STATE OF VERMONT
WASHINGTON COUNTY

SALLY A. BOUCHARD,	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 449-8-06 Wncv**
v.	)	
	)	
EARL GERRISH,	)	
Defendant.	)	

DECISION
Cross-Motions for Summary Judgment on Defendant's Counterclaim Count I
(Declaratory Relief)

In 2000, Plaintiff Sally Bouchard and Carroll Thurston purchased a residential property in Northfield as joint tenants with rights of survivorship. Carroll Thurston died in January 2006. Ms. Bouchard filed this ejectment case seeking possession of the premises and unpaid rent from the current occupant, Defendant Earl Gerrish. Her claim is that Mr. Thurston's interest vested in her upon his death, and that Mr. Gerrish occupied the property as a tenant and is now a holdover tenant.

In his answer and counterclaim, Mr. Gerrish alleges that Mr. Thurston's interest in the property was conveyed to him by quitclaim deed in September 2005. He seeks a declaratory judgment that the September 2005 conveyance severed the joint tenancy and that now he rightfully holds Mr. Thurston's interest as a tenant in common with Ms. Bouchard.[1] The parties have filed cross-motions for summary judgment on Count I of Defendant's Counterclaim seeking a declaration of the effect of the September 2005 deed.

As a general matter, the parties agree that Vermont follows the majority rule that allows the conveyance of one joint tenant's interest to a third party, prior to the death of either joint tenant, to sever a joint tenancy. Such a conveyance converts a joint tenancy with rights of survivorship into an ordinary tenancy in common. See *Gallagher v. McCarthy*, 148 Vt. 258, 261 n.1 (1987). Until the death of one joint tenant, the right of survivorship "is merely an expectancy that is not vested." *Id.* Consequently, if the September 2005 deed effectively conveyed Mr. Thurston's interest to Mr. Gerrish, then it severed the joint tenancy. Mr. Gerrish and Ms. Bouchard now would hold their interests as tenants in common.

The September 2005 deed was drafted by a nonlawyer and does not contain the conventional language and detail typical of contemporary Vermont deeds. Ms. Bouchard argues that the deed is flawed in the following ways: 1) the grantor and the grantee are not identified; 2) the grantor did not sign it; 3) the subject property is not described; 4) it lacks a habendum clause and "words of inheritance"; and 5) it was not properly acknowledged. Mr. Gerrish argues that

[1] He also mentions, at the end of Count I, a request for partition and an accounting. This is a claim and form of relief that is too different from the request for declaratory relief to be considered in conjunction with it. In this decision, only the issue of ownership is addressed.

the deed does not lack any required elements and, in essence, is not ambiguous. To the extent that the acknowledgment appearing on the deed is insufficient, Mr. Gerrish argues that it may be proved to the court. Mr. Gerrish has submitted affidavits in support of such a proof.

The basic standards applicable to deed interpretation are summarized in *Kipp v. Chips Estate*:

> First, in interpreting a deed, we look to the language of the written instrument because it is assumed to declare the intent of the parties. Our "master rule for the construction of deeds is that the intention of the parties, when ascertainable from the entire instrument, prevails over technical terms or their formal arrangement." We read the entire written instrument as a whole, giving "effect to every part" so as to understand the words in the context of the full deed. In so doing, we construe the various clauses of the document, wherever possible, so that the deed has a consistent or harmonious, meaning.

Kipp v. Chips Estate, 169 Vt. 102, 105 (1999) (citations omitted).

Applying these principles, and disregarding extrinsic evidence, the court concludes that the intent of the parties to the deed is clear and its terms are not ambiguous.[2] It is a quitclaim deed by which Carroll Thurston intended to convey "all right title, interest and claim" in a certain Northfield property identified by its specific street address to Earl Gerrish "forever."

The grantor and grantee are adequately identified in the deed, and both signed it. The grantor's signature on the line provided for a witness with an arrow pointing to the line for "First Party," the granting party, is not ambiguous. The legible signature of the grantee accompanied by his street address is not ambiguous.

The deed does not fail to describe the property subject to the conveyance. The property conveyed is described by its specific street address; no evidence suggests that the street address is insufficient to describe the property.

The deed does not fail to describe the legal interest in the property conveyed for lack of a separately stated habendum clause or specific "words of inheritance." "The habendum clause in a deed typically sets forth the estate to be held by the grantee." *Kipp*, 169 Vt. at 104 n.1. Often, the habendum clause is introduced with specific words such as "to have and to hold." The "granting clause actively transfers the land from the grantor to the grantee." *Id.* If the language of a separately stated habendum clause conflicts with the language of a separately stated granting clause, a court may interpret the deed in accord with the "rule" that the granting clause controls over the habendum clause. However, that rule is "an aid to construction" only, and the Vermont

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[2] There are no apparent *material* disputes of fact in the summary judgment record. Ms. Bouchard has filed a motion to strike numerous items of evidence in several filings of Mr. Gerrish as generally inadmissible hearsay, including the disputed deed itself. The deed itself would not be inadmissible hearsay. See V.R.E. 803(14), (15). Other items cited to by Ms. Bouchard either would not be out of court statements offered to prove the truth of the matter asserted or simply are not material to the resolution of the motions, which is based almost exclusively on the language of the deed itself, without resort to extrinsic evidence. The motion to strike is denied.

Supreme Court has made clear that it is a largely "discredited" one. *Id.* at 105. Deeds simply are not required to be divided up into such clauses and arranged in any formal way.

> It seems to have been recognized from the first that the division of a deed into such parts as the premises, the habendum and the tenendum, was pretty much a matter of capitalization and punctuation, and our Court was never greatly impressed with the idea that it is of vital importance in what part of a deed the intention is expressed so long as it finds somewhere clear and adequate expression.

Id., quoting *Johnson v. Barden*, 86 Vt. 19, 25–26 (1912). Mechanistic rules of construction or unconventional diction will not defeat the intent of the parties so long as that intent is manifest in the instrument as a whole.

The deed plainly is intended to convey the entirety of Mr. Thurston's interest to Mr. Gerrish. The deed specifically grants "forever all right title, interest and claim" to Mr. Gerrish. This language is consistent with the references to "quitclaim," which in ordinary usage is understood to convey the entirety of one's interest. See Black's Law Dictionary 446 (8th ed. 2004) (defining "quitclaim deed" as conveying "a grantor's complete interest or claim in certain real property . . ."). In context, the lack of traditional words of inheritance, such as "heirs and assigns," does not suggest any intent to limit the conveyance to a life estate. "Technical terms" of inheritance are not required to avoid limiting a conveyance to a life estate. See *Rowe v. Lavanway*, 2006 VT 47, ¶ 12 (holding that the absence of specific words of inheritance does not necessarily control the interpretation of deed language). The language of the deed evinces the unmistakable intent to convey the entirety of Mr. Thurston's interest to Mr. Gerrish.

Ms. Bouchard also argues that the deed lacks the grantor's acknowledgment of execution. The deed contains an acknowledgement certified to by Karen S. Davis, but purports to be Karen Davis's own acknowledgement rather than that of Mr. Thurston. The acknowledgment in the deed is flawed in that regard. Ms. Bouchard also argues that the language of the acknowledgment is unusual and flawed for that reason. Vermont law does not require the grantor's acknowledgment of the execution of a deed to take a particular form. However, the court need not examine the specific language of this acknowledgment in more detail because Mr. Gerrish has submitted additional proof of the execution to the court.

The execution of a deed may be proved to the court by the testimony of a subscribing witness if the grantor dies without having properly acknowledged it. 27 V.S.A. § 371. Mr. Gerrish has submitted the affidavit of Karen Davis to prove Mr. Thurston's execution of the deed. According to her affidavit, Ms. Davis, a notary at the time, was present for Mr. Thurston's execution of the deed. She states, "At the time he signed the deed, I asked Mr. Thurston if he was signing the deed of his own free will and whether this was his own doing or was someone making him do it. He looked me right in the eye and he said it was [his] free will and he signed the deed . . . . Mr. Thurston acknowledged the deed in my presence and I notarized his signature at that time." Affidavit of Karen S. Davis (filed Dec. 20, 2006). Ms. Bouchard has presented no evidence raising any dispute of fact over the execution of the deed. Ms. Davis's affidavit is satisfactory proof of Mr. Thurston's execution of the deed under 27 V.S.A. § 371.

Ms. Bouchard also argues that Mr. Gerrish's failure to record the deed prior to Mr. Thurston's death prevents the conveyance from severing the joint tenancy. Vermont is a "notice" state, meaning that a conveyance is ineffective against a subsequent purchaser without notice. See *Hemingway v. Shatney*, 152 Vt. 600, 602–03 (1989). Regardless of whether Ms. Bouchard had notice, actual or inquiry, at the time of Mr. Thurston's death, she was not a "subsequent purchaser" and no evidence suggests that she otherwise relied on any lack of actual notice of the conveyance. In Vermont, a joint tenant is not required by statute to record or otherwise provide actual notice to the co-tenant of the conveyance that severs the joint tenancy.

The undisputed material facts show that Defendant is entitled to a declaration that the September 2005 quitclaim deed to him from Mr. Thurston severed the joint tenancy and created a tenancy in common between Plaintiff and Defendant. As a result, Defendant and Plaintiff are owners of the premises as tenants in common.

ORDER

For the foregoing reasons,

1) Plaintiff's Motion for Summary Judgment filed November 22, 2006 is *denied,*

2) Defendant's Motion for Summary Judgment filed December 20, 2006 is *granted,* and

3) A status conference will be scheduled to determine remaining issues in the case.

Dated at Montpelier, Vermont this 26th day of April 2007.

Mary Miles Teachout
Superior Court Judge