STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of TIMMER.

DICK SCHIPPER, Personal Representative of the ESTATE OF HERMINA JOSIE TIMMER, a/k/a HERMINA SCHIPPER TIMMER, TIMOTHY SCHIPPER, BONNIE SLENK, and LUANN COLE,	UNPUBLISHED May 17, 2011
Appellants,	
v	No. 296154 Ottawa Probate Court LC No. 09-056267-DE
KENNETH TIMMER, Trustee of the PETER J. TIMMER TRUST,	
Appellee.	

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Appellant estate appeals as of right from the trial court's judgment after bench trial. We conclude that the trial court failed to make sufficient factual findings as to the intent of the parties. Accordingly, we reverse the trial court's decision and remand for the trial court to consider the extrinsic evidence, make appropriate factual findings, and render a decision based on those findings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue in this case is the construction of language in the prenuptial agreement between Hermina Timmer and Peter Timmer, entered into when they were married later in their lives and each had children of their own. Their agreement, which they entered into on December 18, 1990, contained an ambiguity about the couple's intent regarding their decision to jointly purchase a condominium after marriage. Specifically, the paragraph at issue reads:

> Jointly Held Property. Any property acquired by Husband and Wife during their marriage, and expressly held as tenant by entireties or as joint tenants with full rights of survivorship shall pass to the survivor of them by operation of law and shall not be subject to any of the terms and conditions of this Agreement, no

> matter by whom purchased or acquired. Husband and Wife each promises to act in good faith toward the other in the management of their joint property, if any. Husband and Wife contemplate that they will be purchasing a condominium after marriage. It is their intent that the condominium be held by them as tenants by the entireties or joint tenants and that the surviving spouse shall have a life estate in said condominium as long as the surviving spouse shall occupy said condominium.[[1]]

When the couple subsequently purchased their condominium on May 31, 1991, the deed simply contained a conveyance to "Peter J. Timmer and Hermina J. Timmer, husband and wife," without conditions, life estates, or any other identification of how the property was to be held.

Hermina died on January 17, 2008. On February 14, 2008, Peter deeded the condominium to the "Peter Timmer Declaration of Trust."[2] In January 2009, Hermina's heirs sought informal probate of her will. Peter died on June 21, 2009. Hermina's heirs (appellants) requested a 50 percent interest in the condominium. Peter's heirs (as his trust) moved for summary disposition with regard to this claim, but the court denied the motion, stating that summary disposition was inappropriate because the prenuptial agreement was ambiguous.

A bench trial was held on December 9, 2009. Hermina's son, Dick Schipper, testified regarding ledgers that Peter Timmer kept of Hermina's assets. The ledgers showed Hermina's interest in the condominium as "one half." He also testified that his mother had an eighth-grade education, and that his parents together had owned a restaurant at which his mother worked. The restaurant was sold before his father, Harold Schipper, died.

An expert in probate law, called as a witness for plaintiff, testified that the agreement was "totally conflicting," containing "obvious[] ambiguity and confusion arising out of the jointly held property provision." He stated that the paragraphs providing for separate property, for jointly held property, and for termination led him to conclude that the likely intent of the parties was that the property they owned was to be retained as separate property. He maintained that if

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[1] The agreement contained another provision the significance of which was questioned during the litigation. It reads, "Termination. Husband and Wife may terminate this Agreement only by a written document, dated, witnessed and signed by both. It shall automatically terminate upon the deaths of both Husband and Wife, unless revoked sooner under the specific terms of this Agreement." The agreement was drafted by Peter's brother, an attorney.

[2] This deed contained what appears to be a fee simple conveyance from Peter as survivor of himself and Hermina to Peter as trustee of the trust; but had the following further language:

> Grantor herein reserves unto himself an exclusive life estate in the property conveyed by this deed. Grantor also reserves unto himself the right to dispose of the property during his lifetime by sale or gift free and clear of the rights of the other joint tenants.

the paragraph on jointly held property ended before the last sentence, there would not be an ambiguity, but the added provision about what was essentially a life estate in the condominium was "entirely inconsistent with tenancy by the entireties or joint tenants." The expert also noted that the prenuptial agreement's termination provision would be unnecessary unless the parties intended that there be "continuing rights and obligations after the death of the first person." Thus, the intent to keep the condominium as separate property could be "logically construed;" otherwise the termination provision "doesn't make any sense." He concluded:

> [W]hen they have a paragraph specifically addressing condominium and that paragraph references that the survivor shall have a life estate, and when you have the separate property provision with an exhibit showing that the parties had property and they sold that property to invest in the condominium, I believe the expectation and the intent is that is not be in a legal form of joint tenancy or tenancy by the entireties, but they're really talking about individually held, undivided interest with the protection for the survivor of the life estate.

The expert also testified that to a lay person the language of the last sentence would have been seen as an attempt to protect his or her spouse. However, he also admitted that, if this had been their intent, the deed was inconsistent with that, and that the agreement itself did not create an interest in property.[3] His opinion was that the language in the prenuptial agreement was a "contract between the parties that expressed an intent as to how they were going to handle the condominium."

Kenneth Timmer, Peter's son, testified that his father "was pretty sharp . . . [e]ven up until his death," and that he understood the tenancy terms used in the prenuptial agreement and the deed. Peter told Kenneth that he understood that if he died first, the condominium would go to Hermina. As to the records Timmer, an accountant, testified that it would be proper to account for joint property as "half-and half" in Hermina's ledgers even if the parties believed that the survivor would receive the property. He also admitted, however, that it would be also accurate to report 100 percent of the property to each Hermina and Peter under such circumstances.

After reviewing the evidence, the trial court, sitting without a jury, declared its findings of fact in the following two terse paragraphs:

> Basically the facts are that the—Hermina and Peter Timmer were married on December 20, 1990. Two days before that, on December 18, 1990, they

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[3] He did note that it appeared to him that the parties were not represented by an attorney at the time the deed was drafted, although he did not have personal knowledge of that fact. The copy of the deed furnished to this Court contains only a notation that it was prepared "under direction of Shorewood Realty."

> executed this prenuptial agreement in contemplation of their marriage. And then about five months after that, on May 31, 1991, they purchased this condo.
>
> The deed conveying the condo to them indicates it's conveyed to Peter J. Timmer and Hermina J. Timmer, husband and wife. It does not mention the phrase tenancy by the entireties. But as has been noted in the briefs, and also with Mr. Brower, that when the language is used it's presumed that there's a tenancy by the entireties intended. And I think we can conclude that that is pretty much the language of the deed.

The trial court rendered no findings about the Timmers' intent when they signed the contract. Instead, the trial court construed the ambiguous language of the agreement on the basis of the court's legal interpretation of the document's language, without reference to any facts of record:

> At any rate in looking at this the Court has to construe that agreement. And it is in fact ambiguous. However, the Court in construing the agreement must do its best to give effect to all of the words in the agreement. That's another principle that's been enumerated here today. And I am not at liberty to rewrite it or to adopt interpretations which are not suggested by the language of the agreement.
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> I have to look at this language and reach a reasonable interpretation of what that language means and what the parties meant by it. But I'm not entitled to simply throw it out and do something completely different. Something that they never wrote or said in their agreement. Even if it may be fair in some general sense to reach a result that is not called for by the language. It may be fair in some general sense to just say I'll just divide it 50-50 now. But I can't do that unless it's suggested by language in the agreement.
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> Nowhere in the agreement does it mention the word common or tenancy in common. Nowhere does it say that the parties are to divide the property either upon the death of Hermina or upon the death of Peter. Nowhere in the agreement does it say that the parties are to divide the property either upon the death of Hermina or upon the death of Peter. Nowhere in the agreement does it say that the survivor is to transfer one half the value of the property in cash to the other. And that's the request for relief here. None of those things are remotely suggested by any language in that agreement. What we simply have here is a statement that this condo that they intend to purchase that they intend to hold it as joint tenants—or excuse me, as tenants by the entireties or joint tenants. But then it contains that last little phrase about the life estate. In some ways that's moot at this point, because both parties have now died and neither has to worry about whether the other has a life estate.
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> But I believe that it is most reasonable to construe this language and not to simply rewrite the agreement to call it a joint tenancy with right of survivorship.

> That is the language that is used in the agreement. And it is true that that is inconsistent with the last two lines. But it is more consistent to read that as creating a joint tenant with right of survivorship. And then with life estate language that is surplusage (sic) than to construe it as creating a joint tenancy. There's nothing in there that suggests what the percentage interest of the joint tenants are. And there's nothing that says that when one dies the other one gets paid off. And that would take a lot of language, which is not in there. And I'm not allowed by law to supply that sort of language to an agreement of this sort.
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> So the Court's opinion of the . . . prenuptial agreement is that while ambiguous I will construe it as creating a joint tenancy with right of survivorship. That Peter Timmer survived Hermina Timmer, and that upon her death he became the sole owner of the property.

We note that, although petitioners initially sought to have Peter Timmer transfer Hermina's 50 percent interest in the condominium to petitioners, their second amended petition sought only payment of 50 percent of the market value of the condominium calculated as of Hermina's death, due to Timmer's breach of the prenuptial agreement. Accordingly, this case presents an issue of contract interpretation, which is a question of law, reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). To the extent the decision rests on a finding of fact by the trier of fact, we review underlying factual decisions for clear error. MCR 2.613(C). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

"'The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.'" *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). Generally, if the language of a contract is unambiguous, it is to be construed according to its plain meaning. *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 197-198; 702 NW2d 106 (2005). However, if the language of a contract is ambiguous, courts may consider extrinsic evidence to determine the intent of the parties. *Id*. at 198. A court may not ignore a portion of the contract in order to avoid finding an ambiguity. *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003). Where there is doubt, a contract is to be strictly construed against the party by whose agent it was drafted. *Shay*, 487 Mich at 673, citing *Mich Chandelier Co v Morse*, 297 Mich 41, 46; 297 NW 64 (1941). Where parties use both general and specific terms, the latter will ordinarily be controlling. *Sobel v Steelcraft Piston Ring Sales, Inc*, 294 Mich 211, 219; 292 NW2d 863 (1940).

In this case, the trial court correctly found the agreement was ambiguous. The language "tenants by the entireties or joint tenants" is in direct conflict with the very next phrase, "the surviving spouse shall have a life estate." When a married couple takes property as tenants by the entirety, "both spouses have a right of survivorship, meaning that, in the event that one spouse dies, the remaining spouse automatically owns the entire property." *Tkachik v Mandeville*, 487 Mich 38, 46-47, 790 NW2d 260 (2010). Thus, if these properties are not part of a decedent spouse's estate, the law of descent and distribution does not apply, *id*., and there is no need to reserve a life estate for the surviving spouse as he or she would own the entire fee.

Similarly, a joint tenancy, as opposed to a tenancy in common, would entail survivorship rights, rendering the additional language unnecessary. See *Albro v Allen*, 434 Mich 271, 274-276; 454 NW2d 85 (1990).

Because of the ambiguity, the court needed to look beyond the express language to the context and circumstances to determine the intent of the parties, and it was appropriate to review the extrinsic evidence presented by the parties in doing so. However, after reviewing the trial court's decision we note that the trial court did not make explicit findings of fact, except with respect to its decision not to consider the ledger evidence as persuasive on the question of intent. Instead, it appears that the trial court attempted to decide the parties' intent solely by reference to what was included, or not included, in the language of the prenuptial agreement itself, and concluded that, because the document did not contain a reference to tenancy in common with respect to ownership of the condominium, it could not find that such was their intent. The trial court's insistence that it was not permitted to add language to the contract misconstrues the court's role. Extrinsic evidence is admitted "not to add or detract from the writing, but merely to ascertain what the meaning of the parties is," especially if that evidence reveals the "contemporaneous understanding of the parties." *Klapp*, 468 Mich at 469-470.

> Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions. [*Id.* at 469 (quotation marks and citations omitted).]

The Supreme Court, *id.*, emphasized the finder of fact's role in resolving contractual ambiguities, by citing 11 Williston, Contracts (4th ed), § 30:7, pp 87-91:

> "Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning."

Our Supreme Court summarized, "In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, the [finder of fact] is to consider relevant extrinsic evidence." *Klapp*, 468 Mich at 470.

In the trial court's bench opinion, it interpreted the prenuptial agreement without referencing any of the substantial record evidence of intent. For example, there is no consideration of the expert's trial testimony that lay people seldom understand such terms; and that the language used, when coupled with the provision concerning separate property and the fact that the two used separate property to purchase the condominium, indicated to him that the Timmers' intent was place the property in a form that would enable them to hold the property jointly, albeit while retaining its character as separate property similar to the assets used to purchase it, and in such a way as to ensure protection for the survivor of the life estate. This opinion was certainly consistent with the ambiguity in the prenuptial agreement, as well as the evident ambiguity in Peter's subsequent deed to his trust. See note 2 *supra*. Likewise, the

termination provision supports the conclusion, as the expert noted, that some rights and obligations were to pass to the estate of the first-deceased spouse. Finally, the ledger shows that the property was evenly divided between Hermina and Peter. However, there is no discussion by the trial court as to how it weighed this evidence. Rather, the trial court appears to have construed the document without considering the expert's testimony or any other extrinsic evidence.

Given the complete absence of pertinent factual findings, we cannot ascertain whether the court simply ignored all evidence of record concerning the parties' intent, or blended unspoken factual findings with legal conclusions. In either case, the court failed to comply with MCR 2.517(A)(1), which requires, "In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." "Findings of fact map the path taken by a trial court through conflicting evidence." *Woody v Cello-Foil Products (After Remand)*, 450 Mich 588, 599; 546 NW2d 226 (1996) (dissenting opinion by WEAVER, J.). "Brevity in the articulation of factual findings is not fatal, as long as the appellate body is not forced to draw so many inferences that its review becomes merely speculative." *Id.* Here, construction of the ambiguous prenuptial agreement depended on a factual determination of the parties' intent, derived from both extrinsic evidence and the words the parties selected. The lack of factual findings regarding the intent of the parties leaves this Court without the trial court's map of the evidence. Rather than charting our own course through a thicket of legitimate yet conflicting inferences, we reverse the trial court's ruling and remand for the trial court to make findings of fact and a determination of the parties' intent based upon those findings.

We reverse and remand for the court to make appropriate factual findings and determine the parties' intent based on those findings. We retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro