VERMONT SUPERIOR COURT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 663-11-17 Wncv

Susan White Plaintiff v. Kelly Spears a/k/a Kelly Cormier f/k/a John Burns Defendant	

Opinion and Order on Ms. White's Motion for Partial Summary Judgment

Plaintiff Susan White filed this action seeking to quiet title to the residential Property (the "Property") that was titled to her and her father, Elmer Cormier, in a 1981 deed as joint tenants with rights of survivorship. She claims that the Property devolved to her upon the death of Mr. Cormier. Defendant Kelly Spears resides at the Property, as she did with Mr. Cormier prior to his death, and has refused to vacate it following his death.[1] Ms. Spears counters that the 1981 deed was a mere estate planning tool that was not intended to gift any irrevocable interest in the Property to Ms. White and that the Property otherwise was left to Ms. Spears in Mr. Cormier's will.

[1] Ms. Spears and Mr. Cormier married shortly before his death. Ms. Spears is not Ms. White's mother.

Ms. White seeks a declaration of the parties' rights as to the Property and to evict Ms. Spears. Ms. Spears has counterclaimed against Ms. White for intentional infliction of emotional distress (IIED) based on the content of communications between them that are immaterial to the issue of title to the Property. Ms. White has filed a motion for partial summary judgment addressing the title issue only. The IIED counterclaim is not currently at issue.

On October 24, 2019, the Court held an oral argument concerning the motion. Ms. White was present and was represented by Shannon Bertrand, Esq. Ms. Spears was not present but was represented by Stephen Coteus, Esq. and Intern Emery Mathias. The Court makes the following determinations.

I. Summary Judgment Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.,* 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come

forward with deposition excerpts or affidavits to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991).

II. The Undisputed Facts

The basic material facts are undisputed. In 1971, the Property was conveyed to Mr. Cormier and Beatrice White, who was Mr. Cormier's wife and Ms. White's mother. Following Beatrice White's death, title to the Property was in Mr. Cormier's name only. In 1981, Mr. Cormier deeded the Property to himself and Ms. White jointly, with rights of survivorship, without any consideration.

At that time, Mr. Cormier had lived at the Property for many years, and it was the family home where Ms. White had grown up and where she still lived. Following the 1981 deed, Ms. White continued to live at the Property with her father. In 1987, she and her new husband bought a mobile home and installed it on the Property. In the course of financing that mobile home, she represented herself to her lender as the owner of the Property. She and her husband also made related improvements to the Property, including installing a septic system, at their own expense. While Mr. Cormier generally took care of expenses related to the original family home, Ms. White took care of all expenses and improvements related to the mobile home on the Property. In 1995, Ms. White and her family moved from the Property, seeking larger living quarters.

In 2006, Mr. Cormier met Ms. Spears, and they struck up a relationship. She eventually moved in, and they married in 2015, two months before his death at age 90. In 2014, Mr. Cormier met with a lawyer and executed a will leaving all his

personal and real property to Ms. Spears. The will did not specify what, if any, particular property (personal or real) would have been subject to the will and made no mention of the 1981 deed.

III. Analysis

Under Vermont law, "[u]pon the death of a joint tenant, the deceased joint tenant's interest shall be allocated among the surviving joint tenants." 27 V.S.A. § 2(b)(2)(B). If the 1981 deed effectively made Ms. White a joint tenant of the Property, Mr. Cormier's interest would have been allocated to her at the time of his death, and it would not have been available to pass to Ms. Spears by will.

Ms. White argues that the 1981 deed giving her joint title was an effective *inter vivos* gift and, as a result, she was a proper joint titleholder as of the execution of the 1981 deed. "*Inter vivos*" means "[o]f or relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor's lifetime." *Black's Law Dictionary* 826–27 (7th ed. 1999). A "gift" refers to the transfer of the "ownership or possession" of a thing "without compensation." *Univ. of Vermont v. Wilbur's Estate*, 105 Vt. 147, 156 (1933). "To constitute a gift *inter vivos* there must be an intention on the part of the donor to transfer the title to the Property to the donee immediately and irrevocably [donative intent] accompanied by [delivery]." *Jeffords v. Poor*, 115 Vt. 147, 152 (1947) (emphasis added).

Delivery is not in dispute in this case. *See Phillips v. Plastridge*, 107 Vt. 267, 270 (1935) ("[D]elivery generally is satisfied by a legal presumption of "acceptance of a gift by the donee, when it is unaccompanied by any condition to be performed by

him. Especially is this true where the gift is from parent to child." (citation omitted)). The sole issue in this case is donative intent.

Ms. Spears claims that Mr. Cormier did not intend the 1981 deed to gift an irrevocable joint interest in the Property to Ms. White. Instead, she argues that Mr. Cormier merely contemplated giving Ms. White a residual survivorship interest for estate planning purposes. In short, she maintains that he did not intend any immediate and irrevocable gift to Ms. White, and, accordingly, he was free to disregard the 1981 deed and reassign the entire interest in the Property as he saw fit prior to death.

As for factual support for such a claim, Ms. Spears asserts that Ms. White has conceded that the 1981 deed was executed for estate planning purposes, that Mr. Cormier's longtime doctor heard him state that he hoped to leave "the place" to Ms. Spears, and that Mr. Cormier's will represents his later prevailing intention to convey the entire interest in the Property to her following his death. Ms. Spears also describes in her affidavit her "beliefs" about Mr. Cormier's understanding and intentions with regard to leaving the Property to her.

In Vermont, "the mere joint titling of Property without consideration does not conclusively establish intent to gift the property." *Brousseau v. Brousseau*, 2007 VT 77, ¶ 7, 182 Vt. 533, 534. There is, however, a "general presumption that the act of titling property in another's name establishes intent to convey a present interest in the property." *Id.* ¶ 12, 182 Vt. at 535–36. One challenging the presumption,

particularly in the case of a parent–child or other close-family gift, has the burden of proving the lack of donative intent.[2] *Id.* ¶ 12, 182 Vt. at 535–36.

The Vermont Supreme Court has not determined what level of proof is needed to overcome the language of a deed in this regard. Justice Dooley has opined, however, that the person opposing the deed must do so with clear and convincing evidence of contrary donative intent. *See id.* ¶ 18, 182 Vt. at 538 (Dooley, J., dissenting) (citing *Hooks v. Hooks*, 63 So.2d 348, 350 (Ala. 1953); *Judgment Servs. Corp. v. Sullivan*, 746 N.E.2d 827, 831 (Ill. Ct. App. 2001); *Prange v. Prange*, 755 S.W.2d 581, 593 (Mo. Ct. App. 1987); *Kyles v. Kyles*, 832 S.W.2d 194, 197 (Tex. Ct. App. 1992)).

A number of other decisions and commentators have adopted that standard as well. *In re Pfister*, 749 F.3d 294, 299 (4th Cir. 2014) ("An opponent to a gift may rebut the presumption by offering clear and convincing evidence that a gift was never intended."); *Bhagat v. Bhagat*, 84 A.3d 583, 596 (N.J. 2014) ("Rather, our examination of the cases suggests that the standard has been understood as, and should be, clear and convincing."); *Controlled Receivables, Inc. v. Harman*, 413 P.2d 807, 809 (Utah 1966) ("Of prime importance is the rule that one who asserts the invalidity of a deed must so prove by clear and convincing evidence."); *Almeida v.*

[2] The presumption is a legal one insofar as it shifts the burden of persuasion to the party opposing the matter presumed. It is not a mere evidentiary presumption that shifts the burden of production only and has no effect once that burden of production is satisfied, also known as a "bursting bubble" presumption. *Cf. Chittenden v. Waterbury Ctr. Cmty. Church, Inc.*, 168 Vt. 478, 492 (1998) (discussing "bursting bubble" presumptions).

Almeida, 669 P.2d 174, 178–79 (Haw. App. 1983) ("Generally, the burden of proving an alleged gift is on the donee. However, in cases of close kinship, there is a presumption that a gift was intended and the presumption must be rebutted by clear and convincing evidence." (internal citations omitted)); *see also* 1 Brett R. Turner, *Equit. Distrib. of Property*, 4th § 5:44 ("The joint title gift presumption is almost universally rebuttable by production of countervailing evidence showing that the transfer was made without donative intent. At common law, the standard of proof was clear and convincing evidence."); 38A C.J.S. *Gifts* § 77 ("If the form of ownership created is a joint tenancy with the right of survivorship, it is presumed that there is a donative intent. That presumption may be rebutted only by clear and convincing evidence that the donor intended to retain sole control over the transferred Property. The burden of proof is on the one claiming that it is not a gift."); 38 Am. Jur. 2d *Gifts* § 81 (similar).

An analogous area of the law is the creation of constructive trusts. In such circumstances, courts can look to principles of equity to overcome the plain language of a deed. In those cases, our Supreme Court has cited favorably the clear and convincing evidence standard. In *Gregoire v. Gregoire*, 2009 VT 87, ¶ 13, 186 Vt. 322, 328, for example, the Court noted that nearly all jurisdictions follow that standard of proof. In *Mueller v. Mueller*, 2012 VT 59, ¶ 29, n.6, 192 Vt. 85, 97 n.6, the Court noted that the trend of out-of-state decisions is to "require proof of entitlement to a constructive trust by clear and convincing evidence." *Accord Gregoire v. Armand*, No. S31705, 2007 WL 8044402, at *3 (Vt. Super. Ct. Sep. 14,

2007); George Bogert, *Trusts and Trustees* § 78, at 290 (6th ed. 1987) ("[E]quity requires that the constructive trust claimant prove his case by clear and convincing evidence.").[3]

The Court concludes that the clear and convincing evidence standard is the most appropriate one for overcoming the presumption of donative intent in these circumstances. The high standard of proof reflects the correct level of judicial caution in accepting oral and other evidence that is intended to contradict absolute conveyances set out in written deeds and wills. Such documents are typically recorded and relied upon not only by those involved but the general public and commercial entities. *Cf. id.* § 472 ("The importance of security of titles leads the courts to be very cautious in their acceptance of petitions for constructive trusts, thus the requirement for a high standard of proof."); *see Rackley v. Rackley*, 922 S.W.2d 49, 51 (Mo. Ct. App. 1996) ("The stringency of the proof requirements has been attributed to the public policy in favor of the security of titles and the reluctance of courts to disturb record or other apparent ownership.").

"Clear and convincing evidence is a 'very demanding' standard, requiring somewhat less than evidence beyond a reasonable doubt, but more than a preponderance of the evidence. The clear and convincing evidence standard does not require that evidence in support of a fact be uncontradicted, but does require

[3] Such high standards of proof also apply when trying to reform the language of a deed. *Bemis v. Lamb*, 135 Vt. 618, 621–22 (1971) (proof required to reform the express language of a deed is "beyond a reasonable doubt").

that the fact's existence be 'highly probable.'" *In re E.T.*, 2004 VT 111, ¶ 12, 177 Vt. 405, 410–11.

In this case, Mr. Cormier deeded the Property into joint ownership with his daughter, with rights of survivorship. This is sufficient to raise the legal presumption that he did so with donative intent and, thereafter, was not free to unilaterally divest her of that interest. The question on summary judgment is whether Ms. Spears has come forward with sufficient admissible evidence that could reasonably persuade a jury, by clear and convincing evidence, that Mr. Cormier's actual intent was not to convey the Property to his daughter without recourse.

Of import in this case, "[e]vidence of lack of donative intent must relate back to the time of creation of the joint tenancy." *Franklin v. Anna Nat. Bank of Anna*, 488 N.E.2d 1117, 1119 (Ill. Ct. App. 1986); *accord Cone v. Cone*, 331 So.2d 656, 658 (Ala. 1976); *Nugent v. Dittel*, 239 N.W. 559, 561 (Iowa 1931); *Citizens Bank of Massachusetts v. Coleman*, 987 N.E.2d 1282, 1289 (Mass. Ct. App. 2013). "The decision of the donor, made subsequent to the creation of the joint tenancy, that he did not want the proceeds to pass to the survivor, would not, in itself, be sufficient to sever the tenancy." *Franklin*, 488 N.E.2d at 1119.

Ms. Spears argues that Ms. White conceded in her deposition testimony that the 1981 deed was executed for estate planning purposes. Ms. White counters, among other things, that any such testimony is inadmissible hearsay. Regardless whether the testimony is admissible, it has virtually no impact on the material

inquiry: whether Mr. Cormier lacked donative intent at the time of the 1981 deed. A concession that the deed was motivated by an estate planning interest is insufficient. A general estate planning interest alone does not conflict in any material way with donative intent. A purported donor may act with an estate planning interest either along with or without donative intent. Estate planning can involve either type of property disposition. It does not necessary carry the connotation that an *inter vivos* gift was not intended. As a result, Ms. White's deposition testimony, to the extent that it touches on Mr. Cormier's estate planning interests, does not indicate that he lacked donative intent in 1981.

Ms. Spears suggests that the will itself is indicative of a lack of donative intent in 1981 because it shows that Mr. Cormier was attempting to leave the Property to Ms. Spears much later in life. The supposed inference is that he would not have done so unless he believed he had the right to do so and, *ergo*, that he had lacked donative intent in 1981. Even accepting that possible inference, however, the terms of the will *do not expressly* leave the disputed Property to Ms. Spears. The will generically left Ms. Spears all real property Mr. Cormier owned at the time of his death without specifying any particular property or acknowledging that he actually owned any such property. There is no reference in the will to the 1981 deed or to the Property itself.[4]

[4] Though not consequential to the Court's ruling, the record also reflects that Mr. Cormier consulted with an attorney in crafting his will. Had he intended to revoke the express terms of the prior written deed, he likely would have identified the Property with some specificity.

In any event, even if one could interpret the will, with some speculation, to reflect an intention on Mr. Cormier's part in this regard at the time of the drafting of the will, the issue here is his intent in 1981, when the joint title deed was executed. A mere contrary intention later in life is insufficient to demonstrate what the original intention was in 1981.

Ms. Spears also has produced the affidavit of Mr. Cormier's longtime physician, who claims that Mr. Cormier told him, late in life, that he intended to leave "the place" to Mr. Spears. This testimony is inadmissible hearsay. Nothing in the record suggests that any hearsay exception might reasonably apply or that it could be admitted as nonhearsay.

Further, even assuming it were admissible, the evidence suffers from the same inferential limitations as the will: at best, it sheds dim light on Mr. Cormier's intentions near the time of his death. The salient issue, however, is whether there was donative intent at the time of the 1981 deed. Mr. Cormier's intent near the end of his life to leave "the place" to his wife indicates nearly nothing, if anything, as to whether he intended Ms. White to have joint title thirty-four years earlier in 1981.

Finally, in her own affidavit, Ms. Spears describes her beliefs as to Mr. Cormier's thoughts and intentions with regard to the 1981 deed and the will. As recounted in the affidavit, this testimony is plainly conjectural and inadmissible. Ms. Spears simply states what, she asserts, Mr. Cormier believed and intended. She attributes no clear statements to him (admissible or not), and she otherwise describes no circumstances that would indicate how such testimony about her

beliefs and Mr. Cormier's beliefs could be admissible. Her affidavit, in this regard, is highly speculative and self-serving. In any event, it also bears the weakness that Ms. Spears' other proffered evidence bears: Mr. Cormier's beliefs and intentions late in life are relevant only insofar as they may reflect on his intentions at the time of the 1981 deed and no arguably admissible testimony in Ms. Spears' affidavit shines light on the circumstances of the 1981 deed.

In opposition to Ms. Spears' evidence is the 1981 deed itself, the terms of which clearly create a joint title interest in Ms. White. It is also undisputed that Ms. White acted as an owner of the Property—by living on the Property for years, making certain improvements to it, and representing herself to lenders as an owner.

In this case, Mr. Cormier deeded a joint title interest in the Property to his daughter in 1981, thirty-four years prior to his death. The record includes virtually no admissible evidence to rebut the presumption that he did so with donative intent. There are no suspicious circumstances drawing into question the 1981 deed, and no contrary statements of intent at the time of the execution of the deed. The burden of rebutting the presumption by clear and convincing evidence is on Ms. Spears. She has failed to present sufficient evidence of any triable issue warranting the submission of the donative intent question to a jury. On this record, the Court would so rule even if she needed to do so by a preponderance of the evidence only. Ms. White is entitled to summary judgment on this issue.

ORDER

For the foregoing reasons, Ms. White's Partial Motion for Summary Judgment is granted.

Dated this __ day of November, 2019, at Montpelier, Vermont.

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Timothy B. Tomasi,
Superior Court Judge