[Cite as *Wetli v. Denny*, 2014-Ohio-1009.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

John F. Wetli

Appellee

v.

Gregory B. Denny, et al.

Appellants

Court of Appeals No. L-13-1043

Trial Court No. CI0201202130

DECISION AND JUDGMENT

Decided: March 7, 2014

* * * * *

James F. Nooney, for appellee.

Cary Rodman Cooper, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendants-appellants, Gregory Denny and Tybo Wilhelms, appeal the February 25, 2013 judgment of the Lucas County Court of Common Pleas which granted summary judgment in favor of plaintiff-appellee, John F. Wetli, in a partition action. Because we find that no genuine issues remain for trial and that appellee was entitled to judgment in his favor, we affirm.

{¶ 2} Appellee commenced this partition action on March 7, 2012. The complaint requested that the trial court partition two oil paintings or order their sale if a partition could not be effectuated. In 1996, the paintings were given to the three parties by their law partner, Allan J. Conkle, and remained in the law office. According to the complaint, after appellee left the office, the parties could not agree on the equitable division or sharing of the paintings. In their answer, as an affirmative defense appellants argued that because the gift included rights of survivorship, it could not be partitioned.

{¶ 3} On July 23, 2012, appellants filed a motion for summary judgment. Appellants' motion was supported by the pleadings and their attachments which included the "Memorandum of Gift" and a letter from Allan Conkle dated December 12, 1997. Appellants argued that gift expressly created a joint tenancy with survivorship rights and that partition was not a viable option as it would undermine the survivorship interests.

{¶ 4} Appellee filed his motion for summary judgment on August 6, 2012, stressing the contents of the December 12, 1997 letter wherein, the grantor specifically stated that there were no conditions to the gifted paintings. Appellee further argued that as a joint owner of the property deprived of his possessory interest, partition of the paintings was his only adequate remedy at law.

{¶ 5} On February 25, 2013, the trial court granted appellee's motion for summary judgment and denied appellants' motion for summary judgment. The court concluded that because the grantor expressly noted that the gift was free of conditions, equity favored the partition of the paintings. The court then ordered that the paintings be

appraised and either sold by auction or purchased by one or more of the grantees. This appeal followed.

{¶ 6} Appellants now raise the following assignment of error for our review:

> The trial court erred as a matter of law in ordering the partition and sale of personal property in which appellee and appellants owned an undivided one-third interest for their joint lives, with remainder to the survivor of them, because in ordering partition and sale the court wrongly denied appellants' vested survivorship rights in the personal property.

{¶ 7} In their sole assignment of error, appellants object to the court's award of summary judgment to appellee based on the argument that the partition and sale of the paintings nullifies the survivorship rights set forth in the memorandum of gift. Initially we note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 8} The signed "Memorandum of Gift" at issue was executed on December 19, 1996, December 12, 1997, and January 5, 1998, and provides:

> I, Allan J. Conkle, hereby give and transfer to John F. Wetli, Gregory B. Denny and Tybo Alan Wilhelms for their joint lives, with remainder to the survivor of them, an undivided one-third interest in and to the following two oil paintings:
>
> 1. Oil painting of fall field scene and rail fence in background, with dog and 8 quail. 42 x 58 inches, signed Edmund Osthaus in gilt frame; and
>
> 2. Oil painting of three dogs –two brown and white, and one black and white: The background is of fall colors with stream in background. Signed Edmund Osthaus, dated 1893, size 59 x 111 inches, in gilt frame.

{¶ 9} In addition, a related letter, dated December 12, 1997, provides, in part:

> Gentlemen:
>
> By early 1998 I will have completed the gifts of the paintings to you as a result of transfers in 1996, 1997 and 1998.
>
> Over the years I have had several discussions with John and with members of my family about the disposition of the paintings. Although I was the sole owner of the paintings, I have felt over the years the paintings have become "part of the office." I would like to have the paintings remain part of the office for the foreseeable future.
>
> As you know, I have attached no conditions to the gifts.

> At various times and in various discussions I have considered various alternatives as to the eventual disposition of the paintings. In summary, it seemed to me that conditioning the gifts and the future disposition of the paintings on some future presently unanticipated event would unduly complicate the future for you.
>
> Hopefully the paintings will remain in the office of Bugbee & Conkle and successor firms for the foreseeable future. If it eventually becomes necessary to dispose of the paintings for whatever reason your collective judgment deems to be appropriate I hope that you consider the gift of the paintings to St. Francis De Sales High School, from which our three sons graduated. * * *.

{¶ 10} In support of their argument, appellants contend that because the joint-tenancy gift of personal property had an express right of survivorship, it was not the proper subject of a partition action because dividing or selling the property would destroy appellants' survivorship rights. Conversely, appellee asserts that absent a partition order, he has no remedy at law.

{¶ 11} This court has specifically noted that:

> "[w]hile there is no statute in Ohio authorizing proceedings for the partition of personal property, the absence of such statute does not mean that such an action cannot be maintained. *Greenwald v. Kearns* (1957), 104 Ohio App. 473, 476 * * *; *Traicoff v. Christman* (May 13, 1982),

> [Seventh Dist.] App. No. 549 * * *. The general rule is that personal property of every class may be subject to compulsory partition. *Greenwald* at 476 * * *. This right was well established before statutes of Ohio dealt with the subject, and the statute dealing with partition of real property did not change the character or scope of the action; nor did the statute, merely because it failed to deal with all types of partition, repeal the common-law right to partition personal property. Id. There are many instances where parties, claiming to be joint owners of personal property as tenants in common, would be wholly without a legal remedy were it not for the jurisdiction of the courts in partition. *Id*." *Crowthers v. Gullett*, 150 Ohio App.3d 419, 2002-Ohio-7051, ¶ 13. *McKenzie v. Vickers-McKenzie*, 6th Dist. Lucas No. L-08-1299, 2009-Ohio-5179, ¶ 22.

Thus, the remedy of the partition of personal property is equitable in nature. *Greenwald v. Kearns*, 104 Ohio App. 473, 476, 145 N.E.2d 462 (8th Dist.1973).

{¶ 12} While appellants acknowledge that the partition of personal property is appropriate under certain circumstances, they rely on a 1929 Ohio Supreme Court case which held that parties may contract to jointly own stock certificates with a right of survivorship and that, upon death of one of the owners, the survivor has a vested estate in the remainder. *In re Hutchison's Estate*, 120 Ohio St. 542, 166 N.E. 687 (1929). The parties in the case were husband and wife. Germane to this case, the court noted that the

right of survivorship in personal property can be created by a gift and is enforceable at the time the gift is made. *Id.* at 552.

{¶ 13} Reviewing the Memoranda of Gift in conjunction with the December 12, 1997 letter, we must find that, unlike *Hutchinson,* the grantor specifically anticipated that the grantees may need to "dispose of the paintings for whatever reason" and expressed that "conditioning the gifts and the future disposition of the paintings on some future presently unanticipated event" would cause undue complications. Also in *Hutchinson*, unlike the present facts, the parties already owned the stock upon the death of the husband; the question was whether the survivorship right would allow the remainder to pass to the wife or whether it would pass under the will. Here, the parties were gifted the paintings though, admittedly, the grantor believed that the grantees would be able to make "collective" decisions regarding the future of the paintings. This is precisely the type of factual scenario befitting of the equitable remedy of partition.

{¶ 14} Because we find that there are no genuine issues remaining for trial and that appellee is entitled to partition of the paintings, we find that appellants' assignment of error is not well-taken.

{¶ 15} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed and the matter is remanded for proceedings consistent with this decision. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE