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PROBATE LAW CASE SUMMARY

BY: Alan A. May



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DT: August 6, 2014

RE: GEORGE C. MCDONNELL, SR., Individually and as Trustee of the GEORGE C. MCDONNELL, SR. REVOCABLE LIVING TRUST -v- CHERRI A. ERICKSON
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL LORE:

How Do You Mend a Broken Heart?

In the early 50’s sports were a measure of a kid’s life, and the home team’s success a measure of the kid’s success.

My success ratio was .667. The Lions had crawled out from obscurity and were building championship teams, the Red Wings the same, but the Tigers? Well, they were the ink blot. Having won the pennant in ‘35, ‘40 and ‘45, we expected success in 1950 only to lose it the last week of the season.

The hope for ‘51, based on the 1950 performance led to false expectations. The Bengals finished fifth with a below .500 record. There was, however, the constant bright spot, every Detroit boy’s hero, George Kell.



Traded to Detroit by the Philadelphia A's in early '46 he became a perennial star and laid the basis for entry into the Hall of Fame.

The enemies of the early 50's were the commies and polio. That made Kell's star even brighter. Kell had beaten polio as well as beating out Ted Williams for the batting title on the last game of the '49 season.

He was the mainstay, the glue. Then suddenly, without asking me, Kell was traded to the Boston Red Sox. The only thing we got of "value" was the "Moose", Walter Dropo, who had been rookie of the year in 1950 when he hit .322, but never again did the Moose get loose. He only lasted two years with the Tigers.

And the Tigers? They finished in last place in '52 for the first time in history.

REVIEW OF CASE:

Reference Files: Mickey Mouse Theory – *descriptio personae*
Fiduciary Deed
Failure of Consideration

This is a Circuit Court case that is unpublished but, nevertheless, cites published cases which are dispositive of certain Trust and real estate law. It is also dispositive of any case in which any fiduciary grants a Deed.

The facts are simple. Appellant issued a Deed without delineating capacity; individual or fiduciary. He did not own Blackacre. A Trust, of which he was trustee, owned Blackacre. The Lower Court granted summary disposition saying that Appellee was not individually vested with Title and, therefore, the Deed was void ab initio.

Appellee sought assistance from the Court of Appeals.

Many years ago University of Michigan Law School, Dean Roy Steinheimer, taught us as part of a UCC lecture, what he called the "Mickey Mouse" theory. He said that if an individual had a bank account and issued a check, and signed the name Mickey Mouse on the check, as long as the actual signer of the check had an account at that bank, that was a valid signature.

The Court of Appeal employed the Mickey Mouse doctrine calling it *descriptio personae*. Citing Supreme Court law; *Pungs v Hilgendorf*, 289 Mich 46 (1939) as well as *Levine v Katz*, 293 Mich 493 (1940), the Court of Appeals ruled that if one was really the trustee he did not need to put down his capacity on the Deed as long as it was a Warranty Deed.

In the *Pungs* case the situation was actually the reverse. Mr. Pungs described himself, when signing the Deed, as the trustee but owned the land as an individual and, thus, the description was deemed not to be necessary to make the conveyance valid.

The Court of Appeals, in footnote, pointed out had the Grantor specified that he was conveying the land personally, it might have made a difference.

Of other interest in the case, the court ruled that the consideration recited in a Deed was not absolute proof of the consideration so there might be a failure of consideration.

Also of interest was an effort by the Appellee to get rid of the judge on remand on the basis of bias, and the Court of Appeals would have none of that; citing *In re Contempt of Henry*, 282 Mich App 656 (2009). The mere fact that a judge ruled against a Litigant, even if the rulings are later determined to be erroneous is not sufficient to require disqualification or reassignment.

AAM:jv:775693
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE C. MCDONELL, SR., Individually and
as Trustee of the GEORGE C. MCDONELL, SR.,
REVOCABLE LIVING TRUST,

UNPUBLISHED
June 26, 2014

Plaintiff-Counterdefendant-
Appellee,

v

CHERRI A. ERICKSON,

Defendant-Counterplaintiff-
Appellant.

No. 315343
Newaygo Circuit Court
LC No. 11-019743-CH

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant and counterplaintiff Cheri A. Erickson (hereafter "Erickson") appeals as of right the trial court's order granting summary disposition in favor of plaintiff and counterdefendant George C. McDonell, Sr. (hereafter "McDonell"), in this case entailing a property dispute between a father, McDonell, and his daughter, Erickson, over two lots located on the Muskegon River. We reverse and remand.

The two lots at issue had been conveyed to McDonell and his now-deceased wife Rosemary McDonell (hereafter "Rosemary") as tenants by the entireties; Rosemary was Erickson's mother. McDonell and Rosemary subsequently executed individual living revocable trusts, acting as co-settlors and co-trustees for each of the trusts. They then quitclaimed an undivided one-half interest in the lots to McDonell's trust and an undivided one-half interest to Rosemary's trust. After Rosemary's death, there was an attempted conveyance of the two lots by McDonell to Erickson pursuant to a warranty deed that made no mention of any trust, nor did it indicate that McDonell was conveying the property in his capacity as trustee. Although both Erickson and McDonell intended for a transfer of ownership to occur, McDonell claimed that the consideration was \$25,000, which Erickson failed to pay, while Erickson asserted that the two lots were given to her in consideration for, in part, her assistance in caring for Rosemary prior to her death and in caring for McDonell, and for purposes of equalizing distributions of other property made to siblings. Erickson denied that McDonell deeded the property to her for any monetary amount. The parties sparred over the equities of the situation, with McDonell arguing and providing evidence that Erickson prepared the warranty deed and knew that the trusts held

the property, while Erickson argued and provided evidence that she prepared the warranty deed in accordance with the deed upon which McDonell and Rosemary first obtained title years earlier, as given to her by McDonell as a guide, and that she had no idea that the trusts came to hold the lots. The trial court held that the warranty deed was void *ab initio*, considering that, despite trust ownership of the property, McDonell executed the deed in his capacity as an individual and not as a trustee. With this finding, the court granted McDonell's request to quiet title to the lots in his favor and summarily dismissed various counts alleged in Erickson's counterclaim.

This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of law generally. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). The interpretation of a deed is likewise reviewed de novo on appeal. *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009). Finally, equitable rulings to quiet title are also reviewed de novo by this Court. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006).

The trial court effectively made a single determination in its ruling, i.e., that the warranty deed to Erickson was void *ab initio*. Upon the basis of this ruling, the court granted summary disposition in favor of McDonell on his complaint and summarily dismissed all of the counts in Erickson's counterclaim. In relationship to McDonell's complaint, the trial court's ruling awarded him relief as requested in count I, which asked the court to quiet title in his trust's favor and to void the deed because, as a matter of public record, he did not own the lots individually and therefore "could not transfer any right, title or interest in the [lots]" to Erickson. The trial court did not reach McDonell's allegations in count II, which requested the court to void the warranty deed or transaction on the basis that it failed for want of consideration, given that Erickson never paid McDonell the alleged agreed-upon price of \$25,000. The trial court also did not reach count III of McDonell's complaint, which sought a money judgment in the amount of \$25,000 on the chance that the court found the warranty deed to be valid and enforceable.

In relationship to Erickson's counterclaim, the trial court's ruling did not necessarily defeat count I, considering that count I requested specific performance by way of the court ordering McDonell to execute a new warranty deed in the name of the trust(s) in order to reflect the parties' alleged agreement. As part of count I, Erickson also requested an order requiring McDonell to pay attorney fees and costs that she incurred or would incur in attempting to compel McDonell to fulfill his obligations under the warranty deed to defend title. The court's ruling that the existing warranty deed was void *ab initio* did not directly provide a basis to summarily dismiss the claim for specific performance. And although the trial court voided the warranty deed because it failed to pass title considering the absence of language alluding to the trust(s) or trustee capacity, the ruling would not undermine a claim based on breach of the covenants or warranties that McDonell, individually, owned the property and could convey good title and that he would defend the title against all lawful claims. See MCL 565.151; *McCausey v Oliver*, 253 Mich App 703, 705-709; 660 NW2d 337 (2002); *Wolfenden v Burke*, 69 Mich App 394, 401; 245 NW2d 61 (1976). With respect to count II of the counterclaim, Erickson alleged, it appears, that the warranty deed, by operation of law, necessarily passed any and all rights and interests to her that McDonell had the authority to convey, individually or as trustee, regardless of the failure to specifically reference his status as trustee in the deed. Therefore, according to Erickson, she had full legal and equitable title under the deed and the court should quiet title in her favor. Even

though the trial court did not expressly acknowledge Erickson's counterclaim, let alone count II, the trial court's ruling that the deed was void *ab initio* and did not convey title entirely undermined and defeated count II of the counterclaim. In count III of the counterclaim, Erickson sought damages to cover property taxes that she allegedly paid and \$50,000, which was based on the alleged value of the lots that she was deprived of owning. The property tax component appeared to be an unjust enrichment type of claim, while the request for damages in the amount of \$50,000 appeared to be in the nature of a claim for breach of contract or breach of deed covenants and warranties. Therefore, the trial court's ruling that the warranty deed was void *ab initio* did not encompass the issues presented in count III of Erickson's counterclaim. Given our ruling below, the counts alleged in the counterclaim that should have been addressed by the trial court in light of and despite its ruling voiding the deed will no longer need resolution.

With respect to whether the trial court erred in ruling that the warranty deed was void *ab initio*, we begin with some real property law basics. "No estate or interest in lands . . . shall hereafter be . . . granted, unless by act or operation of law, *or by a deed or conveyance in writing*, subscribed by the party . . . granting . . . the same, or by some person thereunto by him lawfully authorized by writing." MCL 566.106 (emphasis added). This statute is "Michigan's general real-estate statute of frauds." *Rudell Estate*, 286 Mich App at 407. MCL 565.1 provides:

Conveyances of lands, or of any estate or interest therein, *may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass*, being of lawful age, *or by his lawful agent* or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other act or ceremony whatever. [Emphasis added.]

When a conveyance is made by a warranty deed, it "shall be deemed and held to be a *conveyance in fee simple* to the grantee[.]" MCL 565.151 (emphasis added). Here, McDonell, in his capacity as trustee of his trust or both trusts, or the trusts themselves, held the fee simple interest in the property. McDonell, individually, did not hold a fee simple interest, although it appears that he may have held a life estate interest in relationship to Rosemary's trust's undivided one-half interest, assuming the trust retained its interest following her death.

Pursuant to MCL 565.151, the grantor under a warranty deed covenants that he or she "is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he [or she] will warrant and defend the title to the same against all lawful claims." The "covenant of seisin is a covenant of ownership in fee simple." 1 Cameron, *Michigan Real Property Law* (3d ed), Deeds, § 10.21, p 361, citing *Peck v Houghtaling*, 35 Mich 127 (1876). The covenants of a warranty deed are breached, if at all, when the grantor or vendor enters into the covenants. *Reed v Rustin*, 375 Mich 531, 534; 134 NW2d 767 (1965); Cameron, § 10.21. Here, at the time of the attempted conveyance, a trust, or McDonell in a trustee capacity, was lawfully seized of the

premises, and McDonell as trustee had the right to convey the premises.¹ As emphasized by McDonell, the trust or trusts actively held the property at the time of the purported conveyance; therefore, action by a person as trustee would typically have been necessary to accomplish the conveyance. Although McDonell indeed had the authority to act in a trustee capacity, he also had, generally speaking, the capacity to act personally or individually. These are recognized as distinct capacities under the law. See *Bankers Trust Co of Muskegon v Forsyth*, 266 Mich 517, 520; 254 NW 190 (1934) (“A suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by or against him as an individual, although the same identical issue is involved[.]”) (internal quotation marks and citation omitted). In the context of a situation involving a trust that had co-trustees, our Supreme Court in *Nichols v Pospiech*, 289 Mich 324, 334-335; 286 NW 633 (1939), held that a contract of conveyance had to be executed by both trustees in the name of the trust. Under the authorities cited above, the warranty deed *should have indicated* that a trust was conveying the two lots to Erickson through McDonell in his capacity as trustee, or that McDonell as trustee of the trust(s) was conveying the property to Erickson. Although the warranty deed was not properly worded, we hold that this did not nullify the conveyance under the circumstances.

In Michigan, there is a recognized legal principle known as *descriptio personae*, which Black’s Law Dictionary (7th ed) defines as a “phrase, typically used to identify or describe a person in a contract or deed, [that] is not essential to a document’s validity.” In *Pungs v Hilgendorf*, 289 Mich 46, 52-53; 286 NW 152 (1939), our Supreme Court observed:

The deed described Pungs as a trustee, but the interest in the property held by the grantors was conveyed to Pungs and to his heirs and assigns forever. The title thus conveyed did not vest in Pungs as trustee. The words “Sydney C. Pungs, trustee,” etc., are merely *descriptio personae* and the title was conveyed to Pungs individually.

In *Levine v Katz*, 293 Mich 493, 498-499; 292 NW 466 (1940), the Michigan Supreme Court ruled:

It is urged by plaintiff that naming the mortgagee without the word “trustee” in the schedule renders ineffective the listing. We think the argument is without merit. The word “trustee” is not a part of the “name” of the creditor, but is merely *descriptio personae*. We do not commend as good practice the omission of the descriptive word to indicate trust capacity; nevertheless its omission does not render the discharge ineffective as to a creditor who was unknown to the bankrupt when the latter filed his schedules or obtained his discharge. [Citations omitted.]

¹ McDonell does not argue that there is any trust language that specifically precluded him from conveying or attempting to convey the property to Erickson. A trustee *generally* has the power to “sell . . . or otherwise dispose of . . . trust property for any purpose upon any terms or conditions . . .” MCL 700.7817(y).

These cases support the conclusion, and we so hold, that the failure of the warranty deed to show that McDonell was acting in a trustee capacity is forgiven under the doctrine of *descriptio personae*, where there is no dispute that McDonell was the trustee and only had the authority to convey the fee simple interest in the two lots as trustee and that a conveyance was fully intended.² The property was successfully conveyed to Erickson; the deed is valid and enforceable. Furthermore, we are in agreement with holdings and observations made by North Carolina courts, which are consistent with our application of the doctrine of *descriptio personae*. In *Jerome v Great American Ins Co*, 52 NC App 573, 578-579; 279 SE2d 42 (1981), the North Carolina Court of Appeals, relying on a decision by its Supreme Court in *Tocci v Nowfall*, 220 NC 550; 18 SE2d 225 (1942), stated:

Defendant also argues that the second deed of trust was invalid since B. Diane Vickery did not sign the instrument in her capacity as trustee for their children, and thus plaintiffs cannot recover under the standard mortgage clause quoted above on this deed of trust. We disagree. A deed executed by the trustee to convey property held in trust will operate as an exercise of the trustee's power of disposition *notwithstanding the failure on its face to indicate that it was executed by the trustee in his capacity as such when the intent to exercise the power can be inferred from the circumstances surrounding the transaction*. Also, the execution of a deed which would otherwise be ineffective is sufficient evidence to indicate such an intent. Under the circumstances of the present case, B. Diane Vickery clearly intended to sign the second deed of trust in her capacity as trustee, since she only held the property as trustee. Thus, her failure to sign the second deed of trust in her capacity as trustee did not affect the validity of the execution of that deed of trust. [Citations omitted; emphasis added.]

Here, McDonell lacked authority to convey fee title except for in an official trustee capacity, and there is no disagreement that there was an intent to exercise the authority necessary to convey title to Erickson. *Both* parties indicated that there was an intent to convey the lots to Erickson through the warranty deed. McDonell himself testified, "All I wanted to do is sell it and get my money out of it." Again, we hold that the warranty deed conveyed full legal title of the property to Erickson.

Additionally, although we decline to specifically rely upon it in further support of our ruling, we note MCL 556.128, which provides in part:

When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the

² We note that the warranty deed did not specifically state that McDonell was conveying the property "personally," "individually," or in an "individual capacity;" it merely stated that he was executing the deed as "a single man" and as Rosemary's survivor.

estate conveyed, so far as the rights of his creditors and *purchasers* are concerned.
[Emphasis added.]

We are addressing property, which was previously held under a tenancy or estate by the entireties (McDonell and Rosemary as husband and wife), which was then conveyed into trust estates under the authority established by the living revocable trusts, as carried out by the execution and delivery of quitclaim deeds. Unless the trusts had some type of limiting language, after the quitclaim deeds were executed and the trusts were deeded the property, the trustees, McDonell and Rosemary, and later McDonell alone, would have had the unrestrained ability to revoke the trusts and the associated quitclaim conveyances. MCL 556.128 could perhaps be interpreted to allow, for purposes of satisfying or collecting an outstanding debt, a creditor of a debtor to reach property placed into a revocable trust by the debtor, effectively treating the debtor as the absolute owner of the property regardless of the conveyance to the revocable trust. MCL 556.128 applies to not only creditors but purchasers, which arguably could mean that, as to trustee McDonell, he would still be deemed the absolute owner of the two lots, despite the quitclaim conveyances to the revocable trusts, for purposes of conveying the property to *purchaser* Erickson, negating the need to include trust capacity language in the warranty deed. That said, the applicability of MCL 556.128 is not entirely clear. The statute is found in the Powers of Appointment Act of 1967, MCL 556.111 *et seq.* And there is virtually no caselaw addressing MCL 556.128.³

In light of our ruling, the only issue on remand entails the nature of the consideration. The breach of warranty, specific performance, and unjust enrichment allegations contained in the counterclaim are rendered moot because good title was indeed passed to Erickson.⁴ With our holding that title was conveyed to Erickson under the warranty deed, she is entitled to an order quieting title to the property in her favor as requested in count II of her counterclaim. See MCL 600.2932; MCR 3.411. If, however, it is determined on remand that the consideration for the conveyance was \$25,000 as claimed by McDonell, he will be entitled to a judgment in that amount. There appears to be no dispute that Erickson has not paid anything to McDonell. There was no mortgage or lien, so McDonell cannot recover the property or have the deed voided for failure to pay the \$25,000 (count II of his complaint), although he might be able to levy against the lots if he obtains a money judgment.

For purposes of guidance on remand, we feel it necessary to briefly examine the law concerning consideration and conveyances by deed. The fact that the warranty deed referenced the sum of \$25,000 did not definitively establish the true amount of the consideration, upon

³ In a Supreme Court order, the Court stated, “we remand this case to the Court of Appeals for reconsideration of whether a living trust insulates a settlor from personal liability in light of MCL 556.128[.]” *Benz v Walker*, 459 Mich 977; 593 NW2d 547 (1999).

⁴ Erickson’s request for attorney fees and costs as part of the claim that McDonell had a duty to defend the title under the warranties fails, given that, ultimately, the claim of an adverse ownership interest did not successfully divest Erickson of the property interest conveyed to her under the deed. *McCausey*, 253 Mich App at 705-709.

which matter there was conflicting evidence. In *Stotts v Stotts*, 198 Mich 605, 617-618; 165 NW 761 (1917), the Supreme Court observed:

While the consideration expressed in a written instrument is prima facie to be taken as the actual consideration, the rule is well settled by abundant authority that parol evidence is admissible to show that the true consideration was greater than or different from that expressed. That there was a consideration in addition to the nominal one stated may always be shown when material. An examination of the following citations, and others to which they lead, will make clear the rule and reason for it[.]

The trial court was not in error in permitting evidence of the true consideration for the instruments involved in this controversy and of the performance or nonperformance of their obligations by the parties to them. [Citations omitted.]

“[T]he rule in Michigan is that a recital of valuable consideration in a deed is not conclusive proof that the property was actually sold for value.” *Rudell Estate*, 286 Mich App at 406 (further noting that the recital of consideration in a deed is mere hearsay and constitutes evidence of the slightest kind and that consideration can always be inquired into afterwards). Moreover, in regard to part of Erickson’s “consideration” argument, “[e]ven if it be shown that no monetary consideration was given . . . for the property, the consideration of love and affection between parent and child has been held to be adequate by this Court.” *Mallery v Van Hoeven*, 332 Mich 561, 563; 52 NW2d 341 (1952); see also *Straith v Straith*, 355 Mich 267, 277; 93 NW2d 893 (1959); Cameron, § 10.5. A deed, intended by a parent to vest title to property in a child as a voluntary gift, requires no pecuniary consideration. *Takaacs v Takaacs*, 317 Mich 72, 82; 26 NW2d 712 (1947). An issue of fact exists here on the question of consideration.

Finally, Erickson argues in cursory fashion that the case should be remanded to a different trial judge if reversal and remand is ordered. She maintains that the judge showed favoritism and partiality towards McDonell and an indifference to the facts and law. The record does not support granting Erickson’s request. The trial judge was simply adamant with respect to what he viewed was required under the law given the absence of trustee-capacity language in the deed; it was not a reflection of personal bias or prejudice. MCR 2.003(C)(1). “The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment.” *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Erickson has not overcome the heavy presumption of judicial impartiality. *Id.*

In sum, we reverse the trial court’s ruling that the warranty deed was void *ab initio* and remand the case for purposes of quieting title to the lots in favor of Erickson and examination of the issue concerning whether the consideration for the deed was \$25,000, as claimed by McDonell. And the previously-presiding trial judge is not removed as to proceedings on remand.

Reversed and remanded for proceedings consistent with this opinion. Having fully prevailed on appeal, taxable costs are awarded to Erickson under MCR 7.219. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan