THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-In-Equity Judge

Case No.: 2012-213362

Ronald T. Chaney, Respondent

v.

Paula C. Smith, Theresa A. Redding,
Ray D. Chaney, Janice F. Chaney,
Gary D. Chaney, Rose Pamela
Jackson, Deborah C. Harmon,
Freddie L. Chaney and the
Estate of Grover T. Chaney,

Defendants,
Of whom, Gary D. Chaney is Appellant

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SC Court of Appeals

**INITIAL BRIEF
OF APPELLANT**

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in will concluding the deed granted a fee simple interest to grantor's children?

STATEMENT OF THE CASE

This action for partition was filed on May 22, 2008. Plaintiff claimed he was entitled to an interest in real property formerly belonging to his father and the partition of that real property. Plaintiff claimed a deed signed by the father of Plaintiff in 1944 created a trust for his children and gave the children a fee simple interest which vested in the children after the death of the father and after all children reached twenty-one (21) years of age. The Defendant Gary D. Chaney, a brother of Plaintiff, contested the partition action alleging the deed did not pass a fee simple interest, the Plaintiff did not have any interest in the real property, and Plaintiff was not entitled to a partition of the property.

The action was transferred to the Master in Equity and a hearing was held without a jury on May 22, 2012. By Order dated October 5, 2012, the lower court concluded the deed did transfer a fee simple interest to the children and the Plaintiff was entitled to a partition of the property. Attorney for the Defendant Gary D. Chaney received written notice of entry of the Order on October 10, 2012, and Notice of Appeal was filed on November 7, 2012. The Defendant-Appellant Gary D. Chaney, hereinafter Appellant, respectfully submits the lower court erred in concluding the deed at issue conveyed a fee simple interest to his children.

STATEMENT OF FACTS

At the hearing before the Master in Equity the parties stipulated to the relevant facts in the action. On February 22, 1944, Thaxton Chaney, in contemplation of being sent to serve in World War II, executed a deed to real property initially reserving a life estate to himself and then providing the following granting clause, "do grant, bargain, sell and release unto the said Bessie Ursell Chaney, my said wife, as trustee of my said children begotten by her, for the use and benefit of my said children until the youngest shall attain the age of twenty-one years;". (Exhibit 1). A form deed was used and the words "heirs and assigns forever " in the habendum clause were specifically stricken through. (Transcript of Hearing, p.4).

Thaxton Chaney died in 1999, and his wife Bessie Chaney died in 2004. The named parties were the children of Thaxton and Bessie Chaney and all were over the age of twenty-one (21). With these basic facts and the deed, the lower court was called upon to determine the legal effect of the deed. Respondent Ronald Chaney argued the deed provided a trust for the children in fee simple and at the death of the father and upon the children reaching twenty-one years , the real property became the property of the children in fee simple. Appellant contended the deed did not specifically provide for any transfer of a fee simple interest. Furthermore, the only intent of the father to be gleaned from the deed itself was the striking of the "heirs and assigns forever" language in the form deed which evidenced a specific intent not to convey a fee simple interest. Finally, Appellant pointed out to the lower court the mother's dower interest was not waived or released as was the normal practice at the time. This was additional evidence of the intent of the

father not to convey a fee simple interest. The lower court, however, determined the deed did in fact transfer a fee simple interest.

ARGUMENT I

THE LOWER COURT ERRED IN CONCLUDING THE DEED AT ISSUE CONVEYED A FEE SIMPLE INTEREST TO THE GRANTORS' CHILDREN. (ISSUES 1)

A partition action is an equitable and an appeals court may review the evidence to determine the facts in accordance with its own view of the preponderance of the evidence. Zimmerman v. Marsh, 365 S.C. 383, 618 S.E.2d 898 (2005); Campbell v. Jordan, 382 S.C. 445, 675 S.E.2d 801 (Ct.App. 2009). Appellant respectfully submits the lower court was in error in its interpretation of the deed and other facts and its decision should be reversed.

In arguing he was entitled to a partition of real property Respondent contended the deed of 1944 created a trust for the children of the grantor with the remainder of the real property being conveyed to all of the children in fee simple when they reached twenty-one (21) years of age. Respondent contended the language of the deed itself conveyed a fee simple interest to the children and provided no additional evidence to show the intent of the father-grantor.

To prove the existence of a trust the proponent must show a declaration creating a trust, a trust res, and designated beneficiaries. When the trust involves real property the trust declaration must be in writing. Whetstone v. Whetstone, 309 S.C. 227, 420 S.E. 2d877 (Ct. App. 1992); Williams v. Wilson, 341 S.C. 136, 533 S.E. 2d 593 (Ct. App. 2000). Although very limited in details, the current deed arguably could be determined to

have set up a trust for the children. The nature and extent of the trust, however, are at best extremely ambiguous.

The directions for the "trust" provide only for the use of the property "for the use and benefit of my said children until the youngest shall attain the age of twenty-one years". The primary consideration in construing a trust is discerning the settler's intent. Construction of the trust instrument depends upon the trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires, or thoughts after the event. Epworth Children's Home v. Beasley, 365 S.C. 157, 616 S.E. 2d 710 (2005); Holcombe-Burdette v. Bank of America, 371S.C. 648, 640 S.E. 2d 480 (Ct. App. 2006).

In order to convey a fee simple interest to real property a deed is required to include words of inheritance in the granting clause and habendum clause. Failure to include the words of inheritance requires a finding the deed does not convey a fee simple interest. McLaurin v. McLaurin , 265 S.C. 157, 149, 217 S.E. 2d 41 (1975); S.C. Code Ann. Section 27-7-10 (1976). A deed setting up a trust, however, can be viewed differently. Even if the specific words of inheritance are not used, an equity court may determine a trust deed intended to pass a fee simple interest. In order to make such a finding, however, the purported trust deed must include some language evidencing an intent to transfer a fee simple interest or remainder interest to some party. Holder v. Melvin, 106 S.C. 245, 91 S.E. 97 (1917).

The deed currently in issue simply states the property is to be used for the benefit of grantor's children until they reach the age of twenty-one. It gives no indication it intends to provide for any child after age twenty-one and makes no provision of any

nature as to transferring fee simple or any type of remainder interest to any party. In fact, the very language contained in the form deed which would have transferred the fee simple interest was intentionally stricken from the deed.

Additionally, the form deed contained a standard clause at the time which provided for the renunciation of dower by grantor's wife. Although the execution of the renunciation of dower by a wife was a requirement to transfer a fee simple interest at the time of executing the deed in 1944, the renunciation clause was not executed.

The current deed failed to make any provision for the transfer of a fee simple interest. It also failed to make any provision for the transfer of any remainder interest. The only evidence of the grantor's intent as to the transfer of a fee simple was the striking of the inheritance language from the form deed and his failure to have his wife execute the renunciation of dower.

Appellant respectfully submits the current deed was insufficient as a matter of law to transfer a fee simple interest in the property. Furthermore, the only evidence in regard to the intent of the grantor indicates he took specific steps to avoid transferring a fee simple interest. In determining the grantor intended to transfer a fee simple interest the lower court made a leap of judgment which was unsupported by the law or the facts.

CONCLUSION

The deed of Thaxton Chaney made no reference to a transfer of a fee simple interest. The only evidence of record shows an intent to avoid the transfer of such an interest. Appellant respectfully submits the decision of the lower court should be reversed with a determination the deed did not transfer a fee simple interest.

Respectfully submitted,

January 18, 2013
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