THE DRAFTING OF PROPERTY SETTLEMENT AGREEMENTS: *DEMAYO V. DEMAYO*—A CAUTIONARY TALE

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I. INTRODUCTION

When a husband and wife enter into a property settlement agreement, they must manifest a clear intention to sever the tenancy by entirety status of any real property that they own. If they do not, and one spouse dies before a divorce is finalized, the surviving spouse will take the real property. This article analyzes the case of *DeMayo v. DeMayo*, Record No. 101751 (Va. 2011), in which the Alexandria Circuit Court came to this conclusion and on which the Virginia Supreme Court denied the estate's petition for appeal, concluding that the Circuit Court's decision lacked any "reversible error."

II. STATEMENT OF THE CASE

Rear Admiral Peter DeMayo, US Navy (Ret) ("Admiral DeMayo") and Melanie DeMayo ("Mrs. DeMayo) were married in May, 1992. On May 11, 2007, Admiral and Mrs. DeMayo entered into a Property Settlement Agreement ("PSA").[1] The PSA was unusual in that it stated the two had "no aspiration or anticipation for divorce," they still intended to "spend time together," and hoped to "restore their marital relationship." The PSA stated "[e]ach party shall be allowed to pursue their own relationships . . . and should either party *decide to pursue a final dissolution of the marriage*, neither party shall use any such relationships as a grounds for divorce." (italics added).

Under the PSA, the parties were entitled to keep their separate property and to follow specified procedures to divide their marital property. The PSA inured to the benefit of the parties' heirs, personal representatives, and assigns. However, two real properties were not defined as marital property, namely: 1) the martial residence in Alexandria, Virginia ("Virginia Property"), and 2) a rental property in Alexandria, Virginia ("Madison Property"). The two properties are each very valuable. The Virginia Property was assessed in excess of $1.2 million and the Madison Property in excess of $400,000.

The PSA's paragraph 35 specifically discussed the two real properties, in relevant part, as follows:

> The parties own real property as tenants by the entirety . . . known as 500 Virginia Avenue . . . . The parties agree that they shall make the house ready for sale and place it on the market for sale at the earliest mutually convenient time. [T]he parties shall divide the net proceeds from the sale equally. . . . The parties warrant and agree that these funds shall become the sole and separate property of each of the recipients upon receipt. Nothing in this paragraph shall preclude the parties from making a joint investment in another residence, should they so desire. Any such joint investment shall be considered marital property, and shall require equal investment by each party of separate or marital funds.

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[1] It was not drafted by this law firm. *See* Complaint, App. B, *DeMayo v. DeMayo*, C.A. No. 10001675 (City of Alexandria, Va. Cir. Ct. 2010).

> The parties also own as tenants by the entirety . . . 400 Madison Street, Apartment #506 . . . The parties agree that in the event of a final dissolution of their marriage, [the Madison Property] shall be sold on the open market or purchased by one from the other at a fair market value.[2]

The PSA was incorporated, but not merged, into a Decree of Separate Maintenance (the "Decree"). On December 11, 2009, Admiral DeMayo died, but they two never divorced. The day after he died, his adult children from a prior marriage, entered the Virginia Property, removed numerous items, and then changed the locks. However, by exchange of letters among counsel, Mrs. DeMayo indicated that she owned the two properties.

Notwithstanding that Admiral and Mrs. DeMayo never dissolved their marriage, the personal representatives of Peter DeMayo, the adult children from the former marriage (hereafter "Executrixes"), then filed a complaint requesting that the Court: (1) hold Mrs. DeMayo in contempt of the Decree of Separate Maintenance and order her to comply with its terms;[3] (2) issue a declaration that the Estate of Peter DeMayo's (the "Estate") heirs held the two properties as tenants in common with Mrs. DeMayo and impose a constructive trust on the properties (Count I); (3) partition the real property (Count II); and finally, (4) partition certain personal property located in the marital residence (Count III).

Upon demurrer, the Circuit Court dismissed the complaint. The Executrixes appealed. After the writ panel hearing, the Virginia Supreme Court unusually requested additional briefing regarding which appellate court had jurisdiction over the appeal.[4] Ultimately, the Virginia Supreme Court simply denied the petition for appeal stating that it saw "no reversible error" in the Circuit Court's decision.

III. ANALYSIS

The Executrixes essentially advanced the argument that the PSA destroyed the tenancy by entirety ("TBE") status of the properties. Their argument was problematic because the PSA provided for the sale of the properties only if the parties fulfilled future conditions precedent, all of which were entirely at the parties' own discretion.

Sale of the Virginia Property was conditioned upon a time that was "mutually convenient" for both parties. Sale of the Madison Property required "final dissolution" of the parties' marriage. Because neither condition occurred prior to Admiral DeMayo's death, Mrs. DeMayo argued that the tenancies by the entireties remained intact and the properties became her separate property upon Admiral DeMayo's death. Thus, Admiral DeMayo's heirs had no interest in the real property.

A tenancy by the entirety may only be terminated in one of three ways: 1) a tenant's death, 2) divorce, or 3) by voluntary acts of the tenants which manifest a clear intention to change the tenancy by the entireties to some other form of ownership. *GIAC Leasing Corp. v. Perper*, 1991 U.S. App. LEXIS

[2] *Id.* App. B ¶ 35.

[3] However, no final decree of divorce was ever entered in that case, but even if there had been a final decree of divorce, a divorce action is purely personal and the circuit court's jurisdiction over the divorce action would have abated upon Admiral DeMayo's death. *Hackler v. Hackler*, 44 App. 51, 602 S.E.2d 426 (2004). Therefore, the proper cause of action was for the estate to bring an action at law for breach of contract. *Moore v. Crutchfield*, 136 Va. 20, 25-28, 116 S.E. 482, 483-484 (1923).

[4] The parties agreed that the Supreme Court had original appellate jurisdiction because the Court of Appeals is a court of limited jurisdiction. *Lewis v. Lewis*, 271 Va. 520, 524-25, 628 S.E.2d 314, 316-17 (2006). VA. CODE §17.1-405(3)(f) did not create jurisdiction for it because while property settlement agreements are authorized by VA. CODE § 20-150, no provision of Title 20 governs their interpretation, at least not after one party dies.

13101, at *3 (4th Cir. 1991) (*citing* to VA. CODE §§ 55-20, 50-21, 20-111, and *Sudin v. Klein*, 221 Va. 232, 239, 269 S.E. 2d 787, 790 (1980)). Here, the issue was whether the PSA manifested a "clear intention" to sever the Property's tenancy by entirety status.

A property settlement agreement does not manifest a "clear intention" to sever a tenancy by the entirety if the contemplated conveyance depends upon future discretionary actions or decisions by the parties. Where a property settlement agreement simply gives the parties a right or a method by which they may sever a tenancy by the entirety in the future, the tenancy by the entirety remains until the parties actually exercise those rights. *See Stevens v. Fallen*, 5 Va. Cir. Ct. 402, 404, 1986 Va. Cir. LEXIS 2, at *4 (City of Virginia Beach, Va. 1986) (Where a person does not exercise a right to terminate a tenancy by the entirety before he dies, the property becomes the wife's sole property upon his death, and his heirs cannot exercise his right after his death); *GIAC*, 1991 U.S. App. LEXIS, at *3 (refusing to allow a creditor to attack a separated spouse's interest in the real property).

A. A Property Settlement Agreement Does Not Cause an Equitable Conversion If It Merely Provides for Future Sale of the Property at the Discretion of the Parties.

The Executrixes contended that the PSA somehow equitably converted the tenancies by the entireties to tenancies in common. However, the PSA's execution did not trigger equitable conversion of the properties because it never created a "certainty" that there would be a change of title. *See Bauserman v. Digiulian*, 224 Va. 414, 419-420, 297 S.E. 2d 671, 674-675 (1982). In *Bauserman*, the Court made clear that a contract for conveyance of real property does not trigger equitable conversion where it does not create a right to enforce the conveyance through specific performance. *See id.* at 419-420; *accord Estate of Bisbee*, 177 Wis. 77, 80-81 (Wis. 1922).

The equitable conversion doctrine is governed by principles similar to those governing specific performance. *See Clay v. Landreth*, 187 Va. 169, 173, 45 S.E.2d 875, 877-878 (1948). The doctrines are similar in that they require performance to be actually "due," in that there is a present existing right to compel performance (or in this case, conveyance of property). For instance, there is no right to specific performance where the parties have not agreed to all material terms. A court cannot order specific performance of terms never agreed to by the parties. *See Robertson v. Gilbert*, 219 Va. 620, 624-625, 249 S.E.2d 787, 789-790 (1978). In the context of equitable conversion, equity "regards as done what ought to be done," but the analysis of what "ought to be done" begins with whether the parties have a "duty" to do something in the first place. *Bauserman*, 224 Va. at 416, 419-420, 297 S.E. 2d at 674-675. Without a present "duty" or obligation to convey the Property, there is no equitable conversion.

B. The PSA's Plain Terms Demonstrate Lack of any Present Intent to Sever the Tenancy by the Entirety, and Lack of any Equitable Conversion.

Here, the PSA fell well short of the required clear intent to sever tenancies by the entirety, as well as the right to specific performance necessary for equitable conversion. The PSA, like any written contract, is construed as written and without adding terms that the parties did not include. *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 358, 626 S.E.2d 369, 372-373 (2006). "Words that the parties used are normally given their usual, ordinary, and popular meaning. No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *Id.* The court may only consider extrinsic evidence beyond the plain language of the agreement to resolve an ambiguity in the language. *Nextel WIP Lease Corp. v. Saunders*, 276 Va. 509, 666 S.E.2d 317 (2008).

The Executrixes argued the PSA severed the tenancies by the entireties as to the real property because the PSA's "intent" was to provide for "disposition" of the marital assets. While the PSA provided an option and a method of selling the property in the future, it did not unconditionally mandate the sale of the property or create a right to specific performance. Instead, the PSA provided for sale and division of the property only under certain conditions that the parties themselves chose never to meet.

Specifically, Paragraph 35(1) of the PSA called for the sale of the Virginia Property "at the earliest mutually convenient time." Without agreement on a mutually convenient time, the PSA did not require the parties to sell and, obviously, based on their personal desires, they never found such a time over the next 2 ½ years after they signed the PSA.

Paragraph 35(2) of the PSA called for the parties to sell the Madison Property "in the event of a final dissolution of their marriage." This never occurred because they never divorced before Admiral DeMayo's death.

Finally, the Executrixes cited *Phillips v. McCullen (*In re *McCullen)*, 244 B.R. 73 (E.D.V.A. 1999) for the proposition that an agreement to split the proceeds of the property broke the tenancy by the entireties. This rule, however, does not apply if the agreement preconditions the *sale* of the property upon the occurrence of a contingent event.

C. The Trial Court Properly Sustained Mrs. DeMayo's Demurrer as to the Madison Avenue Property.

The Madison Property had a different condition precedent, namely "final dissolution" of the marriage. The Executrixes argued this clause also meant the "death of one of the parties," based on the argument that "death dissolves a marriage." Here, however, one could not properly construe the words "final dissolution" to mean "death" in an agreement that previously used the words "final dissolution" to refer to divorce. *See Flippo v. C.S.C.*, 262 Va. 48, 547 S.E.2d 216 (2001) (limiting the court's ability to construct words used by the parties).

The PSA's plain terms clearly state that the PSA's intent was not to terminate the marriage, but to preserve the marriage by allowing for a separation period and peaceable disposition of the Property. Recital two stated that the parties have "no anticipation of or aspiration for divorce," and referred to the PSA as an agreement whereby the parties "may have the opportunity to live separate and apart yet still communicate and spend time together in an effort to peaceably resolve the differences between them and, if possible, restore their marital relationship."

Paragraph 1 provided that neither party shall use relationships with others as grounds for a divorce "in the event that the parties decide to *pursue* a final dissolution of the marriage." While Executrixes contended that this paragraph 1 was not a "definitional" paragraph, it did not need to be. Paragraph 1 supplied the context in which the parties were using the words "final dissolution" in the PSA. *Flippo*, 262 Va. at 64, 547 S.E.2d at 226. If the phrase "final dissolution of their marriage" in Paragraph 1 referred to an event that the parties may decide to "pursue," that phrase could not also refer to the death of one of the parties without producing an absurd (or perhaps illegal) result. *See Transit Casualty Co. v. Hartman's, Inc.*, 218 Va. 703, 707, 239 S.E.2d 894, 896-897 (1978) (absurd results are to be avoided).

In response, the Executrixes argued that that the words "final dissolution" in Paragraph 35(2) took on a different meaning than in Paragraph 1 because Paragraph 35(2) did not mention the word "pursue." Paragraph 1 used the word "pursue" because it limited what the parties could have used as grounds for divorce if they had "pursued" a "final dissolution" of their marriage. However, in the context of Paragraph 1, the marriage had not yet been dissolved. In the context of Paragraph 35(2), on the other hand, the marriage would have to be first dissolved before it took effect. Paragraph 35(2) exclusively governed what the parties would do with the Madison Avenue Property *after* "final dissolution." Paragraph 35(2) referred to the marriage in a past tense context, because there was no "final dissolution" to "pursue." Ultimately, while *Hackler v. Hackler*, 44 Va. App. 51, 67, 602 S.E.2d 426, 434 (2004) noted that death "terminates" the marriage (it did not use the word "dissolve"), the question was really what does the phrase "final dissolution" mean in this specific PSA.

IV. RECOMMENDATIONS

When drafting a PSA, you must know the intent of the parties as to what will happen to real property owned by tenants by the entirety if one of the parties dies before a divorce is finalized.

There are many ways to capture the parties' intentions, but if the parties intend to sever the tenancy by entirety status of the property, they must do so clearly and unequivocally.

Next, be very careful about using terms like "dissolution of the marriage." If the parties intend to say "divorce," use the term "divorce."

If a particular disposition of property is intended if a party dies, be express about that intention. You fail to do so at your peril.