

PHILADELPHIA COURT OF COMMON PLEAS  
ORPHANS' COURT DIVISION

Etta J. Warring, Deceased  
O.C. No. 121 DE of 2009  
Control No. 090746

***Introduction***

The preliminary objections filed by Gwendolyn Fennell (hereinafter “Gwendolyn”) raise the legal issue of whether a 2006 deed that decedent Etta Warring (hereinafter “Etta”) executed naming herself and her daughter Gwendolyn as “joint tenants” created a right of survivorship for Gwendolyn so that she would then take title to the real property located at 4931 Chancellor Street in its entirety upon Etta’s death. For the reasons set forth below, this court concludes that the deed did not create a right of survivorship in Gwendolyn. Because the deed did not manifest a clear intent to create a right of survivorship, Etta’s one-half share of the property would descend according to the terms of Etta’s 2001 Will. That Will bestowed Etta’s one-half share of the property to her other daughter, Finesse Warring as a life tenant.

As an alternative issue, the parties disagree as to the title of the 4931 Chancellor Street property upon the death of the life tenant Finesse. Resolution of this issue, however, is premature. To safeguard the interests of all parties in interest, as a practical matter the deed should be executed to reflect the precise terms of Etta’s 2001 Will: upon Finesse’s death, the remainder interest of her one-half share of the property should be titled in the name of “each” of Etta Warring’s “daughters then living, share and share alike.”

***Factual Background***

Etta Warring, who died on April 6, 2008, was survived by her six daughters. Prior to her death, Etta executed a Will dated December 10, 2001. In that Will, she devised her real property

located at 4931 Chancellor Street to “Finesse Warring for life, then to each of my daughters then living, share and share alike.”<sup>1</sup> The Will named her daughter Gwendolyn as her “fiduciary.” Five years later, Etta executed a deed dated June 30, 2006 for this 4931 Chancellor Street property. In that deed, she named herself and her daughter, Gwendolyn, as “Joint Tenants” and grantees of the property. The deed states that the grantor “doth grant, bargain, and sell, release and confirm unto the said Grantees, their heirs and assigns.”<sup>2</sup>

After Etta’s death in April 2008, Gwendolyn obtained letters testamentary on November 13, 2008.<sup>3</sup> Four of Etta’s surviving daughters—Elsie Poland, Colista Gemmel, Barbara Moore and Latasha Warring—subsequently filed a petition to quiet title to the 4931 Chancellor Street property. In their petition, the four sisters dispute Gwendolyn’s claim to the Chancellor Street property under the 2006 deed. Instead, they assert that the deed did not create a right of survivorship on behalf of Gwendolyn so that the terms of Etta’s 2001 Will would control. Under that Will, they assert, Finesse Warring is the legal owner of a life estate in a one-half interest in the property. As for the remainder interest, they assert that Elsie Poland, Colista Gemmel, Barbara Moore and Latasha Warring are the legal owners of a remainder one half-interest in that property. They therefore seek an order requiring Gwendolyn, as executrix, to prepare a deed reflecting the life estate in Finesse Warring with a remainder to Latasha Duncan, Barbara J. Moore, Colista Gemmell and Elsie Poland.<sup>4</sup>

Gwendolyn filed preliminary objections in response to this petition. In her objections, Gwendolyn asserts, inter alia, that this court lacks subject matter jurisdiction over the 4931 Chancellor Street property. Gwendolyn claims that by virtue of the 2006 deed, Etta conveyed

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<sup>1</sup> 12/10/2001 Will attached as Exhibit to 4/16/09 Preliminary Objections of Gwendolyn Fennell.

<sup>2</sup> 6/30/06 Deed attached as Exhibit to 4/16/09 Gwendolyn Fennell Preliminary Objections.

<sup>3</sup> 4/16/09 Gwendolyn Fennell Preliminary Objections, ¶ 3.

<sup>4</sup> 3/27/09 Petition to Quiet Title, Proposed Order and ¶ 7.

that property to both herself and Gwendolyn as “joint tenants,” thereby creating a right of survivorship. Gwendolyn emphasizes that Etta had obtained counsel to draft the deed and argues that it was Etta’s intention to create a right of survivorship by using the words “joint tenants.” Consequently, Gwendolyn concludes, that property is not part of the probate estate and this court lacks subject matter jurisdiction.<sup>5</sup>

Alternatively Gwendolyn argues that if the deed did not create a right of survivorship on her behalf, the petition must still be dismissed because Etta’s 2001 Will created a contingent remainder interest in the daughters of the decedent “then living” at the time of the life tenant’s death which cannot be determined at the present time.<sup>6</sup>

Petitioners filed a memorandum in response, asserting that since the preliminary objections raise only a question of law, the court should consider both matters as a motion for judgment on the pleadings and enter a final judgment.<sup>7</sup>

### *Legal Analysis*

#### *A. The June 30, 2006 Deed Executed by Decedent Etta Warring Did Not Create a Right of Survivorship*

The preliminary objections and petition to quiet title raise as a threshold legal issue whether the deed Etta executed on June 30, 2006 created a right of survivorship when she, as grantor, designated herself and Gwendolyn as “joint tenants.” Both sides invoke the same precedent to support their differing positions, but unfortunately that precedent is suggestive rather than dispositive because the language of the deeds it analyzes differs from the language of the Warring deed.

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<sup>5</sup> 4/16/09 Preliminary Objections of Gwendolyn Fennell, ¶¶ 1-12. The preliminary objections thus raise a logical conundrum. On one hand, it asks this court to resolve the issue of the interests conveyed under the Warring deed, while on the other it claims that if the court concludes the deed created a right of survivorship, the court lacks jurisdiction. The PEF Code, however, grants mandatory jurisdiction to the Orphans’ Court as to “the administration and distribution of the real and personal property of decedents’ estates....” 20 Pa.C.S. § 711(1).

<sup>6</sup> 4/16/09 Preliminary Objections of Gwendolyn Fennell, ¶¶ 8-12.

<sup>7</sup> 4/28/09 Petitioners’ Memorandum at 1.

The intention of the parties is the critical factor in determining the nature of the title conveyed by the Warring deed. Maxwell v. Saylor, 359 Pa. 94, 96, 58 A.2d 355, 356 (1948). A “hallmark distinguishing the joint tenancy from the tenancy in common is the right of survivorship.” Edel v. Edel, 283 Pa. Super. 551, 554, 424 A.2d 946, 947 (1981). When a joint tenant dies, the entire estate goes to the surviving tenant free from the claims of the heirs or creditors of the deceased co-tenant. With a tenancy in common, in contrast, when a tenant dies, his interest passes to his heirs and the interest of the surviving co-tenant does not increase. Id., 283 Pa. Super. at 554, 424 A.2d at 948.

Under common law, joint tenancies were favored and a right of survivorship was presumed to be an element of that tenancy. Courts in the United States, however, generally opposed the creation of joint tenancies, “the presumption being that all tenants who are not husband and wife hold jointly as tenants in common unless a clear intention to the contrary is shown.” Zomisky v. Zamiska, 449 Pa. 239, 240, 296 A.2d 722, 723 (1972). In Pennsylvania, the legislature enacted the Act of March 31, 1812 that specifically addressed the issue of the presumption of a right of survivorship as an incident of a joint tenancy. Under that Act, “the incident of survivorship in joint tenancies ... was eliminated unless the instrument creating the estate expressly provided that such incident should exist.” Zomisky v. Zamiska, 449 Pa. at 240, 296 A.2d at 723. See also Pennsylvania Bank & Trust Co. v. Thompson, 432 Pa. 262, 263, 247 A.2d 771 (1968)(“joint tenancies are not favored by law” and “a statute of the Commonwealth eliminates the survivorship feature from joint tenancies unless it is created by express words or necessary implication”). More specifically, that Act provides:

If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or of whatever kind the estates or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy or dower, or

transmissible to executors or administrators, and be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common: Provided always, That nothing in this act shall be taken to affect any trust estate.

68 P.S. § 110.

Pennsylvania courts have emphasized, however, that the Act of 1812 is “a statute of construction” that “does not proscribe creation of a joint tenancy if the language creating it clearly expresses that intent.” Zomisky v. Zamiska, 449 Pa. at 241, 296 A.2d at 723. As the Pennsylvania Supreme Court explained, the intention to create a right of survivorship must be clearly expressed:

Whereas before the act, a conveyance or devise to two or more persons (not husband and wife or trustees) was presumed to create a joint tenancy with the right of survivorship unless otherwise clearly stated, the presumption is reversed by the act, with the result that now such a conveyance or devise carries with it no right of survivorship unless clearly expressed, and in the absence of a clearly expressed intent to the contrary, the conveyance or devise created not a joint tenancy, but a tenancy in common.

Since the passage of the Act of 1812, the question of survivorship has become a matter of intent; and in order to engraft the right of survivorship on a cotenancy which might otherwise be a tenancy in common, the intent to do so must be expressed with sufficient clarity to overcome the statutory presumption that survivorship is not intended. Zomisky v. Zamiska, 449 Pa. at 723, 296 A.2d at 723 (citation omitted).

The task in determining whether a right to survivorship was intended by a grantor requires the combined analysis of relevant precedent and the particular language of the controlling document. While the relevant precedent requires that the intention to create a right of survivorship must be clear, this case law also emphasizes that “no particular form of words is required to manifest such an intention.” Pennsylvania Bank & Trust Co. v. Thompson, 432 Pa. 262, 263, 247 A.2d 771 (1968); Zomisky v. Zamiska, 449 Pa. at 723, 296 A.2d at 723. If the language of the deed is clear and unambiguous, the grantor’s intent must be determined based on that language alone. Teacher v. Kijurina, 365 Pa. 480, 486, 76 A.2d 197, 200 (1950)(“In the absence of fraud, accident or mistake parol evidence is inadmissible to vary or limit the scope of

a deed's express covenants and the nature and quantity of the interest conveyed must be ascertained by the instrument itself and cannot be orally shown").

Although both parties invoke the same precedent to support their conflicting positions, the language of the documents in these cases differs from that of the language of the Warring deed. None of the cases focus on a deed whose claim to a right of survivorship hinges on the words "joint tenant" alone. In Zomisky v. Zamiska, 449 Pa. at 241, 296 A.2d at 723, for instance, the deed at issue by a father conveyed certain property to himself and his son with the words "as joint tenants and as in common with the right of survivorship." With these words, the Zomisky court concluded that a joint tenancy with a right of survivorship had been created. In so doing, the court rejected the argument that the juxtaposition of words that the two grantees were to take as tenants "in common" conflicted with the words "right of survivorship," thereby rendering the grantor's intent ambiguous. Instead, the court emphasized that since the question of survivorship is one of intent, it was essential to give full effect to the combined effect of the words "joint tenants" and "right of survivorship." In the Warring deed, in contrast, there are no conflicting terms as to the tenancy but neither is there any explicit reference to "right of survivorship."

Another case cited by both parties, Teacher v. Kijurina, 365 Pa. 480, 76 A.2d 197 (Pa. 1950) is also not dispositive because of the differing language of the deed. In Teacher, a man and woman who lived together as husband and wife but were not married, acquired farm land by deed as "Nick Kijurina and Sarah his wife." In deciding whether this deed, created a tenancy in common or a joint tenancy with a right of survivorship, the court concluded that such issues as who paid for the land were not relevant. Instead, the court focused on the words set forth in the deed, and concluded that the reference to Sarah as the "wife" of Nick could not be construed as

expressing an intent to create a right of survivorship where the parties were not in fact married because “they may have been motivated solely by a desire to make a public record conform to the pretended relationship.” Teacher v. Kijurina, 365 Pa. at 489, 76 A.2d at 202. But see Maxwell v. Saylor, 359 Pa. 94, 58 A.2d 355 (1948)(right of survivorship was intended by deed to an unmarried couple who were listed as Raymond Maxwell and Emma Maxwell, his wife, with the grant to them, “their heirs and assigns, as tenants by the entireties”).

Another case cited by respondent likewise offers little guidance as to the significance of the wording in the Warring deed. In Pennsylvania Bank & Trust Co. v. Thompson, 432 Pa. 262, 247 A.2d 771 (1968), the Pennsylvania Supreme Court concluded that a deed to two brothers “as tenants by the entireties” created a joint tenancy with a right of survivorship rather than a tenancy in common because a tenancy by the entireties is limited to a dual ownership by husband and wife so that the insertion of the words “by the entireties” manifested an intent to create a right of survivorship.

As petitioners note “a case with facts closest (to) that at bar is Redemptorist Fathers v. Lawler, 205 Pa. 24, 54 A.487 (1903).”<sup>8</sup> In Redemptorist Fathers, a tract of land was conveyed to four reverends to hold “as joint tenants and not as tenants in common.” While observing that the Act of 1812 “abolished the right of survivorship as an incident of joint tenancy,” the court emphasized that it was still possible to create a “an estate with the same attribute as survivorship as joint tenancy at common law.” Redemptorist Fathers, 205 Pa. at 25, 54 A. at 488. The Pennsylvania Supreme Court held that by granting the land to the four individuals “as joint tenants and not as tenants in common” the grantor intended a right of survivorship:

The only practical difference between the two estates [i.e. joint tenancies or tenancies in common] was the right of survivorship in joint tenancy. The statute had abolished this and provided that the estate holden should be considered “in the same manner as

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<sup>8</sup> 4/28/09 Petitioners’ Memorandum at 5.

if...they had been tenants in common.” When therefore the grantor declared in his deed that his grantees should hold “as joint tenants and not as tenants in common,” he made clear his intent not to follow the statute but to convey an estate subject to the right of survivorship, the distinguishing incident of joint tenancy at common law. Redemptorist Fathers, 205 Pa. at 25, 54 A. at 487.

This is the closest precedent to the facts of this case. Yet the contrast between the two deeds is nonetheless striking. While the Warring deed merely refers to the grantees as “Joint Tenants,” the deed in Redemptorist Fathers made it abundantly clear that the grantor unambiguously intended the grantees to hold the land as “joint tenants and not as tenants in common,” thereby leaving no doubt of the incident right of survivorship. Etta Warring’s deed failed to include the few words necessary to convey her intent to create a right of survivorship. Etta Warring’s one-half interest in the 4931 Chancellor Street property therefore would not pass to Gwendolyn but would instead descend to Finesse Warring as life tenant according to the terms of Etta’s 2001 Will. Gwendolyn’s preliminary objections as to this issue are therefore without merit.

***B.Respondent’s Alternative Argument that the Language in Etta Warring’s Will Created a Contingent Remainder Interest in the Daughters then Living at the Death of the Life Tenant That Cannot Be Presently Ascertained Can Be Resolved by Incorporating the Language of The Will Regarding the Remainder Interests Into the Deed for 4931 Chancellor Street***

In her preliminary objections, Gwendolyn raises an alternative argument. She argues that if Etta Warring’s 2006 deed did not create a joint tenancy with a right of survivorship, the petitioners cannot assert a claim to the 4931 Chancellor Street property under her 2001 Will because under her Will, Etta Warring unambiguously bequeathed that property to her daughter Finesse Warring during her lifetime:

I devise and bequeath my premises at 4931 Chancellor Street, Philadelphia, PA, County of Philadelphia, Commonwealth of Pennsylvania, to FINESSE WARRING for life, then to each of my daughters then living, share and share alike.

Gwendolyn further argues that the remainder interests of an individual daughter created under Etta's Will cannot be presently determined because there is a requirement that the daughter must be alive at the death of the life tenant. In arguing that the identity of the remaindermen under Etta Warring's Will cannot be presently determined, Gwendolyn presents a subtle analysis of whether those interests should be construed as contingent or vested. In determining the nature of the remainder interests created under Etta Warring's Will, it is well established that the intention of the testator controls. Because the law favors vested over contingent interests, "the intention of a testator to create a contingent interest must appear clearly and plainly." Houston Estate, 414 Pa. 579, 594-95, 201 A.2d 592, 595 (1964). Gwendolyn argues that in this case, Etta Warring's intent to create contingent interests is clearly expressed in the words "to Finesse Warring for life, then to each of my daughters then living, share and share alike."

The petitioners do not respond to this analysis or argument. Instead, their petition demands that Gwendolyn execute a deed for the 4931 Chancellor Street property that lists Elsie Poland, Colista Gemmel, Barbara Moore and Latasha Warring as the legal owners of a remainder one-half interest in that property.<sup>9</sup> By so doing, the petitioners appear to acknowledge that Gwendolyn is the owner of the other one half remainder interest as the surviving cotenant under the 2006 deed. What petitioners fail to acknowledge is that under the 2001 Will, Gwendolyn would also share in the other one-half remainder interest of the sisters surviving after the death of the life tenant.

At this point, of course, those remainder interests cannot be determined since, as respondent notes, it "is possible that all of the daughters of Etta J. Warring may survive Finesse,

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<sup>9</sup> See, e.g. 3/27/09 Petition, Proposed Decree; 4/28/09 Petitioners' Memorandum at 6-9.

or none of them may.”<sup>10</sup> Rather than decide this issue in the abstract as an advisory opinion, it must be deferred until the triggering event occurs. The cases cited by respondent, for instance, analyze this issue to determine the proper distribution of remainder interests after the life tenant had, in fact, died. See, e.g., Houston Estate, 414 Pa. 579, 201 A.2d 592 (1964); Estate of Zucker, 761 A.2d 148 (2000). This does not mean, however, that the interests of the parties cannot be expressed on the deed as Gwendolyn suggests. Instead, a preferable approach would be to incorporate the language of the will regarding the remainder interests onto the deed for the Chancellor Street property, thereby memorializing and confirming the testator’s intent.

BY THE COURT:

Date: \_\_\_\_\_

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John W. Herron, J.

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<sup>10</sup> 4/16/09 Gwendolyn Fennell Memorandum to Preliminary Objections at 4.