other than having had property from her first marriage descend to her as a matter of law when her first husband died.

The expert testified that what the couple was trying to do was to preserve their separate property for the sake of their heirs. The poorly-written and conflicting language of the agreement cannot overcome the actual intent of the parties to the contract. If the drafting attorney misunderstood property terms so as to create the ambiguity, it seems unlikely the parties to the agreement understood it. Appellants should have received fifty percent of the value of the condominium. The title itself contains no ambiguities, and thus properly passes to Peter's trust. However, Peter breached the agreement he had with Hermina when he cut off appellants' right to her share of the property.

Accordingly, we hold that the evidence presented to the trial court shows that Hermina and Peter Timmer intended at the time that they entered into their prenuptial agreement that they would take title to a condominium during marriage, hold it jointly, that the survivor would have the opportunity to remain in the home for his or her life, and that fee would then revert equally to their estates upon both of their deaths. Because Peter Timmer breached this agreement when he cut off Hermina's estate's share of the condominium property, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro