In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tukel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

v.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 163404

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

APPELLEES' APPENDIX

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July 20, 2022

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Circuit Court Civil Records
13th Circuit Court

Antrim County 13TH CIRCUIT COURT-- Phone (231) 533-6353
PO BOX 520 -- 207 CAYUGA ST
BELLAIRE, MI 49615

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Case #: 2016-9008 CH **County:** Antrim
Case Type: HOUSING AND REAL ESTATE

Trial Type: **Jury Demand:** N
Judge: ELSENHEIMER, KEVIN A. **P-Number:** 49293
Date Issued: 05/09/2016 **Date Closed:** 05/17/2017 **Date Expired:**
Date Reopened: 07/21/2017 **Date Reclosed:** 04/16/2018
Disposition: OTHER **Code:** IS INACTIVE STATUS
Disposition Date: 05/17/2017 **Judgment for:**

Litigants

Name	Plaintiff/Defendant	Attorney	P-Number	Alias
SCHAAF, CINDY	Plaintiff	WHITTEN, JENNIFER L.	75487	
FRYER, COLLEEN	Plaintiff	WHITTEN, JENNIFER L.	75487	
MASON, GWEN	Plaintiff	WHITTEN, JENNIFER L.	75487	
FORBES, CHARLENE	Defendant			
FORBES, ANGIE	Defendant			

Court Proceedings

Date	Action	Proceeding
05/09/2016	SI	SUMMONS ISSUED-(1) TO EXPIRE ON 8/8/2016-COMPLAINT
		FILED RCPT#19496
05/17/2016	SV	DEF'T CHARLENE FORBES SERVED BY COURT OFFICER ON
		5/11/2016
09/29/2016		CORRESPONDENCE FROM COURT ADMIN REGARDING LACK OF
		ACTIVITY IN CASE
10/12/2016	D	DEFAULT REQUEST AFFIDAVIT AND ENTRY
10/12/2016	MO	DEF'TS MOTION FOR SUMMARY DISPOSITION
10/12/2016	HRG	NOTICE OF HEARING-DEF'TS MOTION FOR SUMMARY DISPO
		11/21/2016 @2PM IN BELLAIRE
10/12/2016		TRUEFILING PROOF OF SERVICE- DEFAULT REQUEST AND
		ENTRY
10/12/2016		TRUEFILING PROOF OF SERVICE- NOH ON DEFT'S MSD
10/13/2016		PROOF OF SERVICE-DEFAULT

10/13/2016	OR	ORDER VACATING ENTRY OF DEFAULT ON 10/12/2016
10/13/2016		TRUEFILE SERVICE-ORDER VACATING ENTRY OF DEFAULT
10/18/2016	CPT	COURTS CIVIL PRE TRIAL STATEMENT
10/19/2016	PTS	PLTF'S PRE TRIAL STATEMENT
10/20/2016		TRUEFILE SERVICE-PRE TRIAL STATEMENT
10/28/2016	PTS	PLTF'S PRE TRIAL STATEMENT-AMENDED
10/28/2016	PTS	DEF'TS PRE TRIAL STATEMENT
10/28/2016	AN	ANSWER AND AFFIRMATIVE DEFENSES
10/28/2016		TRUEFILE SERVICE-AMENDED PRE TRIAL STATEMENT
10/28/2016		TRUEFILE SERVICE -DEF'TS PRE TRIAL STATEMENT
10/31/2016		TRUEFILE SERVICE-ANSWER TO AFFIRMATIVE DEF'S
11/01/2016	HRG	NOTICE OF HEARING-SETTLEMENT CONFERENCE-
		3/10/2017 @9AM IN TC
11/01/2016	NJT	NOTICE OF ONE DAY NON JURY TRIAL 4/11/2017 @8:30AM
		IN BELLAIRE
11/01/2016	SCO	COURTS CIVIL SCHEDULING CONFERENCE ORDER
11/10/2016	MO	PLTF'S STIPULATED MOTION TO AMEND COMPLAINT
11/10/2016		TRUEFILE SERVICE
11/15/2016	AC	PLT'S FIRST AMENDED COMPLAINT FOR PARTITION
11/15/2016	OR	ORDER GRANTING STIPULATED MOTION TO AMEND
		COMPLAINT/TGP ON 11/11/2016
11/16/2016		TRUEFILE SERVICE-AMENDED COMPLAINT
11/16/2016		TRUEFILE SERVICE-ORDER
11/17/2016	MR	WITHDRAWAL OF DEF'TS MOTION FOR SUMMARY DISPO.
11/17/2016		TRUEFILING PROOF OF SERVICE- WITHDRAWL OF DETS
		MSD
11/22/2016		PROOF OF SERVICE
11/22/2016		PLTF'S REQUESTS FOR ADMISSIONS TO DEF'T
11/22/2016		TRUEFILE SERVICE-PLTF'S REQUEST FOR ADMISSIONS
11/29/2016	AN	DEF'TS ANSWER TO FIRST AMENDED COMPLAINT AND
		AFFIRMATIVE DEFENSES
11/30/2016		TRUEFILE SERVICE-ANSWER TO AMENDED COMPLAINT
12/05/2016		PROOF OF SERVICE
12/05/2016		PLTF'S WITNESS AND EXHIBIT LIST
12/05/2016		TRUEFILE SERVICE-PLTF'S WITNESS AND EXHIBIT LIST
12/05/2016		DEF'TS W/E LIST
12/06/2016		TRUEFILE SERVICE-DEF'TS WITNESS/EXHIBIT LIST
12/07/2016		DEF'TS AMENDED WITNESS AND EXHIBIT LIST
12/07/2016		TRUEFILE SERVICE-DEF'TS AMENDED WITNESS EXHIBIT
		LIST
12/20/2016	MO	STIPULATED MOTION TO AMEND PLEADINGS AND EXTEND
		TIME TO ANSWER DISCOVERY REQUESTS
12/21/2016		TRUEFILE SERVICE-STIP MOTION TO AMEND PLEADINGS
12/27/2016	OR	ORDER GRANTING STIP MOTION TO AMEND PLEADINGS AND
		EXTEND TIME TO ANSWER DISCOVERY REQUESTS/TGP

12/27/2016		TRUEFILING PROOF OF SERVICE- ORDER GRANTING
		STIP MOTION
01/06/2017	AC	PLTF'S SECOND AMENDED COMPLAINT TO DETERMIN
		INTEREST IN PROPERTY AND FOR PARTITION
01/09/2017		TRUEFILE SERVICE-PLTF'S SECOND AMENDED COMPLAINT
01/09/2017		DEF'TS RESPONSE TO PLTF'S REQUESTS FOR ADMISSIONS
01/09/2017		PROOF OF SERVICE
01/09/2017		TRUEFILE SERVICE-RESPONSE TO PLTF'S REQUESTS FOR
		ADMISSIONS
02/10/2017	AN	ANSWER COUNTER COMPLAINT AND AFFIRMATIVE DEFENSES
		CHARLENE FORBES
02/10/2017		STIPULATION TO EXTEND TIME TO ANSWER SECOND
		AMENDED COMPLAINT
02/13/2017		TRUEFILE SERVICE-ANSWER 2ND AMEND COMPLAINT
02/13/2017		TRUEFILE SERVICE-STIP TO EXTEND
02/13/2017	MO	COUNTER PLT'FS MOTION AND BRIEF FOR ORDER TO SHOW
		CAUSE WHY PRELIM INJUNC SHOULD NOT ISSUE FOR
		COUNTER DEF'TS IMMEDIATE PAYMENT OF PROPERTY
		TAXES TO PREVENT TAX FORFEITURE ON 3/1/2017
02/14/2017		TRUEFILE SERVICE-ORDER TO SHOW CAUSE
02/14/2017	HRG	NOTICE OF HEARING ON COUNTER PLTF'S ORDER TO
		SHOW CAUSE-3/1/2017 IN TC
02/14/2017		TRUEFILE SERVICE-HEARING ON ORDER TO SHOW CAUSE
02/17/2017	MR	PLTF/COUNTER DEF'TS RESPONSE TO DEFT/COUNTER PLTFS
		MOTION TO SHOW CAUSE WHY A PRELIM INJUNC SHOULD
		NOT ISSUE FOR COUNTER DEF'TS IMMEDIATE PAYMENT OF
		PROPERTY TAXES TO PREVENT A TAX FORFEITURE FROM
		OCCURING ON 3/1/2017
02/17/2017		TRUEFILE SERVICE-RESPONSE TO DEF'TS MOTION TO
		SHOW CAUSE
02/21/2017	OR	STIP AND ORDER TO EXTEND DEADLINES /KAE
02/21/2017		TRUEFILE SERVICE- STIP AND ORDER TO EXTEND
02/22/2017	HRG	AMENDED NOTICE OF SETTLEMENT CONFERENCE-5/19/17
		@9AM IN TC
02/22/2017	NJT	AMENDED NOTICE OF JURY TRIAL-6/20/2017 @8:30AM IN
		BELLAIRE
02/22/2017	SCO	COURTS AMENDED CIVIL SCHEDULING CONFERENCE ORDER
02/23/2017	OR	ORDER DENYING COURNTER PLTF'S MOTION FOR ORDER TO
		SHOW CAUSE WHY A PRELIM INJUNC SHOULD NOT ISSUE
02/23/2017		TRUEFILE SERVICE-ORDER DENYING
02/27/2017		TRUEFILE SERVICE- PROPOSED ORDER COMPELLING
		PAYMENT OF PROPERTY TAXES
03/10/2017	AN	PLTF'S/COUNTER DEFT'S ANSWER TO COUNTER COMPLAINT
		AND AFFIRMATIVE DEFENSES
03/10/2017		TRUEFILE SERVICE-ANSWER

04/07/2017	MO	DEF'TS MOTION AND BRIEF FOR SUMMARY DISPOSITION
04/07/2017		INDEX OF EXHIBITS
04/07/2017		TRUEFILE SERVICE-MOTION FOR SUMMARY DISPO.
04/07/2017		TRUEFILE SERVICE-DEF'TS EXHIBITS 1-7
04/11/2017		REQUEST FOR PRODUCTION OF DOCUMENTS
04/11/2017		NOTICE OF TAKING DEPOSITION
04/11/2017		TRUEFILE SERVICE- NOTICE OF TAKING DEPOSITION
04/11/2017		TRUEFILE SERVICE- REQUEST FOR PRODUCTION OF DOCS
04/11/2017	HRG	NOTICE OF HEARING- DEF'TS MOTION FOR SUMMARY
		DISPOSITION 5/8/2017 @8:30AM IN BELLAIRE
04/18/2017		PLTF'S AMENDED W/E LIST
04/18/2017		TRUEFILE SERVICE- PLTF'S AMENDED W/E LIST
04/18/2017	MO	PLTF'S MOTION FOR PARTIAL SUMMARY DISPOSITION
04/18/2017	HRG	NOTICE OF MOTION HEARING- PLTF'S MOTION FOR
		PARTIAL SUMMARY DISPOSITION
04/18/2017	MB	PLTF'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL
		SUMMARY DISPOSITION
04/18/2017		TRUEFILE SERVICE- PLTF'S MOTION FOR PARTIAL
		SUMMARY DISPOSITION
04/18/2017		TRUEFILE SERVICE-BRIEF IN SUPPORT
05/01/2017	HRG	AMENDED NOTICE OF MOTION HEARING-PLTF'S MOTION FOR
		PARTIAL SUMMARY DISPOSITION 5/15/2017 @10:30AM IN
		TRAVERSE CITY
05/01/2017	HRG	AMENDED NOTICE OF MOTION HEARING-DEF'TS MOTION FOR
		SUMMARY DISPOSITION 5/15/2017 @ 10:30AM IN
		TRAVERSE CITY
05/05/2017	MB	PLTF'S BRIEF IN RESPONSE TO DEF'TS MOTION FOR
		SUMMARY DISPOSITION
05/05/2017		TRUEFILE SERVICE- PLTF'S BRIEF IN RESPONSE TO MSD
05/09/2017	MR	DEF'TS BRIEF IN OPPOSITION TO PLTF'S MOTION FOR
		SUMMARY DISPOSITION & REPLY BRIEF IN SUPPORT OF
		DEF'TS MOTION FOR SUMMARY DISPOSITION
05/09/2017		TRUEFILE SERVICE- BRIEF IN OPP TO MSD REPLY BRIEF
		IN SUPPORT
05/17/2017	OR	ADMINISTRATIVE ORDER OF STAY /KAE
07/10/2017	HRG	NOTICE OF MOTION-STATUS CONFERENCE SET FOR
		07/19/2017 AT 1:30PM IN TRAVERSE CITY
07/17/2017	NOE	NOTICE OF ENTRY OF 7 DAY ORDER
07/18/2017		TRUEFILE SERVICE -NOTICE OF ENTRY OF ORDER
07/21/2017	SCO	COURTS SECOND AMENDED CIVIL SCHEDULING CONFERENCE
		ORDER
07/24/2017	OBJ	OBJECTION TO PLTF'S PROPOSED ORDER ON SUMMARY
		DISPOSITION
07/24/2017		TRUEFILE SERVICE- OBJECTION TO RECORDING OF
		PROPOSED ORDER

07/25/2017	HRG	NOTICE OF HEARING- DEF'TS OBJECTION TO PLTF'S
		PROPOSED ORDER ON SUMMARY DISPOSITION
		8/14/2017 @11AM IN BELLAIRE
08/01/2017	HRG	NOTICE OF SETTLEMENT CONFERENCE- 8/25/2017 @9AM IN
		TC
08/01/2017	NJT	NOTICE OF ONE DAY NON JURY TRIAL 9/21/2017 @8:30AM
		IN BELLAIRE
08/02/2017	HRG	NOTICE OF MOTION -8/14/2017 @11AM IN BELLAIRE
		MOTION REGARDING PARTITION
08/10/2017	MB	PLT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR
		PARTIAL SUMMARY DISPOSITION
08/11/2017		TRUEFILE POS-PLT'S SUPPLEMENTAL BRIEF IN SUPPORT
		OF MSD
08/11/2017		DEF'S EXHIBIT 2
08/11/2017		DEF'S EXHIBIT 3
08/11/2017	MR	DEF'S BRIEF IN SUPPORT OF AN EVIDENTIARY HRG TO
		DETERMINE WHETHER THE PROPERTY CAN BE PARTITIONED
08/11/2017		DEF'S EXHIBIT 1
08/11/2017		TRUEFILE POS-EXHIBIT 2
08/11/2017		TRUEFILE POS-EXHIBIT 3
08/11/2017		TRUEFILE POS-DEF'S BRIEF RE PARTITION
08/11/2017		TRUEFILE POS-EXHIBIT 1
08/15/2017		TRUEFILE SERVICE- ORDER
08/15/2017	OR	ORDER /KAE
08/15/2017		TRUEFILE SERVICE- ORDER
08/24/2017	TB	PLTF'S TRIAL BRIEF
08/25/2017		TRUEFILE SERVICE- PLTF'S TRIAL BRIEF
08/25/2017		DEFT'S/COUNTER PLTF'S EXHIBITS F-I
08/25/2017		DEF'T COUNTER PLTF'S EXHIBITS A-E
08/25/2017	TB	DEF'T COUNTER PLTF'S TRIAL BRIEF
08/25/2017	OR	DECISION AND ORDER REGARDING PARTITION/KAE
09/05/2017	MO	DEF'TS MOTION FOR RECONSIDERATION
09/05/2017		TRUEFILE SERVICE- MOTION FOR RECONSIDERATION
09/11/2017	OR	ORDER REGARDING MOTION FOR RECONSIDERATION
09/18/2017	MO	DEF'TS MOTION FOR RECONSIDERATION
09/18/2017		TRUEFILE SERVICE- MOTION FOR RECONSIDERATION OF
		PARTITION
09/21/2017	MB	PLTF/COUNTER DEF'TS BRIEF IN OPPOSITION TO DEF'TS
		MOTION FOR RECONSIDERATION
09/21/2017		TRUEFILE SERVICE- PLTF'S BRIEF IN OPPOSITION
09/22/2017	OR	ORDER RE: MOTION FOR RECONSIDERATION
09/25/2017	OR	DECISION AND ORDER DENYING DEFT'S MOTION FOR
		RECONSIDERATION/KAE
10/05/2017	MB	PLTF'S BRIEF IN OPPOSITION TO DEF'TS MOTION FOR
		RECONSIDERATION

10/05/2017		TRUEFILE SERVICE- PLTF'S BRIEF OPPOSITION MOTION
		RECONSIDER
10/10/2017	OR	DECISION AND ORDER DENYING DEF'TS MOTION FOR
		RECONSIDERATION /KAE
10/30/2017	NOE	NOTICE OF ENTRY OF ORDER UNDER 7 DAY RULE
10/30/2017		TRUEFILE SERVICE- NOTICE OF ENTRY OF ORDER
11/06/2017	OBJ	DEF'TS OBJECTION TO PLTF'S PROPOSED ORDER OF SALE
11/07/2017		TRUEFILE SERVICE- OBJECTION TO ORDER OF SALE
11/09/2017	HRG	DEF'TS OBJECTION TO PLTF'S PROPOSED ORDER OF SALE
		12/11/2017 @11AM IN BELLAIRE
11/21/2017	MR	PLTF'S RESPONSE TO DEF'TS OBJECTION TO PLT'S
		PROPOSED ORDER OF SALE
11/21/2017		TRUEFILE SERVICE- PLTF RESPONSE TO OBJECTION TO
		PLTF PROPOSED ORDER OF SALE
12/11/2017	OR	ORDER OF SALE/KAE
12/11/2017		TRUEFILE SERVICE-ORDER OF SALE
12/12/2017	HRG	NOTICE OF ONE DAY NON JURY TRIAL- 1/11/2018 @8:30
		AM IN BELLAIRE
12/12/2017	NJT	AMENDED NOTICE OF ONE DAY NON JURY TRIAL 1/23/2018
		@8:30AM IN BELLAIRE
12/14/2017		TRUEFILE SERVICE
12/28/2017		REPORTER/RECORDER CERTIFICATE OF ORDERING
		TRANSCRIPTS ON APPEAL
12/29/2017	MB	DEFT'S MOTION & BRIEF FOR RECONSIDERATION
12/29/2017		TRUEFILING PROOF OF SERVICE-MOTION/PETITION-MO
01/03/2018	TRA	TRANSCRIPT FILED -MOTION FOR PARTITION HEARD ON
		8/14/2017 REPORTED BY CSR JAYNES 7597 RPR
01/03/2018	TRA	TRANSCRIPT FILED- HEARING ON 12/11/2017 REPORTED
		BY CSR JAYNES 7597 RPR
01/04/2018	OR	DECISION AND ORDER DENYING DEF'TS MOTION FOR
		RECONSIDERATION/KAE 1/3/2018
01/22/2018	TB	PLTF'S SUPPLEMENTAL TRIAL BRIEF 1/22/2018
		EXHIBIT 12 TO SUPP TRIAL BRIEF
		EXHIBITS 1-11 TO SUPP TRIAL BRIEF
		EXHIBITS 15-16 TO SUPP TRIAL BRIEF
		EXHIBITS 13-14 TO SUPP TRIAL BRIEF
		EXHIBITS 17-19 TO SUPP TRIAL BRIEF
		TRUEFILE SERVICE-TRIAL BRIEF AND EXHIBITS ,
01/22/2018		NOTICE OF FILING OF TRANSCRIPT
02/20/2018		DEF'TS TRIAL EXHIBITS A-L
		TRUEFILE SERVICE--SUPPLE TRIAL BRIEF EXHIBITS
02/20/2018	TB	DEF'TS SUPPLEMENTAL TRIAL BRIEF
		TRUEFILE SERVICE- SUPPLEMENTAL TRIAL BRIEF
		EXHIBITS A-L
02/20/2018		PLTF'S AMENDED EXHIBITS 15A AND 16A 2/20/2018

		TRUEFILE SERVICE-AMENDED SC 15 AND 16
02/20/2018	TB	PLTF'S SUPPLEMENTAL TRIAL BRIEF
		TRUEFILE SERVICE-PLTF'S SUPPLEMENTAL TRIAL BRIEF
02/20/2018		PLTF'S EXHIBIT 29 TO SUPPLEMENTAL TRIAL BRIEF
		TRUEFILE SERVICE-EX 29
02/20/2018		PLTF'S EXHIBITS 24-27 TO SUPPLEMENTAL TRIAL BRIEF
		TRUEFILE SERVICE-EX 24-27
02/20/2018		PLTF'S EXHIBITS 20-23 TO SUPPLEMENTAL TRIAL BRIEF
02/20/2018		PLTF'S EXHIBIT 28 TO SUPPLEMENTAL TRIAL BRIEF
		TRUEFILE SERVICE-EX 28
03/06/2018		PLTF'S EXHIBIT 30
03/06/2018	MR	PLTF'S RESPONSE TO DEF'TS SUPPLEMENTAL TRIAL
		BRIEF 3/6/2018
		TRUEFILE SERVICE-PLTF RESPONSE TO DEF SUPP TRIAL
		BRIEF
03/06/2018		PLTF'S EXHIBIT 32 3/6/2018
		TRUEFILE SERVICE- EX 32 DEP TRANSCRIPT
03/06/2018		PLTF'S EXHIBITS 33-36 3/6/2018
		TRUEFILE SERVICE-EX 33-36 TO PLTF RESPONSE TO
		DEF'S SUPP TRIAL BRIEF
03/06/2018		PLTF'S EXHIBIT 31 3/6/2018
		TRUEFILE SERVICE-EX 31 DEP TRANSCRIPT MASON
03/06/2018	TB	DEF'TS REPLY TO PLTF'S TRIAL BRIEFS 3/6/2018
		TRUEFILE SERVICE-DEF'TS TRIAL REPLY BRIEF
03/06/2018		DEFT'S EXHIBIT M 3/6/2018
		TRUEFILE SERVICE-DEF'TS EXHIBIT M
04/03/2018	TRA	TRANSCRIPT FILED-MOTION HEARD ON 5/15/17 BY
		JUDGE ELSENHEIMER -REPORTED BY CSR COPELAND 6054
04/17/2018	OR	DECISION AND ORDER-CLOSING CASE/KAE 4/16/2018
05/08/2018		EXHIBTS A DOCUMENTS 05/07/2018
05/08/2018	MO	DEFT'S/APPELLANT'S MOTION TO STAY ENFORCEMENT OF
		THIS COURT'S ORDERS WITHOUT BOND PENDING APPEAL
		05/07/2018
05/08/2018		TRUEFILE POS-EXH A-MOTION TO STAY JUDGMENT
05/08/2018		TRUEFILE POS-MOT TO STAY ENFORCEMENT OF JDGMNT
		PENDING APPEAL
05/09/2018	HRG	NOTICE OF MOTION SET FOR 05/21/2018 AT 11AM IN
		BELLAIRE 05/09/2018
05/15/2018	HRG	NOTICE OF HEARING-PLT'S MOTION FOR BOND PENDING
		APPEAL 5/21/2018 @11AM IN BELLAIRE
		TRUEFILE SERVICE- NOTICE OF HEARING
05/15/2018	MO	PLTF/COUNTER DEF'TS MOTION FOR BOND PENDING APPEAL
		TRUEFILE SERVICE-MOTION FOR BOND
05/15/2018	MR	PLT'FS OBJECTION TO DEF'TS MOTION TO STAY
		ENFORCEMENT OF THIS COURTS ORDERS WITHOUT BOND

		PENDING APPEAL
		TRUEFILE SERVICE-OBJECTION TO MOTION TO STAY
05/17/2018	HRG	PLTF'S /COUNTER DEF'TS MOTION FOR BOND PENDING
		APPEAL 6/18/2018 @11AM IN BELLAIRE
05/17/2018	HRG	AMENDED NOTICE OF MOTION HEARING-PLTF'S MOTION FOR
		BOND PENDING APPEAL 5/21/2018 @11AM IN BELLAIRE
05/21/2018	MR	DEF'TS/APPELLANTS BRIEF IN OPPOSITION TO PLTS
		MOTION FOR BOND PENDING APPEAL
		TRUEFILE-RESPONSE TO MOTION FOR BOND
05/21/2018	TRA	MOTION TRANSCRIPT-5/15/2017 HEARD BY HON.KEVIN
		ELSENHEIMER REPORTED BY CSR COPELAND 6054
05/22/2018		NOTICE OF FILING OF TRANSCRIPT AND AFFIDAVIT OF
		MAILING
		TRUEFILE SERVICE- FORBES
05/29/2018	OR	ORDER OF STAY WITHOUT BOND PENDING APPEAL /KAE
		5/29/2018
		TRUEFILE SERVICE- PROPOSED ORDER ON BOND
06/25/2018	OR	ORDER ON BOND PENDING APPEAL/KAE 6/25/2018
		TRUEFILE SERVICE-ORDER REVISED
08/03/2018	UOR	BOND ON APPEAL FILED W/ COUNTY CLERK RCPT# 28416
		$33000
08/06/2019		ORDER FROM THE COURT OF APPEALS-REVERSING IN PART,
		AFFIRMING IN PART, VACATING IN PART, AND
		REMANDING TO THE CIRCUIT COURT FOR FURTHER
		PROCEEDINGS/8/69/2019
08/06/2019		DISSENTING OPINION FROM MICHIGAN COURT OF APPEALS
		8/6/2019
08/07/2019	HRG	NOTICE OF HEARING-STATUS CONFERENCE 9/9/2019 @11AM
		IN BELLAIRE
09/11/2019	HRG	NOTICE OF MOTION HEARING-STATUS CONFERENCE-
		1/21/2020 @11AM IN BELLAIRE
09/30/2019		COURT OF APPEALS ORDER-MOTION FOR RECONSIDERATION
		IS DENIED/9/30/2019
01/15/2020	OR	STIPULATED ORDER TO ADJOURN STATUS CONFERENCE
		/KAE 1/14/2020
		TRUEFILE SERVICE-STIP ORDER
07/06/2021		COURT OF APPEALS ORDER-ON REMAND/7/6/2021
07/06/2021		COURT OF APPEALS-ORDER ON REMAND/7/6/2021
07/16/2021	MO	PLTF'S MOTION TO LIFT STAY AND AMEND AND ENFORCE
		ORDER OF SALE/7/16/2021
		MIFILE POS
07/19/2021	HRG	NOTICE OF HEARING-PLTF'S MOTION TO LIFT STAY AND
		AMEND AND ENFORCE ORDER OF SALE-8/9/2021 @8:30AM
		IN BELLAIRE VIA ZOOM
07/20/2021	HRG	NOTICE OF HEARING-PLTF'S MOTION TO LIFT STAY AND

		AMEND AND ENFORCE ORDER OF SALE 8/9/2021 @8:30AM
		IN BELLAIRE
08/06/2021	OR	STIPULATION AND ORDER TO ADJOURN HEARING
		08/06/2021/KAE
		MIFILE POS
08/06/2021	HRG	AMENDED NOTICE OF MOTION/PLAINTIFF'S MOTION TO
		LIFT STAY AND AMEND AND ENFORCE ORDER OF SALE
		SET FOR 09/13/2021 AT 11:15AM BELLAIRE
		08/06/2021
09/10/2021	MR	PLTF'S WITHDRAWAL OF MOTION TO LIFT STAY AND AMEND
		AND ENFORCE ORDER OF SALE/9/10/2021
		MIFILE POS

STATE OF MICHIGAN

IN THE 13th CIRCUIT COURT FOR THE COUNTY OF ANTRIM

Cindy Schaaf, Colleen M. Fryer, and Gwen Mason,

Plaintiffs,

CASE NO. 16-9008-CH

Honorable Philip E. Rodgers, Jr.

v

Charlene Forbes a/k/a Angie Forbes,

Defendant.

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PLAINTIFFS' SECOND AMENDED COMPLAINT TO DETERMINE INTEREST IN PROPERTY AND FOR PARTITION

NOW COMES Plaintiffs Cindy Schaaf, Colleen M. Fryer, and Gwen Mason by and through their attorneys, Alward Fisher Rice Rowe & Graf, PLC, and for their Second Amended Complaint against Defendant Charlene Forbes a/k/a Angie Forbes, states the following:

GENERAL ALLEGATIONS

1. Plaintiffs, Cindy Schaaf, Colleen M. Fryer, and Gwen Mason ("Plaintiffs"), are individuals residing in Howard County, Indiana, Antrim County, Michigan and Kalkaska County, Michigan respectively.

2. Defendant, Charlene Forbes a/k/a Angie Forbes ("Defendant") an individual, resides in Antrim County, Michigan.

3. Jurisdiction is proper in this court because the amount in controversy exceeds $25,000, exclusive of interest and costs, and because Plaintiffs seek equitable relief.

4. Venue is proper in this court because the property, which is the subject of this action, is situated in Antrim County, Michigan. See MCL § 600.1605.

FACTUAL ALLEGATIONS

5. The property which is the subject of this partition ("Property") is located in the Township of Milton, County of Antrim of Michigan described as follows:

> A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

6. The Property is a 60 acre parcel on Torch Lake.

7. The Property was previously owned by Leo Bussa ("Leo") and Mae Fitzpatrick ("Mae"), as joint tenants with rights of survivorship.

8. By instrument dated August 27, 1998, and recorded on August 28, 1998 at Liber 496, Page 753, Mae and Leo transferred the Property to the Mae E. Fitzpatrick Trust uad 05/08/1998, as amended ("Mae Trust") and the Leo Bussa Trust uad 05/08/98, as amended ("Leo Trust") to each an undivided one-half interest as tenants in common. See paragraph 17 in the Title Search attached hereto as **Exhibit A**.

9. By instrument dated December 7, 2010 and recorded December 9, 2010 at Liber 810 Page 2981, Leo as Trustee of the Leo Trust transferred his undivided 50% interest in the Property to Leo, an individual. See **Exhibit A** paragraph 20.

10. By instrument dated December 7, 2010 and recorded December 9, 2010 at Liber 810 Page 2983, Leo transferred his undivided 50% interest in the Property (subject to an enhanced life estate of Leo Bussa and the power to convey during his lifetime) to Leo, Cindy Schaaf, Colleen Fryer and Charlene A. Forbes as joint tenants with rights of survivorship. See **Exhibit A** paragraph 21.

11. On April 26, 2004 Mae passed away and Leo became trustee of the Mae Trust.

12. By instrument dated February 9, 2011, recorded February 10, 2011 at Liber 812 Page 2584, Leo as Trustee of the Mae Trust transferred an undivided 50% interest in the Mae Trust's undivided 50% interest in the Property (subject to an enhanced life estate of Leo as Trustee and the power to convey during his lifetime), to Leo as Trustee of the Mae Trust and Gwen Mason as joint tenants with full rights of survivorship. See **Exhibit A** paragraph 23.

13. That same day, by instrument dated February 9, 2011 recorded February 10, 2011 at Liber 812, Page 2586 Leo as Trustee of Mae Trust transferred an undivided 50% interest in the Mae Trust's undivided 50% interest (subject to an enhanced life estate of Leo as Trustee and the power to convey during his lifetime) to Leo as Trustee of the Mae Trust, Cindy Schaaf, Colleen Fryer and Charlene Forbes as joint tenants with rights of survivorship. See **Exhibit A** paragraph 24.

14. Upon information and belief, Leo made the aforementioned transfers at the advice of Charlene Forbes and Attorney John Unger that such transfers, in the form of lady bird deeds, would avoid probate and uncapping of property taxes.

15. Leo passed away on March 16, 2011.

16. Section 5.1.2 of the Fourth Amendment to the Leo Trust, executed on November 12, 2010 provided that the Trust's undivided 50% interest in and to the Property should be given to Cindy Schaaf, Colleen M. Fryer and Charlene Forbes. See Fourth Amendment to Leo Trust attached hereto as **Exhibit B**.

17. Section 5.1.3 of the Fourth Amendment to the Leo Bussa Trust provided the following:

> I have deleted Gwen Mason as a beneficiary hereunder not because I do not love her, but Gwen received fifty percent of the undivided 50% interest in the 60 acre parcel held by the trust of Mae E. Fitzpatrick, which Cindy, Colleen and Charlene each received one third (1/3) of the other one half of the undivided 50 % interest in the 60 acre parcel. When my trust is distributed, Gwen, Cindy, Colleen and Charlene will each own an undivided twenty five percent (25%) of the 60 acre parcel **and will be treated equally**, which is my desire. [emphasis added]. See **Exhibit B**.

18. Upon information and belief, Mae's Trust provides that Gwen shall receive 50% of the Mae Trust's undivided 50% interest in the Property and Cindy Schaaf, Colleen Fryer and Charlene Forbes are to share in the other 50% of the Mae Trust's undivided 50% interest.

19. Leo's Trust did not provide that the parties should hold the property as joint tenants WITH FULL RIGHTS OF SURVIVORSHIP.

20. Upon information and belief, Mae's Trust did not provide that the parties should hold the property as joint tenants WITH FULL RIGHTS OF SURVIVORSHIP.

21. All presumptions are against joint tenancies and an express declaration of joint tenancy is required. *Weiler v Heuple*, 4 Mich App 654; 145 NW2d 352 (1966).

22. Upon information and belief, neither Leo nor Mae intended for the property to be transferred as joint tenants with rights of survivorship.

23. Furthermore, a trust cannot hold property as a joint tenant with full rights of survivorship as the trust is a legal entity and the "life" of the trust could extend far beyond the life of an individual.

24. Thus, the deed in 2011 from Leo as Trustee of the Mae Trust to Leo as Trustee and Gwen Mason as joint tenants with full rights of survivorship (See **Exhibit A** paragraph 23) and the deed from Leo as Trustee of the Mae Trust to Leo as Trustee and to Cindy Schaaf, Colleen Fryer and Charlene Forbes as joint tenants with full rights of survivorship (See **Exhibit A** paragraph 24) were not effective in transferring the property as "joint tenants with full rights of survivorship" and actually transferred the property as "tenants in common."

25. On April 22, 2011, Gwen Mason as Successor Trustee of the Mae E. Fitzpatrick trust conveyed an undivided 50% interest in the Trust's undivided 50% interest to Gwen Mason. See Quit Claim Deed attached hereto as **Exhibit C.** The deed provided that it was given to confirm title already

vested in the Grantee and to cure a technical defect in the chain of title; however, the deed was never recorded.

26. Also, on April 22, 2011 Gwen Mason as Successor Trustee of the Mae E. Fitzpatrick trust conveyed an undivided 50% interest in the Trust's undivided 50% interest to Cindy Schaaf, Colleen Fryer and Charlene Forbes as Joint Tenants with Rights of Survivorship. See Quit Claim Deed attached hereto as **Exhibit D.** The deed provided that it was given to confirm title already vested in the Grantee and to cure a technical defect in the chain of title. The deed was never recorded.

27. The deed mentioned in the preceding paragraph above, was not effective to transfer the Mae Trust's interest to Cindy Schaaf, Colleen Fryer and Charlene Forbes because the Mae Trust had already transferred this interest via the February 10, 2011 deed recorded at Liber 812, Page 2586 (See **Exhibit A** paragraph 24).

28. As joint owners of the Property, all parties are responsible for the payment of Property taxes.

29. In 2012, the parties were involved in litigation involving the Property.

30. The litigation concerned the right of the Property owners to use an Easement (Bussa Lane) to access the Property.

31. Bussa Lane provides the only access to the Property and the waterfront.

32. The Property owners hoped to use the easement to access proposed subdivisions of the Property.

33. This Court's Order dated October 2, 2012, held that the Bussa Lane Easement could not be used to access proposed subdivisions of the Property.

34. Upon information and belief, Defendant has purchased a parcel of property adjacent to the Property, which would allow Defendant to create an additional easement/road to access the back section of the Property.

35. Plaintiffs have requested that Defendant purchase their interests in the Property or sell the Property and split the proceeds; however, Defendant has refused.

36. Gwen Mason is 65 years old, Cindy Schaaf is 53 years old, Colleen Fryer is 54 years old and Charlene Forbes is 43 years old.

37. Upon information and belief, Defendant wishes to "outlive" Plaintiffs and then take title to the Property.

COUNT I- ACTION TO DETERMINE INTERESTS IN LAND

38. Plaintiffs restate and incorporate by reference the allegations in the preceding paragraphs as though fully set forth in this complaint.

39. As mentioned above, any transfers from Mae's Trust to Plaintiffs and Defendant as joint tenants with rights of survivorship (See Exhibit A paragraphs 23 and 24) were ineffective at transferring the property "with rights of survivorship" because the Mae Trust could not own the property as "with rights of survivorship".

40. Thus, the transfers from Mae's Trust to Plaintiffs and Defendant as joint tenants with rights of survivorship actually transferred the property to Plaintiffs and Defendant as "tenants in common."

41. In addition, the unrecorded deed from Gwen as trustee of the Mae Trust to Cindy Schaaf, Colleen Fryer and Charlene Forbes as joint tenants with rights of survivorship was ineffective because the Mae Trust had already conveyed this interest in the Property via the February 10, 2011 deed recorded at Liber 812, Page 2586 (See **Exhibit A** paragraph 24).

42. Thus, current ownership of the portion of the Property formerly in Mae's Trust (an undivided 50% interest in the Property) is as follows:

(1) Gwen Mason owns an undivided 50%; (2) Cindy Schaaf, Colleen Fryer and Charlene Forbes own an undivided 50% interest as tenants in common.

(2) The portion of the Property formerly in Mae's Trust (an undivided 50% interest in the Property) is held by the owners as tenants in common with the portion of the property formerly in Leo's Trust (an undivided 50% interest in the Property).

COUNT II- PARTITION

43. Plaintiffs restate and incorporate by reference the allegations in the preceding paragraphs as though fully set forth in this complaint.

44. Plaintiffs and Defendant are co-owners of the subject Property.

45. No persons other than Plaintiffs and Defendant have any interest in or title to the Property or any part of it, in possession, remainder, reversion, or otherwise.

46. Plaintiffs and Defendant own an undivided interest in the Property with the concomitant right to enjoy and possess the whole.

47. Plaintiffs and Defendants are obligated to pay taxes on the Property; however, if Defendant's ownership interest is that of a joint tenant with rights of survivorship, and because Plaintiffs are significantly older than Defendant, and Plaintiffs cannot subdivide the Property, Plaintiffs prospect of any future beneficial use of the Property is extinguished.

48. For all practical purposes, it has become impossible for Plaintiffs and Defendant to jointly possess and enjoy the whole of the Property.

49. Because the subject Property can be accessed only by the Bussa Easement and the Court's prior order prohibited increased access on the Easement including access by proposed subdivisions of the Property, partition in-kind is impossible. Accordingly, the Property should be sold and the proceeds divided between Plaintiffs and Defendant.

COUNT III- CONTRIBUTION

50. Plaintiff restates and incorporates by reference the allegations in the preceding paragraphs as though fully set forth in this complaint.

51. Plaintiffs and Defendant own an undivided twenty five percent (25%) interest in the Property with the concomitant right to enjoy and possess the whole.

52. Defendant has failed to share the responsibilities of ownership of the Property including the equal contribution for property taxes, expenses associated with the farmhouse on the Property, property maintenance expenses such as mowing and plowing, and fees associated with the previous litigation concerning the Property (Antrim County Circuit Court Case No 11-8633-CH).

53. Plaintiffs are entitled to contribution for paying more than their share of the aforementioned expenses associated with the Property.

WHEREFORE, Plaintiffs respectfully request the following relief:

A. That the Court hold that the deed in 2011 from Leo as Trustee of the Mae Trust to Leo as Trustee and Gwen Mason as joint tenants with full rights of survivorship (See **Exhibit A** paragraph 23) and the deed from Leo as Trustee of the Mae Trust to Leo as Trustee and to Cindy Schaaf, Colleen Fryer and Charlene Forbes as joint tenants with full rights of survivorship (See **Exhibit A** paragraph 24) were not effective in transferring the property as "joint tenants with full rights of survivorship" and actually transferred the property as "tenants in common."

B. That the Court hold that the deed conveying an undivided 50% interest in Mae's Trust's undivided 50% interest in the Property from Mae's Trust to Cindy Schaaf, Colleen Fryer and Charlene Forbes as joint tenants with rights of survivorship (**Exhibit D**) was defective and Cindy Schaaf, Colleen Fryer and Charlene Forbes own the Property as tenants in common.

C. That the Court hold that the current ownership of the portion of the Property formerly in Mae's Trust (an undivided 50% interest in the Property) is as follows:

(1) Gwen Mason owns an undivided 50%; (2) Cindy Schaaf, Colleen Fryer and Charlene Forbes own an undivided 50% interest as tenants in common.

(2) The portion of the Property formerly in Mae's Trust (an undivided 50% interest in the Property) is held by the owners as tenants in common with the portion of the property formerly in Leo's Trust (an undivided 50% interest in the Property).

D. That a just and equitable division and partition of the Property be made between Plaintiffs and Defendant, according to their respective rights and interests, according to the course of practice in this court, and to the applicable statute.

E. If it appears that a partition cannot be made without manifest injury to the rights of the parties, then the Property should be sold under the judgment and by the direction of this court, and that the proceeds of that sale, after payment of the expenses and the costs of this action, be divided between the parties according to their respective rights and interests in the subject Property.

F. That the rights and interests of the parties in and to the Property and in the proceeds of the Property once sold be ascertained and declared by the judgment of this Court.

G. That a receiver be appointed to lease and manage the Property and to protect the Property from waste, trespass, and damage to the Property.

H. That Plaintiffs recover costs, including attorney fees, incurred in obtaining a partition.

I. That pursuant to MCL § 600.3336, the court consider equity and reimburse Plaintiffs for paying part of Defendant's share of the expenses associated with the Property, and that a reasonable rate of interest be applied to such reimbursement amount.

J. That Plaintiffs may have any other relief warranted by law, equity and good conscience.

Dated: January 5, 2017

ALWARD FISHER RICE ROWE & GRAF, PLC

By: Jennifer Whitten

Jennifer L. Whitten (P75487)
Attorneys for Plaintiff
202 E. State St., Ste. 100
Traverse City, Michigan 49684
(231) 346-5400

Riverside Title LLC
402 S. Bridge Street
PO Box 817
Elk Rapids, MI 49629

#19024
Legal Description:
TOWNSHIP OF MILTON, COUNTY OF ANTRIM, STATE OF MICHIGAN
A strip of land off the North side of the Northwest fractional ¼ of the Northwest fractional ¼ and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

We have examined the records of the Office of the Register of Deeds for Antrim County, Michigan, and find no instruments of record affecting the above described property recorded from October 26, 1973 @ 1:00 p.m. to July 17, 2014 @ 8:00 a.m., except the following:

1) Quit Claim Deed Liber 210, Page 240
Instrument dated October 9, 1963, recorded October 26, 1973
Grantor: Mae E. Fitzpatrick, same person as Mae E. Bussa
Grantee: Mae E. Fitzpatrick and Leo Bussa, mother and son, as joint tenants, not as tenants in common, with full rights of survivorship

2) Declaration of Restrictions Liber 348, Page 6
Instrument recorded January 25, 1990
NOTE: Places restrictions of Parcels 1-7

3) Grant of Easement Liber 348, Page 14
Instrument dated December 29, 1989, recorded January 25, 1990
Grantor: Mae E. Fitzpatrick, a single woman and Leo Bussa, a single man
Grantee: Elton Bussa and Sue Bussa, husband and wife; Mary Bussa, a single woman; Larry and Claudia Penzel, husband and wife

4) Grant of Easement Liber 348, Page 19
Instrument dated December 28, 1989, recorded January 25, 1990
Grantor: Mae E. Fitzpatrick, a single woman; Neal Way and Evelyn Way, husband and wife; Elton Bussa and Sue Bussa, husband and wife; Mary K. Bussa, a single woman
Grantee: Larry and Claudia Penzel, husband and wife; and Leo Bussa, a single man

continued

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EXHIBIT tabbies A

#19024

5) Land Contract Liber 348, Page 27 Parcel 5, Section 7
Instrument dated December 29, 1989, recorded January 25, 1990
Seller: Leo Bussa, a single man
Purchaser: Larry Penzel and Claudia Penzel, husband and wife

6) Survey Liber 353, Page 577 Parcels 1-7, Section 7
Instrument dated July 26, 1989
Certified to: Mr. Leo Bussa
Surveyor: Lennox and Associates, P.C.

7) Survey Liber 368, Page 1186 Parcels 1, 1-A and 2, Section 7
Instrument dated July 26, 1989
Certified to: Mr. Leo Bussa
Surveyor: Lennox and Associates, P.C.

8) Quit Claim Deed Liber 421, Page 569 Parcel 1, Section 7
Instrument dated December 20, 1994, recorded December 21, 1994
Grantor: Evelyn M. Way, a single woman
Grantee: Mae E. Fitzpatrick
NOTE: Parcel 1 description from Survey in Liber 368, Page 1186 (#7 above)

9) Warranty Deed Liber 422, Page 228 Parcel 1, Section 7
Instrument dated December 29, 1994, recorded January 8, 1995
Grantor: Mae E. Fitzpatrick, a single woman
Grantee: Ronald H. Ring and Joan Kay Ring, husband and wife
NOTE: Parcel 1 description from Survey in Liber 368, Page 1186 (#7 above)

10) Warranty Deed Liber 429, Page 707 Parcel 4, Section 7
Instrument dated June 23, 1995, recorded June 30, 1995
Grantor: Mary K. Bussa Trust, uad September 19, 1994
Grantee: William M. Kennedy, a married man

11) Land Contract Liber 434, Page 656 Parcels 6 and 7, Section 7
Instrument dated September 28, 1995, recorded October 3, 1995
Seller: Leo Bussa, a single man
Purchaser: Rick J. Whiteherse and Rebecca Whiteherse, husband and wife

continued

#19024

12) Extension of Land Contract Liber 438, Page 785 Parcel 5, Section 7
Instrument dated January 24, 1995, recorded December 20, 1995
Seller: Leo Bussa, a single man
Purchaser: Larry Penzel and Claudia Penzel, husband and wife
NOTE: Extends balloon payment of Land Contract dated December 29, 1989

13) Warranty Deed Liber 459, Page 326 Parcel 5, Section 7
Instrument dated February 14, 1997, recorded February 21, 1997
Grantor: Leo Bussa, a single man
Grantee: Larry A. Penzel and Claudia Penzel, husband and wife

14) Easement Liber 459, Page 523 Parcel 6, Section 7
Instrument dated June 12, 1996, recorded February 24, 1997
Grantor: Rick Whiteherse and Rebecca Whiteherse, husband and wife; and Leo Bussa, a single man
Grantee: Top O' Michigan Rural Electric Company

15) Warranty Deed Liber 463, Page 450 Parcels 6 and 7, Section 7
Instrument dated May 14, 1997, recorded May 20, 1997
Grantor: Leo Bussa, a single man
Grantee: Rick J. Whiteherse and Rebecca Whiteherse, husband and wife

16) Land Contract Liber 470, Page 794 Parcel 3, Section 7
Instrument dated September 2, 1997, recorded September 11, 1997
Seller: Elton J. Bussa and Susan T. Bussa, husband and wife
Purchaser: Richard J. Haener and Sandra Haener, husband and wife

17) Quit Claim Deed Liber 496, Page 753
Instrument dated August 27, 1998, recorded August 28, 1998
Grantor: Mae E. Fitzpatrick and Leo Bussa, a single man
Grantee: Mae E. Fitzpatrick, Trustee of the Mae E. Fitzpatrick Trust uad 05/08/98, as amended and Leo Bussa, Trustee of the Leo Bussa Trust uad 05/08/98, as amended, to each an undivided one-half interest as tenants in common

continued

#19024

18) Warranty Deed Liber 520, Page 871 Parcel 3, Section 7
Instrument dated June 25, 1999, recorded July 1, 1999
Grantor: Elton J. Bussa and Susan T. Bussa, husband and wife
Grantee: Richard J. Haener and Sandra L. Haener, husband and wife

19) Reciprocal Easement Agreement Liber 581, Page 1125
Instrument recorded July 27, 2001
Parties: Mae E. Fitzpatrick, a single woman; Leo Bussa, a single man; Evelyn M. Way, a widowed woman; Elton Bussa and Sue Bussa, husband and wife; William M. Kennedy, a married man; Mary K. Bussa; Larry Penzel and Claudia Penzel, husband and wife; Ronald H. Ring and Joan Kay Ring, husband and wife.

20) Quit Claim Deed Liber 810, Page 2981
Instrument dated December 7, 2010, recorded December 9, 2010
Grantor: Leo Bussa, Trustee of the Leo Bussa Trust uad 05/08/98, as amended
Grantee: Leo Bussa a/k/a Leo J. Bussa
NOTE: conveys undivided 50% interest

21) Quit Claim Deed Liber 810, Page 2983
Instrument dated December 7, recorded December 9, 2010
Grantor: Leo Bussa a/k/a Leo J. Bussa
Grantee: Leo Bussa a/k/a Leo J. Bussa, Cindy Schaaf, Colleen M. Fryer and Charlene A. Forbes, a/k/a Angie Forbes, as joint tenants with rights of survivorship
NOTE: conveys undivided 50% interest, subject to enhanced life estate of Leo Bussa a/k/a Leo J. Bussa, a life estate coupled with unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3.

22) Quit Claim Deed Liber 812, Page 2582
Instrument dated February 9, 2011, recorded February 10, 2011
Grantor: Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated may 8, 1998, as amended
Grantee: Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended and Charlene Forbes a/k/a Angie Forbes, as joint tenants with rights of survivorship
NOTE: conveys ONLY UNDIVIDED 50% INTEREST IN OIL, GAS AND MINERAL RIGHTS, subject to enhanced life estate of Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, a life estate coupled with unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3.

continued

#19024

23) Quit Claim Deed Liber 812, Page 2584
Instrument dated February 9, 2011, recorded February 10, 2011
Grantor: Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended
Grantee: Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended and Gwen Mason as joint tenants with rights of survivorship
NOTE: conveys an undivided 50% interest in the Mae E. Fitzpatrick Trust's undivided 50% Interest, subject to enhanced life estate of Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, a life estate coupled with unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3.

24) Quit Claim Deed Liber 812, Page 2586
Instrument dated February 9, 2011, recorded February 10, 2011
Grantor: Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended
Grantee: Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, Cindy Schaaf, Colleen M. Fryer and Charlene Forbes a/k/a Angie Forbes, as joint tenants with rights of survivorship
NOTE: conveys an undivided 50% interest in the Mae E. Fitzpatrick Trust's undivided 50% interest, subject to enhanced life estate of Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, a life estate coupled with unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3.

25) Mortgage Liber 821, Page 2918 $14,780.27
Instrument dated December 15, 2012, recorded December 16, 2011
Mortgagor: Colleen M. Fryer, a single woman
Mortgagee: Charlene A. Forbes, a married woman

26) Death Certificate Liber 824, Page 326
Instrument recorded March 6, 2012, date of death March 16, 2011
Leo Bussa, deceased

27) Letters of Authority Liber 844, Page 83
Instrument dated October 7, 2013, recorded October 24, 2013
Estate of: Leo Bussa a/k/a Leo J. Bussa
Personal Representative: Charlene A. Forbes

continued

#19024

28) Order Liber 847, Page 2276
Instrument dated November 29, 2011, recorded April 17, 2014
Plaintiffs: Cindy Schaaf, Gwen Mason, C. Angelic Forbes and Colleen M. Fryer
Defendants: Ronald H. and Joan K. Ring; Richard S. and Sandra L. Doornbos; Rick J. and Rebecca J. Whiteherse; Richard D. and Linda L. Gruss; William M. Kennedy; Laurel J. Mayer, Trustee of the Laurel J. Mayer Trust uad January 20, 1994; Richard J. and Sandra L. Haener, husband and wife

29) Decision and Order Liber 847, Page 2281
Instrument dated October 2, 2012, recorded April 17, 2014
Plaintiffs: Cindy Schaaf, Gwen Mason, C. Angelie Forbes and Colleen M. Fryer
Defendants: Ronald H. and Joan K. Ring; Richard S. and Sandra L. Doornbos; Rick J. and Rebecca J. Whiteherse; Richard D. and Linda L. Gruss; William M. Kennedy; Laurel J. Mayer, Trustee of the Laurel J. Mayer Trust uad January 20, 1994; Richard J. and Sandra L. Haener, husband and wife

30) Decision and Order Liber 847, Page 2292
Instrument dated December 6, 2013, recorded April 17, 2014
Plaintiffs: Cindy Schaaf, Gwen Mason, C. Angelie Forbes and Colleen M. Fryer
Defendants: Ronald H. and Joan K. Ring; Richard S. and Sandra L. Doornbos; Rick J. and Rebecca J. Whiteherse; Richard D. and Linda L. Gruss; William M. Kennedy; Laurel J. Mayer, Trustee of the Laurel J. Mayer Trust uad January 20, 1994; Richard J. and Sandra L. Haener, husband and wife

31) PROPERTY TAXES PAID THROUGH 2013
2014 SUMMER TAX: $4,703.57, OUT AND PAYABLE JULY 1, 2014
2013 WINTER TAX: $1,333.23
PROPERTY TAX NUMBER: 05-12-218-001-00
SEV: $1,019,700 TV: $294,539 PRE: 100%
NO SPECIAL ASSESSMENTS ACCORDING TO TOWNSHIP TREASURER

continued

#19024

Under this form of search, this company is not an insurer of the above title nor does it guarantee the title or any evidence thereto.

Instruments (however designated) filed in the Office of the Register of Deeds as "Financing Statements" pursuant to the Uniform Commercial Code PA 1962, No 174 effective January 1, 1964, are not included in the matters covered by this certificate.

This search does not cover matters of survey nor any items determinable only by inspection of the premises. The liability of the company is limited to the amount paid for the search.

_____

Authorized Signatory

#19825
Legal Description:
TOWNSHIP OF MILTON, COUNTY OF ANTRIM, STATE OF MICHIGAN
A strip of land off the North side of the Northwest fractional ¼ of the Northwest fractional ¼ and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

We have examined the records of the Office of the Register of Deeds for Antrim County, Michigan, and find no instruments of record affecting the above described property recorded from July 17, 2014 @ 8:00 a.m. to April 8, 2016 @ 8:00 a.m., except the following:

No instruments of record

PROPERTY TAXES PAID THROUGH 2014
2015 TAXES OWING: $2,890.14, IF PAID APRIL 2016
2015 SUMMER BASE TAX: $4,760.67 (PARTIAL PAYMENT MADE)
2015 WINTER BASE TAX: $1,857.67
PROPERTY TAX NUMBER: 05-12-218-001-00
SEV: $1,039,500 TV: $299,251 PRE: 100%
NO SPECIAL ASSESSMENTS ACCORDING TO TOWNSHIP TREASURER

Under this form of search, this company is not an insurer of the above title nor does it guarantee the title or any evidence thereto.

Instruments (however designated) filed in the Office of the Register of Deeds as "Financing Statements" pursuant to the Uniform Commercial Code PA 1962, No 174 effective January 1, 1964, are not included in the matters covered by this certificate.

This search does not cover matters of survey nor any items determinable only by inspection of the premises. The liability of the company is limited to the amount paid for the search.

_____
Authorized Signatory

Riverside Title, LLC

#19825
Legal Description:
TOWNSHIP OF MILTON, COUNTY OF ANTRIM, STATE OF MICHIGAN
A strip of land off the North side of the Northwest fractional ¼ of the Northwest fractional ¼ and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

We have examined the records of the Office of the Register of Deeds for Antrim County, Michigan, and find no instruments of record affecting the above described property recorded from July 17, 2014 @ 8:00 a.m. to April 8, 2016 @ 8:00 a.m., except the following:

No instruments of record

PROPERTY TAXES PAID THROUGH 2014
2015 TAXES OWING: $2,890.14, IF PAID APRIL 2016
2015 SUMMER BASE TAX: $4,760.67 (PARTIAL PAYMENT MADE)
2015 WINTER BASE TAX: $1,857.67
PROPERTY TAX NUMBER: 05-12-218-001-00
SEV: $1,039,500 TV: $299,251 PRE: 100%
NO SPECIAL ASSESSMENTS ACCORDING TO TOWNSHIP TREASURER

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This search does not cover matters of survey nor any items determinable only by inspection of the premises. The liability of the company is limited to the amount paid for the search.

Brett C. Baldwin

Authorized Signatory

PO Box 817, 402 S Bridge St, Elk Rapids, MI 49629 • www.riversidetitle.org • Phone (231)264-6462 • Fax (231) 264-6344

BORRE, PETERSON, FOWLER & REENS, P. C.
ATTORNEYS AT LAW
44 LAFAYETTE AVE.
P. O. BOX 1767
GRAND RAPIDS, MICHIGAN 49501-1767

REVOCABLE LIVING TRUST AGREEMENT

ARTICLE I
ESTABLISHMENT OF TRUST

1.1 Creation of Trust. I hereby establish this trust agreement on May 8, 199 8. I am the grantor of this trust and also the initial sole trustee. I am currently a resident of the State of Michigan.

1.2 Name of Trust. This trust shall be known as the LEO BUSSA TRUST.

1.3 Declaration. I currently have no children.

1.4 Funding of Trust. Assets may be added to this trust at any time by me or by any other person in any manner. All such assets shall be subject to the terms and conditions of this trust agreement and must be acceptable to my trustee.

1.5 Successor Trustees. Upon my death, I appoint GWEN MASON and ELTON BUSSA, or the survivor of the two, as my successor co-trustees.

In the event no named trustees are available, a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income under this agreement shall name a corporate fiduciary as soon as practicable. The corporate fiduciary must be a bank or trust company situated in the United States having trust powers under applicable federal or state law.

A successor trustee shall begin to serve in its fiduciary capacity upon execution of an acceptance of trust to be delivered to the then current beneficiaries of this trust.

ARTICLE II
ADMINISTRATION OF MY TRUST DURING MY LIFE

2.1 My Lifetime Powers. During my lifetime, my trustee shall pay to me as much of the income and principal from the trust as I request. Any income not distributed shall be added to the principal. I shall have the absolute right to add or remove trust property at any time. I shall also have the absolute right to revoke or amend this trust at any time. After my death this trust shall be irrevocable.

EXHIBIT
tabbies
B

2.2 Distributions During My Disability. During any period of my disability my trustee shall distribute as much of the principal and income from my trust as my trustee deems necessary, in its sole discretion, for the education, health, maintenance and support of me and those persons deemed by my trustee to be dependent on me. My trustee in its sole and absolute discretion may make distributions to me and one or more dependents to the complete exclusion of other dependents, in equal or unequal shares, as my needs and the needs of my respective dependents require. My trustee may also make distributions to the holder of my durable power of attorney for the purpose of making gifts to my lineal descendants (and their spouses), including any trustee of this trust and including the holder of the power of attorney, in an amount, not exceeding the amount of the annual gift tax exclusion (whether I am the actual donor or the consenting spouse) annually with respect to any one of them.

Any distribution made to any of my dependents shall not be charged against the share that such dependent may ultimately receive under the terms of this trust.

ARTICLE III
ADMINISTRATION OF MY TRUST UPON MY DEATH

3.1 Payment of Expenses. Upon my death my trustee is authorized, but not directed, to pay the following:

(a) Expenses of my last illness, funeral and burial;

(b) Legally enforceable claims against my estate;

(c) Expenses with regard to the administration of my estate;

(d) Federal estate tax, applicable state inheritance or estate taxes, or any other taxes occasioned by my death;

(e) Statutory or court ordered allowances for my family members.

The payments authorized under this Section 3.1 are discretionary, and no claims or right to payment by third parties may be enforced against my trust by virtue of such discretionary authority. My trustee shall be free from all liability in connection with such payments. The payments authorized under this Section 3.1 shall only be paid to the extent that the probate assets are insufficient or impracticable to make these payments.

3.2 Gifts in Will. All bequests and devises whether specific, general or residuary appearing in my will, to the extent such bequests and devises are unable, or in the discretion of

my trustee, impractical to be satisfied by my probate estate, shall be paid by my trust. To the extent that there are insufficient funds remaining in the trust to fulfill all specific gifts of either real or personal property to be distributed from this trust, then my trustee shall not be required to pay a greater percentage of any bequest or devise contained in the will than it is able to pay to any specific beneficiary of a gift set forth in this trust.

3.3 Nonapportionment. All expenses and claims and all estate, inheritance and death taxes resulting from my death, shall be paid without apportionment and without reimbursement from any person except as otherwise specifically provided in this trust. Notwithstanding anything to the contrary, any estate, inheritance or death tax assessed with regard to property passing outside of this trust or outside my probate estate, but included in my gross estates for estate tax purposes, shall not be paid by this trust but shall be the liability of the person receiving such property.

ARTICLE IV
DISTRIBUTION OF PERSONAL PROPERTY

Upon my death my trustee shall distribute the jewelry, clothing, household furniture, furnishings and fixtures, chinaware, silver, photographs, works of art, books, boats, automobiles, sporting goods, artifacts relating to hobbies, and all other tangible articles of household or personal use in accordance with any list or statement written or signed by me directing the distribution of such property. Any such list or statement shall be deemed to be incorporated by reference into this trust. If there are multiple written lists left by me, then the last dated list or statement shall control. If I have left no list directing distribution of my personal property, then all such personal property shall be distributed in accordance with the terms of my will.

Any property passing under this Article shall pass subject to all liens, mortgages or other encumbrances on the property. Further, any policies of insurance covering any personal property shall be transferred to that beneficiary who receives ownership to such property by reason of my death.

ARTICLE V
DISTRIBUTION OF TRUST PROPERTY

5.1 Mae E. Fitzpatrick. Upon my death, the remaining trust property shall be held in trust for the benefit of MAE E. FITZPATRICK during her lifetime. While said property is continued in trust:

(a) my trustee shall pay the entire net income therefrom to MAE E. FITZPATRICK at quarter-annual or more frequent installments.

(b) my trustee shall distribute to MAE E. FITZPATRICK so much of the principal thereof as my trustee, in its sole and absolute discretion shall consider necessary or advisable for her education, health, maintenance and support in accordance with the standard of living she enjoyed during my lifetime.

Upon the death of MAE E. FITZPATRICK, the remaining trust property shall be disposed of in accordance with Section 5.2 below.

5.2 Final Distribution. Upon the death of MAE E. FITZPATRICK or if she predeceases me, the amount remaining in trust shall be divided into the following percentage shares:

(a) 0.1% thereof shall be distributed to ROGER C. VELIQUETTE.

(b) 0.1% thereof shall be distributed to SARA M. VELIQUETTE McGUIRE.

(c) 0.1% thereof shall be distributed to M. JUDITH VELIQUETTE.

(d) 0.1% thereof shall be distributed to RACHEL A. BUNNER.

(e) 0.1% thereof shall be distributed to CHARLOTTE M. VELIQUETTE.

(f) 0.1% thereof shall be distributed to TYLOR G. VELIQUETTE.

(g) 0.1% thereof shall be distributed to NELS D. VELIQUETTE.

(h) 0.1% thereof shall be distributed to CHRISTOPHER D. VELIQUETTE.

(i) 0.1% thereof shall be distributed to BRUCE E. VELIQUETTE.

(j) 0.1% thereof shall be distributed to SHIRLEY M. CISNEROS.

(k) 0.1% thereof shall be distributed to CARMEN CISNEROS.

(l) 0.1% thereof shall be distributed to ABEL CISNEROS.

(m) 0.1% thereof shall be distributed to JESSICA CISNEROS.

(n) 0.2% thereof shall be distributed to TRUDY L. CULLIMORE.

(o) 0.1% thereof shall be distributed to DAMON M. CULLIMORE.

(p) 0.1% thereof shall be distributed to STEVEN J. CULLIMORE.

(q) 0.2% thereof shall be distributed to JAN R. VELIQUETTE.

(r) 0.1% thereof shall be distributed to JASON R. VELIQUETTE.

(s) 0.1% thereof shall be distributed to KEVIN J. VELIQUETTE.

(t) 0.3% thereof shall be distributed to NEVA VELIQUETTE.

(u) 0.3% thereof shall be distributed to CHRISTOPHER M. LANDAU.

(v) 0.3% thereof shall be distributed to KATIE LANDAU.

(w) 0.3% thereof shall be distributed to MICHELLE L. LANDAU.

(x) 0.6% thereof shall be distributed to JAMES N. VELIQUETTE.

(y) 1.7% thereof shall be distributed to COLLEEN M. FRYER.

(z) 0.3% thereof shall be distributed to JONATHAN T. VELIQUETTE.

(aa) 0.1% thereof shall be distributed to ALYSSA M. VELIQUETTE.

(bb) 0.1% thereof shall be distributed to NATHAN J. VELIQUETTE.

(cc) 0.3% thereof shall be distributed to TONI V. MORRISON.

(dd) 0.1% thereof shall be distributed to SANDY SWARTHOUT.

(ee) 44.4% thereof shall be distributed to ELTON BUSSA.

(ff) 0.3% thereof shall be distributed to MERRIE LOU NELSON.

(gg) 0.3% thereof shall be distributed to ALAN BUSSA.

(hh) 0.3% thereof shall be distributed to BECKY KLINGENBERG.

(ii) 5.0% thereof shall be distributed to EVELYN M. WAY.

(jj) 0.3% thereof shall be distributed to CATHLEEN STERNAMAN.

(kk) 0.1% thereof shall be distributed to STEPHEN E. ROWE.

(ll) 0.1% thereof shall be distributed to CHERYL A. ROWE.

(mm) 0.3% thereof shall be distributed to C. ANGELIE FORBES.

(nn) 30.0% thereof shall be distributed to GWEN MASON.

(oo) 0.3% thereof shall be distributed to TERESA GALLIGAN.

(pp) 0.3% thereof shall be distributed to TONIA GALLIGAN.

(qq) 0.3% thereof shall be distributed to TAMERA GALLIGAN.

(rr) 0.5% thereof shall be distributed to JANET PARRY.

(ss) 0.1% thereof shall be distributed to JESSICA PARRY.

(tt) 4.8% thereof shall be distributed to BARBARA BARBER.

(uu) 0.2% thereof shall be distributed to KATRINA ELLIOTT.

(vv) 0.6% thereof shall be distributed to DANIEL WAY.

(ww) 5.0% thereof shall be distributed to CINDY SCHAAF.

(xx) 0.6% thereof shall be distributed to DONALD WAY.

If any beneficiary listed in this Section 5.2 (a) through (xx) dies while a beneficiary of this trust, my trustee may distribute his or her share as GWEN MASON and ELTON BUSSA may appoint during his or her lifetime; such appointment shall be exercised only in favor of the beneficiaries listed in this Section 5.2(a) through (xx). It is my intention that this power shall be construed as a special power of appointment under the applicable provisions of the Internal Revenue Code and that the assets of such beneficiary's share shall not be included in the estates of GWEN MASON and ELTON BUSSA.

If GWEN MASON and ELTON BUSSA do not exercise such appointment, such deceased beneficiary's share shall be divided and distributed equally among his or her then surviving issue per stirpes. If such beneficiary has no then living issue, his or her share shall be divided and distributed equally among his or her then surviving siblings.

5.3 Distributions with Regard to Minors or Disabled Beneficiaries. Whenever a distribution is authorized or required by a provision of this agreement to any beneficiary who is legally incapacitated or a minor, such distribution shall be made by my trustee in any one or more of the following ways:

(a) Directly to the beneficiary;

(b) To the guardian or conservator of such beneficiary;

(c) To any other person deemed by my trustee to be responsible, and who has assumed the responsibility of caring for the beneficiary;

(d) To any person or duly licensed financial institution, including my trustee, as a custodian under the Michigan Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act or any similar act of any state or in any manner allowed by any state statute dealing with gifts or distributions to minors or other individuals under legal disability; or

(e) By my trustee, using such amounts to pay directly for such beneficiary's care, support and education.

5.4 Statement of Intent. For reasons satisfactory to myself, I have made no provisions in this trust for any of my heirs-at-law not listed in Sections 5.1 and 5.2 above.

ARTICLE VI
TRUST ADMINISTRATION

6.1 Resignation of Trustee. Any trustee may resign by giving thirty (30) days prior written notice to any other trustee and to each of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income from any trust created under this agreement.

6.2 Removal of Trustee by Court or Co-trustee. A trustee may be removed by any other trustee when, in the opinion of two licensed physicians, because of illness, age or any other cause, such trustee is unable to effectively manage the trust property or its financial affairs. Also, a trustee may be removed by any court of competent jurisdiction which has declared that such trustee has become legally incapacitated or otherwise legally unable to effectively manage this trust property or its financial affairs. Such court may also remove a corporate trustee and name a replacement individual trustee if, in the opinion of such court, a corporate trustee, for cost, efficiency, or other reasons is not best suited to carry out the provisions of the trust, and all of the current income beneficiaries consent to such removal and appointment.

6.3 Removal of Trustee by Beneficiaries. I give a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income in their sole discretion, the power to remove any trustee and substitute another trustee in any of the following instances:

(a) Removal of corporate trustee if:

(i) My trustee has failed to carry out the terms of this agreement or its duties as trustee.

(ii) The corporate trustee does not provide the trust with investment results consistent with reasonable objectives established for the trust by the individual trustee (if any) upon consultation with the adult beneficiaries.

(iii) The fee charged by my trustee is twenty percent (20%) greater than the average normal fee of the three (3) largest banking institutions within a fifty (50) mile radius of the current corporate trustee.

(b) Removal of individual trustee if:

(i) My trustee has failed to carry out the terms of this agreement or its duties as trustee.

Notice of removal shall be effective when made in writing and personally delivered to all trustees.

A corporate trustee shall be appointed to replace a removed corporate trustee. Subject to Section 1.4 above, an individual or corporate trustee may replace a removed individual trustee.

The substituted corporate trustee shall have a minimum combined capital and surplus of not less than Ten Million Dollars ($10,000,000.00).

6.4 Limitation on Trustee who is a Beneficiary. Notwithstanding any other provision in this agreement, any trustee, other than the Grantor, who is a beneficiary or who has any vested or contingent interest in this trust, whether income or principal, shall not exercise any power or act upon any matter relating to himself or herself (or anyone to whom such trustee owes a legal obligation) which involves the use of discretion.

6.5 No Requirement to Furnish Bond. My trustee shall not be required to furnish any bond for the faithful performance of its duties. If a bond is required by any law or court of competent jurisdiction it is my desire that no surety be required on such bond.

6.6 Court Supervision Not Required. All trusts created under this agreement shall be administered free from the act of supervision of any court.

6.7 Majority of Trustees Required to Control. When more than two (2) trustees are acting, the concurrence and joinder of a majority of trustees shall control in all matters pertaining to the administration of any trusts created under this agreement. If only two (2) trustees are acting, then the concurrence of both shall be required. When more than two (2) trustees are acting, any dissenting or abstaining trustee may be absolved from personal liability by registering a written dissent with the records of the trust and the dissenting trustee shall thereafter act with the other trustees in any manner necessary or appropriate to effectuate the decision of the majority.

6.8 Trustee Accounting. My trustee shall report, at least annually, to the beneficiaries then eligible to receive mandatory or discretionary distributions of the net income from the various trusts created in this agreement, all of the receipts, disbursements, and distributions occurring during the reporting period along with a complete statement of the trust property. The trust books and records, along with all trust documentation, shall be available and open at all reasonable times to the inspection of the trust beneficiaries and their representatives. My trustee shall not be

required to furnish trust records or documentation to any individual,corporation or entity that is not a beneficiary, does not have the express written approval of a beneficiary, or is not requesting such pursuant to a court order.

6.9 Trustee Fee. My trustee (whether corporate or individual) shall be entitled to fair and reasonable compensation for the services it renders as a fiduciary. The amount of compensation shall be an amount equal to the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale. My trustee shall be reimbursed for the reasonable costs and expenses incurred in connection with its fiduciary duties under this agreement.

6.10 Small Trust Termination. If at any time after my death my trustee shall determine that the trust is of a size that is no longer economical to administer, that trustee, without further responsibility, may (but need not) distribute the trust to the beneficiaries for whom the trust assets are being administered.

6.11 Other Provisions.

6.11.1 Trustee Powers. My trustee shall have the power to deal with real and personal property held in trust as freely as I might have, without prior or subsequent approval by any court or judicial authority and shall have those powers allowed to trustees under Michigan law and the laws of any state where this agreement may be administered. No person dealing with my trustee shall be required to inquire into the propriety of any of my trustee's actions nor shall any person paying money or delivering money to the trust be required to see to its application. Without in any way limiting the generality of the foregoing, my trustee is granted the rights and powers set forth on Schedule "A", which shall be deemed part of this trust and is incorporated herein by reference.

6.11.2 State Law. This Agreement shall be governed and interpreted in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF, I have hereunto set my hands the day and year first above written.

Witnesses:

Leo Bussa
LEO BUSSA, Grantor

Elizabeth E Borre

Leo Bussa
LEO BUSSA, Trustee

STATE OF MICHIGAN)
COUNTY OF Grand Traverse)

On May 8, 1998, before me, a Notary Public, in and for said County, personally appeared LEO BUSSA to me known to be the person described in and who executed the within instrument and who acknowledged the same to be his free act and deed.

Notary Public, _____ County, MI
My Commission Expires: _____

Prepared by:
Borre, Peterson, Fowler & Reens, P.C.
P.O. Box 1767
Grand Rapids, Michigan 49501

GLEN V. BORRE
Notary Public, Charlevoix County, M.
Acting in Kent County
My Commission Expires March 18, 00

SCHEDULE A
TO
TRUST AGREEMENT

A. Introduction to Trustee's Powers. Except as otherwise provided in the trust agreement, my trustee shall have both the administrative and investment powers under this Schedule and any other powers granted by the laws of the State of Michigan with respect to the various trusts created by this agreement. These powers shall include those powers enumerated under MCLA Section 700.801 et seq.

B. Administrative and Investment Powers. My trustee is hereby granted the following administrative and investment powers:

1. Common Fund Powers. For the purpose of convenience with regard to the administration and investment of the trust property, my trustee may hold the several trusts created under this agreement as a common fund. My trustee may make joint investments with respect to the funds comprising the trust property.

2. Distribution Powers. My trustee is specifically authorized to make divisions and distributions of the trust property either in cash or in kind, or partly in cash and partly in kind, or in any proportion it deems advisable. It shall be under no obligation or responsibility to make pro rata divisions and distributions in kind. My trustee may allocate specific property to any beneficiary or share although the property may differ in kind from the property allocated to any other beneficiary or share. The foregoing powers may be exercised regardless of the income tax basis of any of the property.

3. Investment Powers. My trustee may invest and reinvest in such classes of stocks, bonds, securities, or other property, real or personal, as it shall determine. It may invest in investment trusts as well as in common trust funds. It may purchase life, annuity, accident, sickness, and medical insurance on the behalf of and for the benefit of any trust beneficiary.

4. Loaning or Borrowing. My trustee may loan money to any beneficiary, with or without interest, on any term or on demand, with or without collateral, as it deems in the best interest of the trust beneficiaries. It may borrow money upon such terms and conditions as it shall deem advisable, including, in the case of a corporate fiduciary, the power to borrow from its own banking or commercial loan department. It shall have the power to obligate the trust property for the repayment of any sums borrowed where the best interests of the beneficiaries have

been taken into consideration. My trustee shall have the power to encumber the trust property, in whole or in part, by mortgage, pledge, hypothecation or otherwise.

5. Income and Principal Powers. My trustee shall determine (in accordance with sound trust accounting principles and without regard to the Michigan Uniform Principal and Income Act) in a fair, equitable, and practical manner how all disbursements, receipts, and wasting assets shall be credited, charged or apportioned between principal and income.

6. Real Estate Powers. My trustee shall have the power to buy or sell any interest in real estate on any terms deemed appropriate by my trustee. My trustee may improve any real estate held as trust property, including the power to demolish any buildings in whole or in part, and to erect any buildings; to lease and grant options to lease for any term and upon such terms and conditions as it deems reasonable even though the term of said lease may extend beyond the termination of any trust created under this agreement.

My trustee may also grant or release any easements or other interests with respect to real estate and may dedicate parks, streets and alleys or vacate any street or alley or construct, repair, alter, remodel or abandon any improvements.

7. Environmental Matters. My trustee may use and expend the trust income and principal to (i) conduct or cause to be conducted environmental investigations of the trust property, including environmental audits, assessments, site monitoring, laboratory analyses, testing, title histories, aerial photographs, public and private records reviews, and any related inquiries arising out of or in any way related to liability or claims under federal, state or local environmental statutes, regulations, ordinances, requirements, demands of government authorities or policies or under common law ("environmental laws"); (ii) take appropriate remedial action to contain, clean up or remove any actual or threatened environmental hazard, including a spill, release, discharge or contamination, and conduct site restoration work on the trust property and notify the appropriate federal, state or local authorities either on its own accord or in response to an actual or threatened violation of environmental laws; (iii) institute legal proceedings, claims and demands concerning environmental hazards, contamination or condition of the trust property, or contest, pay, compromise, settle or comply with legal proceedings, claims, demands, orders, penalties, fines and damages brought or imposed by federal, state or local government authorities or by a private litigant; and (iv) employ agents, consultants and legal counsel to assist with or perform the above undertakings or actions.

No trustee shall be liable for any loss or depreciation in value of trust assets as the result of the trustee retaining any property that is polluted or contaminated or has an adverse environmental condition unless the trustee caused the loss or depreciation in value through willful default, willful conduct, or gross negligence.

8. Securities Powers. In addition to those other securities powers granted throughout this Schedule A, my trustee may retain, exercise, or sell rights of conversion or subscription with respect to any securities held as part of the trust property. My trustee may vote or refrain from voting at corporate meetings either in person or by proxy, whether general or limited, and with or without substitutions.

9. Sale, Lease, and Other Dispositive Powers. My trustee may sell, lease, transfer, exchange, grant options with respect to, or otherwise dispose of the trust property. My trustee may make such contracts, deeds, leases, and any other instruments it deems proper under the immediate circumstances, and may deal with the trust property in all other ways in which a natural person could deal with his or her property.

10. Life Insurance Powers. My trustee may purchase, accept, hold, and deal with as owners, policies of insurance on the life of any trust beneficiary, or on the life of any person in whom any trust beneficiary has an insurable interest. My trustee may borrow money with which to pay premiums due on any policy either from the company issuing the policy or from any other source and may assign any such policy as security for the loan. My trustee shall have the power to exercise any option in a policy with regard to any dividend or share of surplus apportioned to the policy; to reduce the amount of a policy or convert or exchange the policy; or to surrender a policy at any time for its cash value. My trustee may elect any paid-up insurance or any extended term insurance nonforfeiture option contained in a policy. My trustee shall have the power to sell policies at their fair market value to the insured or to anyone having an insurable interest in the policies. My trustee shall have the right to exercise any other right, option, or benefit contained in a policy or permitted by the insurance company issuing that policy. Upon termination of any trust created under this agreement, my trustee shall have the power to transfer and assign the policies held by the trust as a distribution of trust property.

11. Non-Productive Property. My trustee may hold property which is non-income producing or is otherwise nonproductive if the holding of such property is, in the sole and absolute discretion of my trustee, in the best interests of the beneficiaries.

12. Settlement Powers. My trustee may compromise, adjust, arbitrate, alter the terms of, or abandon any claim in favor of or against any trust created under this agreement.

13. Trust Addition and Retention Powers. My trustee is authorized to receive additional trust property, whether by gift, will, or otherwise, either from me, or from any other person, corporation, or entity. Upon receipt of any additional property, my trustee shall administer and distribute the same as part of the trust property. My trustee may retain, without liability for depreciation or loss resulting from such retention, all property constituting the trust

estate at the time of its creation or thereafter received from other sources. The foregoing shall be acceptable even though such property may not be of the character prescribed by law for the investment of trust funds, or may result in inadequate diversification of the trust property. My trustee may reject additions to trust property if the acceptance of such trust property would likely result in a potentially greater liability than the fair value of the addition.

14. Business Powers. My trustee may retain and continue any business in which I had an interest as a shareholder, partner, sole proprietor, or as a participant in a joint venture, even though that interest may constitute all or a substantial portion of the trust property. It may directly participate in the conduct of any such business or employ others to do so on behalf of the beneficiaries. It may execute partnership agreements, buy-sell agreements, and any amendments to them. It may participate in the incorporation of any trust property, any corporate reorganization, merger, consolidation, recapitalization, liquidation, dissolution, or any stock redemption or cross purchase buy-sell agreement. It may hold the stock of any corporation as trust property, and may elect or employ directors, officers, employees, and agents, and compensate them for their services. It may sell or liquidate any business interest that is part of the trust property. It shall carry out the provisions of any agreement entered into by me for the sale of any business interest or the stock thereof.

My trustee may exercise all of the business powers granted in this agreement regardless of whether my trustee is personally interested or an involved party with respect to any business enterprise forming a part of the trust property.

15. Agricultural Powers. My trustee may retain, acquire, and continue any farm or ranching operation whether as a sole proprietorship, partnership, or corporation. It may engage in the production, harvesting, and marketing of both farm and ranch products either by operating directly or with management agencies, hired labor, tenants, or sharecroppers. It may engage and participate in any government farm program, whether state or federally sponsored. It may purchase or rent machinery, equipment, livestock, poultry, feed, and seed. It may improve and repair all farm and ranch properties, construct buildings, fences, and drainage facilities; acquire, retain, improve, and dispose of wells, water rights, ditch rights, and priorities of any nature.

My trustee may, in general, do all things customary or desirable to operate a farm or ranch operation for the benefit of the beneficiaries of the various trusts created under this agreement.

C. Instructions of Agent. My trustee shall follow and comply with the instructions of any agent of mine designated to act for me or on my behalf, provided that my trustee shall have no liability for following such instructions.

D. Restriction of Assignment - Spendthrift. No beneficiary of the trust shall have any right to or interest in the income or principal of the trusts hereby created until it shall have been paid to him or her. Both principal and income of the trust created shall be free from the interference and control of the creditors of any beneficiary and neither the principal nor income of any trust shall be subject to assignment or other anticipation by any beneficiary nor to seizure under any legal, equitable or other process whatsoever, and in the event that my trustee believes that this provision may be violated or if it believes the protection of any beneficiary requires, it shall have the power to withhold any part or all of the income and principal payments to which any such beneficiary may at any time be entitled and to use and pay directly such portion thereof as to it in its discretion may seem advisable to carry out the purposes of the trust. However, the provisions of this section shall in no way limit the rights given to my spouse with regard to those portions of the trust intended to qualify for the marital deduction.

E. Rule Against Perpetuities. Notwithstanding any other provision of the trust agreement, at the end of ninety (90) years after the date of my death, my trustee shall distribute the principal and all accrued or undistributed net income of the trust to the beneficiary for whom such funds are being held.

F. Definitions.

(1) Disability. For purposes of this agreement, the term "disability" shall be defined as any period when (a) in the opinion of two (2) licensed physicians, because of illness, age or any other cause, I am unable to effectively manage my property or financial affairs; or (b) a court of competent jurisdiction has declared that I am legally incapacitated or otherwise legally unable to effectively manage my property or financial affairs.

(2) Child, Children. "Child" or "children" shall be as defined in the Michigan Revised Probate Code in effect on the date of this agreement, excluding, however, persons adopted after attaining age twenty-one (21).

(3) Issue. "Issue" means all of the designated person's descendants of all generations with the relationship of parent and child determined at each generation as defined above.

(4) Education. "Education" includes education at a preparatory school, trade school, college, university, professional or postgraduate school, or other institution of higher education and travel, lodging or other expenses incidental or supplemental thereto.

(5) Tax Terminology. Tax terms shall have the meaning those terms, or their equivalents, have under the Federal Internal Revenue Code in effect from time to time.

G. Tax Elections.

1. [illegible] available elections with regard to [illegible] tax law. Further, my [illegible]

2. Generation-Skipping Tax Exemption. Each [illegible] distribution from this trust shall be reduced by the [illegible] Section 2611 of the Internal Revenue Code of 1986, as [illegible] fraction determined as follows: The numerator shall be the beneficiary's share and the denominator shall be the total amount of all transfers subject to generation-skipping tax. For purposes of this paragraph "beneficiary" shall mean that person defined as a "skip person" in Section 2613 of the Internal Revenue Code of 1986. My trustee shall have the right and full authority to determine and allocate the generation-skipping exemption and any generation-skipping taxes. The decisions of my trustee involving these matters or in connection with any interpretations of the general provisions of this trust agreement shall be conclusive and binding on all interested parties.

3. S Corporation Election.

Notwithstanding any other provision in this trust agreement, if there is capital stock of a "small business corporation" as defined in Section 1361(b) of the Internal Revenue Code of 1986, as amended, allocable to or comprising a part of the principal of this trust agreement, then my trustee shall allocate all of the capital stock of such "small business corporation" to a separate trust for the benefit of one beneficiary, or prior to making an election under said Section 1362(a) my trustee shall either allocate or sever the capital stock of such "small business corporation" from such trust and allocate the capital stock to a separate trust for the benefit of one beneficiary. The trust created hereunder shall be known as the "qualified S Corporation trust FBO" said beneficiary. The following terms and conditions of such trust shall supplement or override, if to the contrary, any other terms or conditions contained elsewhere in this trust agreement to the trust for the benefit of the designated beneficiary:

(i) All income, within the meaning of Section 643(b) of the Internal Revenue Code of 1986, as amended, of the trust shall be distributed to the designated beneficiary while the small business corporation is an "S corporation".

(ii) The income and principal of the trust may be distributed only to the designated beneficiary or, while the designated beneficiary is under any

legal disability, may be paid by my trustee to any court-appointed guardian or similar appointee with respect to such legally disabled designated beneficiary.

(iii) The trust terms and conditions, not to the contrary that would otherwise apply if this trust was not created, shall control the administration and disposition of any trust created hereunder.

4. Alternative Valuation Date. My trustee shall have the right to elect any alternate valuation date for federal estate tax or inheritance tax purposes.

5. Employee Benefit Plans. My trustee shall have the right, in its sole and absolute discretion, to elect to receive any retirement plan death proceeds, whether under a qualified pension, profit sharing, individual retirement account, or any other retirement plan, either in a lump sum or in any other manner permitted by the terms of the particular retirement plan, to the extent of my interest. My trustee shall not be liable to any beneficiary for the death benefit election ultimately selected. My trustee may disclaim the benefits of any retirement plan payable to this trust including any individual retirement accounts. Such disclaimed benefits shall be payable in accordance with such plan.

I hereby acknowledge that this Schedule A was attached to my trust agreement when executed and is intended to be incorporated therein.

Leo Burns

Grantor

FIRST AMENDMENT
TO THE
TRUST AGREEMENT
OF
LEO BUSSA

This is the First Amendment to the Trust Agreement dated May 8, 1998, by and between LEO BUSSA, presently of ~~Kalkaska~~ Antrim County, Michigan, Grantor; and LEO BUSSA, Trustee.

In accordance with the provisions contained in the Trust Agreement, I hereby amend the original Trust Agreement by deleting Section 5.2 thereof and by substituting a new Section 5.2 in place thereof which shall consist of the following:

"5.2 Final Distribution. Upon the death of MAE E. FITZPATRICK or if she predeceases me, the amount remaining in trust shall be divided into the following percentage shares:

(a) 0.1% thereof shall be distributed to ROGER C. VELIQUETTE.

(b) 0.1% thereof shall be distributed to SARA M. VELIQUETTE McGUIRE.

(c) 0.1% thereof shall be distributed to M. JUDITH VELIQUETTE.

(d) 0.1% thereof shall be distributed to RACHEL A. BUNNER.

(e) 0.1% thereof shall be distributed to CHARLOTTE M. VELIQUETTE.

(f) 0.1% thereof shall be distributed to TYLOR G. VELIQUETTE.

(g) 0.1% thereof shall be distributed to NELS D. VELIQUETTE.

(h) 0.1% thereof shall be distributed to CHRISTOPHER D. VELIQUETTE.

(i) 0.1% thereof shall be distributed to BRUCE E. VELIQUETTE.

(j) 0.18% thereof shall be distributed to TRUDY L. CULLIMORE.

(k) 0.3% thereof shall be distributed to NEVA VELIQUETTE.

(l) 0.3% thereof shall be distributed to CHRISTOPHER M. LANDAU.

(m) 0.3% thereof shall be distributed to KATIE LANDAU.

(n) 0.3% thereof shall be distributed to MICHELLE L. LANDAU.

(o) 1.00% thereof shall be distributed to JAMES N. VELIQUETTE.

(p) 2.00% thereof shall be distributed to COLLEEN M. FRYER.

(q) 0.3% thereof shall be distributed to JONATHAN T. VELIQUETTE.

(r) 0.3% thereof shall be distributed to TONI V. MORRISON.

(s) 40.03% thereof shall be distributed to ELTON BUSSA.

(t) 0.3% thereof shall be distributed to MERRIE LOU NELSON.

(u) 5.00% thereof shall be distributed to ALAN BUSSA.

(v) 0.3% thereof shall be distributed to BECKY KLINGENBERG.

(w) 5.0% thereof shall be distributed to EVELYN M. WAY.

(x) 0.3% thereof shall be distributed to CATHLEEN STERNAMAN.

(y) 0.1% thereof shall be distributed to STEPHEN E. ROWE.

(z) 0.1% thereof shall be distributed to CHERYL A. ROWE.

(aa) 0.3% thereof shall be distributed to C. ANGELIE FORBES.

(bb) 30.0% thereof shall be distributed to GWEN MASON.

(cc) 0.3% thereof shall be distributed to TERESA GALLIGAN.

(dd) 0.3% thereof shall be distributed to TONIA GALLIGAN.

(ee) 0.3% thereof shall be distributed to TAMERA GALLIGAN.

(ff) 5.0% thereof shall be distributed to BARBARA BARBER.

(gg) 0.2% thereof shall be distributed to KATRINA ELLIOTT.

(hh) 0.6% thereof shall be distributed to DANIEL WAY.

(ii) 5.39% thereof shall be distributed to CINDY SCHAAF.

(jj) 0.6% thereof shall be distributed to DONALD WAY.

If any beneficiary listed in this Section 5.2 (a) through (xx) dies while a beneficiary of this trust, my trustee may distribute his or her share as GWEN MASON and ELTON BUSSA may appoint during his or her lifetime; such appointment shall be exercised only in favor of the beneficiaries listed in this Section 5.2(a) through (xx) except themselves or their estates. It is my intention that this power shall be construed as a special power of appointment under the applicable provisions of the Internal Revenue Code and that the assets of such beneficiary's share shall not be included in the estates of GWEN MASON and ELTON BUSSA.

If GWEN MASON and ELTON BUSSA do not exercise such appointment, such deceased beneficiary's share shall be divided and distributed equally among his or her then surviving issue per stirpes. If such beneficiary has no then living issue, his or her share shall be divided and distributed equally among his or her then surviving siblings."

In all other respects the Trust Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have hereunto set their hands this May 22, 199 8.

Witnesses:

Jessica L. Schwab

Jessica L. Schwab

Les Bussa (L.S.)
LEO BUSSA, Grantor

Julia Coleman

Julia Coleman

Les Bussa (L.S.)
LEO BUSSA, Trustee

STATE OF MICHIGAN)
) ss
COUNTY OF Antrim)

On this May 22, 1998, before me, a Notary Public, in and for said County, personally appeared LEO BUSSA to me known to be the person described in and who executed the within instrument and who acknowledged the same to be his free act and deed.

Jessica L. Schwab

Notary Public, ____ County, MI
My commission expires:
JESSICA L. SCHWAB
Notary Public Kalkaska County, Michigan
Acting in Antrim County
My Commission Expires July 30, 2001

SECOND AMENDMENT
TO THE
TRUST AGREEMENT
OF
LEO BUSSA

This is the Second Amendment to the Trust Agreement dated May 8, 1998, and May 22, 1998, by and between LEO BUSSA, presently of Antrim County, Michigan, Grantor; and LEO BUSSA, Trustee.

In accordance with the provisions contained in the Trust Agreement, I hereby amend the original Trust Agreement by deleting Article V thereof and by substituting a new Article V in place thereof which shall consist of the following:

"ARTICLE V
DISTRIBUTION OF TRUST PROPERTY

5.1 Mae E. Fitzpatrick. Upon my death, the remaining trust property shall be held in trust for the benefit of MAE E. FITZPATRICK during her lifetime. While said property is continued in trust:

(a) my trustee shall pay the entire net income therefrom to MAE E. FITZPATRICK at quarter-annual or more frequent installments.

(b) my trustee shall distribute to MAE E. FITZPATRICK so much of the principal thereof as my trustee, in its sole and absolute discretion shall consider necessary or advisable for her education, health, maintenance and support in accordance with the standard of living she enjoyed during my lifetime.

Upon the death of MAE E. FITZPATRICK, the remaining trust property shall be disposed of in accordance with Sections 5.2 and 5.3 below.

5.2 Gift. Upon the death of MAE E. FITZPATRICK or if she predeceases me, I give the 80 acre farm located in Milton Township, Antrim County, Michigan, described as:

That part of Government Lot 4 Section 7, T29N, R8W, lying West of a line starting on the South line of said Section 7, 2645 feet East of the SW corner of the Section and running North 1°30' West

AND

The SW fractional 1/4 of the SW fractional 1/4 of Section 7, T29N, R8W.

to CINDY SCHAAF. If CINDY SCHAAF is not then surviving, this gift shall be divided and distributed equally between COLLEEN M. FRYER and ANGIE FORBES. If COLLEEN M. FRYER or ANGIE FORBES is not then surviving, her portion shall lapse.

5.3 Final Distribution. Upon the death of MAE E. FITZPATRICK or if she predeceases me, the amount remaining in trust shall be divided into the following percentage shares:

5.3.1 Elton Bussa. Fifty percent (50%) thereof shall be distributed to ELTON BUSSA. If ELTON BUSSA is not then surviving, his share shall be divided and distributed equally among CINDY SCHAAF, COLLEEN M. FRYER, and ANGIE FORBES. If CINDY SCHAAF, COLLEEN M. FRYER, or ANGIE FORBES is not then surviving, her portion shall lapse.

5.3.2 Gwen Mason. Fifty percent (50%) thereof shall be distributed to GWEN MASON. If GWEN MASON is not then surviving, her share shall be divided and distributed equally among CINDY SCHAAF, COLLEEN M. FRYER, and ANGIE FORBES. If CINDY SCHAAF, COLLEEN M. FRYER, or ANGIE FORBES is not then surviving, her portion shall lapse.

5.4 Distributions with Regard to Minors or Disabled Beneficiaries. Whenever a distribution is authorized or required by a provision of this agreement to any beneficiary who is legally incapacitated or a minor, such distribution shall be made by my trustee in any one or more of the following ways:

(a) Directly to the beneficiary;

(b) To the guardian or conservator of such beneficiary;

(c) To any other person deemed by my trustee to be responsible, and who has assumed the responsibility of caring for the beneficiary;

(d) To any person or duly licensed financial institution, including my trustee, as a custodian under the Michigan Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act or any similar act of any state or in any manner allowed by any state statute dealing with gifts or distributions to minors or other individuals under legal disability; or

(e) By my trustee, using such amounts to pay directly for such beneficiary's care, support and education.

5.5 Statement of Intent. For reasons satisfactory to myself, I have made no provisions in this trust for any of my heirs-at-law not listed in Sections 5.1, 5.2 and 5.3 above."

In all other respects the Trust Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have hereunto set their hands this 11th, 1998.

Witnesses:

Butch Bartz, Jr.

Julia Coleman

Leo Bussa (L.S.)
LEO BUSSA, Grantor

Leo Bussa (L.S.)
LEO BUSSA, Trustee

STATE OF MICHIGAN)
) ss
COUNTY OF Antrim)

On this November 2, 1998, before me, a Notary Public, in and for said County, personally appeared LEO BUSSA to me known to be the person described in and who executed the within instrument and who acknowledged the same to be his free act and deed.

BUTCH BARTZ, JR.
Notary Public Antrim County, Michigan
My Commission Expires October 03, 2002

Butch Bartz, Jr.
Notary Public, Antrim County, MI
My commission expires: 10-03-2002

Third Amendment to the Leo J. Bussa Revocable Living Trust COPY

I, Leo J. Bussa on February 12, 2010, sign this Third Amendment ("Amendment") to my Revocable Living Trust Agreement ("Agreement") dated May 8, 1998, with a first amendment dated May 22, 1998 and Second Amendment dated, November 2, 1998.

I amend my living trust by expanding the Successor Trustees (sec. 1.5 of Trust) as follows:

A. If Gwen Mason is unable to serve for any reason, I name Angie Forbes as Successor Trustee, if she is unable to serve for any reason, I name Cindy Schaaf, if she is unable to serve for any reason, I name Colleen Fryer.

In all other respects, I ratify and confirm the balance of the Trust provisions dated May 8, 1998, as amended.

Executed in multiple original counterparts and delivered to Trustee as of the date first written above.

I sign my name to this Amendment on the date that is first written above. I declare under penalty of perjury under the laws of the State of Michigan that the statements in this Amendment are true; that this document is my Third Trust Amendment; that I sign it willingly or willingly direct another to sign for me; that I execute it as my voluntary act for the purposes expressed in this Amendment; and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

/s/ Leo Bussa
Leo J. Bussa
Individually and as Trustee

We, the witnesses, sign our names to this Amendment on the date that is first written above and declare under penalty of perjury under the laws of the State of Michigan that all of the following statements are true of the individual signing this Amendment: he executes it as a voluntary act for the purposes expressed in this Amendment; each of us, in the individual's presence, signs this Amendment as a witness to the individual's signing; and, to the best of our knowledge, the individual is 18 years of age or older, of sound mind, and under no constraint or undue influence.

/s/ Anthony R. Wittbrodt
Anthony R. Wittbrodt

/s/ Terri Armstrong
Terri Armstrong

STATE OF MICHIGAN)
COUNTY OF ANTRIM)

Subscribed and sworn to before me on February 12, 2010 by Leo J. Bussa.

/s/ Theresa Armstrong
Theresa Armstrong, Notary public,
State of Michigan, County of Antrim
My commission expires February 4, 2014.

Prepared by:
Anthony R. Wittbrodt-Attorney
P26702
By: /s/
112 Fourth St.
P.O.Box 905
Elk Rapids, MI. 49629
231-264-5650

COPY

FOURTH AMENDMENT

TO THE

LEO BUSSA TRUST

I, Leo Bussa ("Trustee"), do hereby make, publish and declare this to be the FOURTH AMENDMENT to the LEO BUSSA TRUST dated May 8, 1998 ("Trust"), as amended by the FIRST AMENDMENT to the Trust dated May 22, 1998, as amended by the SECOND AMENDMENT to the Trust dated November 2, 1998, and as amended by the THIRD AMENDMENT to the Trust dated February 12, 2010.

WHEREAS, the Trustee has reserved the right at any time to amend the terms of the Trust. Therefore pursuant to Article II, Administration of my Trust During my Life, paragraph 2.1, Trustee hereby amends the Trust as follows:

Trustee hereby deletes Article I, paragraph 1.5 in its entirety and replaces with a new Article I, paragraph 1.5 as follows:

ARTICLE I
ESTABLISHMENT OF TRUST

1.5 **Successor Trustees.** Upon my death or disability, Cindy Schaaf and Charlene A. Forbes a/k/a Angie Forbes shall serve as Co-Trustees. If one of those persons is unavailable, she shall be replaced by Colleen M. Fryer. If no named Successor Trustees are available, a bank or trust company shall so serve.

Trustee hereby deletes Article V in its entirety, and a new Article V, is hereby substituted as follows:

ARTICLE V
DISTRIBUTION OF TRUST PROPERTY

5.1 Distribution of Trust property. Upon my death, Mae E. Fitzpatrick having predeceased me, my Successor Trustees shall distribute my trust estate as follows:

5.1.1 The 80 acre parcel. That certain parcel of real property described as,

That part of Government Lot four (4), Section 7, Township 29 North, Range 8 West, lying West of the * North and South line; ALSO, the Southwest fractional one-quarter (SW fr 1/4) of the Southwest fractional one-quarter (SW fr 1/4) of Section 7, Township 29 North, Range 8 West.

* North and South line starting on the South line of said Section seven (7). 2645 feet East of the Southwest corner of the Section and running North1°30" West.

sometimes known within the family as "the 80 acre parcel", to Cindy Schaaf, if she survives me.

5.1.2 The 60 acre parcel. The trust's undivided fifty (50%) interest in and to that certain parcel of real property described as,

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, range 8 West.

sometimes known within the family as "the 60 acre parcel" to Cindy Schaaf, Colleen M. Fryer and Charlene A. Forbes a/k/a/ Angie Forbes. If any of said beneficiaries shall not survive me, her or their beneficial interest shall lapse.

5.1.3 **Gwen Mason.** I have deleted Gwen Mason as a beneficiary hereunder, not because I do not love her, but Gwen received fifty percent (50%) of the undivided fifty percent (50%) interest in the 60 acre parcel held by the trust of Mae E. Fitzpatrick, while Cindy Schaaf, Colleen M. Fryer and Charlene A. Forbes a/k/a Angie Forbes, each received third (1/3) of the other one-half (1/2) of the undivided fifty percent (50%) interest in the 60 acre parcel. When my trust is distributed, Gwen, Cindy, Colleen and Charlene will each own an undivided twenty-five percent (25%) of the 60 acre parcel and will be treated equally, which is my desire.

Trustee hereby adds Article VI:

ARTICLE VI
CONTESTIBILITY

6.1 **Contestability.** If any person shall contest this trust or any of its provisions, that person shall take nothing as a benefit from my trust.

In all other respects the Trust Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, I do sign, seal, publish and declare this as the FOURTH AMENDMENT TO THE LEO BUSSA REVOCABLE LIVING TRUST AGREEMENT dated MAY 8, 1998, in the presence of the persons witnessing it, this 12th day of November, 2010.

Leo Bussa - Trustee
Leo Bussa, Trustee

We, the witnesses, sign our names to this Amendment on the date that is first written above and declare under penalty of perjury under the laws of the State of Michigan that all of the following statements are true: the individual signing this Amendment executes it as a voluntary act for the purposes expressed in this Amendment; each of us, in the individual's presence, signs this Amendment as a witness to the individual's signing; and, to the best of our knowledge, the individual is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

John W. Unger

Michelle D. Valuet

STATE OF MICHIGAN)
)§
COUNTY OF ANTRIM)

Subscribed and sworn to before me in Antrim County by Leo Bussa, the Trustee, on the 12th day of November, 2010.

Michelle D. Valuet
Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires August 27, 2017
Acting in the County of Antrim

Prepared by:

John W. Unger (P21679)
John W. Unger, P.L.L.C.
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615
(231) 533-6566

QUIT CLAIM DEED

The Grantor: GWEN MASON, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,

Whose address is: 3662 ISLAND LAKE, KALKASKA, MICHIGAN, 49646,

Conveys and quit claims to: GWEN MASON ("Grantee"),

Whose address is: 3662 ISLAND LAKE, KALKASKA, MICHIGAN, 49646,

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

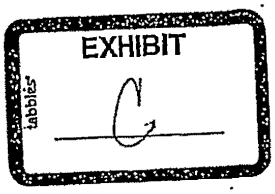
Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

This deed is given to confirm title already vested in the Grantee and to cure a technical defect in the chain of title.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(n) and MCL 207.505, Section 5(l).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.



Dated this 22nd day of April, 2011,

Signed by:

Gwen Mason, Successor Trustee of the
Mae E. Fitzpatrick Trust dated May 8, 1998,
as amended

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 22nd day of April, 2011, by Gwen Mason, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantee

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

COPY

QUIT CLAIM DEED

The Grantor: GWEN MASON, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,

Whose address is: 3662 ISLAND LAKE, KALKASKA, MICHIGAN, 49646,

Conveys and quit claims to: CINDY SCHAAF, COLLEEN M. FRYER and CHARLENE FORBES A/K/A ANGIE FORBES ("Grantees") as Joint Tenants with Rights of Survivorship,

whose addresses are 5532 N. Meridian Road, Peru, Indiana, 46970; 10191 Bates Road, Williamsburg, MI 49690; and 4136 Hollow Haven Lane, Mancelona, MI 49659, respectively;

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

This deed is given to confirm title already vested in the Grantee and to cure a technical defect in the chain of title.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(n) and MCL 207.505, Section 5(l).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

EXHIBIT tabbies 1

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 22nd day of April, 2011,

Signed by:

Gwen Mason, Trustee

Gwen Mason, Successor Trustee of the
Mae E. Fitzpatrick Trust dated May 8, 1998,
as amended

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 22nd day of April, 2011, by Gwen Mason, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Michelle D Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantees

Tax Parcel #.
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

ANTRIM COUNTY CLERK

PO BOX 520
BELLAIRE, MI 49615
(231) 533-6353

Receipt: 19496 05/09/16

Cashier: hockingm

The sum of: 175.00

Received Of: ALWARD, FISHER, RICE, ROWE & GRAF PL

FILINGFE	16 9008 CH			175.00
		101000-000-608.010	31.00	
		701000-000-228.580	119.00	
		701000-000-228.560	25.00	
			Total	175.00

TENDERED: CHECK 3522 175.00

Signed: _____

COPY

REVOCABLE LIVING TRUST AGREEMENT

ARTICLE I
ESTABLISHMENT OF TRUST

1.1 Creation of Trust. I hereby establish this trust agreement on May 8, 1995. I am the grantor of this trust. I am currently a resident of the State of Michigan.

1.2 Name of Trust. This trust shall be known as the MAE E. FITZPATRICK TRUST.

1.3 Declaration. I currently have six (6) children, namely: EDMOND BUSSA (deceased), LEO BUSSA, MARIE E. VELIQUETTE, LLOYD BUSSA (deceased), ELTON BUSSA, and EVELYN M. WAY.

All references to my children are to these children.

1.4 Funding of Trust. Assets may be added to this trust at any time by me or by any other person in any manner. All such assets shall be subject to the terms and conditions of this trust agreement and must be acceptable to my trustee.

1.5 Trustees. I appoint MYSELF and LEO BUSSA as my co-trustees.

If I am unwilling or unable to serve, or I cannot continue to serve, then LEO BUSSA shall serve alone.

If LEO BUSSA is unwilling or unable to serve, or he cannot continue to serve, then I appoint GWEN MASON and ELTON BUSSA, or the survivor of the two, to serve in place thereof.

In the event no named trustees are available, a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income under this agreement shall name a corporate fiduciary as soon as practicable. The corporate fiduciary must be a bank or trust company situated in the United States having trust powers under applicable federal or state law.

A successor trustee shall begin to serve in its fiduciary capacity upon execution of an acceptance of trust to be delivered to the then current beneficiaries of this trust.

EXHIBIT
tabbies
B

ARTICLE II
ADMINISTRATION OF MY TRUST DURING MY LIFE

2.1 My Lifetime Powers. During my lifetime, my trustee shall pay to me as much of the income and principal from the trust as I request. Any income not distributed shall be added to the principal. I shall have the absolute right to add or remove trust property at any time. I shall also have the absolute right to revoke or amend this trust at any time. After my death this trust shall be irrevocable.

2.2 Distributions During My Disability. During any period of my disability my trustee shall distribute as much of the principal and income from my trust as my trustee deems necessary, in its sole discretion, for the education, health, maintenance and support of me and those persons deemed by my trustee to be dependent on me. My trustee in its sole and absolute discretion may make distributions to me and one or more dependents to the complete exclusion of other dependents, in equal or unequal shares, as my needs and the needs of my respective dependents require. My trustee may also make distributions to the holder of my durable power of attorney for the purpose of making gifts to my lineal descendants (and their spouses), including any trustee of this trust and including the holder of the power of attorney, in an amount, not exceeding the amount of the annual gift tax exclusion (whether I am the actual donor or the consenting spouse) annually with respect to any one of them.

Any distribution made to any of my dependents shall not be charged against the share that such dependent may ultimately receive under the terms of this trust.

ARTICLE III
ADMINISTRATION OF MY TRUST UPON MY DEATH

3.1 Payment of Expenses. Upon my death my trustee is authorized, but not directed, to pay the following:

(a) Expenses of my last illness, funeral and burial;

(b) Legally enforceable claims against my estate;

(c) Expenses with regard to the administration of my estate;

(d) Federal estate tax, applicable state inheritance or estate taxes, or any other taxes occasioned by my death;

(e) Statutory or court ordered allowances for my family members.

The payments authorized under this Section 3.1 are discretionary, and no claims or right to payment by third parties may be enforced against my trust by virtue of such discretionary authority. My trustee shall be free from all liability in connection with such payments. The payments authorized under this Section 3.1 shall only be paid to the extent that the probate assets are insufficient or impracticable to make these payments.

3.2 Gifts in Will. All bequests and devises whether specific, general or residuary appearing in my will, to the extent such bequests and devises are unable, or in the discretion of my trustee, impractical to be satisfied by my probate estate, shall be paid by my trust. To the extent that there are insufficient funds remaining in the trust to fulfill all specific gifts of either real or personal property to be distributed from this trust, then my trustee shall not be required to pay a greater percentage of any bequest or devise contained in the will than it is able to pay to any specific beneficiary of a gift set forth in this trust.

3.3 Nonapportionment. All expenses and claims and all estate, inheritance and death taxes resulting from my death, shall be paid without apportionment and without reimbursement from any person except as otherwise specifically provided in this trust. Notwithstanding anything to the contrary, any estate, inheritance or death tax assessed with regard to property passing outside of this trust or outside my probate estate, but included in my gross estates for estate tax purposes, shall not be paid by this trust but shall be the liability of the person receiving such property.

ARTICLE IV
DISTRIBUTION OF PERSONAL PROPERTY

Upon my death my trustee shall distribute the jewelry, clothing, household furniture, furnishings and fixtures, chinaware, silver, photographs, works of art, books, boats, automobiles, sporting goods, artifacts relating to hobbies, and all other tangible articles of household or personal use in accordance with any list or statement written or signed by me directing the distribution of such property. Any such list or statement shall be deemed to be incorporated by reference into this trust. If there are multiple written lists left by me, then the last dated list or statement shall control. If I have left no list directing distribution of my personal property, then all such personal property shall be distributed in accordance with the terms of my will.

Any property passing under this Article shall pass subject to all liens, mortgages or other encumbrances on the property. Further, any policies of insurance covering any personal property shall be transferred to that beneficiary who receives ownership to such property by reason of my death.

ARTICLE V
DISTRIBUTION OF TRUST PROPERTY

5.1 Leo Bussa. Upon my death, the remaining trust property shall be held in trust for the benefit of LEO BUSSA during his lifetime. While said property is continued in trust:

(a) my trustee shall pay the entire net income therefrom to LEO BUSSA at quarter-annual or more frequent installments.

(b) my trustee shall distribute to LEO BUSSA so much of the principal thereof as my trustee, in its sole and absolute discretion shall consider necessary or advisable for his education, health, maintenance and support in accordance with the standard of living he enjoyed during my lifetime.

Upon the death of LEO BUSSA, the remaining trust property shall be disposed of in accordance with Section 5.2 below.

5.2 Final Distribution. Upon the death of LEO BUSSA or if he predeceases me, the amount remaining in trust shall be divided into the following percentage shares:

(a) 0.1% thereof shall be distributed to ROGER C. VELIQUETTE.

(b) 0.1% thereof shall be distributed to SARA M. VELIQUETTE McGUIRE.

(c) 0.1% thereof shall be distributed to M. JUDITH VELIQUETTE.

(d) 0.1% thereof shall be distributed to RACHEL A. BUNNER.

(e) 0.1% thereof shall be distributed to CHARLOTTE M. VELIQUETTE.

(f) 0.1% thereof shall be distributed to TYLOR G. VELIQUETTE.

(g) 0.1% thereof shall be distributed to NELS D. VELIQUETTE.

(h) 0.1% thereof shall be distributed to CHRISTOPHER D. VELIQUETTE.

(i) 0.1% thereof shall be distributed to BRUCE E. VELIQUETTE.

(j) 0.1% thereof shall be distributed to SHIRLEY M. CISNEROS.

(k) 0.1% thereof shall be distributed to CARMEN CISNEROS.

(l) 0.1% thereof shall be distributed to ABEL CISNEROS.

(m) 0.1% thereof shall be distributed to JESSICA CISNEROS.

(n) 0.2% thereof shall be distributed to TRUDY L. CULLIMORE.

(o) 0.1% thereof shall be distributed to DAMON M. CULLIMORE.

(p) 0.1% thereof shall be distributed to STEVEN J. CULLIMORE.

(q) 0.2% thereof shall be distributed to JAN R. VELIQUETTE.

(r) 0.1% thereof shall be distributed to JASON R. VELIQUETTE.

(s) 0.1% thereof shall be distributed to KEVIN J. VELIQUETTE.

(t) 0.3% thereof shall be distributed to NEVA VELIQUETTE.

(u) 0.3% thereof shall be distributed to CHRISTOPHER M. LANDAU.

(v) 0.3% thereof shall be distributed to KATIE LANDAU.

(w) 0.3% thereof shall be distributed to MICHELLE L. LANDAU.

(x) 0.6% thereof shall be distributed to JAMES N. VELIQUETTE.

(y) 1.7% thereof shall be distributed to COLLEEN M. FRYER.

(z) 0.3% thereof shall be distributed to JONATHAN T. VELIQUETTE.

(aa) 0.1% thereof shall be distributed to ALYSSA M. VELIQUETTE.

(bb) 0.1% thereof shall be distributed to NATHAN J. VELIQUETTE.

(cc) 0.3% thereof shall be distributed to TONI V. MORRISON.

(dd) 0.1% thereof shall be distributed to SANDY SWARTHOUT.

(ee) 44.4% thereof shall be distributed to ELTON BUSSA.

(ff) 0.3% thereof shall be distributed to MERRIE LOU NELSON.

(gg) 0.3% thereof shall be distributed to ALAN BUSSA.

(hh) 0.3% thereof shall be distributed to BECKY KLINGENBERG.

(ii) 5.0% thereof shall be distributed to EVELYN M. WAY.

(jj) 0.3% thereof shall be distributed to CATHLEEN STERNAMAN.

(kk) 0.1% thereof shall be distributed to STEPHEN E. ROWE.

(ll) 0.1% thereof shall be distributed to CHERYL A. ROWE.

(mm) 0.3% thereof shall be distributed to C. ANGELIE FORBES.

(nn) 30.0% thereof shall be distributed to GWEN MASON.

(oo) 0.3% thereof shall be distributed to TERESA GALLIGAN.

(pp) 0.3% thereof shall be distributed to TONIA GALLIGAN.

(qq) 0.3% thereof shall be distributed to TAMERA GALLIGAN.

(rr) 0.5% thereof shall be distributed to JANET PARRY.

(ss) 0.1% thereof shall be distributed to JESSICA PARRY.

(tt) 4.8% thereof shall be distributed to BARBARA BARBER.

(uu) 0.2% thereof shall be distributed to KATRINA ELLIOTT.

(vv) 0.6% thereof shall be distributed to DANIEL WAY.

(ww) 5.0% thereof shall be distributed to CINDY SCHAAF.

(xx) 0.6% thereof shall be distributed to DONALD WAY.

If any beneficiary listed in this Section 5.2 (a) through (xx) dies while a beneficiary of this trust, my trustee may distribute his or her share as GWEN MASON and ELTON BUSSA may appoint during his or her lifetime; such appointment shall be exercised only in favor of the beneficiaries listed in this Section 5.2(a) through (xx) except themselves or their estates. It is my intention that this power shall be construed as a special power of appointment under the applicable provisions of the Internal Revenue Code and that the assets of such beneficiary's share shall not be included in the estates of GWEN MASON and ELTON BUSSA.

If GWEN MASON and ELTON BUSSA do not exercise such appointment, such deceased beneficiary's share shall be divided and distributed equally among his or her then surviving issue per stirpes. If such beneficiary has no then living issue, his or her share shall be divided and distributed equally among his or her then surviving siblings.

5.3 Distributions with Regard to Minors or Disabled Beneficiaries. Whenever a distribution is authorized or required by a provision of this agreement to any beneficiary who is legally incapacitated or a minor, such distribution shall be made by my trustee in any one or more of the following ways:

(a) Directly to the beneficiary;

(b) To the guardian or conservator of such beneficiary;

(c) To any other person deemed by my trustee to be responsible, and who has assumed the responsibility of caring for the beneficiary;

(d) To any person or duly licensed financial institution, including my trustee, as a custodian under the Michigan Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act or any similar act of any state or in any manner allowed by any state statute dealing with gifts or distributions to minors or other individuals under legal disability; or

(e) By my trustee, using such amounts to pay directly for such beneficiary's care, support and education.

5.4 Statement of Intent. For reasons satisfactory to myself, I have made no provisions in this trust for any of my heirs-at-law not listed in Sections 5.1 and 5.2 above.

ARTICLE VI
TRUST ADMINISTRATION

6.1 Resignation of Trustee. Any trustee may resign by giving thirty (30) days prior written notice to any other trustee and to each of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income from any trust created under this agreement.

6.2 Removal of Trustee by Court or Co-trustee. A trustee may be removed by any other trustee when, in the opinion of two licensed physicians, because of illness, age or any other cause, such trustee is unable to effectively manage the trust property or its financial affairs. Also, a trustee may be removed by any court of competent jurisdiction which has declared that such trustee has become legally incapacitated or otherwise legally unable to effectively manage this trust property or its financial affairs. Such court may also remove a corporate trustee and name a replacement individual trustee if, in the opinion of such court, a corporate trustee, for cost, efficiency, or other reasons is not best suited to carry out the provisions of the trust, and all of the current income beneficiaries consent to such removal and appointment.

6.3 Removal of Trustee by Beneficiaries. I give a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income in their sole discretion, the power to remove any trustee and substitute another trustee in any of the following instances:

(a) Removal of corporate trustee if:

(i) My trustee has failed to carry out the terms of this agreement or its duties as trustee.

(ii) The corporate trustee does not provide the trust with investment results consistent with reasonable objectives established for the trust by the individual trustee (if any) upon consultation with the adult beneficiaries.

(iii) The fee charged by my trustee is twenty percent (20%) greater than the average normal fee of the three (3) largest banking institutions within a fifty (50) mile radius of the current corporate trustee.

(b) Removal of individual trustee if:

(i) My trustee has failed to carry out the terms of this agreement or its duties as trustee.

Notice of removal shall be effective when made in writing and personally delivered to all trustees.

A corporate trustee shall be appointed to replace a removed corporate trustee. Subject to Section 1.4 above, an individual or corporate trustee may replace a removed individual trustee.

The substituted corporate trustee shall have a minimum combined capital and surplus of not less than Ten Million Dollars ($10,000,000.00).

6.4 Limitation on Trustee who is a Beneficiary. Notwithstanding any other provision in this agreement, any trustee, other than the Grantor, who is a beneficiary or who has any vested or contingent interest in this trust, whether income or principal, shall not exercise any power or act upon any matter relating to himself or herself (or anyone to whom such trustee owes a legal obligation) which involves the use of discretion.

6.5 No Requirement to Furnish Bond. My trustee shall not be required to furnish any bond for the faithful performance of its duties. If a bond is required by any law or court of competent jurisdiction it is my desire that no surety be required on such bond.

6.6 Court Supervision Not Required. All trusts created under this agreement shall be administered free from the act of supervision of any court.

6.7 Majority of Trustees Required to Control. When more than two (2) trustees are acting, the concurrence and joinder of a majority of trustees shall control in all matters pertaining to the administration of any trusts created under this agreement. If only two (2) trustees are acting, then the concurrence of both shall be required. When more than two (2) trustees are acting, any dissenting or abstaining trustee may be absolved from personal liability by registering a written dissent with the records of the trust and the dissenting trustee shall thereafter act with the other trustees in any manner necessary or appropriate to effectuate the decision of the majority.

6.8 Trustee Accounting. My trustee shall report, at least annually, to the beneficiaries then eligible to receive mandatory or discretionary distributions of the net income from the various trusts created in this agreement, all of the receipts, disbursements, and distributions occurring during the reporting period along with a complete statement of the trust property. The trust books and records, along with all trust documentation, shall be available and open at all reasonable times to the inspection of the trust beneficiaries and their representatives. My trustee shall not be required to furnish trust records or documentation to any individual corporation or entity that is not a beneficiary, does not have the express written approval of a beneficiary, or is not requesting such pursuant to a court order.

6.9 Trustee Fee. My trustee (whether corporate or individual) shall be entitled to fair and reasonable compensation for the services it renders as a fiduciary. The amount of compensation shall be an amount equal to the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale. My trustee shall be reimbursed for the reasonable costs and expenses incurred in connection with its fiduciary duties under this agreement.

6.10 Small Trust Termination. If at any time after my death my trustee shall determine that the trust is of a size that is no longer economical to administer, that trustee, without further responsibility, may (but need not) distribute the trust to the beneficiaries for whom the trust assets are being administered.

6.11 Other Provisions.

6.11.1 Trustee Powers. My trustee shall have the power to deal with real and personal property held in trust as freely as I might have, without prior or subsequent approval by any court or judicial authority and shall have those powers allowed to trustees under Michigan law and the laws of any state where this agreement may be administered. No person dealing with my trustee shall be required to inquire into the propriety of any of my trustee's actions nor shall any person paying money or delivering money to the trust be required to see to its application. Without in any way limiting the generality of the foregoing, my trustee is granted the rights and powers set forth on Schedule "A", which shall be deemed part of this trust and is incorporated herein by reference.

6.11.2 State Law. This Agreement shall be governed and interpreted in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF, I have hereunto set my hands the day and year first above written.

Witnesses:

MAE E. FITZPATRICK, Grantor

MAE E. FITZPATRICK, Trustee

STATE OF MICHIGAN)
)ss
COUNTY OF GRAND TRAVERSE)

On MAY 8, 1995, before me, a Notary Public, in and for said County, personally appeared MAE E. FITZPATRICK to me known to be the person described in and who executed the within instrument and who acknowledged the same to be her free act and deed.

Notary Public, _____ County,MI
My Commission Expires:_____

GLEN V. BOFFIN
Notary Public, Charlevoix County, MI
Acting in Kent County
My Commission Expires March 18, CC

Prepared by:
Borre, Peterson, Fowler & Reens, P.C.
P.O. Box 1767
Grand Rapids, Michigan 49501

SCHEDULE A
TO
TRUST AGREEMENT

A. Introduction to Trustee's Powers. Except as otherwise provided in the trust agreement, my trustee shall have both the administrative and investment powers under this Schedule and any other powers granted by the laws of the State of Michigan with respect to the various trusts created by this agreement. These powers shall include those powers enumerated under MCLA Section 700.801 et seq.

B. Administrative and Investment Powers. My trustee is hereby granted the following administrative and investment powers:

1. Common Fund Powers. For the purpose of convenience with regard to the administration and investment of the trust property, my trustee may hold the several trusts created under this agreement as a common fund. My trustee may make joint investments with respect to the funds comprising the trust property.

2. Distribution Powers. My trustee is specifically authorized to make divisions and distributions of the trust property either in cash or in kind, or partly in cash and partly in kind, or in any proportion it deems advisable. It shall be under no obligation or responsibility to make pro rata divisions and distributions in kind. My trustee may allocate specific property to any beneficiary or share although the property may differ in kind from the property allocated to any other beneficiary or share. The foregoing powers may be exercised regardless of the income tax basis of any of the property.

3. Investment Powers. My trustee may invest and reinvest in such classes of stocks, bonds, securities, or other property, real or personal, as it shall determine. It may invest in investment trusts as well as in common trust funds. It may purchase life, annuity, accident, sickness, and medical insurance on the behalf of and for the benefit of any trust beneficiary.

4. Loaning or Borrowing. My trustee may loan money to any beneficiary, with or without interest, on any term or on demand, with or without collateral, as it deems in the best interest of the trust beneficiaries. It may borrow money upon such terms and conditions as it shall deem advisable, including, in the case of a corporate fiduciary, the power to borrow from its own banking or commercial loan department. It shall have the power to obligate the trust property for the repayment of any sums borrowed where the best interests of the beneficiaries have

been taken into consideration. My trustee shall have the power to encumber the trust property, in whole or in part, by mortgage, pledge, hypothecation or otherwise.

5. Income and Principal Powers. My trustee shall determine (in accordance with sound trust accounting principles and without regard to the Michigan Uniform Principal and Income Act) in a fair, equitable, and practical manner how all disbursements, receipts, and wasting assets shall be credited, charged or apportioned between principal and income.

6. Real Estate Powers. My trustee shall have the power to buy or sell any interest in real estate on any terms deemed appropriate by my trustee. My trustee may improve any real estate held as trust property, including the power to demolish any buildings in whole or in part, and to erect any buildings; to lease and grant options to lease for any term and upon such terms and conditions as it deems reasonable even though the term of said lease may extend beyond the termination of any trust created under this agreement.

My trustee may also grant or release any easements or other interests with respect to real estate and may dedicate parks, streets and alleys or vacate any street or alley or construct, repair, alter, remodel or abandon any improvements.

7. Environmental Matters. My trustee may use and expend the trust income and principal to (i) conduct or cause to be conducted environmental investigations of the trust property, including environmental audits, assessments, site monitoring, laboratory analyses, testing, title histories, aerial photographs, public and private records reviews, and any related inquiries arising out of or in any way related to liability or claims under federal, state or local environmental statutes, regulations, ordinances, requirements, demands of government authorities or policies or under common law ("environmental laws"); (ii) take appropriate remedial action to contain, clean up or remove any actual or threatened environmental hazard, including a spill, release, discharge or contamination, and conduct site restoration work on the trust property and notify the appropriate federal, state or local authorities either on its own accord or in response to an actual or threatened violation of environmental laws; (iii) institute legal proceedings, claims and demands concerning environmental hazards, contamination or condition of the trust property, or contest, pay, compromise, settle or comply with legal proceedings, claims, demands, orders, penalties, fines and damages brought or imposed by federal, state or local government authorities or by a private litigant; and (iv) employ agents, consultants and legal counsel to assist with or perform the above undertakings or actions.

No trustee shall be liable for any loss or depreciation in value of trust assets as the result of the trustee retaining any property that is polluted or contaminated or has an adverse environmental condition unless the trustee caused the loss or depreciation in value through willful default, willful conduct, or gross negligence.

8. Securities Powers. In addition to those other securities powers granted throughout this Schedule A, my trustee may retain, exercise, or sell rights of conversion or subscription with respect to any securities held as part of the trust property. My trustee may vote or refrain from voting at corporate meetings either in person or by proxy, whether general or limited, and with or without substitutions.

9. Sale, Lease, and Other Dispositive Powers. My trustee may sell, lease, transfer, exchange, grant options with respect to, or otherwise dispose of the trust property. My trustee may make such contracts, deeds, leases, and any other instruments it deems proper under the immediate circumstances, and may deal with the trust property in all other ways in which a natural person could deal with his or her property.

10. Life Insurance Powers. My trustee may purchase, accept, hold, and deal with as owners, policies of insurance on the life of any trust beneficiary, or on the life of any person in whom any trust beneficiary has an insurable interest. My trustee may borrow money with which to pay premiums due on any policy either from the company issuing the policy or from any other source and may assign any such policy as security for the loan. My trustee shall have the power to exercise any option in a policy with regard to any dividend or share of surplus apportioned to the policy; to reduce the amount of a policy or convert or exchange the policy; or to surrender a policy at any time for its cash value. My trustee may elect any paid-up insurance or any extended term insurance nonforfeiture option contained in a policy. My trustee shall have the power to sell policies at their fair market value to the insured or to anyone having an insurable interest in the policies. My trustee shall have the right to exercise any other right, option, or benefit contained in a policy or permitted by the insurance company issuing that policy. Upon termination of any trust created under this agreement, my trustee shall have the power to transfer and assign the policies held by the trust as a distribution of trust property.

11. Non-Productive Property. My trustee may hold property which is non-income producing or is otherwise nonproductive if the holding of such property is, in the sole and absolute discretion of my trustee, in the best interests of the beneficiaries.

12. Settlement Powers. My trustee may compromise, adjust, arbitrate, alter the terms of, or abandon any claim in favor of or against any trust created under this agreement.

13. Trust Addition and Retention Powers. My trustee is authorized to receive additional trust property, whether by gift, will, or otherwise, either from me, or from any other person, corporation, or entity. Upon receipt of any additional property, my trustee shall administer and distribute the same as part of the trust property. My trustee may retain, without liability for depreciation or loss resulting from such retention, all property constituting the trust

estate at the time of its creation or thereafter received from other sources. The foregoing shall be acceptable even though such property may not be of the character prescribed by law for the investment of trust funds, or may result in inadequate diversification of the trust property. My trustee may reject additions to trust property if the acceptance of such trust property would likely result in a potentially greater liability than the fair value of the addition.

14. Business Powers. My trustee may retain and continue any business in which I had an interest as a shareholder, partner, sole proprietor, or as a participant in a joint venture, even though that interest may constitute all or a substantial portion of the trust property. It may directly participate in the conduct of any such business or employ others to do so on behalf of the beneficiaries. It may execute partnership agreements, buy-sell agreements, and any amendments to them. It may participate in the incorporation of any trust property, any corporate reorganization, merger, consolidation, recapitalization, liquidation, dissolution, or any stock redemption or cross purchase buy-sell agreement. It may hold the stock of any corporation as trust property, and may elect or employ directors, officers, employees, and agents, and compensate them for their services. It may sell or liquidate any business interest that is part of the trust property. It shall carry out the provisions of any agreement entered into by me for the sale of any business interest or the stock thereof.

My trustee may exercise all of the business powers granted in this agreement regardless of whether my trustee is personally interested or an involved party with respect to any business enterprise forming a part of the trust property.

15. Agricultural Powers. My trustee may retain, acquire, and continue any farm or ranching operation whether as a sole proprietorship, partnership, or corporation. It may engage in the production, harvesting, and marketing of both farm and ranch products either by operating directly or with management agencies, hired labor, tenants, or sharecroppers. It may engage and participate in any government farm program, whether state or federally sponsored. It may purchase or rent machinery, equipment, livestock, poultry, feed, and seed. It may improve and repair all farm and ranch properties, construct buildings, fences, and drainage facilities; acquire, retain, improve, and dispose of wells, water rights, ditch rights, and priorities of any nature.

My trustee may, in general, do all things customary or desirable to operate a farm or ranch operation for the benefit of the beneficiaries of the various trusts created under this agreement.

C. Instructions of Agent. My trustee shall follow and comply with the instructions of any agent of mine designated to act for me or on my behalf, provided that my trustee shall have no liability for following such instructions.

D. Restriction of Assignment - Spendthrift. No beneficiary of the trust shall have any right to or interest in the income or principal of the trusts hereby created until it shall have been paid to him or her. Both principal and income of the trust created shall be free from the interference and control of the creditors of any beneficiary and neither the principal nor income of any trust shall be subject to assignment or other anticipation by any beneficiary nor to seizure under any legal, equitable or other process whatsoever, and in the event that my trustee believes that this provision may be violated or if it believes the protection of any beneficiary requires, it shall have the power to withhold any part or all of the income and principal payments to which any such beneficiary may at any time be entitled and to use and pay directly such portion thereof as to it in its discretion may seem advisable to carry out the purposes of the trust. However, the provisions of this section shall in no way limit the rights given to my spouse with regard to those portions of the trust intended to qualify for the marital deduction.

E. Rule Against Perpetuities. Notwithstanding any other provision of the trust agreement, at the end of ninety (90) years after the date of my death, my trustee shall distribute the principal and all accrued or undistributed net income of the trust to the beneficiary for whom such funds are being held.

F. Definitions.

(1) Disability. For purposes of this agreement, the term "disability" shall be defined as any period when (a) in the opinion of two (2) licensed physicians, because of illness, age or any other cause, I am unable to effectively manage my property or financial affairs; or (b) a court of competent jurisdiction has declared that I am legally incapacitated or otherwise legally unable to effectively manage my property or financial affairs.

(2) Child, Children. "Child" or "children" shall be as defined in the Michigan Revised Probate Code in effect on the date of this agreement, excluding, however, persons adopted after attaining age twenty-one (21).

(3) Issue. "Issue" means all of the designated person's descendants of all generations with the relationship of parent and child determined at each generation as defined above.

(4) Education. "Education" includes education at a preparatory school, trade school, college, university, professional or postgraduate school, or other institution of higher education and travel, lodging or other expenses incidental or supplemental thereto.

(5) Tax Terminology. Tax terms shall have the meaning those terms, or their equivalents, have under the Federal Internal Revenue Code in effect from time to time.

G. Tax Elections.

1. Authority of Trustee to Make Election. My trustee may exercise any available election with regard to state or federal income, inheritance, estate, succession, or gift tax law. Further, my trustee may make elections under any employee benefit plans.

2. Generation-Skipping Tax Election. Each beneficiary's share of any distribution from this trust shall be reduced by that proportion of the GST tax (as defined in Section 2611 of the Internal Revenue Code of 1986) paid by the trust and represented by the fraction determined as follows: The numerator shall be that beneficiary's share and the denominator shall be the total amount of all transfers subject to generation-skipping tax. For purposes of this paragraph "beneficiary" shall mean that person defined as a "skip person" in Section 2613 of the Internal Revenue Code of 1986. My trustee shall have the right and full authority to determine and allocate the generation-skipping exemption and any generation-skipping taxes. The decisions of my trustee involving these matters or in connection with any interpretations of the general provisions of this trust agreement shall be conclusive and binding on all interested parties.

3. S Corporation Election.

Notwithstanding any other provision in this trust agreement, if there is capital stock of a "small business corporation" as defined in Section 1361(b) of the Internal Revenue Code of 1986, as amended, allocable to or comprising a part of the principal of this trust agreement, then my trustee shall allocate all of the capital stock of such "small business corporation" to a separate trust for the benefit of one beneficiary, or prior to making an election under said Section 1362(a) my trustee shall either allocate or sever the capital stock of such "small business corporation" from such trust and allocate the capital stock to a separate trust for the benefit of one beneficiary. The trust created hereunder shall be known as the "qualified S Corporation trust FBO" said beneficiary. The following terms and conditions of such trust shall supplement or override, if to the contrary, any other terms or conditions contained elsewhere in this trust agreement to the trust for the benefit of the designated beneficiary:

(i) All income, within the meaning of Section 643(b) of the Internal Revenue Code of 1986, as amended, of the trust shall be distributed to the designated beneficiary while the small business corporation is an "S corporation".

(ii) The income and principal of the trust may be distributed only to the designated beneficiary or, while the designated beneficiary is under any

legal disability, may be paid by my trustee to any court-appointed guardian or similar appointee with respect to such legally disabled designated beneficiary.

(iii) The trust terms and conditions, not to the contrary that would otherwise apply if this trust was not created, shall control the administration and disposition of any trust created hereunder.

4. Alternative Valuation Date. My trustee shall have the right to elect any alternate valuation date for federal estate tax or inheritance tax purposes.

5. Employee Benefit Plans. My trustee shall have the right, in its sole and absolute discretion, to elect to receive any retirement plan death proceeds, whether under a qualified pension, profit sharing, individual retirement account, or any other retirement plan, either in a lump sum or in any other manner permitted by the terms of the particular retirement plan, to the extent of my interest. My trustee shall not be liable to any beneficiary for the death benefit election ultimately selected. My trustee may disclaim the benefits of any retirement plan payable to this trust including any individual retirement accounts. Such disclaimed benefits shall be payable in accordance with such plan.

I hereby acknowledge that this Schedule A was attached to my trust agreement when executed and is intended to be incorporated therein.

Grantor

COP -

FIRST AMENDMENT
TO THE
TRUST AGREEMENT
OF
MAE E. FITZPATRICK

This is the First Amendment to the Trust Agreement dated May 8, 1998, by and between MAE E. FITZPATRICK, presently of ~~Kalkaska~~ Antrim County, Michigan, Grantor; and MAE E. FITZPATRICK and LEO BUSSA, Co-Trustees, therein collectively referred to as Trustee.

In accordance with the provisions contained in the Trust Agreement, I hereby amend the original Trust Agreement by deleting Section 5.2 thereof and by substituting a new Section 5.2 in place thereof which shall consist of the following:

"5.2 Final Distribution. Upon the death of LEO BUSSA or if he predeceases me, the amount remaining in trust shall be divided into the following percentage shares:

(a) 0.1% thereof shall be distributed to ROGER C. VELIQUETTE.

(b) 0.1% thereof shall be distributed to SARA M. VELIQUETTE McGUIRE.

(c) 0.1% thereof shall be distributed to M. JUDITH VELIQUETTE.

(d) 0.1% thereof shall be distributed to RACHEL A. BUNNER.

(e) 0.1% thereof shall be distributed to CHARLOTTE M. VELIQUETTE.

(f) 0.1% thereof shall be distributed to TYLOR G. VELIQUETTE.

(g) 0.1% thereof shall be distributed to NELS D. VELIQUETTE.

(h) 0.1% thereof shall be distributed to CHRISTOPHER D. VELIQUETTE.

(i) 0.1% thereof shall be distributed to BRUCE E. VELIQUETTE.

(j) 0.18% thereof shall be distributed to TRUDY L. CULLIMORE.

(k) 0.3% thereof shall be distributed to NEVA VELIQUETTE.

(l) 0.3% thereof shall be distributed to CHRISTOPHER M. LANDAU.

(m) 0.3% thereof shall be distributed to KATIE LANDAU.

(n) 0.3% thereof shall be distributed to MICHELLE L. LANDAU.

(o) 1.00% thereof shall be distributed to JAMES N. VELIQUETTE.

(p) 2.00% thereof shall be distributed to COLLEEN M. FRYER.

(q) 0.3% thereof shall be distributed to JONATHAN T. VELIQUETTE.

(r) 0.3% thereof shall be distributed to TONI V. MORRISON.

(s) 40.03% thereof shall be distributed to ELTON BUSSA.

(t) 0.3% thereof shall be distributed to MERRIE LOU NELSON.

(u) 5.00% thereof shall be distributed to ALAN BUSSA.

(v) 0.3% thereof shall be distributed to BECKY KLINGENBERG.

(w) 5.0% thereof shall be distributed to EVELYN M. WAY.

(x) 0.3% thereof shall be distributed to CATHLEEN STERNAMAN.

(y) 0.1% thereof shall be distributed to STEPHEN E. ROWE.

(z) 0.1% thereof shall be distributed to CHERYL A. ROWE.

(aa) 0.3% thereof shall be distributed to C. ANGELIE FORBES.

(bb) 30.0% thereof shall be distributed to GWEN MASON.

(cc) 0.3% thereof shall be distributed to TERESA GALLIGAN.

(dd) 0.3% thereof shall be distributed to TONIA GALLIGAN.

(ee) 0.3% thereof shall be distributed to TAMERA GALLIGAN.

(ff) 5.0% thereof shall be distributed to BARBARA BARBER.

(gg) 0.2% thereof shall be distributed to KATRINA ELLIOTT.

(hh) 0.6% thereof shall be distributed to DANIEL WAY.

(ii) 5.39% thereof shall be distributed to CINDY SCHAAF.

(jj) 0.6% thereof shall be distributed to DONALD WAY.

If any beneficiary listed in this Section 5.2 (a) through (xx) dies while a beneficiary of this trust, my trustee may distribute his or her share as GWEN MASON and ELTON BUSSA may appoint during his or her lifetime; such appointment shall be exercised only in favor of the beneficiaries listed in this Section 5.2(a) through (xx) except themselves or their estates. It is my intention that this power shall be construed as a special power of appointment under the applicable provisions of the Internal Revenue Code and that the assets of such beneficiary's share shall not be included in the estates of GWEN MASON and ELTON BUSSA.

If GWEN MASON and ELTON BUSSA do not exercise such appointment, such deceased beneficiary's share shall be divided and distributed equally among his or her then surviving issue per stirpes. If such beneficiary has no then living issue, his or her share shall be divided and distributed equally among his or her then surviving siblings."

In all other respects the Trust Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have hereunto set their hands this May 22, 1998.

Witnesses:

Jessica L. Schwab
Jessica L. Schwab

Julia Coleman
Julia Coleman

Mae E. Fitzpatrick (L.S.)
MAE E. FITZPATRICK, Grantor

Mae E. Fitzpatrick (L.S.)
MAE E. FITZPATRICK, Trustee

Leo Bussa (L.S.)
LEO BUSSA, Trustee

STATE OF MICHIGAN)
) ss
COUNTY OF Antrim)

On this May 22, 1998, before me, a Notary Public, in and for said County, personally appeared MAE E. FITZPATRICK to me known to be the person described in and who executed the within instrument and who acknowledged the same to be her free act and deed.

Jessica L. Schwab

Notary Public, _____ County, MI
My commission expires:_____

JESSICA L. SCHWAB
Notary Public Kalkaska County, Michigan
Acting in Antrim County
My Commission Expires July 30, 2001

COPY

SECOND AMENDMENT
TO THE
TRUST AGREEMENT
OF
MAE E. FITZPATRICK

This is the Second Amendment to the Trust Agreement dated May 8, 1998, as amended May 22, 1998, by and between MAE E. FITZPATRICK, presently of Antrim County, Michigan, Grantor; and MAE E. FITZPATRICK and LEO BUSSA, Co-Trustees, therein collectively referred to as Trustee.

In accordance with the provisions contained in the Trust Agreement, I hereby amend the original Trust Agreement by deleting Article V thereof and by substituting a new Article V in place thereof which shall consist of the following:

"ARTICLE V
DISTRIBUTION OF TRUST PROPERTY

5.1 Leo Bussa. Upon my death, the remaining trust property shall be held in trust for the benefit of LEO BUSSA during his lifetime. While said property is continued in trust:

(a) my trustee shall pay the entire net income therefrom to LEO BUSSA at quarter-annual or more frequent installments.

(b) my trustee shall distribute to LEO BUSSA so much of the principal thereof as my trustee, in its sole and absolute discretion shall consider necessary or advisable for his education, health, maintenance and support in accordance with the standard of living he enjoyed during my lifetime.

Upon the death of LEO BUSSA, the remaining trust property shall be disposed of in accordance with Section 5.2 below.

5.2 Final Distribution. Upon the death of LEO BUSSA or if he predeceases me, the amount remaining in trust shall be divided into the following percentage shares:

5.2.1 Elton Bussa. Fifty percent (50%) thereof shall be distributed to ELTON BUSSA. If ELTON BUSSA is not then surviving, his share shall be divided and distributed equally among CINDY SCHAAF, COLLEEN M. FRYER, and ANGIE FORBES. If CINDY SCHAAF, COLLEEN M. FRYER, or ANGIE FORBES is not then surviving, her portion shall lapse.

5.2.2 Gwen Mason. Fifty percent (50%) thereof shall be distributed to GWEN MASON. If GWEN MASON is not then surviving, her share shall be divided and distributed equally among CINDY SCHAAF, COLLEEN M. FRYER, and ANGIE FORBES. If CINDY SCHAAF, COLLEEN M. FRYER, or ANGIE FORBES is not then surviving, her portion shall lapse.

5.3 **Distributions with Regard to Minors or Disabled Beneficiaries.** Whenever a distribution is authorized or required by a provision of this agreement to any beneficiary who is legally incapacitated or a minor, such distribution shall be made by my trustee in any one or more of the following ways:

(a) Directly to the beneficiary;

(b) To the guardian or conservator of such beneficiary;

(c) To any other person deemed by my trustee to be responsible, and who has assumed the responsibility of caring for the beneficiary;

(d) To any person or duly licensed financial institution, including my trustee, as a custodian under the Michigan Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act or any similar act of any state or in any manner allowed by any state statute dealing with gifts or distributions to minors or other individuals under legal disability; or

(e) By my trustee, using such amounts to pay directly for such beneficiary's care, support and education.

5.4 **Statement of Intent.** For reasons satisfactory to myself, I have made no provisions in this trust for any of my heirs-at-law not listed in Sections 5.1 and 5.2 above."

In all other respects the Trust Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have hereunto set their hands this 11-2, 1998.

Witnesses:

Butch Bartz, Jr.

Julia Coleman

Mae E Fitzpatrick (L.S.)
MAE E. FITZPATRICK, Grantor

Mae E Fitzpatrick (L.S.)
MAE E. FITZPATRICK, Trustee

Leo Bussa (L.S.)
LEO BUSSA, Trustee

STATE OF MICHIGAN)
) ss
COUNTY OF Antrim)

On this November 2, 1998, before me, a Notary Public, in and for said County, personally appeared MAE E. FITZPATRICK to me known to be the person described in and who executed the within instrument and who acknowledged the same to be her free act and deed.

BUTCH BARTZ, JR.
Notary Public Antrim County, Michigan
My Commission Expires October 03, 2002

Butch Bartz, Jr.
Notary Public, Antrim County, MI
My commission expires: 10-03-2002

Instrument Liber Page
201000009630 OR 810 2089

201000009630
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
12-01-2010 At 12:01 pm.
QUIT CLAIM 17.00
OR Liber 810 Page 2089 - 2090

QUIT CLAIM DEED

The Grantor:	Leo Bussa, Trustee of the Leo Bussa Trust UAD 05/08/98, as amended,
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,
Conveys and quit claims to:	Leo Bussa a/k/a Leo J. Bussa, ("Grantee"),
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,

the following described premises situated in the Township of Milton, County of Antrim and the State of Michigan:

That part of Government Lot four (4), Section 7, Township 29 North, Range 8 West, lying West of the * North and South line; ALSO, the Southwest fractional one-quarter (SW fr 1/4) of the Southwest fractional one-quarter (SW fr 1/4) of Section 7, Township 29 North, Range 8 West.

* North and South line starting on the South line of said Section seven (7). 2645 feet East of the Southwest corner of the Section and running North1°30' West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and MCL 207.505, Section 5(a).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 30th day of November, 2010

Received
ANTRIM COUNTY MICHIGAN
11-30-2010 03:57 pm.

Instrument 201000009630 OR Liber 810 Page 2090

Signed by:

Leo Bussa - Trustee

Leo Bussa, Trustee

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 30th day of November, 2010, by Leo Bussa, Trustee.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantee

Tax Parcel #
05-12-207-023-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

Instrument 201000009862 DR | Liber Page 810 2981

201000009862
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
12-09-2010 At 09:47 am.
QUIT CLAIM 17.00
DR Liber 810 Page 2981 - 2982

QUIT CLAIM DEED

The Grantor:	Leo Bussa, Trustee of the Leo Bussa Trust UAD 05/08/98, as amended,
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,
Conveys and quit claims to:	Leo Bussa a/k/a Leo J. Bussa, ("Grantee"),
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,

An undivided fifty percent (50%) interest in and to the following described premises situated in the Township of Milton, County of Antrim and the State of Michigan:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and MCL 207.505, Section 5(a).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 7th day of December, 2010

Signed by:

Leo Bussa - Trustee

Leo Bussa, Trustee

Received
ANTRIM COUNTY MICHIGAN
12-08-2010 03:56 pm.

Instrument 201000009862 OR Liber 810 Page 2982

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 7th day of December, 2010, by Leo Bussa, Trustee.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

Instrument 201000009863 DR
Liber Page 810 2983

201000009863
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 26B
12-09-2010 At 09:47 am.
QUIT CLAIM 17.00
DR Liber 810 Page 2983 - 2984

QUIT CLAIM DEED

(subject to enhanced life estate)

Subject to the enhanced life estate below, the Grantor, **Leo Bussa a/k/a Leo J. Bussa,** whose address is **11148 Bussa Road, Rapid City, Michigan, 49676,** quit claims to,

Grantees, **Leo Bussa a/k/a Leo J. Bussa, Cindy Schaaf, Colleen M. Fryer and Charlene A. Forbes a/k/a Angie Forbes** whose addresses are **11148 Bussa Road, Rapid City, Michigan, 49676; 5532 N. Meridian Road, Peru, Indiana, 46970; 10191 Bates Road, Williamsburg, MI 49690; and 4136 Hollow Haven Lane, Mancelona, MI 49659, respectively,** as Joint Tenants with Rights of Survivorship,

An undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any, excepting therefrom all oil, gas and mineral rights which are reserved to Grantor.

The Grantor reserves and grants unto **Leo Bussa a/k/a Leo J. Bussa,** a life estate coupled with an unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3. This power to convey includes the power to sell, gift, mortgage, lease, including the right to lease oil, gas and mineral rights, divide as allowed by law, and otherwise dispose of the property.

For no monetary consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and (r); and MCL 207.505, Section 5(a) and (o).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Received
ANTRIM COUNTY MICHIGAN
12-08-2010 03:56 pm.

Dated this 7th day of December,

Signed by:

Leo Bussa

Leo Bussa a/k/a Leo J. Bussa

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me in Antrim County this 7th day of December, 2010, by Leo Bussa a/k/a Leo J. Bussa.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

****

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

Instrument Liber Page
201100000975 OR 812 2584

201100000975
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
02-10-2011 At 10:05 am.
QUIT CLAIM 17.00
OR Liber 812 Page 2584 - 2585

QUIT CLAIM DEED

(subject to enhanced life estate)

Subject to the enhanced life estate below, the Grantor, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** whose address is **11148 Bussa Road, Rapid City, Michigan, 49676**, quit claims to,

Grantees, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, and Gwen Mason**, whose addresses are **11148 Bussa Road, Rapid City, Michigan, 49676, and 3662 Island Lake, Kalkaska, Michigan, 49646, respectively** as Joint Tenants with Rights of Survivorship,

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

The Grantor reserves and grants unto **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** a life estate coupled with an unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3. This power to convey includes the power to sell, gift, mortgage, lease, including the right to divide as allowed by law, and otherwise dispose of the property.

For no monetary consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and (r); and MCL 207.505, Section 5(a) and (o).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Received
ANTRIM COUNTY MICHIGAN
02-09-2011 03:57 pm.

Dated this.9th day of February, 2011

Signed by:

Leo Bussa

Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me in Antrim County this 9th day of February, 2011, by Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Notary Public: John W. Unger
Antrim County, Michigan
My commission expires: April 29, 2011
Acting in the County of Antrim

****

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

Instrument 201100000976 DR | Liber Page 812 2586

201100000976
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY MIEPOTH - 268
02-10-2011 At 10:05 am.
QUIT CLAIM 17.00
DR Liber 812 Page 2586 - 2587

QUIT CLAIM DEED

(subject to enhanced life estate)

Subject to the enhanced life estate below, the Grantor, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** whose address is **11148 Bussa Road, Rapid City, Michigan, 49676,** quit claims to,

Grantees, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, Cindy Schaaf, Colleen M. Fryer and Charlene Forbes a/k/a Angie Forbes,** whose addresses are **11148 Bussa Road, Rapid City, Michigan, 49676, 5532 N. Meridian Road, Peru, Indiana, 46970; 10191 Bates Road, Williamsburg, MI 49690; and 4136 Hollow Haven Lane, Mancelona, MI 49659, respectively** as Joint Tenants with Rights of Survivorship,

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

The Grantor reserves and grants unto **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** a life estate coupled with an unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3. This power to convey includes the power to sell, gift, mortgage, lease, including the right to divide as allowed by law, and otherwise dispose of the property.

For no monetary consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and (r); and MCL 207.505, Section 5(a) and (o).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

Received
ANTRIM COUNTY MICHIGAN
02-09-2011 03:57 pm.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this.9th day of February, 2011

Signed by:

Leo Bussa

Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me in Antrim County this 9th day of February, 2011, by Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Notary Public: John W. Unger
Antrim County, Michigan
My commission expires: April 29, 2011
Acting in the County of Antrim

****

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF ANTRIM

Cindy Schaaf, Colleen M Fryer, and Gwen Mason,

Plaintiffs,

v.

Charlene Forbes, a/k/a Angie Forbes,

Defendant.

CASE NO. 16-9008-CH

Honorable Kevin A. Elsenheimer

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
Alward Fisher Rice Rowe & Graf, PLC
Attorneys for Plaintiffs
202 E. State Street, Suite 100
Traverse City, MI 49684
(231) 346-5400

Brace Kern (P75695)
BEK Law, PLC
Attorney for Defendant
3434 Veterans Drive
Traverse City, MI 49684
(231) 492-0277

AFFIDAVIT OF CINDY SCHAAF

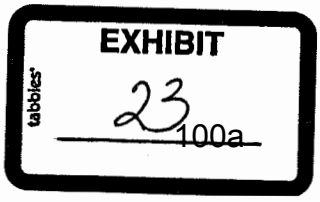
STATE OF INDIANA)
) ss
COUNTY OF)

The undersigned, being duly sworn, does hereby state and affirm as follows:

1. I am a co-owner of the property located in the Township of Milton, County of Antrim, State of Michigan, described as follows:

   A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

   ("Property").



2. The co-owners of the Property are me, Charlene Forbes, Gwen Mason, and Colleen Fryer ("Co-owners").
3. Prior to becoming a Co-owner, the Property was owned by my Uncle Leo Bussa and his mother Mae.
4. I was named co-personal representative of my Uncle Leo Bussa's estate ("Estate") with Defendant, Charlene Forbes ("Defendant").
5. Defendant put herself in control of the Estate.
6. Initially, I believed I could trust Defendant.
7. However, eventually I became concerned that Defendant utilized Uncle Leo's money for her personal benefit thereby reducing what should have been available to pay expenses associated with Uncle Leo's Estate and the Property.
8. As expenses were incurred by the Estate, Defendant informed me and the other Co-owners that there was insufficient money in the Estate to pay for expenses associated with the Property.
9. Defendant requested that all Co-owners contribute equally as individuals to all Property expenses.
10. Prior to my Uncle Leo Bussa's passing he initiated a lawsuit regarding the use of the Bussa Lane Easement, Case NO 11-8633-CH ("Easement Litigation").
11. After Uncle Leo passed away, the Co-owners became Plaintiffs (replacing Leo Bussa) to the Easement Litigation.
12. Defendant was the primary contact between the attorneys who represented me and the other Co-owners in the Easement Litigation.
13. As a result of the Easement Litigation, me and the other Co-owners incurred expenses such as attorney and mediation fees.
14. All of the Co-owners of the Property understood that we would pay an equal one quarter share of all expenses associated with the Property.
15. As bills for the Property would come in, Defendant would tell each of the Co-owners the amount of our "quarter share".

16. Initially after Uncle Leo's passing, I paid my share of the expenses for the Property directly to Defendant.
17. I became concerned that Defendant was not handling money properly so I started paying for Property expenses directly to third parties.
18. Exhibits 1-4 to Plaintiffs' Supplemental Trial Brief are copies of check registries for checking accounts used to pay expenses related to the Estate of Leo Bussa and the Property.
19. Exhibits16B -16cc to Plaintiffs' Supplemental Trial Brief are copies of checks written by me to Defendant or third parties for expenses related to the Property.
20. Exhibit 16A to Plaintiffs' Supplemental Trial Brief is a spreadsheet listing of all my checks paid for Property expenses, including the check number, date, amount, the specific expense for which the Check was to be used (if known) and whether it was deposited into one of the checking accounts Defendant used to pay Estate and Property expenses.
21. At the time of the Easement Litigation, I also owned an 80 acre parcel of property adjacent to the Property that was given to me by Uncle Leo Bussa.
22. Often times when paying property taxes I would pay property taxes for both the Property and the 80 acre parcel.
23. On January 25, 2012, I wrote Defendant a check for $482.19, of which $92.77 was for property taxes related to the 80 acre parcel.
24. On August 16, 2012, I wrote Defendant a check for $1,531.43, of which, $390.45 was for property taxes for the 80 acre parcel.
25. On February 4, 2013, I wrote Defendant a check for $1,723.07. $101.96 of that check was to be used for property taxes for the 80 acres and the remainder was for attorney fees related to the Easement Litigation.
26. On December 4, 2013, I wrote a check to Milton Township for Property taxes for $447.34, of which $117.02 was for property taxes related to the 80 acre parcel.

27. Uncle Leo and I planned to move the farmhouse located on the Property to the 80 acre parcel once the Property was developed.
28. I planned to retire to the 80 acre parcel.
29. I never had plans to develop the 80 acre parcel and therefore never discussed development of the 80 acre parcel with attorneys.
30. Exhibits 5B-5M to Plaintiffs' Supplemental Trial Brief are copies of invoices from Attorney Bill Garratt for the services he provided for representing the Co-owners in the Easement Litigation.
31. Exhibit 5A to Plaintiffs' Supplemental Trial Brief is a spreadsheet identifying the invoices from Attorney Bill Garratt.
32. Exhibits 6B-6T to Plaintiffs' Supplemental Trial brief are copies of invoices from Attorney Gary Ford for the services he provided for representing the Co-owners in the Easement Litigation.
33. Exhibit 6A to Plaintiffs' Supplemental Trial brief is a spreadsheet identifying the invoices from Attorney Gary Ford.
34. Exhibits 7B -7C to Plaintiffs' Supplemental Trial brief are a letter from Attorney Ford and an invoice for mediation services from Sondee Racine & Doren for mediation that occurred in March 2012 related to the Easement Litigation.
35. A subsequent mediation with Sondee, Racine and Doren related to the Easement Litigation occurred in March 2014. The total amount due for that mediation was $1,444.00 of which I paid my quarter share: $361.00.
36. Exhibit 7A to Plaintiffs' Supplemental Trial brief is a spreadsheet identifying the mediation fees.
37. Exhibits 10B-10E to Plaintiffs' Supplemental Trial brief are invoices from Gourdie Fraser for engineering and survey costs related to the Easement Litigation.
38. The Gourdie Fraser surveys and engineering costs were related to development of the Property.
39. Exhibits 13B-13-H-3 to Plaintiffs' Supplemental Trial brief are Property Tax Bills and Receipts from Milton Township and Antrim County for property taxes associated with the Property from 2011 to present.

40. An inventory for Leo Bussa's estate was done shortly after Leo Bussa's passing at which time Defendant had access to all buildings on the Property and continued to have access to all buildings for two years after all personal property was distributed to heirs according Leo Bussa's will.
41. Per Leo Bussa's wishes I was to take ownership of the farmhouse on the Property and move the farmhouse to the 80 acres.
42. From the beginning of 2012 going forward, I paid for the maintenance expenses associated with the farmhouse on the Property, including paying for heat and electricity, snow plowing, mowing, and tree removal.
43. Exhibits 17B through 17T-2 are copies of checks and receipts for miscellaneous expenses such as fuel from Blarney Castle for heating the farmhouse on the Property, Farm Bureau Insurance for the farmhouse on the Property, and snow plowing and landscaping.
44. Exhibits 17A of Plaintiffs' Supplemental Trial Brief is a spreadsheet identifying the miscellaneous Property expenses paid by me.
45. Exhibits 18B-18X to Plaintiffs' Supplemental Trial Brief are copies of statements from Great Lakes Energy showing that I paid for the electricity associated with the farmhouse on the Property.
46. Exhibit 18A is a spreadsheet identifying all of the Great Lakes Energy Bills I paid for the Property.
47. In January 2014, I gave my brother, Don Way, permission to remove dead ash trees from the Property.
48. Don Way removed dead ash trees from the Property.
49. None of the ash trees which were removed were sold.
50. I gave Don Way and his brother, Dan Way, permission to use the wood from the trees to heat their homes through the winter.
51. I never received any money for the trees.

52. After Leo Bussa passed, Defendant removed large boulders of significant value from the Property without my permission.

53. I stopped paying Property taxes on the Property when Defendant made it clear that she refused to sell the Property and that she was going to wait it out and attempt to outlive the Co-owners in order to take title to the Property.

Further, your affiant sayeth not.

SIGNATURE ON NEXT PAGE

Dated: 2-19-18

Cindy Schaaf

Cindy Schaaf

STATE OF INDIANA)
) ss
COUNTY OF Howard

On this 19th day of Feb ~~2/17~~/2018, before me personally appeared Cindy Schaaf, to me known and known to me to be the person described in and who executed the foregoing instrument, who being duly sworn, did depose and say that he duly executed the same as and for his voluntary act and deed.

Angela D Griffith

, Notary Public

Howard County, IN

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October 08, 2022

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

SCHAAF, FRYER & MASON,
Plaintiff,

v. Case No. 16-9008-CH

CHARLENE ANGIE FORBES,
Defendant,
_____/

MOTION

Traverse City, Michigan - Monday, May 15, 2017

BEFORE THE HONORABLE KEVIN A. ELSENHEIMER

APPEARANCES:

For the Defendant: MR. BRACE KERN (P75695)
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For the Plaintiff: MR. THOMAS ALWARD (P31724)
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REPORTED BY: Karen M. Copeland (CSR-6054)
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I N D E X

WITNESSES

None

EXHIBITS

None

Bellaire, Michigan

Monday, May 15, 2017 - at 10:29 a.m.

(Court, counsel and parties present)

THE COURT: This is the time, date and place set for oral argument on cross motions for summary disposition in the matter of Schaaf, et al versus Forbes 16-09008-CH.

Again, we have cross motions for summary disposition. I'm not sure who wishes to proceed first, I guess it's whoever filed first.

So the parties are aware, the Court has had an opportunity to review all of the documents and has spent a considerable amount of time going over the title issues with regard to the property. The Court has some familiarity of the property as a long time resident of Antrim County.

But, let's go ahead and proceed with oral argument.

Mr. Kern, you go ahead and lead off.

MR. KERN: This is really a fascinating case. What we have for Count I is determination of the parties interest by virtue of the deeds that were issued after Mr. Bussa's death. And, the plaintiff is actually -- was a co-personal representative of the estate issued deeds to Gwen Mason, who is a tenant in common, 25 percent

interest, she received half of May's undivided one-half, and the other one-half of May's went to joint tenants with the right of survivorship, which is the deed plaintiff's counsel is challenging.

Leo Bussa's one-half of the property passed to the three joint tenants with rights of survivorship without passing through a trust. He took it out of his trust and put it in his own name and then transferred it, so that's not at issue. We know half of the property is joint tenants with rights of survivorship, so we are only talking about May's one-half. Of May's one-half, we are only talking about one-half of that because Gwen Mason has one-half as tenant in common from that. We don't deny the ability to partition the property, that she should be able to take off 25 percent and go ahead and sell that property.

Now, the partition is a bit premature and not yet ripe since we don't know exactly that's all we're taking off the property. Plaintiff's counsel's issue is quite novel as far as I can tell from my research. Interestingly you'll see Exhibit 1 from our motion for summary disposition went into an article that was written by a well esteemed attorney talking about this is how lady bird deeds operate in the State of Michigan and how trusts are used to accomplish that.

THE COURT: I don't think there is any dispute as to whether lady bird deeds are lawful mechanisms in Michigan, I think we can move right past there. I don't think there is opposition regarding that.

MR. KERN: Sure. Next argument that plaintiff's counsel has is that the grantor cannot be a trust. He cites to authority saying, well, a corporation can't be and an LLC can't be therefore the trust can't be. Which, the essence of that argument can't pass on rights of survivorship because it never dies; well, that's not necessarily what I believe we have the case to be here. The actual deed does not pass it to the trust, it passes to Leo Bussa, as trustee. The importance of that is that is the life of being, which is why I go into the analysis of the rule of perpetuities isn't being addressed here. If you take the argument the trust cannot hold survivorship to its ultimate end, the reason being is the rules against perpetuities would apply. I think plaintiff's counsel has failed to come forward and meet his burden necessary in order to be able to over turn all of the trusts in the state as well as the country that currently use a trust to prevent uncapping of taxes. His argument is essentially going to be anybody's trust who holds survivorship rights is thus invalid and you must take the property out of the trust,

put it in your own name plus the co-owners name at the time of death, it must be personally owned before you can pass it without uncapping the taxes. None of the parties dispute that is the purpose behind this preventing uncapping taxes standard 9.3 which provides the legality of lady bird deeds, but that's as far as it goes. Even the article we cite from Attorney Frank does not cite authority for that proposition, when he says your trust can be used in order to hold survivorship rights and that's where I think counsel's argument is novel and hasn't been addressed in this state and in this Court. I suggest their evidence has not come forward to meet the burden necessary to over turn status quo of the successful use of trusts to hold it, especially in consideration of the fact the life in being is specified, as Leo Bussa Corporation does not have a life in being, LLC does not have a life in being. But, if it was transferred to Leo Bussa, as president of this company that's a life in being as soon as he passes a way or he's no longer president then it no longer survives and it would pass to the other people.

THE COURT: One of the challenges that I'm having with that argument is that it places frankly a choice on the part of the grantor as to whether or not, or I suppose anybody taking from the grantor, as to

whether or not the grantor is transferring on behalf of the trust or transferring individually, in other words using the same language. I think if you were in a different position in this lawsuit you could come in and say no, no, no the transfer was intended to be on behalf of the trust and not necessarily on behalf of Mr. Bussa.

MR. KERN: So that presents a good question, which is, is there a difference between this deed when it says Leo Bussa as trustee of May's trust versus if it just said May's trust, is that different? Are we talking about two different things or not? Because one seems like it would be trust as grantor, the May Fitzpatrick trust and the other one saying Leo Bussa. To me it seems like a difference. That's a question to be addressed aside from can the trust hold survivorship rights.

THE COURT: How would the trust transfer property other than through the actions of the trustee?

MR. KERN: I don't doubt -- I agree the trustee would be the one that transfers it. Does the trustee have to have that personal name on that deed when Leo Bussa, trustee, is no longer trustee. Let's say he steps down, he doesn't pass he steps down as trustee and a new one is appointed, do you have to issue a new deed to say now it's Angie Forbes as trustee of the May Fitzpatrick trust?

THE COURT: Is there a land title standard on point, I didn't look that up, but, with regard to the transfer of trust property that there is a destination? Again, I'm digging.

MR. KERN: I'm not familiar with it.

THE COURT: I apologize for bringing the issue up.

Continue.

MR. KERN: That's one question, does it make a difference with Leo Bussa trust versus just saying May Fitzpatrick trust, that's a question to be answered before you get to the question can the trust hold survivorship rights, that's essentially my argument.

I will leave it to counsel to carry the burden to say the trust does not hold survivorship and then reserve the opportunity to discuss the partition aspect of it since that came from plaintiff's motion rather than mine.

We have explored the option, but we've stopped at a point of trying to decide to pay an engineer to do this split for us because we don't know the percentage of the split to be.

THE COURT: Let's talk about partition in a moment.

First, I agree, we need to resolve the issues

with regard to the title itself. So, Mr. Kern, thank you.

Mr. Alward, I I'll let you proceed. But, I am interested in your position. I know what your position is, your support for the idea as to whether or not a trust can hold a remainder in interest, please.

MR. ALWARD: Your Honor, we didn't file this motion to invalidate the deeds, as counsel suggests. We're simply having the Court determine what those interests are in those deeds and whether you name them a lady bird deed or hummingbird deed doesn't matter, they are deeds.

We put forth three arguments as to why those deeds in our opinion conveyed the property to the parties as tenants in common.

First argument, which is the one Mr. Kern's addressed both orally and in his response, has to do with whether a trust can hold property as a joint tenant with the rights of survivorship, and our position is that the trust never dies and therefore you cannot hold property as -- a trust can't as a joint tenant with rights of survivorship when it never dies.

THE COURT: Because you are not a person.

MR. ALWARD: Exactly. Same reason you would have as a corporation, it doesn't die. Leo could die, we

could change to successor trustee, but the trust remains.

In addition, your Honor, we had two other arguments. We don't believe that the May trust granted the parties the authority to transfer the property as joint tenants with rights of survivorship. Nothing in the trust specifically allows for that transfer to be done as joint tenants with rights of survivorship. And, the statute is clear, if there is not specific authority then those conveyances are as tenants to the parties, as tenants in common.

THE COURT: That's consistent with the language actually in the trust, is it not?

MR. ALWARD: That is correct. That is correct.

THE COURT: Please continue.

MR. ALWARD: Third argument we had dealt with the four unities, your Honor. And, I must confess that wasn't my original argument, that came from one of our associates but I thought it was a good one once I started looking at it.

Four unities are:

Parties must receive interest in the property at the same time. Now, what we have to remember when we talk property, we're talking the entire parcel. There are two undivided 50 percent interests, but the property is the whole. There is no suggestion that the parties

receive title to that property at the same time because they did not, they didn't receive from a single deed which is another one of the requirements of the unities argument. There were several deeds. In fact, one of the deeds conveyed the property to Gwen Mason as a tenant in common.

The parties didn't meet the requirements of the four unities, therefore the conveyances that were made, although they say joint tenants with rights of survivorship, clearly don't pass the test to be that, therefore the conveyances were as tenants in common.

Did the Court want to hear the argument on the partition, or did it have questions with respect to the arguments I already raised?

THE COURT: I understand the arguments with regard to title.

Let's give Mr. Kern an opportunity to reply on the title issue. I think the best approach here is for me to go ahead and rule on the title issues then we can proceed to talk if necessary about partition.

All right, Mr. Kern, please reply.

MR. KERN: Thank you.

I won't reply to argument number one considering that was the basis of my starter argument.

Argument two is that May's trust didn't convey

survivorship rights. Number one, it's the deed that conveyed survivorship rights, not May's trust. If you are challenging the deed does not properly represent the intent of May's trust, that's a probate challenge.

THE COURT: Mr. Kern, does the powers vested in the trustee by the trust convey the power to -- from the settler of the trust convey the power to the trustee to grant property, to grant assets, by joint tenancy?

MR. KERN: Yes, it granted Leo Bussa full authority to dispose of that property as he saw fit. If he added survivorship rights when he passed it on there is nothing wrong with that according to the trust. What counsel's argument is in the trust that did not contain specific language of passing on survivorship rights. If you are going to argue the deed didn't represent what the trust said then you do that in Probate Court.

The reason they didn't make that argument in Probate Court: Number one, one of the plaintiffs was the personal representative that signed those deeds and added the survivorship right that was conveyed so she would be challenging her own actions saying I did it then but I did it wrong; and, two, there is a no contest provision, if they brought that argument up in Probate Court they would lose everything they were supposed to inherit on the argument, that's why the argument is being brought

here in a back door version of saying this deed shouldn't have conveyed survivorship rights. You are saying the deed does not reflect testator's intent as to the trust, there is a reason that argument was never made and they have been litigating in Probate Court for years and that's not one of the arguments made there. That's the reason why, no contest provision, as well as a person who executed it as plaintiff herein.

Now, that goes into the same argument of number three, he says four unities are not present, he says they are not present for the four parties. Nobody is talking about four parties, we are talking about three parties, that's where his faulty logic starts. If you add in Gwen Mason you can say, sure, it wasn't a single deed, sure it doesn't convey the same interest, sure you can break-up the unities by adding in Gwen Mason. Gwen Mason is not part of it. The four unities are in the deed that passed on survivorship. The four unities are all there, time, title, interest, everything. It's a single deed, that's one deed that's being challenged here. So the argument is flawed from the beginning of the four unities because it starts with the premise the four parties are to be considered. We admit Gwen was not part of it, only these three received all the same interest at the same time and those unities are present.

THE COURT: Thank you.

Go ahead, Mr. Alward.

MR. ALWARD: Mr. Kern's argument fails to address the issue that one deed that did have three parties on it was only for half of the property, it did not convey, as unities require, the entire property, because the entire property is a full 60 acres, not one-half of one-half.

THE COURT: All right.

This is a motion for summary disposition. There are cross motions for summary disposition, both of which focus on title issues involving a 60 acre property located on Torch Lake, Michigan with 894' of frontage, a beautiful piece of property, and certainly one that has apparently been in the Bussa/Fitzpatrick family for some time and is now, as we see often with some of the larger pieces of property, particularly those that border waterfront, is being fought over between various interests and various parts of families. And, it's to the Court's judgment now as to whether or not certain transfers of property were valid under Michigan law. And, to determine what the appropriate title, current title, is, at least with regard to the recorded documents and, frankly, a couple of unrecorded documents.

So, let's go through some of the facts.

This property goes back to 1963, when it was transferred from Ms. Fitzpatrick who we have called I think throughout this hearing, Mae, M-A-E, to herself and Leo Bussa, B-U-S-S-A, as to full rights of survivorship. In 1998 there were amendments to a trust that Mr. Bussa had and amendments to a trust Ms. Fitzpatrick had as well and there were transfers into their trusts, individual trusts, an undivided one-half interest in the subject property as tenants in common. Now, the next transfers occurred in 2010, which is when Mr. Bussa's trustee transferred 50 percent interest in his property to himself as an individual subject to the lady bird deed that we've been talking about, which is an enhanced life estate and power to convey during his lifetime. He has an individual transferred and undivided 50 percent in his property, again subject to the enhanced life estate and power to convey to himself, Schaaf, S-C-H-A-A-F, Fryer, and Forbes, as joint tenants with rights of survivorship.

Now, looking at the Fitzpatrick side of the property. Fitzpatrick died in 2004 and Bussa became trustee of the Fitzpatrick trust in 2011. Bussa's the trustee of the Fitzpatrick estate -- pardon me, trust not estate, transferred an undivided 50 percent interest in property to Bussa as Fitzpatrick trustee and Mason as joint tenants with full rights of survivorship. And,

Bussa as Fitzpatrick trustee transferred an undivided 50 percent interest to himself as trustee and Schaaf, Fryer and to Forbes as joint tenants with full rights of survivorship.

Now, in 2011, in March of 2011, Leo Bussa, the transferor in the deeds I just described passed away. And, in April of 2011 Mason, as successor to the Fitzpatrick trust conveyed an undivided 50 percent interest to Mason as an individual, but this deed was never recorded and Mason as successor to the Fitzpatrick trust conveyed an undivided 50 percent interest to Schaaf, Fryer and Forbes as joint tenants with rights of survivorship. But, this deed also was never recorded.

It's apparent that the parties have been litigating with regard to this property and other matters involving family assets for some period of time, but this particular complaint for partition initially was filed back in May of 2016, so just about a year ago. There were various matters that were handled late last year, there was a default that was resolved, there was a motion for summary disposition that was filed in October of 2016, that was withdrawn, and the parties amended their complaints and we wound up where we are today, with the plaintiff's first amended complaint being for partition in Count I and Count II for contribution and the second

amended complaint adding an action to determine the interest in land, which is again why we're here today. The answer and counter complaint seeks contribution and unjust enrichment, and in Count II, quantum meruit, breach of contract and claim of quiet title, and Count III, statutory and common law conversion.

We're here today on defendant's motion for summary disposition as to Count I, that is an action to determine interest in land, and plaintiff's cross-motion for partial summary disposition, as to Count I, that is an action to determine interest in land, and Count II, which is the partition issue.

So, that's the history.

Let's talk a little bit about the standard of review with regard to the legal issues. Motions for summary disposition can be brought pursuant to one of several different themes, they are set forth in the Court Rules that the parties are well aware. Specifically with regard to these motions we're looking at MCR 2.116(C)(8), these are failure to state a claim motions, essentially they are saying that relief -- pardon me, relief cannot be granted and legal sufficiency of the claim must be tested, and that is Spiek, S-P-I-E-K, versus Department of Transportation 456 Mich 331, that's a 1998 case.

When reviewing a (C)(8) motion only the legal

basis of the complaint is examined, the factual allegations are accepted as true, along with any fair inferences that may be drawn from them, and unless a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Motions under (C)(8) should be denied, and that is Mills versus White Castle Systems Incorporated, 167 Mich App 202, a 1988 case.

Now, the motions have also been filed under (C)(10), which tests the factual support for a claim, and that should be granted when there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. Again, these cases are well-known to the parties, Dressel versus an Ameribank, 468 Mich 557, and that's a 2003 case. Under a (C)(10) motion a party can move for dismissal of a claim saying there is no genuine issue as to fact and the moving party is entitled to judgment or partial judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, open an issue as to whether reasonable minds can differ on a particular point, and that is West versus General Motors Corporation, 469 Mich 177, also a 2003 case. The moving party is required to specifically identify undisputed factual issues and support its

position with documentary evidence. The non-movant then has the burden of showing that there is a genuine issue of disputed fact, that is Meagher, M-E-A-G-H-E-R, versus Wayne State University, 222 Mich App 700, 1997.

All right. Let's talk a little bit about some of the principles involved in this case. A standard or ordinary joint tenancy is characterized by four unities: first is unit of interest; the second unit of title; third unit of time; and, fourth, is unit of possession. The chief characteristic of an ordinary joint tenancy is right of survivorship, which means that upon the death of one of the joint tenants the surviving tenants take or assume ownership of the whole, and this is Wengel versus Wengel, W-E-N-G-E-L, 207 Mich App 286, a 2006 case, and it's set forth by statute MCL 554.44. In an ordinary joint tenancy right of survivorship can be destroyed by severances of the joint tenancy through the act of one tenant, such as a conveyance to a third party or levy or sale and remaining joint grantee become tenants in common. A joint tenancy requires an expressed declaration of joint tenancy in order to be created, and that is Weiler, W-E-I-L-E-R, versus Hempel 4 Mich App 654, 1966.

A joint tenancy with full rights of survivorship is a more unique animal and created by

express language directly referencing words of survivorship as contained in the granting instrument, and thus this tenancy is comprised of a joint life estate with dual contingent remainders, and that is again the Wengel case as cited above.

The operative remainder in the joint tenancy with full rights of survivorship is in fee simple, when a survivorship feature of the ordinary joint -- pardon me, while the survivorship of the ordinary joint tenancy may be defeated by the act of a co-tenant the dual contingent remainders of the joint tenancy full rights of survivorship are indestructible. The contingent remainder of a co-tenant is not subject to being destroyed by the actions of other co-tenants. Again, also the Wengal case.

Although a joint tenant with rights of survivorship can achieve partial partition through the conveyance of the life estate the partition does not effect the remainders, Wengal again.

Importantly, joint tenancy is an estate in fee simple for life, for years, or a will arising by purchase or grant between two or more persons, and that is direct from Black's Law Dictionary, fourth edition.

Estates in joint tenancy are not favored and all presumptions are against them. Conveyance in which

the grantor or one or more of the grantors are named among the grantees shall have the same force and effect as they would if the conveyance was made by a grantor or grantors who are not named by the grantees, MCL 565.49.

Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effected to create the type of ownership indicated by the terms of the conveyance, again 565.49.

All right, joint property -- strike that.

We've been discussing trusts here as well. And, trusts are fiduciary relationships with respect to property that subject the person who holds the title to the property to equitable duties to deal with the property for the benefit of another person, which fiduciary relationship rises out of a manifestation of an intent to create it, and that's of course MCL 700.29011(1)(J).

Importantly, when the trust shall be expressed in the instrument creating the estate every sale, conveyance or other acts of the trustees in contravention of the trust shall be absolutely void, MCL 555.21.

There has been some discussion about a ladybird deed, and I want to discuss that briefly, it's simply a transfer of real property by a warranty or quitclaim deed

to a contingent grantee that reserves a life estate and the lifetime power to convey the property and unilaterally defeat the grantee's interest because the grantor still has unrestricted interest in the property, the transfer is not an investment. Tenants in common, joint tenants or tenants by the entireties can be used to designate multiple remainder persons. The grantor can also name his or her revocable trust as a remainder person.

All right. As to analysis, this property has been divided since 1998 through two separate lineages if you will. The first lineage, as indicated earlier, I call the Fitzpatrick side, the second lineage I called the Bussa side. And, they transferred somewhat differently. There is dispute regarding some portion of the transfers, but I will discuss where the Court feels the title is currently vested, how and why.

Again, ladybird deeds are permitted under MCL 211.27(A)(7), and have been used effectively for years to prevent property tax on capping, so, that apparently is the reason the deeds were used initially in this case. The Court has no information as to whether or not that was effective, but that is certainly one of the reasons that they are used.

It's clear that Mr. Bussa saw to avoid property

taxes on capping for the property by transferring his 50 percent of the property to himself Shaaf, Fryer and Forbes, with joint tenants with full rights of survivorship, and these transfers were done properly. And, his undivided 50 percent is currently held by Shaaf, Fryer and Forbes as joint tenants with full rights of survivorship. Now, Bussa as May Fitzpatrick's trustee sought to transfer May Fitzpatrick's undivided 50 percent to Mason and the trust, and subsequently the trust remaining interest to Shaaf, Fryer and Forbes as joint tenants with full rights of survivorship. It {PAERS/} to the Court that these transfers were not done properly. May as trustee could have transferred the property naming herself and others as grantees to avoid uncapping; however, it does appear upon her death there was no way to avoid uncapping. A trust cannot hold property as joint tenants with rights of survivorship because joint tenancies are limited to natural persons and a natural person has a lifetime and a specific date of death. A trust can have a perpetual succession and does not necessarily have to die. A conveyance attempting to transfer property to a trust as joint tenant with rights of survivorship is therefore voidable.

Here, the transfer from May's trust to Mason and May's trust as joint tenants with a right of

survivorship is voidable, and voided subsequent transfers are voidable and are voided. The trustee acts as the agent of the trust and not in an individual capacity; therefore, whether or not a trustee has a measurable life, as with Mr. Bussa in this case, is not relevant. Mr. Bussa could transfer trust property to Mason and the trust as tenants in common but not as joint tenants with the right of survivorship because, again, the trust does not have a measurable life. The language of May's trust indicates that she wanted her 50 percent to be conveyed to the grantees as tenants in common, she does not include any power in the trust to grant a joint tenancy or to grant survivorship language and the Court believes that language is necessary under Michigan law.

The trust is very clear, 50 percent shall be distributed to Gwen Mason. If Ms. Mason is not surviving then her share shall be divided and distributed equally among Shaaf, Fryer and Forbes and 50 percent distributed to Elton Bussa. If Elton Bussa is not surviving his shall be divided and distributed equally among Shaaf, Fryer and Forbes; thus, by the terms of the trust Mason would own one-half of May's 50 percent, that being 25 percent of the whole property, and Shaaf, Fryer and Forbes would each own 16.6 percent of May's 50 percent of the joint tenancy or 8.3 percent of the whole

as tenants in common -- pardon me, I said joint tenancy, I meant of the tenants in common. Let me restate that. Thus, Mason would own one-half of May's 50 percent, or 25 percent of the whole property and Shaaf, Fryer, and Forbes would each own 16.6 percent of May's 50 percent, or 8.3 percent of the whole as tenants in common.

All right. Under Leo's 50 percent, and this is not necessarily in dispute, under Leo's 50, Shaaf, Fryer and Forbes each own 16.6 percent of that property -- pardon me, of the entire property. Under May's 50 percent, Mason owns 25 percent of the entire property, and Shaaf, Fryer and Forbes each own 8.3 percent of the total property. If we were to remove the form of ownership then Mason, Shaaf -- Shaaf, Fryer and Forbes would each own approximately a 25 percent interest in the property. This appears to the Court to be essentially what was intended by Leo and May in the long run. However, because Leo did transfer property with joint full rights 50 percent of the property is owned by Shaaf, Fryer and Forbes as joint tenants with rights of survivorship. The deeds conveying May's 50 percent however are invalid for reasons already stated, but pursuant to her trust, ownership is as follows, Mason, Shaaf and Fryer and Forbes would each own May's 50 percent as tenants in common. Mason would own 50 percent

of her share, Shaaf, Fryer and Forbes 16.6 percent each, thus, one-half of the property is owned as joint tenants with rights of survivorship and one-half of the property is owned as tenants in common.

All right. Having found how the property is titled currently, the next question we need to go to is the question of partition. The Court again has had the opportunity to take a look at the drawings that were provided by the parties, the exhibits provided by the parties with regard to the property itself, the Court has some limited familiarity with the property.

This would be your argument, Mr. Alward.

MR. ALWARD: Can I take a minute to collect my thoughts now that we had the first part decided?

Having determined that there is an ownership as tenants in common, the law provides that we can now go forward with the partition, which is what my clients would like to do.

In determining the partition, however, we have to look at this Court's prior ruling, Judge Rodgers' opinion, with respect to --

THE COURT: The access.

MR. ALWARD: The access, Bussa Lane.

The property, according to that opinion, at least the way I read, is we cannot put any more houses or

make any more divisions to that property and still have access on Bussa Lane, it is limited to that single property having access. Thus, it is our position the property in order to be partitioned must be sold as a whole because that then would allow the owner to provide a single dwelling or single use, a single family, for that single property and not violate the Court's order with respect to use of that easement, and I believe that is the only alternative available.

The defendants have argued because defendant owns a piece of abutting property that access could be made that way, perhaps the defendant can use that as access, the plaintiff certainly can't, we have no interest in that property. The only access my clients have is on Bussa Lane; therefore, it's our opinion the property needs to be partitioned and needs to be sold. There is no way to make an equitable division of that property where you would divide and have additional parcels that would need to have access through Bussa Lane.

THE COURT: Would your position be different if the lane -- pardon me, not the lane, if the abutting access -- some rights were granted to the subject property from the abutting access? Or, are your clients seeking sale of the property and that's it?

MR. ALWARD: Although I've only been involved in this action, I do know that there have been three or four other actions as Mr. Kern has eluded to. And, I think the Court has -- I don't want my parties back involved in the situation where there is going to be more issues, more fighting, more whose got what rights and whatnot. The simplest in my opinion, easiest and most practical way to handle it, is to sell it, and that then resolves the issue.

Now, keep in mind if there is other access, if the defendant had some interest she can be a buyer, but I believe it needs to be sold. I don't believe we want these parties to have to continue to work together with another piece of property when we can't work together on the one we have.

THE COURT: Mr. Kern, as to partition?

MR. KERN: Sure.

I think you put plaintiff's counsel in a quick answer position by asking him what you did, which is are your clients still forcing the sale. Now, having heard my decision when the purpose of the sale was to joint tenants with rights of survivor were never going to collect any money during their lifetime the way deed is set, now that your position is they are joint tenants in common they collect regardless if you sell the entire

property. Now, you asked him a question and he hasn't had an opportunity to consult with them to see if that's adequate, that's my point. We are prematurely moving into the idea of partition without having taken now some time to analyze that and go to our engineers and say here's what we need to do to get 8.3 percent for one, 8.3 percent for this one, 16.6 percent for this one.

THE COURT: Do the parties have currently scheduled a facilitative mediation on this matter?

MR. KERN: We did it already without the benefit of Count I being determined and it was un successful for primarily the reason for determining whose getting paid out or not.

THE COURT: Partition can go several ways as these parties know, I can appoint a special master to review and approve the sale or division proposal, or the parties could take that upon themselves.

MR. KERN: Save the money, themselves, right.

THE COURT: I'm simply looking for an interest here. I agree making a decision today with regard to sale is likely inappropriate given the fact you just had the opportunity to ear my ruling with regard to the title issues, which I think are necessary in order for you to make decisions going forward for all parties. So, I would like to give the parties an opportunity to

constructively develop a solution on their own; however, I would like that to have a deadline so if you are unable to do so the Court would then appoint a special master to go ahead and make those determinations.

THE COURT: Mr. Alward.

MR. ALWARD: May I?

THE COURT: Please, Mr. Alward, yes.

MR. ALWARD: I have no problem sitting down trying to come to a resolution, we tried that, it hasn't worked. Now with the Court's determination on Count I we will have a better result. But, the bottom line is with that easement the way it is, I don't know how you're going to divide the property. I don't know if the Court has any thoughts it wants to express. Quite candidly, you looked at this, it was a quick response to after we just found this but quite candidly it's an easy response because I don't believe there is any other resolution.

THE COURT: Counsel, you may be right. I'm not going to intrude on what is a long standing set of issues between these parties. But, looking at the documents you provided to me, it does appear the adjoining property could certainly be deeded if there was a desire, an easement could be deeded over to the plaintiffs in order to access, also while there is a judgment with regard to Bussa Lane, judgments can be revisited, particularly, I

don't know if there are other parties to that particular action, I know the lane provides access -- appears to provide access, again, I am only looking at the exhibit, it appears to provide access to some other properties other than Bussa property, perhaps that particular judgment could be revisited. I'm not trying to put ideas in your head, I'm not trying to tell you how to ultimately decide this. And the best solution might ultimately be to have a sale of the property; however, the Court's not in a position to make that determination today without the parties having a full opportunity to see whether or not there is a resolution now you know how the Court views the title issue.

So, Mr. Alward?

MR. ALWARD: Excuse me, your Honor, I apologize. We have deadlines the Court has imposed with respect to I think a settlement conference is coming up Friday if I'm not mistaken. I have no problem in sitting down quickly and you put the deadline on us how quickly we have to sit down, but I would like the Court to move those other deadlines out while we focus on this issue, if that's okay with the Court.

THE COURT: Mr. Kern?

MR. KERN: Agreed.

THE COURT: All right.

Well, it sounds like if everybody is going to be here Friday anyway that might be a very good day to begin work on this.

Would the parties be able now that you have an idea as to the title issues to work constructively on Friday to come up with a solution?

Why wouldn't the parties be?

MR. KERN: Because it's a little too soon for starters. You mentioned the other properties, that's how the other lawsuit started, you first had to ask other neighbors whether they consent to the split, we have to figure out how to split it, and maybe neighbors are agreeable to it. The last one was going to Court because the proposed subdivision, 80 acres up here, was going to be split like crazy and this 60 acres split like crazy and neighbors said we don't agree with that, that's how the lawsuit started. In this situation we have to have engineers map out how is best to do that, if we're going to physically divide it, if not just a buy out, and, two, what do neighbors think of this proposed plan of engineers will they consent or no, that would mute the point of whether you are overextending the use of it. So, I think there is more work to do than party trial briefs, exhibits to be filed as well in advance, so.

THE COURT: Fair point.

Would the parties be amenable to an administrative stay to give you 60 days to work on the various legal and engineering issues with regard to this matter? And, after 60 days, the Court would reopen the file and set it for a conference, a final conference, and we fish or cut the bait at that point, Mr. Alward?

MR. KERN: Yeah.

THE COURT: I don't want to extend the period so long as to get you out of the sale season, if in fact we are heading towards a sale.

MR. ALWARD: My point exactly, your Honor. Frankly, the issue of Bussa Lane is the one that's driving this. Because we can go spend as much in engineering, or defendants can, but if you can't have access on Bussa Lane it isn't going to matter.

THE COURT: Unless there is access on the --

MR. ALWARD: Unless --

THE COURT: -- the LLC property.

MR. ALWARD: Unless defendant wants to come up with some proposal that's going to take access that's not going to take 60 days for that to take place.

THE COURT: Well, I think what I'll do is this, I'll put this matter on administrative hold for 30 days, that takes it off my docket essentially so I don't have to report on progress and I give you folks an opportunity

to work through those issues. We'll put this on administrative hold for 30 days, during that time period it's my expectation the parties will proceed in good faith to resolve these outstanding issues. And, if it's necessary we'll go ahead in 30 days and have a final conference, at which we'll discuss the resolution of the parties issue.

Are there any other matters we need to deal with today?

MR. KERN: No, your Honor.

MR. ALWARD: I don't believe so, your Honor.

THE COURT: Parties have their marching orders.

MR. KERN: We do.

THE COURT: Mr. Alward, can I get an order from you with regard to today's motions?

MR. ALWARD: Yes, your Honor.

THE COURT: Thank you.

Good luck to you all.

(11:25 a.m. - proceedings concluded)

****

CERTIFICATE OF OFFICIAL COURT REPORTER

STATE OF MICHIGAN

COUNTY OF ANTRIM

I, Karen M. Copeland, Official Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that this is a true and correct transcript of my stenotype notes with the assistance of Computer-Assisted Transcription to the best of my ability of the proceedings held before the Honorable Kevin A. Elsenheimer, Circuit Court Judge in the matter of SCHAAF, FRYER & MASON v. FORBES, File No. 16-9008-CH, on Monday, May 15, 2017.

S/: Karen M. Copeland
Karen M. Copeland, CSR-6054, RPR
Official Court Reporter

Dated: This 2nd day of April, 2018

STATE OF MICHIGAN

IN THE 13th CIRCUIT COURT FOR THE COUNTY OF ANTRIM

Cindy Schaaf, Colleen M. Fryer, and Gwen Mason,

Plaintiffs/ Counter-Defendants

CASE NO. 16-9008-CH

Honorable Kevin A. Elsenheimer

v

Charlene Forbes a/k/a Angie Forbes,

Defendant/ Counter-Plaintiff.

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
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(231)-492-0277

ORDER

At a session of said Court held at the Grand Traverse County Courthouse in Traverse City, Michigan on the _____ day of July, 2017

PRESENT: THE HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

This matter having come before the Court for hearing on the Defendant/Counter-Plaintiff's Motion for Summary Judgment and the Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, the Court having read the parties' briefs, heard oral argument and being otherwise duly advised in the matter,

NOW THEREFORE, for the reasons set forth on the record,

IT IS HEREBY ORDERED as follows with respect to the 60 acre parcel located in Milton Township, Antrim County, Michigan ("Property") legally described as follows:

> A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

(1) The conveyances, as detailed hereafter, to the parties from the Mae E. Fitzpatrick Trust uad 05/08/1998, as amended ("Trust"), of the Trust's undivided 50% interest in the Property are void for the reason that a Trust cannot hold Property as a joint tenant with rights of survivorship and because the Trust had no authority to convey the Property as joint tenants with rights of survivorship. The void conveyances include:

(a) Deed dated February 9, 2011and recorded on February 10, 2011 in Liber 812, Page 2584 from Leo Bussa as Trustee of the Trust to Leo Bussa as Trustee and Gwen Mason, as joint tenants with rights of survivorship

(b) Deed dated February 9, 2011 and recorded on February 10, 2011 in Liber 812, Page 2586 from Leo Bussa as Trustee of the Trust to Leo Bussa as Trustee, Cindy Schaaf, Colleen M. Fryer and Charlene Forbes, aka Angie Forbes, as joint tenants with rights of survivorship.

(c) Deed dated April 22, 2011 but never recorded from Gwen Mason as Trustee of the Trust to Cindy Schaaf, Colleen M. Fryer and Charlene Forbes, aka Angie Forbes, as joint tenants with rights of survivorship.

(2) The parties currently hold the following interest in the Property, formerly held by the Trust:

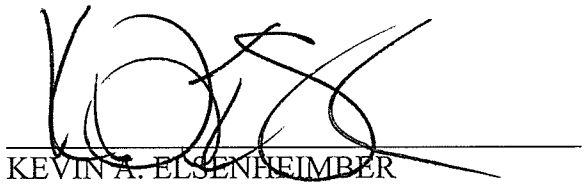
(a) Gwen Mason owns an undivided 50% interest in an undivided 50% interest in the Property (which is equivalent to a 25% interest in the entire Property) as a tenant in common with the other parties.

(b) Cindy Schaaf, Colleen Fryer and Charlene Forbes collectively own an undivided 50% interest in an undivided 50% interest in the Property (which is equivalent to a 25% interest in the entire Property) as tenants in common.

(3) The conveyance, dated December 7, 2010 and recorded on December 9, 2010 at Liber 810, Page 2983, from Leo Bussa to Leo Bussa, Cindy Schaaf, Colleen Fryer and Charlene Forbes, of an undivided 50% interest in the Property as joint tenants with rights of survivorship is a valid conveyance. Thus, Cindy Schaaf, Colleen Fryer and Charlene Forbes currently hold an undivided 50% interest in the Property, formerly owned by Leo Bussa, as joint tenants with rights of survivorship.

(4) This Order is not a final order and does not resolve this matter.

(5) Upon entry of a final order by this Court, this Order may be recorded by any party to confirm ownership of the Property.



KEVIN A. ELSENHEIMER
Circuit Court Judge

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

CINDY SCHAFF, COLLEEN M. FRYER,
and GWEN MASON,

Plaintiff,

v

File No. 2016009008CH
HON. KEVIN A. ELSENHEIMER

CHARLENE FORBES a/k/a ANGIE FORBES,

Defendant.
/

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
Attorneys for Plaintiffs

Brace Kern (P75695)
Attorney for Defendant

DECISION AND ORDER REGARDING PARTITION

Decedents Leo Bussa and Mae Fitzpatrick jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980's and 1990's, a portion of the waterfront property was divided into seven separate parcels for residential development.[1] After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel.[2] The 60-acre parcel (hereinafter the "Parcel") is currently owned by Cindy Schaaf, Colleen Fryer, Gwen Mason and Charlene Forbes (collectively the "Parties"), as descendants and relatives of Bussa and Fitzpatrick. The present owners disagree as to how the Parcel should be divided and sought the assistance of the Court in resolving their disputes.

Pursuant to the Court's previous Order, issued August 15, 2017, the current ownership of the Parcel is as follows:

[1] The original division, pursuant to the Grant of Easement, recorded with the Antrim County Register of Deeds: Liber 348, pages 14-26, indicates the north-eastern portion of property was divided into seven individual parcels or home sites.
[2] See Antrim County Register of Deeds, Liber 856, Page 685.

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;
Cindy Schaaf (Plaintiff)	An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided ⅓ interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided ⅓ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided ⅓ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The question currently before the Court is whether the Parcel may be partitioned between the Parties, pursuant to MCR 3.402, or whether partition would result in undue prejudice and a sale in lieu of partition should be ordered.[3] The Court heard oral arguments on August 14, 2017, has reviewed the briefing and now issues this decision and order for the reasons set forth herein.

In an action for partition, the court determines whether the premises can be partitioned without great prejudice to the parties, the property's value and use and any other matters the court finds pertinent.[4] Partition of lands held in joint tenancy or tenancy in common may be accomplished voluntarily by cotenants or by judicial action.[5] Physical division of jointly held property is preferred method of partition.[6] Although partition in kind is favored, the court may order sale and division of proceeds when it concludes that equitable physical division cannot be achieved.[7] Where partition of jointly held property by physical division results in inequalities in owner's shares, court may award money payments to offset the difference.[8] Dual contingent remainders of joint life estates are not subject to partition, as they are not possessory estates.[9]

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[3] MCR 3.401(B).
[4] *In re Temple Marital Trust*, 278 Mich App 122, 144; 748 NW2d 265 (2008).
[5] *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

The relevant statute allowing for partition is MCL § 600.3308, which states:

> Any person who has an estate in possession in the lands of which partition is sought may maintain a claim for partition of those lands, but a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition.

Partition is also controlled by MCR 3.401, which reads in pertinent part as follows:

> (A) Matters to Be Determined by Court. On the hearing of an action or proceeding for partition, the court shall determine
>
> (1) whether the premises can be partitioned without great prejudice to the parties;
>
> (2) the value of the use of the premises and of improvements made to the premises; and
>
> (3) other matters the court considers pertinent.
>
> (B) Partition or Sale in Lieu of Partition. If the court determines that the premises can be partitioned, MCR 3.402 governs further proceedings. If the court determines that the premises cannot be partitioned without undue prejudice to the owners, it may order the premises sold in lieu of partition under MCR 3.403.

As the Court has already determined that each party to this litigation has a possessory estate in the Parcel, the statutory requirement to seek a partition is met. The remaining question is whether the special characteristics of the Parcel warrant a partition in kind or a sale in lieu of partition.

Plaintiffs, relying on MCR 3.403, make several arguments in favor of a sale in lieu of partition. First, Plaintiffs suggest that a partition of the subject property which reflects its unusual ownership structure would necessarily result in (at least) five distinct "sub" parcels. As per the Court's ownership determination above, an undivided one-half of the Parcel is held by the Parties as tenants in common. The other undivided half of the Parcel is owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship. Without consideration of other objections raised by Plaintiffs, a physical partition of the tenancy in common ownership is essentially mathematical. Plaintiff Mason would be entitled to one-half of the interest, which would result in a parcel equal to 25% of the entire property. The remaining interests in the tenancy in common would be divided equally among Schaaf, Fryer and Forbes, resulting in three parcels each having 8 ⅓ percent of the whole.

When the joint tenancy is divided, however, the matter becomes more complex. As discussed above, the survivorship interests in a joint tenancy with full rights of survivorship cannot be partitioned and cannot be terminated absent the agreement of the parties holding the

contingency. While the joint tenancy itself could be divided equally among them, joining Schaaf, Fryer and Forbes' interests in the joint estate with their interests in the tenancy in common subjects the latter to the dual contingent remainders held by the joint tenants. A tenancy in common may not be encumbered with a survivorship feature as that would destroy the unity of possession.[10]

The Court agrees with Plaintiffs that to equitably partition the Parcel in a manner that protects the tenancy in common from the operation of the joint tenancy's dual contingent remainders would require subdividing the Parcel into minimum of five "sub" parcels. One-half of the Parcel would be split among the Parties as their interests appear as tenants in common and the other half of the property would be held by Schaaf, Fryer and Forbes and joint tenants with full rights of survivorship. The latter half could be further partitioned to reflect the three owners' possessory interests, but would retain the survivorship feature.

This analysis is further compounded by the fact that the subject Parcel does not adjoin a public road. Bussa Road, which is a public road, is south of and parallel to the Parcel. Bussa Lane, a private road created by Grant of Easement, begins approximately at the intersection of Bussa Road and Wallen Lane, crosses over the Parcel and provides access to the seven residential properties developed in the 1980's and 1990's. While the Parties may lawfully access the Parcel using Bussa Lane, the easement has been the subject of litigation in this circuit.[11]

In addressing the easement, Judge Philip Rodgers, Jr. determined that the Parties, "as Owners of [the] Parcel…the servient estate, have all the 'rights and benefits of ownership consistent with the easement' and [retained] the 'right to use the property in common' with the [dominant estate owners]."[12] Further, the Court held that the Parties may use the portion of Bussa Lane that crosses the Parcel for ingress and egress purposes, but did not have the ability to exceed the scope or increase the burden on the easement by providing access to "additional parties, such as new lot owners."[13]

The Parties' rights to access the Parcel via Bussa Lane are associated with their ownership interests and would therefore continue post-partition. However, creating five or more

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[10] *Devries v Brydges I,* 94 Mich 957 (1892). See Sections 9.2 and 9.4 of Cameron's Michigan Real Property Law.
[11] Collectively, the Parties were the plaintiffs in Antrim Case No. 2011008633CH, *Cindy Schaaf et al v Ronald Ring et al.*
[12] See Decision and Order Granting Plaintiff/Counter-Defendants' Motion for Summary Disposition and Granting in Part and Dismissing in Part Defendants/Counter-Plaintiffs' Motion for Summary Disposition, filed October 3, 2012.
[13] *Id.*

"sub" parcels to preserve the survivorship interest in the joint tenancy would arguably be adding "additional parties" and thus, an impermissible expansion of the easement.[14] Such an expansion would seem to violate the Court's holding in the prior case of *Schaaf v Ring*.

In contrast, the Defendant argues that partition in kind is warranted because alternative methods for accessing the Parcel exist. Bussa Road LLC owns real property located on Bussa Road and adjacent to the Parcel.[15] Defendant, as a member of Bussa Road LLC, suggests that the Parties could use the LLC property to access the Parcel, which would avoid the issue of ingress and egress on Bussa Lane. Further, Defendant maintains that she could grant the Plaintiffs access rights as part of a partition in kind of the Parcel. However, there is no firm proposal to do same before the Court. Currently, only the Defendant has guaranteed access to the Parcel over the LLC property and thus, the Court will not consider the LLC property in determining whether to allow partition in kind.[16]

For the reasons stated herein, a partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved. As such, it is the finding of this Court that sale of the Parcel and division of the proceeds between the Parties is the appropriate relief in this case. The Court orders the entire Parcel be sold, in lieu of partition, pursuant to MCR 3.403.

IT IS SO ORDERED.

08/25/2017
09:23AM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

[14] All of the lots created pursuant to a partition of the property would be alienable, although the lot(s) held as a joint tenancy with full rights of survivorship would still be subject to the dual contingent remainder.
[15] Antrim County Parcel No. 05-12-218-002-45.
[16] An easement over the LLC property would require a unanimous agreement by the Parties and it is clear to the Court that it is the Parties' *inability* to agree on solutions that brought them to Court to begin with. Therefore, the Court will not compound this matter by requiring the Parties to reach an agreement on access across the LLC property.

STATE OF MICHIGAN

IN THE 13th CIRCUIT COURT FOR THE COUNTY OF ANTRIM

Cindy Schaaf, Colleen M. Fryer, and Gwen Mason,

Plaintiffs,

CASE NO. 16-9008-CH

Honorable Kevin A. Elsenheimer

v

Charlene Forbes a/k/a Angie Forbes,

Defendant.

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
Alward Fisher Rice Rowe & Graf, PLC
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(231) 346-5400

Brace Kern (P75695)
BEK Law, PLC
Attorney for Defendant
3434 Veterans Drive
Traverse City, MI 49684
(231)-492-0277

ORDER OF SALE

At a session of said Court held at the Courthouse
in the Village of Bellaire, Antrim County, Michigan
on the ____ day of _____, 2017

This matter having coming before the Court on Motions for Summary Disposition brought by both Plaintiffs and Defendant; the Court having entered a Decision and Order on August 25, 2017, requiring that the 60-acre parcel located in Milton Township, Antrim County, Michigan ("Premises"), which is the subject of this litigation, be sold as one parcel in lieu of partition; and the Court having denied Defendant's Motion for Reconsideration;

NOW, THEREFORE, pursuant to the Court's Order and in order to complete the sale of the Premises in lieu of partition, IT IS HEREBY ORDERED:

A. Attorney R. Edward Kuhn is hereby appointed as Commissioner to administer the sale of the Premises. The Commissioner shall be paid his fee from the proceeds of the sale of the Premises pursuant to MCR 3.402.

B. The Premises, which is more fully described as

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West

shall be sold as a single parcel.

C. There is no minimum price at which the Premises may be sold.

D. The sale shall be a cash sale with no credit terms.

E. No proceeds shall be retained for the benefit of unknown owners, infants, parties outside Michigan or parties who have dower interest or life estates.

F. The Premises shall be listed for sale by the Commissioner through Bob and Tia Rieck of Coldwell Banker Schmidt Realtors at an initial listing price of $2,250,000.00.

G. Upon receipt of a purchase agreement acceptable to the Commissioner, the Commissioner shall, pursuant to MCR 3.403(B)(4) file a report with the Court, requesting the Court to confirm the sale. The Court may confirm the sale at a hearing with reasonable notice to Plaintiffs and Defendant.

H. If the Court confirms the sale, pursuant to MCR 3.403(B), the Commissioner shall be authorized to execute conveyances pursuant to the sale, and pursuant to MCR 3.403(C) deduct the costs of expenses of the proceeding, including the Plaintiffs' reasonable attorney fees as determined by the Court, from the proceeds of the sale and pay them to Plaintiffs' attorney. Thereafter, the Commissioner shall, pursuant to MCR 3.403(D), deduct any other costs and divide the proceeds of the sale among the parties in proportion to their respective interests, i.e. each party having a 25% interest in the entire Premises.

IT IS SO ORDERED.

Dated: 12/11/2017
12:10PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

Honorable Kevin A. Elsenheimer, Circuit Court Judge

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

CINDY SCHAFF, COLLEEN M. FRYER,
and GWEN MASON,

Plaintiffs,

v

File No. 2016009008CH
HON. KEVIN A. ELSENHEIMER

CHARLENE FORBES a/k/a ANGIE FORBES,

Defendant.
/

DECISION AND ORDER

Leo Bussa and Mae Fitzpatrick, both deceased, jointly owned real property on the west shoreline of Torch Lake. In the 1980's and 1990's, a portion of the waterfront property was divided into seven separate parcels (hereinafter "Residential Parcels") for residential development.[1] After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel with 894 feet of frontage on Torch Lake.[2]

The 60-acre parcel (hereinafter the "Property") is described as follows:

> A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

The Property is currently owned by Cindy Schaaf, Colleen Fryer, Gwen Mason and Charlene Forbes (collectively the "Parties"), as descendants and relatives of Bussa and Fitzpatrick. The Property is accessed using Bussa Lane. Bussa Lane, a private road, begins

[1] The original division, pursuant to the Grant of Easement, recorded with the Antrim County Register of Deeds: Liber 348, pages 14-26, indicates the north-eastern portion of property was divided into seven individual parcels or home sites, which have the following tax identification numbers: 05-12-207-023-25; 05-12-207-023-50; 05-12-207-023-50; 05-12-207-023-40; 05-12-207-023-30; 05-12-207-023-10; and 05-12-207-023-60.

[2] See Antrim County Register of Deeds, Liber 856, Page 685. This parcel is described as: A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ pf MW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

approximately at the intersection of Bussa Road and Wallen Lane, crosses over the Property and runs along the western portion of the Residential Parcels.[3] The Bussa Lane Easement was created by a Grant of Easement ("Easement"), dated December 29, 1989, however, Bussa and Fitzpatrick did not reserve any right to use Bussa Lane in the document.

In a prior case, Antrim County File No. 2011008633CH, Judge Philip E. Rodgers, Jr. held that the scope of the Easement limits use of Bussa Lane to ingress and egress by residential traffic to and from family residences located on the Residential Parcels and, while the Parties may use Bussa Lane to access the Property, they are prohibited from extending rights of ingress and egress to additional lot owners.[4] The Court's ruling effectively prevented Schaaf, Fryer, Mason and Forbes from developing and/or creating subdivisions on the Property.

A Complaint for Partition was filed in the above captioned case on May 6, 2016. Plaintiffs filed a First Amended Complaint for Partition on November 9, 2016, and a Second Amended Complaint to determine Interest in Property and for Partition on January 6, 2017.[5] Defendant filed a Counter-Complaint on February 10, 2017.[6]

The Defendant filed a Motion for Summary Disposition on April 7, 2017, and Plaintiffs filed a Motion for Summary Disposition on April 18, 2017. After hearing oral arguments by the Parties, the Court determined the ownership of the Property in an Order dated August 15, 2017, and further, ordered the sale of the Property, in lieu of partition, in a Decision and Order Regarding Partition, dated August 25, 2017.[7] The Court signed an Order of Sale, with an initial

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[3] The southern entrance to Bussa Lane is located on Parcel No. 05-12-582-001-00.

[4] See Decision and Order Granting Plaintiff/Counter-Defendants' Motion for Summary Disposition and Granting in Part and Dismissing in Part Defendants/Counter-Plaintiffs' Motion for Summary Disposition, issued October 2, 2012. In Antrim County File No. 2011008633CH, Cindy Schaff, Colleen Fryer, Gwen Mason and Charlene Forbes were the Defendants/Counter-Plaintiffs and were jointly represented.

[5] Plaintiffs' Second Amended Complaint includes the following counts: Count I – Action to Determine Interests in Land; Count II – Partition; Count III - Contribution

[6] Defendant's Counter-Complaint includes the following counts: Count I – Contribution/Unjust Enrichment; Count II – Quantum Meruit/Breach of Implied Contract/Claim to Quiet Title; and Count III – Statutory and Common Law Conversion

[7] The ownership of the Property is as follows: Gwen Mason - An undivided one-half interest in a one-half undivided interest in the entire Property as a tenant in common with the other parties; Cindy Schaaf - An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Property as a tenant in common, and an undivided ⅓ interest in a one-half undivided interest in the entire Property as a joint tenant with right of survivorship as to the other interests in that one-half; Colleen Fryer - An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Property as a tenant in common, and an undivided ⅓ interest in a one-half undivided interest in the entire Property as a joint tenant with rights of survivorship as to the other interests in that one-half; Charlene Forbes - An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and an undivided ⅓ interest in a one-half undivided interest in the entire Property as a joint tenant with rights of survivorship as to the other interests in that one-half.

listing price of $2,250,000, on December 11, 2017. The remaining unresolved claims in this litigation are Plaintiffs' Claim for Contribution and Defendant's Counter-Claim for Contribution, Quantum Meruit/Implied Contract, and Conversion.

The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.[8] The doctrine of contribution between cotenants is based upon purely equitable considerations and is premised upon the simple proposition that equality is equity; however, contribution is not to be enforced unless reason and justice require that each of the cotenants contribute their proportionate share of the common burden.[9] The granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case.[10]

As cotenants and beneficiaries of Leo Bussa, the Parties are jointly and equally responsible for the costs and attorney fees associated with Antrim County File No. 2011008633CH, and for the real estate taxes and expenses associated with maintenance of the Property.[11] Currently, Property related expenses total approximately $150,135.63, which includes verified payments to the following entities: $56,164.37 for legal services provided by Attorney Garratt; $48,348.47 for legal services provided by Attorney Ford; $3,001.03 for mediation costs; $33,532.30 for property taxes; $6,929 to Gourdie-Fraser; $606 to Farm Bureau; $289.45 to Great Lakes Energy; $255 to Jim Veliquette Snow Plowing; and $1,010.01 for miscellaneous expenses. Plaintiffs have provided documentation which confirms that they have

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[8] *Caldwell v Fox*, 394 Mich 401; 231 NW2d 46 (1975).
[9] *Strohm v Koepke*, 352 Mich 659; 90 NW2d 495 (1958).
[10] *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947).
[11] The prior litigation was initiated to establish the scope of the Easement and was necessary to determine whether the Easement was so narrowly construed as to prevent subdivision development of/on the Property. The prior litigation resulted in a final determination as to the scope of the Easement, which was a "benefit" to all litigants, regardless of the outcome. Plaintiffs' correctly note that the result of litigation is not dispositive of the benefit conferred. Moreover, the outcome of the easement litigation was necessary and relevant to each Schaaf, Fryer, Mason and Forbes as co-owners of the Property, and potential developers of the Property. While Defendant claims that the prior litigation was voluntary, did not confer a benefit on the Property and that she should not be liable for litigation expenses because they are not a common burden, these claims are disingenuous at best for the reasons stated.

paid $142,602.59 of the Property related expenses.[12] To date, Plaintiff Mason has paid $62,877.58, of the above total spent; Plaintiff Fryer has paid $25,435.46, of the above total spent, and Plaintiff Schaaf has paid $54,289.55, of the above total spent.[13] Based on the figures provided, Defendant has only paid $7,533.04, a mere 5%, of the total spent on property related expenses.

The Court finds that Plaintiffs are entitled to contribution by the Defendant in this matter. Reason and justice require that the Defendant is responsible for one-quarter of the costs and attorney fees associated with Antrim County File No. 2011008633CH, and for the real estate taxes and expenses associated with maintenance of the Property. Pursuant to the total expenditure amount of $150,135.63, each litigant/co-owner is responsible for $37,533.90. Defendant previously paid $7,533.04, therefore, she owes the Plaintiffs $30,000.86. This amount, $30,000.86, shall be withheld from the Defendant's portion of the sales proceeds for the Property and shall be distributed to the Plaintiffs.[14]

Furthermore, as to Defendant's contribution claim, Plaintiffs have paid the delinquent 2016 property taxes and acknowledge they are responsible for paying their portion, or $5,256.62, for of the 2017 property taxes. The Court finds that due to the Plaintiffs' verified payments, in conjunction with the individual litigants' proportional responsibility for Property related expenses, the Defendant is not entitled to contribution from the Plaintiffs. However, the Court orders that, within 30-days from the date of this Decision and Order, the Plaintiffs shall make current the 2017 property taxes.

Defendant's Count II alleges that she was locked out of the farmhouse and out buildings located on the Property from 2012 through 2015 and is, therefore, entitled to reimbursement for property taxes for this period.[15] According to the Plaintiffs, Bussa wanted Schaaf to have the

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[12] Plaintiff Mason has paid 41.8% of the total spent; Plaintiff Fryer has paid 16.9% of the total spent, and Plaintiff Schaaf has paid 36.1% of the total spent. The three Plaintiffs have paid a combined 94.9% of the property related expenses, versus the 75% they are required to pay as co-owners.

[13] Moreover, Plaintiff Schaaf has paid an additional $11,651.78 for costs associated with the Property ($1,985 to Great Lakes Energy and $9,666.78 for fuel, insurance, maintenance, plowing and tree removal), however, the $11,651.78 is not included in the $150,135.63 listed above.

[14] The Court declines to apportion the $30,000.86 amongst the Plaintiffs, but is confident that they can determine an appropriate division of the funds based on their prior payment history.

[15] The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another. *Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187; 729 NW2d 898 (2006). Generally, an implied contract may not be found if there is an express contract between the same parties on the same subject matter. *Id.* In order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish: (1) the receipt of a benefit by the defendant from the plaintiff

farmhouse. Plaintiffs were also aware of Schaaf's desire to eventually transfer the farmhouse/out buildings from the Property to her 80-acre parcel and were amenable to this plan. Because of this, Fryer and Mason treated the farmhouse/out buildings as belonging to Schaaf. Additionally, from 2012 through 2015, Plaintiff Schaaf was paying all maintenance expenses associated with the farmhouse/out buildings, such as fuel costs, utilities, snow removal and landscaping.

The Court finds that Defendant is not entitled to reimbursement of property taxes for years 2012 through 2015, as she had no legitimate expectancy of regularly accessing the farmhouse/out buildings due to Schaaf's residence.

Defendant's Count III alleges conversion, claiming: (1) that Plaintiffs failed to account for and/or removed personal property from the farmhouse for their own use and benefit, and (2) that Plaintiffs committed waste/conversion by removing and selling timber from 50 ash trees and failing to provide Defendant with her portion of the proceeds. Under common law, conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.[16]

Plaintiffs note that an inventory for Bussa's probate estate was conducted shortly after his death, a time when Defendant had unlimited access to the farmhouse/out buildings, and that subsequent to this inventory, all personal property was distributed according to Bussa's will. Defendant has failed to allege what specific personal property was converted and further, has provided no evidence to sustain this claim except for speculation and conjecture. The Defendant is not entitled to compensatory damages for conversion of personal property based on the complete lack of evidence to support this allegation.

With regard to the Ash trees, the Plaintiffs were informed by Don Way, owner of a tree servicing company, that the Ash trees were dead and should be removed. The Court takes notice of the spread of the Emerald Ash Borer, an insect which devastated Ash trees throughout Michigan during this time period. Plaintiffs reasonably relied on Way's knowledge and expertise in assessing the health of the trees. Way requested permission to use the Ash trees that he removed as kindling, and the Plaintiffs agreed. Plaintiffs dispute Defendant's claims that the trees were: (1) healthy and (2) sold for profit. To bolster her claim, Defendant has submitted two

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and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Id.* Not all enrichment is unnecessarily unjust. *Id.* at 195-196. The key to any quantum meruit recovery from a noncontracting party is proof that he or she unjustly received and retained an independent benefit from the plaintiff's contractual services. *Id*

[16] *Aroma Wines & Equip, Inc. v Columbian Distribution Services, Inc.*, 497 Mich 337; 871 NW2d 136 (2015).

photographs of the alleged ash trees, purported showing that the trees were not infected with Emerald Ash Borer and/or not dead. However, Defendant has not provided any evidence (e.g. receipts, invoices, etc.) demonstrating that the trees were sold for a profit and again relies on speculation and conjecture. For the same reasons discussed previously, the Defendant is not entitled to compensatory damages for conversion of personal property based on a lack of evidence.

In conclusion, and for the reasons stated herein, the Plaintiffs are entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property. Defendant is not entitled to contribution from the Plaintiffs, nor is she entitled to compensatory damages. This Decision and Order resolves all remaining issues in this litigation and closes the case.

IT IS SO ORDERED.

04/16/2018
04:21PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

STATE OF MICHIGAN

IN THE COURT OF APPEALS

CINDY SCHAAF, COLLEEN FRYER, and GWEN MASON,

Plaintiffs-Appellees,

Court of Appeals Case No. 343630

v

13th Circuit Court Case No. 2016-9008-CH

CHARLENE ANGIE FORBES,

Defendant-Appellant,

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DEFENDANT'S-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Jurisdiction is conferred on the Court of Appeals pursuant to MCR 7.203(A)(1) and MCR 7.204(A)(1)(a). Defendant-Appellant filed a Claim of Appeal from a Decision and Order entered by Judge Kevin A. Elsenheimer on April 16, 2018 in the 13th Circuit Court for the County of Antrim. Defendant-Appellant is challenging the Court's orders dating August 15, 2017; August 25, 2017; December 11, 2017; and the final order on April 16, 2018. Copies of those Decisions and Orders were submitted with the Claim of Appeal.

The April 16, 2018 Decision and Order is a final judgement, pursuant to MCR 7.202(6)(a)(i), because it disposed of all the claims and adjudicated the rights and liabilities of the parties. On May 1, 2018, this Court received Defendant-Appellant's Claim of Appeal. Since the Claim of Appeal was Received by this Court within 21 days after a final order, it was filed timely pursuant to MCR 7.204(A)(1)(a).

STATEMENT OF THE QUESTION PRESENTED

1. Whether the Circuit Court erred by determining that a trust is incapable of holding and conveying property with rights of survivorship?

Court's Answer:	No, a trust cannot hold or convey survivorship rights
Appellant's answer:	Yes, a trust can hold and convey survivorship rights
Appellees' answer:	No, a trust cannot hold or convey survivorship rights

2. Whether the Circuit Court erred in finding that the 60-acre parcel that is the subject of this litigation is incapable of partition in kind and that a sale in lieu of partition was necessary, relying on its interpretation of a prior court case order regarding an easement on the property?

Court's Answer:	No, the property cannot be partitioned in kind without great prejudice to the parties because of the prior order restricting expansion of the easement on the property, leading to a sale in lieu of partition
Appellant's Answer:	Yes, the property can be partitioned in kind without great prejudice to the parties because only one split needs to be made and additional ingress and egress exists to ensure that use of the Bussa Lane easement would not expand
Appellees' Answer:	No, the property cannot be partitioned in kind without great prejudice to the parties because of the prior order restricting expansion of the easement on the property, leading to a sale in lieu of partition.

3. Whether the Circuit Court's conclusion that massive sums of evidence, marked as trial exhibits, dumped on the eve of trial were admissible?

Court's Answer:	The evidence was relied upon to award Plaintiffs $30,000 on their contribution claim for attorney fees

Appellant's Answer: The document dump on the eve of trial violated the Scheduling Order, and prejudiced Appellant by an inability to cross examine the admitted evidence

Appellee's Answer: Unknown

4. Whether the Circuit Court erred when it granted Appellees' contribution claim under MCL 600.3336(2) for non-beneficial, elective litigation?

Court's Answer: Contribution for the prior litigation is permissible

Appellant's Answer: Yes, contribution cannot be sought because the prior litigation was not a common burden of ownership that the co-tenants were bound to discharge, and the unsuccessful litigation conferred no benefit upon Appellant

Appellee's Answer: Contribution for the prior litigation is appropriate

I. INTRODUCTION

This case focuses on a trust's ability to hold and convey property as a joint tenant with rights of survivorship. The 13th Circuit Court for Antrim County improperly concluded that a trust could not hold property as a joint tenant with survivorship rights and this is an appeal of that decision. From that, an improper partition in lieu of sale was ordered due to the incorrect parcel division, which resulted in five estates, or "Parcels" being found instead of the proper two estates. Therefore, if the property interests and rights of survivorship are corrected by this Court, then only Ms. Mason's 25% interest in the property is capable of partition and the other 75% interest held by the other parties is incapable of partition due to the survivorship rights held by those parties. In the alternative, if this Court concludes that a trust cannot hold or convey survivorship rights, a partition in kind of $41^2/_3\%$ of the property is the proper outcome. Additionally, the Circuit Court erred in its contribution order by including voluntary, non-beneficial litigation costs in that award. In making that determination, the Circuit Court also wrongly relied on a document dump on the eve of trial of materials that were never produced during discovery or in compliance with the Scheduling Order. Thus, such documents should have been ruled inadmissibile.

II. STATEMENT OF FACTS

This action concerns a 60-acre parcel of land on Torch Lake in Antrim County, Michigan. It was previously owned by Mae Fitzpatrick, and her son, Leo Bussa. In May of 1998, both Mae and Leo created separate trusts. In August of that year, they transferred, to their respective trusts, each of their undivided one-half interests as tenants in common. In 2004, Mae passed away and Leo became Trustee of Mae's Trust. When his mother died, Leo received a life estate in her undivided one-half interest in the 60-acre parcel. When Leo passed away in 2011, his life estate in his mother's one-half interest terminated, and his own one-half interest vested in the joint tenant

remainderpersons (subject to total divestment if they failed to outlive their co-tenants with rights of survivorship). The parties to this action inherited the entire 60-acre parcel of land on Torch Lake.

Before Leo died, he executed 5 ladybird deeds to the parties to this action. Collectively, those five deeds conveyed 100% of the 60-acre parcel on Torch Lake. Upon the advice of counsel, Leo started with his own undivided one-half interest in the 60-acre parcel, which was held by his trust at that time. So, the first ladybird deed transferred Leo's undivided one-half interest in the 60-acre parcel from his trust to himself personally.[1] Second, Leo conveyed, through ladybird deed number 2, that same undivided one-half interest in the 60-acre parcel to Appellees Ms. Schaaf and Ms. Fryer, and the Appellant Mrs. Forbes.[2] As the deed states, those three inherited Leo's one-half interest "as Joint Tenants with Rights of Survivorship."[3] Their interests are classified as vested remainders subject to total divestment if they do not outlive their joint tenants. This is not in dispute.

Leo's third ladybird deed conveyed the property's mineral rights to Mrs. Forbes. Appellees are not challenging these 3 deeds because the property passed through Leo personally; not through Leo's trust. Consequently, there is no dispute that Ms. Schaaf, Ms. Fryer and Mrs. Forbes inherited Leo's undivided one-half interest in the 60-acre parcel "as Joint Tenants with Rights of Survivorship."

Leo's fourth and fifth ladybird deeds conveyed his mother's undivided one-half interest in the 60-acre parcel. Leo, as trustee of his mother's trust, conveyed ½ of Mae's one-half interest to

[1] Exhibit 1 – Quit Claim Deed from Leo Bussa, Trustee of the Leo Bussa Trust AUD (Grantor) to Leo Bussa (Grantee)
[2] Exhibit 2 – Quit Claim Deed (subject to an enhanced life estate) from Leo Bussa (Grantor) to Leo Bussa, Ms. Schaff, Ms. Fryer, and Ms. Forbes (Grantees)
[3] See Exhibit 2, ¶ 2

Appellee Ms. Mason,[4] and the other ½ of Mae's one-half interest to Ms. Schaaf, Ms. Fryer, and Mrs. Forbes "as Joint Tenants with Rights of Survivorship."[5] Appellees are challenging the latter, but not the former because the former did not convey survivorship rights. Thus, upon Leo's death, Ms. Mason received her ½ of Mae's one-half (i.e. 25% of the whole) without any survivorship rights, which is undisputed.[6] Conversely, the other 3 grantee remainderpersons received the other ½ of Mae's one-half interest in the 60-acre parcel (i.e. 25% of the whole) "as Joint Tenants with Rights of Survivorship."[7] This is the deed being challenged because it involves survivorship rights being held by a trust.

It should be noted that if Leo intended for the survivorship rights to restrict Ms. Mason's ¼ share, then Leo would have used only one ladybird deed to convey his mother's ½ interest to the four grantees "as Joint Tenants with Rights of Survivorship." Instead, Leo used two ladybird deeds to craft this result to coincide with his mother's trust that did not recite survivorship rights with respect to Ms. Mason's inheritance. Importantly, this is exactly how the parties transferred the title shortly after Leo's death.[8]

III. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for questions of law, such as the proper interpretation of statutes or court rules is reviewed de novo.[9] "[E]quitable actions are reviewed de novo with the trial court's

[4] Exhibit 3 – Quit Claim Deed (subject to enhanced life estate) from Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust and Ms. Mason (Grantees)
[5] Exhibit 4 – Quit Claim Deed (subject to enhanced life estate) from Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust, Ms. Schaaf, Ms. Fryer, and Ms. Forbes (Grantees)
[6] See Exhibit 3
[7] See Exhibit 4
[8] Exhibit 5 – Quit Claim Deed from Ms. Mason, Successor Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Ms. Mason (Grantee)
[9] *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013)

findings of fact reviewed for clear error. . . ."[10] Additionally, a common law doctrines' applicability, such as the rule against perpetuities, is reviewed de novo. Therefore, this Court will review de novo whether a trust can hold and convey property as a joint tenant with rights of survivorship and the trust's relation to the rule against perpetuities. This Court also reviews contribution actions, founded in equity, de novo.[11] Partition actions are equitable actions, so the finding of a partition will be reviewed de novo, only overturning the circuit court's factual findings for clear error.[12] Finally, this Court will review the discovery violation de novo because it is a Court Rule interpretation.[13]

B. A TRUST CAN CONVEY SURVIVORSHIP RIGHTS BECAUSE A TRUST MAY HOLD AND CONVEY ANY INTEREST IN PROPERTY THAT A PERSON MAY HOLD OR CONVEY

While it is understood that tenancies in common are the default interest in property, "[c]onveyances expressing an intent to create a joint tenancy . . . in the grantor or grantors with the grantee or grantees shall be effective to create *the type of ownership indicated by the terms of the conveyance*."[14] The deeds at the heart of this litigation all use the express language "as Joint Tenants with Rights of Survivorship," clearly indicating that the grantor intended to create a joint tenancy with rights of survivorship.[15]

Appellees argue that the four unities establishing a joint tenancy (time, title, interest, and possession) are not met and, therefore, the conveyance merely creates a tenancy in common.[16] Specifically they argue that the unities of time and title were not satisfied because "[the parties]

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[10] *Id.* quoting *In re Temple Marital Trust*, 278 Mich App 122, 141; 748 NW2d 265 (2008)
[11] *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010)
[12] *Id.*
[13] *Silich* at 143
[14] MCL § 565.49 (emphasis added)
[15] See Exhibits 1-4
[16] Exhibit 6 – Plaintiffs' Brief in Support of Motion for Partial Summary Disposition, pg. 9

did not obtain those interests simultaneously . . . nor by the same instrument."[17] However, the unity of title is no longer needed in creating a joint tenancy under MCL § 565.49.[18] Specifically that statute states: "Conveyances expressing an intent to create a joint tenancy . . . in the grantor or grantors together with the grantee or grantees shall be effective to create the type of ownership indicated by the terms of the conveyance."[19] Additionally, "rigid adherence to the requirement of the four unities in creating a joint tenancy is *not warranted* where such adherence will defeat the intent of the grantor(s)."[20] This means that the intent of the grantor is the most important aspect in determining the interests that are conveyed. Here, all we have to do is look at the grantor, Leo Bussa's language to discern his clear intent to transfer rights of survivorship by using those exact words.

The type of joint tenancy created here is a life estate with dual contingent remainders due to the language used in the deed conveying that interest. The deed in question here conveys "an undivided fifty percent (50%) interest in the Mae F. Fitzpatrick Trust's undivided fifty percent (50%) interest" in the property to Leo Bussa, Trustee of the Mae F. Fitzpatrick Trust, Ms. Schaaf, Coleen M. Fryer, and Charlene Forbes a/k/a Angie Forbes "*as Joint Tenants with Rights of Survivorship.*"[21] "The Court of Appeals has repeatedly recognized that the express words of survivorship create a joint life estate with dual contingent remainders."[22] Express words of survivorship are exactly what we have here.[23] The contingent remainders that are established are in fee simple.[24]

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[17] *Id.*
[18] See *In re Estate of Ledwidge*, 136 Mich App 603, 606; 358 NW2d 18 (1984)
[19] MCL § 565.49
[20] *Estate of Ledwidge* at 606 (emphasis added) (interpreting MCL § 565.49)
[21] Exhibit 4 (emphasis added)
[22] *Albro v Allen*, 434 Mich 271, 277; 454 NW2d 85 (1990)
[23] *Id.* at 275, quoting *Ballard v Wilson*, 364 Mich 479, 481; 110 NW2d 751 (1961)
[24] *Id.* at 277-78

The Circuit Court ruled that a "Trust cannot hold property as a joint tenant with rights of survivorship" and voided three[25] of the conveyances.[26] However, this ruling is inconsistent with principles of trusts and, if upheld, would place a great hindrance on the viability of transferring real estate via trusts despite widespread use in Michigan. According to the Restatement of Trusts "[a]ny property which can be voluntarily transferred by the owner can be held in trust" including "contingent interest[s], if transferable."[27] Here, ladybird deeds were used to transfer the interests in property from the trusts to the parties. A ladybird deed is merely "a transfer of real property to a contingent grantee that reserves a life estate and the lifetime power to convey the property."[28] Additionally, as discussed earlier, when a conveyance uses specific words of survivorship, as the deeds in question did, then the joint tenancy is a life estate with dual contingent remainders. Since a trust can hold any transferable interest in property, including contingent remainders, and the joint tenancy we have in this situation is a joint life estate with dual contingent remainders, it is clear that a trust may properly convey the attempted rights of survivorship.

While the Circuit Court, in its Order determining this parties' property interests, did not specify why a trust cannot hold property as a joint tenant,[29] the Plaintiffs' Complaint and Brief in Support for their Motion for Summary disposition makes an argument that essentially attempts to stretch the rule against perpetuities over this issue.[30] They state that, "[a] corporation, limited partnership, or LLC may not be a joint tenant, since an artificial person does not 'die' in the

[25] Exhibit 7 - Quit Claim Deed from Ms. Mason, Successor Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Ms. Schaaf, Ms. Fryer, and Ms. Forbes (Grantees) (this deed was not filed with the register of deeds for Antrim County)
[26] Exhibit 8 – 13th Circuit Court Order determining interests in 60-acre parcel (voiding conveyances dated February 9, 2011 (Exhibit 3), February 9, 2011 (Exhibit 4), and April 22, 2011 (Exhibit 7)
[27] Restatement (Second) of Trusts §§ 78, 85 (1959)
[28] Exhibit 9 – 95-Jun Mich BJ 30
[29] Exhibit 8, (1)
[30] Exhibit 10 – Plaintiffs' Second Amended Complaint, ¶ 23; Exhibit 6, pg. 6

ordinary sense."[31] Then, without citing any authority, assert, "[t]hus, a trust cannot own property as a joint tenant with 'rights of survivorship.'"[32] Essentially what the Appellees are claiming is that since a trust does not die there is not life in being, and if there is no life in being, then the rule against perpetuities is violated. However, a trust is nothing like a corporation, limited partnership or LLC. It is measured by the life of the trustee and the beneficiaries, all of whom, at least in the present case, have vested interests in the property that the trust possessed. Upholding the Circuit Court's ruling that a trust cannot hold property as a joint tenant with rights of survivorship would be setting precedent that vastly undermines the usability of trusts and ladybird deeds together. These deeds have become paramount instruments in conveying property in Michigan, and it is common practice to hold property in a trust. Therefore, if this Court eliminates a trusts ability to pass survivorship rights via these ladybird deeds, it will be greatly restricting the viability of survivorship rights in the state of Michigan, because every time someone wanted to pass survivorship rights using a ladybird deed in a trust they would violate the rule against perpetuities.

The rule against perpetuities states: "The rule against perpetuities is violated if, at the time an instrument creating a future estate (interest in property) comes into operation, it is not certain that the estate will vest or fail to vest within 21 years of the death of a person named in the instrument."[33] Additionally, the rule has been adopted by statute.[34] That statute says:

> The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, whether freehold or non-freehold, legal or equitable, **by way of trust or otherwise**, thereby making uniform the rule as to perpetuities applicable to real and personal property.[35]

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[31] *Id.* at ¶ 2 (citing 4 *Thompson on Real Property* § 1775, at 14 (1979)
[32] *Id.*
[33] *Stenke v Masland Development Co.*, 152 Mich App 562, 570; 394 NW2d 418 (1986)
[34] MCL § 554.51
[35] *Id.* (emphasis added)

The fact that that the legislature included the language of "by way of trust or otherwise" highlights (the inverse) that a trust can pass future interests in property without violating the rule against perpetuities, which brings Plaintiffs' argument crashing down. In the present case, all parties' interests vested within 21 years of the death of Leo Bussa, a person named on the instrument. Being that all the property interests have vested, and the language of the statute includes trusts, there was no basis for the Court essentially finding that the rule against perpetuities had been violated.

The Circuit Court incorrectly ruled that a trust cannot hold rights of survivorship. It is not clear if this is because it believed that a trust violated the rule against perpetuities or because a trust is like a corporation which does not die; either line of reasoning does not support the law surrounding trusts or joint tenancies. A trust is capable of holding any property interest that a person can, including contingent remainders, as long as those interests are transferrable. This type of joint tenancy is a life estate with a dual contingent remainder, created via the language of survivorship rights in the conveyance. Therefore, it follows that a trust can transfer this joint life estate with dual contingent remainders as any person could and there is nothing in the law or literature surrounding the issue barring a trust from doing so. Being that a trust is completely capable of conveying this type of joint tenancy, the Circuit Court's ruling that "a Trust cannot hold Property as a joint tenant with rights of survivorship"[36] should be overturned.

[36] Exhibit 6, page 6, ¶ 2

C. THE 60-ACRE PARCEL THAT IS THE CENTER OF THIS LITIGATION IS COMPLETELY CAPABLE OF BEING PARTITIONED IN KIND BECAUSE THE RULING ON THE EASEMENT CROSSING THE PROPERTY DOES NOT PROHIBIT SUCH PARTITION

"All persons holding lands as joint tenants or as tenants in common may have those lands partitioned,"[37] "but a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition."[38] Thus, Appellees may only maintain a claim to partition lands that they currently possess i.e. as tenants in common. Appellees may not partition those lands that they hold only a remainder interest in, i.e. those requiring their survival to acquire. Consequently, Appellee Ms. Mason may only maintain a claim to partition 25% of the property, whereas Appellees Ms. Schaaf and Ms. Fryer cannot maintain a claim for partition because all of their interests in the property is subject to the remainder created by the survivorship rights previously discussed. In the alternative, if this Court determines that a trust cannot pass survivorship rights, the land can be partitioned in kind, without great prejudice to the parties, because a prior ruling on the easement crossing the property is not prohibitive. Therefore, if this Court correctly determines that a trust can hold and convey survivorship rights then only Ms. Mason's 25% interest in the property may be partitioned. In the alternative, if this Court finds that a trust cannot hold or convey survivorship rights, a partition in kind of 50% is possible and preferable for this unique piece of property.

The first step in the partition analysis is to determine whether the property can be partitioned without great prejudice to the parties.

> On a hearing of an action or proceeding for partition, the court shall determine (1) whether the premises can be partitioned without great prejudice to the parties, (2)

[37] MCL § 600.3304
[38] MCL § 600.3308

> the value of the use of the premises and of improvements made to the premises; and (3) other matters the court considers pertinent.[39]

"If the court determines that the premises can be partitioned, MCR 3.402 governs further proceedings."[40] "If the court determines that the premises cannot be partitioned without undue prejudice to the owners, it may order the premises sold in lieu of partition," in which case MCR 3.403 governs the further proceedings.[41]

> Physical division of the jointly held property is the preferred method of partition. Normally a physical division of the property confers upon each cotenant his respective fractional portion of the land. Where such a division results in inequalities in owners' shares, the court may award money payments to offset the difference. Although partition in kind is favored, the court may also order sale and division of the proceeds when it concludes that an equitable division cannot be achieved.[42]

Appellees' assert that "any physical partition of the property would have to result in five parcels," causing great prejudice to the parties because a prior ruling restricting expansion of the easement crossing the property. However, the Circuit Court and Appellees incorrectly interpreted Judge Rodger's ruling in the prior case addressing the Bussa Lane easement. The prior ruling states in part, "To add additional benefited properties . . . the Easement would need to be amended via a 'written agreement signed by the owner of both the [currently] benefited and burdened parcels.'"[43] The Court in the present case applied the prior case as:

> The parties' rights to access the Parcel via Bussa Lane are associated with their ownership interests and would therefore continue post-partition. However, creating five or more "sub" Parcels to preserve the survivorship interests in the joint tenancy would arguably be adding "additional parties" and thus, an impermissible expansion of the easement. Such an expansion would seem to violate the Court's holding in the prior case of *Schaaf v Ring*.[44]

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[39] MCR 3.401(A)
[40] MCR 3.401(B)
[41] *Id.*
[42] *Albro v Allen*, 434 Mich 271, 284; 454 NW2d 85 (1990) (citations omitted)
[43] Exhibit 11 – Judge Rodgers' Decision and Order on Bussa Lane easement (October 2, 2012), pg. 11, ¶ 1
[44] Exhibit 12 – 13th Circuit Court's Decision and Order Regarding Partition, pgs. 4-5

However, there was no need to assume the partition would result in five sub parcels. Either (1) Ms. Mason's 25% may be partitioned in kind while the remaining undivided 75% remains owned by the other three with rights of survivorship, or (2) 50% may be partitioned in kind while the remaining 50% (Leo Bussa's pre-death transfer) remains unpartitionable due to survivorship rights. If the Circuit Court had correctly determined the property interests as only creating one split into 2 parcels, then there would not have been an assumed expansion of the easement (or assumed unwillingness of the dominant tenement owners to provide their consent). There are no "additional benefited properties" being added because the rights of ingress and egress already exist for the current parties/60-acre property owners. Judge Rodgers' decision about the easement was primarily focused on the neighboring 80-acre lot and its subdivision proposal to use Bussa Lane for ingress and egress to the 80 acres. When only 2 parcels are considered, the 60 acres may easily be partitioned in kind without expanding the use of the easement. To be sure, Ms. Forbes purchased a lot adjoining the 60-acre parcel to add an alternative to Bussa Lane for ingress and egress to a County Road.[45] When this parcel is considered with the 60-acre parcel, partition in kind can be accomplished while fairly compensating the parties for any inequities in their ownership interests.

If this Court correctly finds that a trust can hold and convey survivorship rights, then 75% of the interest will be held by Ms. Schaaf, Ms. Fryer, and Mrs. Forbes. This entire interest in the property is not permitted to be partitioned because it will be subjected to the survivorship rights and the dual-contingent remainder created therein. Therefore, only Ms. Mason's 25% interest in the land as a tenant in common will be capable of partition. When the proper division of interests in the property is applied, there are only two parcels: Ms. Mason's 25% interest and Ms. Schaaf,

[45] Exhibit 13 – Affidavit of Ms. Forbes' contributing additional parcel for partition in kind analysis / usage

Ms. Fryer, and Mrs. Forbes's 75% interest with survivorship rights. Since Ms. Mason's 25% interest in the property is completely capable of partition in kind, and the other Parties' interests are not permitted to be partitioned we are left with two parcels (and additional ingress and egress across the property of Bussa Road, LLC).

D. THE CIRCUIT COURT'S DECISION ON CONTRIBUTION WAS INCORRECT BECAUSE IT IMPROPERLY RELIED ON DOCUMENTS DUMPED ON THE EVE OF TRIAL THAT HAD NOT BEEN PRODUCED BY APPELLEES DURING DISCOVERY.

Less than 24 hours before trial, Appellees filed 305 pages of proposed trial exhibits, which should have been precluded from admission at trial. The 2nd Amended Scheduling Order ("Scheduling Order") mandated that "counsel shall electronically file… **COMPLETE** copies of PRE-MARKED TRIAL EXHIBITS" "PRIOR TO the Final Pre-Trial/Settlement Conference."[46] As per the terms of the Scheduling Order, "[f]ailure to comply with every requirement of this conference paragraph may result in a default or a dismissal as may be appropriate against the offending party or attorney and an award of sanction to each non-offending party."[47] Pursuant to MCR 2.401(G):

> The court shall excuse a failure to… participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that (a) entry of an order of default or dismissal would cause manifest injustice, or (b) the failure was not due to the culpable negligence of the party or the party's attorney.
>
> The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).[48]

[46] Exhibit 14 - Second Amended Civil Scheduling Conference Order, July 21, 2017, pg. 4, ¶ 4
[47] Exhibit 14, pg. 5, ¶ 2, citing MCR 2.401(G)
[48] MCR 2.401(G) – Failure to Attend or to Participate

In response to Appellees' attempt at gotcha law, exhibits that were not identified as trial exhibits in compliance with the Scheduling Order should have been precluded from admission at trial.

Additionally, the only documents that Appellees ever exchanged during the entire course of this case were attached as exhibits to pleadings. The Scheduling Order requires:

> Counsel shall… exchange copies of exhibits no later than February 5, 2017.
>
> Witnesses or exhibits not under the control of party and which become known or made available to a party through the discovery process may be later added so long as the disclosure is prompt and no prejudice is shown.
>
> Failure to comply with this paragraph will bar the introduction of the evidence or testimony at trial.[49]

Given that Appellees never provided any discovery that was not attached to a pleading, these 305 pages of proposed exhibits were never disclosed. Appellees appear to have obtained documents from the various prior court proceedings between or amongst these parties, and then introduced them into this matter for the first time as voluminous trial exhibits filed on the eve of trial. Obviously, this surprise disclosure was not prompt, and it clearly prejudiced the Defendant as her eve of trial was then dedicated to the preclusion of previously undisclosed exhibits (that depart significantly from the pleadings). Furthermore, both Ms. Mason and Ms. Fryer testified that neither of them had any such proofs as they pointed to Ms. Schaff, who, while testifying, flat out refused to produce any such proofs as she hinted at producing them in a way that would only benefit her. Because of this, the 305 pages of exhibits should have been deemed inadmissible but the Circuit Court nevertheless relied upon them in awarding Plaintiffs $30,000.

[49] Exhibit 13, pg. 2, ¶¶ 1-3, citing MCR 2.401(I).

E. THE COURT'S AWARD OF ATTORNEY'S FEES TO CO-OWNERS WAS IMPROPER BECAUSE THE LITIGATION THAT OCCURRED WAS ELECTIVE AND CONFERRED NO BENEFIT UPON THE PREMISES

Appellees' contribution award from the Circuit Court included "fees associated with the previous litigation concerning the property (Antrim County Circuit Court Case No 11-8633-CH)."[50] This lawsuit ended in 2012, with the decision from Judge Rodgers that prevented the easement on this 60-acre parcel, known as Bussa Lane, from being utilized to provide access to the 80-acre neighboring parcel, which Ms. Schaaf owned. This lawsuit was initiated by Leo Bussa the day before he died (at the time he held a life estate on the 80-acres). Shortly thereafter, all four parties to this action amended the Complaint to replace Mr. Bussa's name with their names as Co-Plaintiffs. Co-Plaintiffs pursued that lawsuit in hopes of obtaining a ruling that would allow them to develop the 60-acre parcel (and Ms. Schaaf's 80-acre parcel[51]) into multiple lots. Co-Plaintiffs were unsuccessful in that litigation.

Despite the negative result, Appellees were awarded contribution from Mrs. Forbes based upon MCL § 600.3336(2).[52] This statute permits the Court to consider "the benefits which a party has conferred upon the premises."[53] Nowhere in the statute does it empower the Court to consider a failed attempt to increase the property's value. That unsuccessful litigation cannot be said to have conferred a "benefit" upon the premises. Quite the contrary, the resulting decision further encumbered the premises by adding a Court Order to the property's chain of title. Suing their

[50] Exhibit 15 – 13th Circuit Court Decision and Order for contribution, pg. 8, ¶ 52
[51] Importantly, Ms. Schaaf solely owned the neighboring 80-acre parcel, in addition to her co-tenant ownership interest in the 60-acre parcel. So, if the legal bills were going to be shared – wouldn't one-half of the legal bills be the sole responsibility of Ms. Schaaf (for her 80-acres), and only the other half would be attributable to the co-tenants (for their 60-acres). Tellingly, Appellees' claim for contribution sought to give Ms. Schaaf a free ride for her 80-acres while making her 60-acre co-tenants bear her burden. Similarly, Plaintiffs are also trying to double dip by claiming these same legal fees in the still pending Antrim County Probate Court matter for the Estate of Leo Bussa.
[52] Exhibit 10, pg. 9, ¶ I
[53] MCL 600.3336(2)

neighbors certainly did not confer a "benefit" upon these premises in terms of neighborly relations. Understandably, a future potential buyer may be deterred from purchasing property that was the subject of a lawsuit against the neighbors. Thus, Plaintiffs' claim for contribution must fail as a matter of law due to the absence of a benefit being conferred upon the premises by the unsuccessful litigation.

The only benefit that can arguably have arisen from that unsuccessful litigation inured solely for the benefit of Appellees in this action; not for Mrs. Forbes. "[A] party should not be charged for costs that did not benefit that party."[54] In this case, Plaintiffs relied upon Judge Rodgers's decision in the previous litigation to force the sale of the entire 60-acre parcel. Mrs. Forbes preferred partition-in-kind to preserve her survivorship rights that apply to 75% or 50% of the property, depending on this Court's determination of a trust's ability to hold and convey survivorship rights. Now, because of that unsuccessful prior litigation, Mrs. Forbes is going to lose her entire ownership interest in 60 awe-inspiring and incomparable acres of Torch Lake waterfront property that has been in her family for well over a hundred years. Therefore, the fees associated with the previous litigation did not confer a benefit upon the premises from Mrs. Forbes' perspective. Consequently, Appellees cannot maintain a claim pursuant to MCL § 600.3336(2) for fees associated with the previous litigation because those fees did not confer a benefit upon the premises; and especially not upon Mrs. Forbes' survivorship interest.

Furthermore, litigation gambling on increasing the property's development potential is not a common burden or obligation which co-tenants are bound to discharge. In 2010, the Michigan Supreme Court explained:

[54] *Silich v Rongers*, 302 Mich App 137, 144; 840 NW2d 1 (2013)

> The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share *of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge*, is entitled to contribution against the others to obtain from them payment of their respective shares.[55]

"It is not, however, enforced unless reason and justice require that each of the cotenants contribute his proportionate share of the common burden."[56] The voluntary decision to sign a retainer agreement with a law firm (or multiple firms in this case) to partake in a lawsuit against their neighbors in hopes of increasing their property's value is not a common burden or obligation of ownership which co-tenants are bound to discharge. Taxes are a common burden of ownership that several persons may be equally liable and are bound to discharge. The same cannot be said for voluntary litigation – especially when the litigation ends with a burdensome impact upon the premises. In no way can it be said that reason and justice require that Mrs. Forbes contribute to fees associated with a previous unsuccessful litigation that sought to provide Ms. Schaaf's neighboring 80-acre parcel with access across Bussa Lane so that it could be developed into multiple lots. If one of the co-tenants had single-handedly paid for the litigation, won, and increased the property's sale price due to its developability, then yes (assuming the property's value increased by more than the cost of the endeavor) the out-of-pocket co-tenant could seek contribution of their aliquot share from the other co-tenants who benefited from the successful endeavor. That is what the statute allows. But, an unsuccessful attempt to increase the property's value is not a benefit conferred upon the premises, and voluntary litigation in hopes of increasing the property's value is not a common obligation of ownership that a co-tenant is bound to

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[55] *Tkachik v Mandeville*, 487 Mich 38, 47; 790 NW2d 260 (2010) quoting *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975) (emphasis added)

[56] *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958)

discharge. As such, Appellees failed to carry their burden of proof on their claim for contribution, and the Circuit Court erred in awarding contribution for that litigation.

IV. CONCLUSION & RELIEF REQUESTED

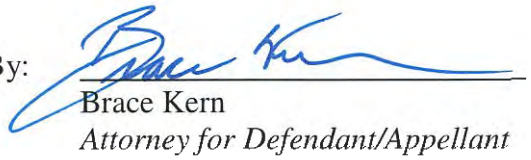
In conclusion, a trust has all the powers an individual does in terms of holding and conveying property and, more specifically, future contingent remainders. A joint tenancy is merely a joint life estate with dual contingent remainders when the instrument conveying that interest uses express words of survivorship. This is the exact situation in the present case. A trust is vastly distinct from a Corporation, a Limited Partnership, or an LLC, in that it does not violate the rule against perpetuities and can hold and convey survivorship rights. Therefore, the Circuit Court erred in its conclusion that a trust is incapable of holding property as a joint tenant with rights of survivorship. Using the interests concluded from that prior ruling, the Court incorrectly determined that partition in kind would result in five parcels, and their ingress and egress would unreasonably expand the use of the Bussa Road easement. Once the proper interests in property are determined, there really only needs to be one split. Furthermore, additional ingress and egress thereto can even be provided across Bussa Road, LLC, with that parcel being absorbed in the partition in kind outcome. Additionally, the Court incorrectly relied on evidence, that was not provided during discovery, in determining the contribution award. Finally, the Court should not have included voluntary litigation that conferred no benefit onto the property in its order of contribution.

WHEREFORE, Defendant/Appellant requests that the 13th Circuit Court's decisions and orders dated August 15, 2017; August 25, 2017; December 11, 2017; and April 16, 2018 be VACATED; for this Court to determine and establish the correct property interests among the parties; for this Court to allow only partition in kind of Appellee Mason's 25% share of the property; and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

BEK Law, PLC

Dated: July 23, 2018

By: 

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STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

v

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
August 6, 2019

No. 343630
Antrim Circuit Court
LC No. 2016-009008-CH

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

In this dispute among co-owners of real property, defendant appeals as of right the circuit court's orders voiding certain purported conveyances, ordering that the property be sold intact in lieu of partitioning it, and awarding plaintiffs contribution relating to the costs associated with certain earlier litigation connected with the subject property. We reverse in part, affirm in part, vacate in part, and remand to the circuit court for further proceedings consistent with this opinion, including consideration of whether, in light of this holding, the circuit court has subject matter jurisdiction to hear this case.[1]

[1] In her reply brief on appeal, defendant challenged the jurisdiction of the circuit court to hear and decide this case, on the basis of MCL 700.1302(b)(vi)'s grant of "exclusive legal and equitable jurisdiction" to the probate court over "[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary," including to "determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right." Although a party may not normally raise a new issue in a reply brief, MCR 7.212(G), "a challenge to subject-matter jurisdiction may be raised at any time."

I. FACTS

Mae Fitzpatrick and Leo Bussa, mother and son, jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980s and 1990s, a portion of the waterfront property was divided into seven separate parcels for residential development. Access to the seven lots was through the subject parcel by an easement on a private road, Bussa Lane. After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel. Bussa Lane provided the only means of access to the latter parcel as well.

Fitzpatrick died in 2004, leaving Bussa as the trustee of the Fitzpatrick Trust. Bussa endeavored to restructure ownership of the subject 60-acre parcel by executing five conveyances. First, he, as trustee of the Bussa Trust, conveyed to himself, as an individual, the trust's half interest. He then conveyed that interest to himself, defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while retaining his own enhanced life estate.[2] This left the Fitzpatrick Trust retaining its half interest in the subject parcel as a tenant in common, and the other half, formerly that of the Bussa Trust, shared by Bussa personally, along with defendant and plaintiffs Schaaf and Fryer, as joint tenants with rights of survivorship.

Bussa then, as trustee of the Fitzpatrick Trust, simultaneously conveyed half of the latter trust's interest to himself as trustee of the Fitzpatrick Trust, and to plaintiff Mason, "as Joint Tenants with Rights of Survivorship," while retaining his own personal enhanced life estate, and the other half of that interest to himself, again as trustee of the Fitzpatrick Trust, and to defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while again retaining his own enhanced life estate.

Shortly before he died, Bussa commenced litigation relating to a proposed subdivision of the parcel and use of the Bussa Lane easement. The owners of the seven adjacent parcels objected to any increased burden on that easement, and they contested the litigation. Upon Bussa's death, the instant parties were substituted as plaintiffs in the case, who continued the litigation. That case ended in a ruling that acknowledged that the 60-acre parcel had the right to use the easement, but prohibited the further burdening of the easement by allowing additional owners or newly created parcels to use it.

Plaintiff Mason, as successor trustee of the Fitzpatrick Trust, drew up and filed deeds confirming the transfers from Bussa to the remaindermen. Plaintiffs contested the validity of the conveyances that purport to have the Fitzpatrick Trust as a joint tenant with rights of survivorship. The circuit court agreed that "a Trust cannot hold Property as a joint tenant with rights of survivorship," and thus that the Fitzpatrick Trust "had no authority to convey the

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Adams v Adams, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). However, we conclude that it is appropriate to permit the circuit court to decide this issue in the first instance.

[2] An enhanced life estate is "a life estate reserved in the grantor and enhanced by the grantor's reserved power to convey." Frank, *Ladybird Deeds*, Mich BJ 30, 30 (June, 2016).

Property as joint tenants with rights of survivorship." The court voided the attendant conveyances, which left the interests in the Fitzpatrick Trust's half of the subject parcel to pass in accord with the terms of the trust itself. The circuit court recognized the resulting interests in the subject property as follows:

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;
Cindy Schaaf (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The court summarized the ownership situation as "an undivided one-half of the Parcel . . . held by the Parties as tenants in common" and "[t]he other undivided half . . . owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship." The parties do not dispute that the circuit court correctly identified the interests of the parties if indeed Bussa's and Mason's conveyances of the Fitzpatrick Trust's real property are set aside.

The circuit court concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved." Accordingly, the court ordered

that the property be sold intact.

The circuit court further held that the parties, "[a]s cotenants and beneficiaries of Leo Bussa," were "jointly and equally responsible for the costs and attorney fees" associated with the earlier litigation concerning the easement, and also "for the real estate taxes and expenses associated with maintenance of the Property." The court set forth detailed findings and calculations, and concluded that plaintiffs were "entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property." This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo questions of law, *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 124; 680 NW2d 485 (2004), including matters of statutory interpretation, *Bank v Michigan Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016).

III. JOINT TENANCY WITH RIGHTS OF SURVIVORSHIP HELD BY A TRUST

The circuit court held, without reference to any legal authority, that the conveyances from the Fitzpatrick Trust failed by operation of law. On appeal, plaintiffs argue, without citation to any legal authority, that the circuit court correctly decided this issue. We disagree.

Plaintiffs' position finds some support in the common law, where corporations and sovereigns could not hold title as a joint tenant because the "king and corporation can never die." 2 Blackstone, Commentaries on the Laws of England, p *184. Presumably, the lack of reciprocity in survivorship precluded these entities from holding and conveying land in this manner. See 6A Fletcher, Cyclopedia of the Law of Corporations § 2816; 2 Tiffany Real Prop §423 (3d ed); 10 McQuillin Mun Corp §28:19 (3d ed). Notably, the common law rule was limited to corporations and sovereigns, and was not explicitly extended to trusts, which do not enjoy a perpetual existence because of the rule against perpetuities.[3] However, to the extent that the common law does support plaintiffs' position, it has been abrogated by statute.

MCL 554.44 states that, "[a]ll grants and devises of lands, made to 2 or more **persons**, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." (Emphasis added.) Thus, § 554.44 creates a presumption in favor of tenancy in common. *Matter of Estate of Kappler*, 418 Mich 237, 239; 341 NW2d 113 (1983). MCL 554.45 provides an exception to this rule, stating that, "[t]he preceding section shall not apply to mortgages, nor to devises or **grants made in trust,** or made to executors, or to husband and wife." (Emphasis added.) These statutes abrogate the common law principles regarding joint tenancy, and because they are not limited to natural persons or otherwise exclude trusts, the conveyance at issue does not fail by operation of law.

[3] The common law rule against perpetuities has been adopted in Michigan by statute, but has been amended to allow for perpetual trusts of personal property. MCL 554.51, *et seq.*; MCL 554.71, *et seq.*; 554.91 *et seq.*; *Moffit v Sederlund*, 145 Mich App 1, 14; 378 NW2d 491 (1985).

MCL 8.3 states, "In the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3*l* states that "[t]he word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." Although this definition does not expressly include trusts, it does show the intention that the term "person" include entities other than natural persons.[4] Additionally, the legislature could have limited the term "person" in § 554.44 to mean only natural persons. We cannot read into a statute what the legislature did not include, *Book-Gilbert v Greenleaf*, 302 Mich App 538, 547; 840 NW2d 743 (2013), and limiting § 554.44 to apply only to natural persons would require this Court to rewrite the statute.

Moreover, the presumption established in § 554.44 is limited by § 554.45, which expressly exempts "grants made in trust." Words in a statute should not be construed in a vacuum, but should be read together to harmonize the meaning, giving effect to the act as a whole. *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). The express exemption in § 554.45 of "grants made in trust," along with its cross-reference to § 554.44, further evidences the legislative intent to expand the meaning of "person" to include trusts.

Additional textual support is found in MCL 565.49, which states:

> Conveyances in which the grantor or 1 or more of the grantors are named among the grantees therein shall have the same force and effect as they would have if the conveyance were made by a grantor or grantors who are not named among the grantees. Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effective to create the type of ownership indicated by the terms of the conveyance.

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[4] Notably, MCL 8.3*l* does not state that the term "person" can extend and "be applied ***only*** to bodies politic and corporate, as well as to individuals" as the dissent concludes. *MCL 8.3l* does not limit "individuals" to mean only natural persons. Because so, we apply the ordinary meaning of the term, *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004), and turn to *Black's Law Dictionary* (11th ed), which defines "individual" as "1. Existing as an indivisible entity. 2. Of, relating to, or involving a single person *or thing*, as opposed to a group." (Emphasis added.) Returning to the definition of "person" we note that *Black's Law Dictionary* (11th ed) defines the term as follows:

> 1. A human being – Also termed natural person. 2. The living body of a human being <contraband found on the smuggler's person>. 3. *An entity* (such as a corporation) that is recognized by law as having most of the rights and duties of a human being • In this sense, the term includes partnerships and other associations, whether incorporated or unincorporated. [Emphasis added.]

Thus, the plain and ordinary meaning of the terms "individual" and "person" aligns with the definition provided by MCL 8.3*l*.

Again, the legislature abrogated the common law by statute, and abolished strict adherence to the four unities doctrine. *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990). However, the statute includes no language which hints at an intent to limit to natural persons the ability to hold a joint tenancy with rights of survivorship. Moreover, the statute requires that this Court to give full effect to the conveyance despite a grantor-trustee also being a grantee on an instrument attempting to convey a joint tenancy with a right of survivorship.

Finally, there are no provisions in EPIC[5] that suggest any legislative intent to prohibit a trust from holding and conveying real property in this manner. Rather, in the definitions section of EPIC, MCL 700.1106(o), defines "person" as "an individual or an organization." MCL 700.1106(i), further defines "organization" as, "a corporation, **business trust**, estate, **trust**, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity." (Emphasis added.) In Article II of EPIC, which concerns intestacy, wills, and donative transfers, the legislature has limited the term "persons" in the following manner:

> (1) This part shall be known and may be cited as the "disclaimer of property interests law".
>
> (2) As used in this part:
>
> ***
>
> (h) "**Person**" includes an entity and an individual, but **does not include** a fiduciary, an estate, or **a trust**. [MCL 700.2901 (emphasis added).]

"Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Id.* (cleaned up).

When reading the act as a whole, it is apparent the legislature knew how to limit the definition of person to exclude trusts from the definition of "person" as it did so in § 700.2901. However, this Court cannot read that same limiting language into the statutes regarding property conveyances, §§ 554.44-45 and § 565.49, or read as surplusage the provisions in § 700.1106 which recognize a trust as a person. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) ("In interpreting a statute, we must avoid a construction that would render part of the

[5] The Estates and Protected Individuals Code, Act 386 of 1998 (EPIC). "In 1998, the Michigan Legislature enacted EPIC, 1998 PA 386, which became effective April 1, 2000. The new law, which repealed and replaced the Revised Probate Code, 1978 PA 642, MCL 700.1 *et seq.,* was intended to modernize probate practice by simplifying and clarifying the law concerning decedents' affairs and by creating a more efficient probate system. MCL 700.1201; MCL 700.1303(3)." *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010).

statute surplusage or nugatory.") (cleaned up).[6]

Accordingly, we hold that a trust may hold and convey real property as a joint tenant with rights of survivorship. The conveyances from the Fitzpatrick Trust to itself, plaintiffs, and defendant, as joint tenants with rights of survivorship, do not fail by operation of law, and we reverse the circuit court's ruling on this issue.

IV. PARTITION AND CONTRIBUTION

Additionally, the circuit court's ruling on Count II, requesting partition of the property, was based on the proportionate property interests of the parties, which in turn was based on an erroneous legal conclusion, and is therefore vacated.

With regard to Count III, plaintiffs' request for contribution, we affirm. "Contribution is an equitable remedy based on principles of natural justice." *Tkachik v Mandeville*, 487 Mich 38, 47; 790 NW2d 260 (2010). The circuit court's ruling on this issue was not made with regard to the respective property interests of the parties. In fact, it was made in *disregard* of those interests, assessing the four parties equal shares of the costs, relying on the equitable maxim that "equality is equity."

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[6] The dissent presumably concludes that the legislature has not abrogated the common law, and therefore, a trust cannot hold property as a joint tenant with the right of survivorship because trusts cannot die as a natural person does. As we stated *supra*, this is a questionable extension of the common law, which only prohibited the monarch and corporations from holding property in this manner. Blackstone and the seminal case, *Law Guarantee and Trust Society v Governor & Co of the Bank of England*, 24 QBD 406 (1890), teach that the fundamental principle underlying the right of survivorship is the *reciprocity* of survivorship, meaning that no party may exist perpetually. See 2 Blackstone, Commentaries on the Laws of England, pp **184-185, n 33 (stating that the right of survivorship, or *jus accrescendi*, "ought to be mutual" but that another reason for prohibiting corporations from holding such rights is that it might be "ruinous to the family of the deceased partner" to permit capital or stock to pass in this manner, and thus, "[t]he right of survivorship, for the benefit of commerce, holds no place among merchants") (citation omitted). This reasoning does not apply to trusts that cannot exist in perpetuity. See MCL 554.51, *et seq*.; MCL 554.71, *et seq*.; 554.91 *et seq*. Accordingly, there is no reason why the right of survivorship should be made exclusive to beings that enjoy a natural life, as opposed to trusts that also are subject to the rule against perpetuities.

Further, the dissent recites the *Black's Law Dictionary* (11th ed) definitions of "right of survivorship" and "death" for the proposition that the right of survivorship may only be held by a natural person susceptible to "cessation of all vital functions and signs." However, the complete entry for "death" reads as follows: "The ending of life; the cessation of all vital functions and signs. — Also termed decease; demise." "Demise" is defined as, "[t]he death of a person or (figuratively) of a thing; the end of something that used to exist <the corporation's untimely demise>." *Black's Law Dictionary* (11th ed). Accordingly, the plain meaning of the terms associated with rights of survivorship do not limit enjoyment of this right to only natural persons.

V. LATE-OFFERED DOCUMENTATION

Defendant argues that the circuit court erred by receiving, and considering, more than 300 pages of documentation plaintiffs offered only as the case proceeded to the issue of contribution. We disagree. We review a circuit court's evidentiary rulings for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). This includes a court's decisions concerning discovery. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). "A trial court does not abuse its discretion when its decision falls within the range of principled outcomes." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

Defendant characterizes plaintiffs' late submission of documents as occurring less than 24 hours before trial, but, in fact, it was on the eve of the day originally scheduled for trial on the issue of contribution, but which proceeding brought to light that plaintiff Fryer could not be present because of a medical issue, and also that the parties had agreed to have the court decide the question of contribution on the basis of briefing to be completed several weeks hence.

In responding to defendant's motion to disallow the recent submissions, the circuit court took into account, among other things, that a decision on contribution was still several weeks away:

> First, any documents that were identified either formally as trial exhibits or that were produced as part of discovery are available as trial documents in this case, which would include largely apparently, based on the representations of counsel, the documentation that has been offered or is intended to be offered by the plaintiff in this case; however, any documents that were not specifically identified or reasonably identified pursuant to the normal general identifications that attorneys use in their witness and exhibit lists would not be admissible. There will be an opportunity in reply briefs for argument with regard to admissibility of documentation. So, my expectation is that probably largely in the reply briefs there will be arguments regarding admissibility of individual documents, the parties are welcome to make those for any reason whatsoever and the Court will rule on those in a case by case basis. But, again, these documents were largely provided by the defense, they are known to the defense, while they were not specifically identified as trial exhibits and while defendant is correct the initial trial was to be heard I believe in the fall of 2016, which would mean the initial trial exhibits would have been due in the fall or late summer, August probably of 2016, we are now six months beyond that, we have had multiple hearings on this matter since that time, the element of surprise if you will particularly with regard to matters that have been produced pursuant to discovery requests simply doesn't exist. The parties know what the files are, they know what the potential exhibits are, so, again, we'll allow matters that are at least identified somehow in the witness and exhibit list and we'll take argument regarding anything that isn't or any objections to matters that are on the witness exhibit list in the reply briefs and the Court will decide those on a case by case basis.

On appeal, defendant continues to complain about the filing of "305 pages of proposed

trial exhibits," without any of the differentiation that the circuit court called for. Further, defendant does not dispute the validity of the court's distinguishing between documents that were and were not "specifically identified or reasonably identified pursuant to the normal general identification that attorneys use in the witness and exhibit lists," does not take issue with the court's statement concerning what would and would not be deemed admissible thereafter, and does not assert that she acted on the invitation to specify objectionable documents in the briefing to follow, let alone that the circuit court made any erroneous decisions in connection with such activity.

To summarize, defendant on appeal reiterates the general objection to plaintiffs' offering of more than 300 pages of documents collectively, with no acknowledgement that the circuit court was prepared to distinguish the offerings in meaningful ways and issue decisions on admissibility accordingly. Defendant's failure to offer cogent argument relating to the circuit court's thoughtful ruling from the bench on her objection to plaintiffs' recent offering of abundant production, or to assert that she accepted the court's invitation to sort through the documents and offer more nuanced reasons for objecting to the admission of some, constitutes abandonment of the issue. See *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007) ("It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's arguments, and then search for authority either to sustain or reject the appellant's position.").

VI. CONCLUSION

We reverse in part, vacate in part, affirm in part, and remand to the circuit court for further proceedings consistent with this opinion, including consideration of whether, in light of this holding, the circuit court has subject matter jurisdiction to hear this case.

/s/ Jonathan Tukel
/s/ Michael J. Riordan

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON, Plaintiffs/Counterdefendants-Appellees,	UNPUBLISHED August 6, 2019
v	No. 343630 Antrim Circuit Court LC No. 2016-009008-CH
CHARLENE FORBES, also known as ANGIE FORBES, Defendant/Counterplaintiff-Appellant.	

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

Servitto, J. (*dissenting*).

I respectfully dissent. While I agree with the majority that the circuit court did not abuse its discretion in receiving and considering more than 300 pages of documentation that plaintiffs offered as the case proceeded to the issue of contribution, I disagree with the majority's conclusion that a trust can hold and convey property as a joint tenant with rights of survivorship.

At the outset, I would find that the trial court had jurisdiction to hear and decide this case. "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). The circuit court is a court of general jurisdiction, extending to "all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const 1963, art 6, § 1. The Legislature exercised its prerogative to limit the jurisdiction of the circuit court when it vested the probate court with "exclusive legal and equitable jurisdiction" over "[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary," including to "determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right." MCL 700.1302(b)(*vi*).

The Legislature indicated that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts did not extend to plaintiffs' real property claims by having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property. See MCL 600.2932(1) (a person "who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff"); MCL 600.3301 ("Actions containing claims for the partition of lands may be brought in the circuit courts . . . . Such actions are equitable in nature.").

Further, the Legislature did not grant the probate court exclusive jurisdiction over necessarily *any* cause of action that might incidentally touch on such issues as a settlor's intentions, but instead confined that grant to "[a] *proceeding* that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b)(*vi*) (emphasis added). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(*vi*) covers not necessarily every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts, or the rights and duties of affected persons.

The issue in this case primarily concerned the legal question of whether a trust—any trust—may hold and convey property as a joint tenant with rights of survivorship. Plaintiffs set forth three specific causes of action in "Plaintiffs' Second Amended Complaint to Determine Interest in Property and For Partition": (1) an "Action to Determine Interests in Land", (2) "Partition", and (3) "Contribution." In count I, plaintiffs specifically asserted that any transfers from the Fitzpatrick Trust to plaintiffs and defendant, as joint tenants with rights of survivorship, were ineffective because the trust could not own the property with rights of survivorship. In count II, plaintiffs asserted that they and defendant are co-owners of the subject property with each owning an undivided interest in the whole property, and that because it has become impossible for all to jointly possess and enjoy the whole of the property, the property should be sold and the proceeds divided. In count III, plaintiffs asserted that defendant has not shared in the responsibilities of ownership of the property, and that they were entitled to contribution for paying more than their fair share of the expenses associated with the property. The parties brought to the circuit court disputes among living co-owners of real property over identification and realization of their respective but overlapping interests, not issues concerning the distribution of, or rights under, the trusts that largely engendered those interests. Plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument involved in the chain of title in the subject property, and defendant does not suggest that plaintiffs' claims for determining interests in land, partition, and contribution were not actionable in the circuit court. Moreover, the circuit court did not rule on any issue concerning any trust settlor's intent, the scope of any trust, or the administration of any trust, and need not have done so because, as it recognized, the issue for resolution was the legal issue of whether a trust can hold property as a joint tenant with rights of survivorship. I believe that jurisdiction over this matter properly lies with the circuit court.

Next, I agree with the trial court that a trust cannot own or convey property as a joint tenant with rights of survivorship. First, I am not convinced that the majority's interpretation of MCL 554.44 is correct. MCL 554.44 states that all grants and devises of lands:

> made to 2 or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

The majority relies upon the definition of "person" in MCL 8.3*l* to conclude that use of the word "persons" in MCL 554.44 includes a trust. However, MCL 8.3*l* explicitly states that the word "person" can extend to "bodies politic and corporate, as well as to individuals." Thus, in clear and unambiguous terms, "person" is extended to political and corporate bodies under that provision. The majority concludes that MCL 8.3*l*, because it does not contain the word "only", can be extended to include trusts. I disagree.

First, MCL 8.3*l* does not state that "person" may include, but is not limited to, "bodies politic and corporate, as well as to individuals." It simply states that it may include those three specifically named things. Absent any legislative expression indicating that it intended to include other entities, the statute must be read according to its plain language. It is axiomatic that "if the statute's language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written." *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796 (2018). To apply MCL 8.3*l*, this Court need not, and indeed must not, look any further than the unambiguous statutory language.[1]

While the majority indicates that "bodies politic and corporate as well as to individuals" is not meant to be an exhaustive list included in the definition of "person" under MCL 8.3*l*, the legislature is wholly capable of indicating when its use of listed items in a statute is not meant to be an exhaustive list. See, e.g., *People v Feeley*, 499 Mich 429, 438; 885 NW2d 223 (2016)("the Legislature's use of the phrase 'including, but not limited to'. . . indicates that it intended an expansive and inclusive reading . . . this particular phrase is not 'one of limitation,' but is instead meant to be illustrative and purposefully capable of enlargement.). "This Court cannot assume that language chosen by the Legislature is inadvertent. *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009).

I find further guidance on this issue in *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010). Overruling precedent, the *McCormick* Court held that the Court in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), improperly expanded the language of MCL 500.3135. "[T]he *Kreiner* majority went astray and gave the statute a labored interpretation inconsistent with common meanings and common sense." *McCormick*, 487 Mich at 205. The *McCormick* Court noted that the *Kreiner* Court applied "its chosen definition" to certain terms in

[1] The majority cites various legal treatises to support its position. Treatises, however, "are not binding authority; rather, they are considered only as potentially persuasive authority." *Fowler v Doan*, 261 Mich App 595, 601; 683 NW2d 682 (2004). Where, as here, we are presented with an unambiguous statute, reference to nonbinding authority is unnecessary.

the statute, and interjected two terms that were not in MCL 500.3135, thereby shifting the meaning of one word "from the most natural contextual reading of the word." *Id*. at 206.

In the matter before this Court, I believe that the majority, too, has judicially expanded MCL 8.3*l,* applying its chosen definition, and has given the statute an interpretation inconsistent with its plain meaning and common sense. Again, the statute states very clearly that the word person "may extend and be applied to bodies politic and corporate, as well as to individuals." The majority focuses on the term "individuals" and relies upon a definition of that term to include a single "*thing*" as a basis for determining that a trust (presumably as a *thing*) is included in the definition of "person" for purposes of MCL 8.3*l*. I, however, look at the context, and do not isolate that word in determining its meaning. After all, when interpreting statutes, "we must not read a word or phrase of a statute in isolation; rather, each word or phrase and its placement must be read in the context of the whole act." *Alvan Motor Freight, Inc v Dept of Treasury*, 281 Mich App 35, 40; 761 NW2d 269 (2008). In context, it is clear that the Legislature intended in MCL 8.3*l* to clarify that when the word "person" is used (and not otherwise specifically defined) in a statute, that word does not only refer to "person" in its most commonly understood definition (an individual, i.e. single, human being), but that it additionally refers to political and corporate bodies. In other words, I would read MCL 8.3*l* to mean that "person" applies not just to individuals (understood as single human beings), but also to political and corporate bodies. This interpretation takes into consideration that the Legislature stated that the word "person" may "extend" ("to spread or stretch forth; to increase the scope, meaning, or application of." Merriam-Webster's Collegiate Dictionary (11th ed.)) to corporate and political bodies in addition to the previously understood ("as well as") individuals. And, trusts are distinctly dissimilar to political and corporate bodies such that their inclusion into the two specified bodies cannot be fairly inferred. I would therefore find that the word "person" as it appears in MCL 554.44 refers only to individuals, political bodies, and corporate bodies. Consequently, I would find that neither the presumption set forth in MCL 554.44, nor the exception to that presumption set forth in MCL 554.45, applies in this matter.

I believe that the primary issue before this Court, whether a trust may own and transfer real property as a joint tenant with rights of survivorship, can be very simply resolved by looking to the plain, unambiguous statutory language of MCL 8.3*l*, and taking a common sense approach by additionally looking at the definition of and explanation concerning ownership as joint tenants with rights of survivorship. The earliest recognition of a joint tenancy with rights of survivorship in this state appears in *Schulz v Brohl*, 116 Mich 603; 74 NW 1012 (1898). In that case:

> the interest created by a deed to Peter Brohl and Christine Schulz "and to the survivor of them" was described as **"a moiety to each [party] for life, with remainder to the survivor in fee."** 116 Mich at 605, 74 NW 1012. Peter conveyed his interest to a third party, Joseph Brohl, reserving a life estate. Subsequent to Peter's death, Christine Schulz brought an action to quiet title. The Court held in her favor, stating that **"[n]either grantee could convey the estate so as to cut off the remainder."** *Albro v Allen*, 434 Mich 271, 276; 454 NW2d 85 (1990). [Emphasis in original]

Since that time, both this Court and our Supreme Court have consistently defined and applied a joint tenancy with rights of survivorship as concerned with the *life* and *death* of one joint tenant.

See e.g., *Jackson v Estate of Green*, 484 Mich 209, 213; 771 NW2d 675 (2009) ("the principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate."); *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008), citing 1 Cameron, Michigan Real Property Law (3d ed.), § 9.14, p. 328 (". . . at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property."). Indeed, "right of survivorship" is even defined in Black's Law Dictionary (11th ed.) as "[a] joint tenant's right to succeed to the whole estate upon the death of the other joint tenant." "Death", in turn, is defined as "the ending of life; the cessation of all vital functions and signs." Black's Law Dictionary (11th ed.).

Logically, survivorship rights obviously address the interests of natural persons, including the uncertainties normally attending to natural persons' life spans. A trust, not being a natural person, has no actual residential needs, cannot occupy real property in fact, and does not "die." Common sense indicates that it cannot end its life or that all of its vital functions and signs could cease. Instead, a trust comes to an end on its own terms or by other orderly processes. As plaintiffs point out, if a trust could maintain its own interest in real property as a joint tenant with the right of survivorship, the survivorship interests of any joint tenants who are natural persons would be substantially "illusory—because the trust would never 'die' and thus those other tenants would have nothing more than a life estate in the property." I would thus affirm the circuit court's orders voiding the purported conveyances concerning the Fitzpatrick Trust property as a joint tenant with rights of survivorship.

I would also affirm the circuit court's holding that the parties' interests were better served by sale of the subject parcel than by attempting partition in kind. Defendant asserts that, according to MCL 600.3304, "[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned," but that, according to MCL 600.3308, "a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition." However, the limitation in MCL 600.3308 applies to persons having "*only* an estate in reversion or remainder" (emphasis added), and thus, does not apply to holders of current possessory rights, whether or not those holders of existing possessory rights also happen to hold rights of reversion or remainder. Here, I believe that the trial court did not err in concluding that, given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved."

I would affirm the circuit court's rulings in their entirety.

/s/ Deborah A. Servitto

Order

Michigan Supreme Court
Lansing, Michigan

October 30, 2020

160503

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,
Plaintiffs/
Counterdefendants-Appellants,

v

SC: 160503
COA: 343630
Antrim CC: 2016-009008-CH

CHARLENE FORBES, a/k/a ANGIE FORBES,
Defendant/
Counterplaintiff-Appellee.

_____/

On order of the Court, the application for leave to appeal the August 6, 2019 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the Court of Appeals judgment and we REMAND this case to the Court of Appeals to determine whether the circuit court was vested with subject matter jurisdiction of the case, see MCL 700.1302; MCL 700.1303. The Court of Appeals erred in reaching the merits before the threshold jurisdictional issue was resolved. See *Bowie v Arder*, 441 Mich 23, 56 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."). Once the determination of subject matter jurisdiction is made, the Court of Appeals shall reconsider (if necessary) the legal issue raised by the defendant on appeal.

We do not retain jurisdiction.

t1027

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 30, 2020

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON, Plaintiffs/Counterdefendants-Appellees, v CHARLENE FORBES, also known as ANGIE FORBES, Defendant/Counterplaintiff-Appellant.	FOR PUBLICATION July 1, 2021 9:00 a.m. No. 343630 Antrim Circuit Court LC No. 2016-009008-CH

ON REMAND

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

SERVITTO, J.

This case is again before us following an order by our Supreme Court which vacated our judgment in *Schaaf v Forbes*, unpublished opinion of the Court of Appeals, issued August, 6, 2019 (Docket No. 343630) (*Schaaf I*), and remanded the case with the directive that we first consider defendant's challenge regarding the circuit court's subject-matter jurisdiction before we consider any remaining legal issues. *Schaaf v Forbes*, ___ Mich ___; 949 NW2d 726 (2020). We now hold that the circuit court had subject-matter jurisdiction to hear and decide this case and, on the merits, we conclude that the circuit court properly held as a matter of law that a trust cannot hold and convey real property as a joint tenant with rights of survivorship. We also reject defendant's arguments that the circuit court abused its discretion in receiving and considering more than 300 pages of documentation that plaintiffs offered regarding the issue of contribution as the case proceeded, and conclude that the trial court properly ordered defendant to contribute to prior easement litigation expenses concerning the property. Accordingly, as we find no error in any of the trial court's rulings, we affirm its judgment.

I. FACTS & PROCEDURAL HISTORY

We previously summarized the pertinent facts as follows:

Mae Fitzpatrick and Leo Bussa, mother and son, jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980s and 1990s, a portion of the waterfront property was divided into seven separate parcels for residential development. Access to the seven lots was through the subject parcel by an easement on a private road, Bussa Lane. After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel. Bussa Lane provided the only means of access to the latter parcel as well.

Fitzpatrick died in 2004, leaving Bussa as the trustee of the Fitzpatrick Trust. Bussa endeavored to restructure ownership of the subject 60-acre parcel by executing five conveyances. First, he, as trustee of the Bussa Trust, conveyed to himself, as an individual, the trust's half interest. He then conveyed that interest to himself, defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while retaining his own enhanced life estate.[1] This left the Fitzpatrick Trust retaining its half interest in the subject parcel as a tenant in common, and the other half, formerly that of the Bussa Trust, shared by Bussa personally, along with defendant and plaintiffs Schaaf and Fryer, as joint tenants with rights of survivorship.

Bussa then, as trustee of the Fitzpatrick Trust, simultaneously conveyed half of the latter trust's interest to himself as trustee of the Fitzpatrick Trust, and to plaintiff Mason, "as Joint Tenants with Rights of Survivorship," while retaining his own personal enhanced life estate, and the other half of that interest to himself, again as trustee of the Fitzpatrick Trust, and to defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while again retaining his own enhanced life estate.

Shortly before he died, Bussa commenced litigation relating to a proposed subdivision of the parcel and use of the Bussa Lane easement. The owners of the seven adjacent parcels objected to any increased burden on that easement, and they contested the litigation. Upon Bussa's death, the instant parties were substituted as plaintiffs in the case, who continued the litigation. That case ended in a ruling that acknowledged that the 60-acre parcel had the right to use the easement, but prohibited the further burdening of the easement by allowing additional owners or newly created parcels to use it.

Plaintiff Mason, as successor trustee of the Fitzpatrick Trust, drew up and filed deeds confirming the transfers from Bussa to the remaindermen. Plaintiffs contested the validity of the conveyances that purport to have the Fitzpatrick Trust as a joint tenant with rights of survivorship. The circuit court agreed that "a Trust cannot hold Property as a joint tenant with rights of survivorship," and thus that the Fitzpatrick Trust "had no authority to convey the Property as joint tenants with

[1] An enhanced life estate is "a life estate reserved in the grantor and enhanced by the grantor's reserved power to convey." Frank, *Ladybird Deeds*, Mich BJ 30, 30 (June, 2016).

rights of survivorship." The court voided the attendant conveyances, which left the interests in the Fitzpatrick Trust's half of the subject parcel to pass in accord with the terms of the trust itself. The circuit court recognized the resulting interests in the subject property as follows:

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;
Cindy Schaaf (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided $^{1}/_{3}$ interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided $^{1}/_{3}$ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided $^{1}/_{3}$ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The court summarized the ownership situation as "an undivided one-half of the Parcel . . . held by the Parties as tenants in common" and "[t]he other undivided half . . . owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship." The parties do not dispute that the circuit court correctly identified the interests of the parties if indeed Bussa's and Mason's conveyances of the Fitzpatrick Trust's real property are set aside.

The circuit court concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in

> kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved." Accordingly, the court ordered that the property be sold intact.
>
> The circuit court further held that the parties, "[a]s cotenants and beneficiaries of Leo Bussa," were "jointly and equally responsible for the costs and attorney fees" associated with the earlier litigation concerning the easement, and also "for the real estate taxes and expenses associated with maintenance of the Property." The court set forth detailed findings and calculations, and concluded that plaintiffs were "entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property." [*Schaaf I*, unpub op at 1-3.]

Defendant appealed as of right to this Court.

In a split, unpublished opinion this Court rejected defendant's claims of error related to the more than 300 pages of documentation but held that the trial court committed error requiring reversal when it concluded, as a matter of law, that a trust may not hold land as a joint tenant with rights of survivorship. Regarding defendant's jurisdictional challenge, we concluded that it was appropriate for the circuit court to make the initial determination on remand. Accordingly, we reversed in part, vacated in part, affirmed in part, and remanded the case to the circuit court for further proceedings. *Schaaf I*, unpub op at 3-7.

Plaintiffs sought leave to appeal in the Michigan Supreme Court, raising the sole question of whether a trust can own property as joint tenants with rights of survivorship. In lieu of granting leave, the Supreme Court vacated our judgment in *Schaaf I*, and remanded the case to this Court to consider in the first instance plaintiff's jurisdictional challenge before reaching the merits of the remaining legal issues. *Schaaf II*, ___ Mich at ___.

II. JURISDICTION

Defendant contends on appeal that the circuit court exceeded its jurisdiction, and encroached on the exclusive jurisdiction of the probate court, when it voided the deeds executed by the Fitzgerald Trust's trustee and reallocated trust distributions in accord with its own interpretation of the terms of the trust. We disagree.

The existence of jurisdiction is a question of law that may be raised at any time and that this Court reviews de novo. *Adams v Adams*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). Because the jurisdiction of the probate court is entirely a matter of statute, the question of the scope of the probate court's exclusive jurisdiction is an issue of statutory interpretation, calling for review de novo. See *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

"Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

The circuit court is a court of general jurisdiction, which jurisdiction extends to "all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const. 1963, art. 6, § 1. The Legislature exercised its prerogative to limit the jurisdiction of the circuit court when, in MCL 700.1302, it vested the probate court with "exclusive legal and equitable jurisdiction" over the following relevant matters:

> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
>
> (i) The internal affairs of the estate.
>
> (ii) Estate administration, settlement, and distribution.
>
> (iii) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
>
> (iv) Construction of a will.
>
> (v) Determination of heirs.
>
> (vi) Determination of death of an accident or disaster victim under section 1208.
>
> (b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:
>
> (i) Appoint or remove a trustee.
>
> (ii) Review the fees of a trustee.
>
> (iii) Require, hear, and settle interim or final accounts.
>
> (iv) Ascertain beneficiaries.
>
> (v) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.
>
> (vi) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.
>
> (vii) Release registration of a trust.
>
> (viii) Determine an action or proceeding that involves settlement of an irrevocable trust.

In addition to the probate court's exclusive jurisdiction under MCL 700.1302, the probate court also has concurrent jurisdiction over certain matters concerning the estate of a decedent, protected individual, ward, or trust. These include concurrent jurisdiction to determine a property right or interest, to authorize partition of property, to hear and decide claims by or against a fiduciary or trustee for the return of property, and to hear and decide a contract proceeding or action by or against an estate, trust, or ward. MCL 700.1303.

Notably, by having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property, the Legislature provided that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts did not extend to plaintiffs' real property claims. See MCL 600.2932(1) (a person "who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff"); MCL 600.3301 ("Actions containing claims for the partition of lands may be brought in the circuit courts . . . . Such actions are equitable in nature.").

Further, the Legislature declined to grant the probate court exclusive jurisdiction over *every* cause of action that might incidentally touch on such issues as a settlor's intentions, but instead confined that grant of exclusive jurisdiction to "[a] *proceeding* that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b)(*vi*) (emphasis added). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich. 147, 160; 528 NW2d 707 (1995). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(*vi*) covers not every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts, or the rights and duties of affected persons.

Here, plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument, involved in the chain of title in the subject property. The parties brought to the circuit court disputes among living co-owners of real property over identification and resolution of their respective but overlapping interests, not issues concerning the distribution of, or rights under, the trusts that largely engendered those interests. Specifically, plaintiffs' complaint contained claims to determine interests in real property, for sale of the property, and for defendant's monetary contribution to the ownership responsibilities of the property. Defendant does not suggest that plaintiffs' claims for determining interests in real property, for sale of the property, and contribution were not actionable in the circuit court. Indeed, she could not validly make such a suggestion. Given the above, none of plaintiffs' claims fall within the exclusive jurisdiction of the probate court, and the circuit court thus did not err in exercising subject-matter jurisdiction in the present matter.

III. TRUST AS JOINT TENANT WITH RIGHTS OF SURVIVORSHIP

Defendant next argues that a trust may hold property as a joint tenant in common with rights of survivorship and the trial court erred in finding otherwise and in thereafter voiding certain conveyances to the parties from the Fitzpatrick Trust. We disagree.

In Michigan, there are five common types of concurrent ownership that are recognized relative to the ownership of real property: tenancies in common, joint tenancies, joint tenancies with full rights of survivorship, tenancies by the entireties, and tenancies in partnership. *Wengel v Wengel*, 270 Mich App 86, 93; 714 NW2d 371 (2006). Although an ordinary joint tenancy may be destroyed by an act that severs the joint tenancy (such as a conveyance of interest by one of the joint tenants), no act of a co-tenant can defeat the other co-tenant's right of survivorship in a joint tenancy with rights of survivorship. *Townsend v Chase Manhattan Mortg Corp*, 254 Mich App 133, 136; 657 NW2d 741 (2002).

Relevant to the instant matter, MCL 554.44 states that all grants and devises of lands:

> made to 2 or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

The above thus creates a presumption in favor of tenancies in common. Because estates in joint tenancy are not favored, all presumptions are against them. *Atha v Atha*, 303 Mich 611, 615; 6 NW2d 897 (1942).

In arguing that a trust may hold property as a joint tenant with rights of survivorship, defendant leans heavily upon the fact that the language used to convey the property interest to the trust specifically stated that the trust was to hold its property rights in that manner. However, simply saying something is intended or shall be does not necessarily make the intended act permissible or lawful. Common sense and relevant law establish that, contrary to defendant's position, a trust may not hold property as a joint tenant with rights or survivorship.

Under MCL 554.43, estates are divided into estates in severalty, in joint tenancy, and in common "the nature and properties of which respectively, shall continue to be such as are now established by law . . . ." Since the earliest recognition in Michigan of a joint tenancy with rights of survivorship in *Schulz v Brohl*, 116 Mich 603; 74 NW 1012 (1898), both this Court and our Supreme Court have consistently defined and applied the right of survivorship as it relates to the *life* and *death* of one joint tenant. "[T]he principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate." *Jackson v Estate of Green*, 484 Mich 209, 213; 771 NW2d 675 (2009). "A right of survivorship, which means that a surviving tenant takes ownership of the whole estate upon the death of the other joint tenant, does not exist in tenancies in common." *Wengel*, 270 Mich App at 94 & n 4. See also *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008), citing 1 Cameron, Michigan Real Property Law (3d ed.), § 9.14, p. 328 (". . . at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property.").

It has long been recognized that parties holding property as joint tenants with full rights of survivorship hold joint life estates with contingent remainders. *Albro v Allen*, 434 Mich. 271, 275; 454 NW2d 85 (1990). "Life estate" is defined as "[a]n estate held only for the duration of a specified person's life." *Black's Law Dictionary* (11 ed.). The key word in the definition is "life." The duration of a life estate is determined by a particular person's life and a trust, as an artificial entity, does not have a lifetime. With life comes the expectation of its antonym, death. "[T]he contingency is surviving the cotenants, and at the moment of death, the decedent's interest in the property passes to the survivor or survivors." *Albro*, 434 Mich at 274–275. A trust, however does not and cannot die. Rather, it terminates only through specifically required actions of a non-biological character. MCL 700.7410-MCL 700.7414.

Survivorship rights address the interests of natural persons, including the uncertainties normally attendant to natural persons' life spans. A trust, not being a natural person, has no actual residential needs, cannot occupy real property, and does not die. It is true that a trust cannot exist in perpetuity. A trust can, however, exist far beyond the lifespan of a natural person.[2] A trust holding property as a joint tenant with rights of survivorship thus potentially renders any such right of survivorship illusory.

MCL 565.48 provides further support for the premise that literal, physical death of a joint tenant is the key to the law's purpose in having created a joint tenancy with rights of survivorship. That statute provides:

> A register of deeds shall not record a deed or other instrument in writing that purports to convey an interest in land by the survivor or survivors under a deed to joint tenants or tenants by the entirety, unless, for each joint tenant or tenant by the entirety who is indicated in the deed or instrument to be deceased, a certified copy of the death certificate or other proof of death that is permitted by the laws of this state to be received for record by the register, is shown to have been recorded in the register's office by liber and page reference or is filed concurrently with the deed or other instrument and recorded as a separate document.

Because a trust does not die but instead terminates, MCL 554.44 leaves no room to conflate the definition of death beyond its practical meaning for purposes of joint tenancy with rights of survivorship. In short, we find that the trial court properly concluded that, as a matter of law, a trust may not hold real property as a joint tenant with rights of survivorship.

IV. PARTITION

Defendant asserts that the trial court erred in finding that the property was not fairly capable of being partitioned in kind. We disagree.

[2] The dissent points out that at common law, a trustee may hold title as a joint tenant. While that may be true, a trustee is different than a trust itself. The powers of a trustee are thus irrelevant for our purposes today. Moreover, a trustee may be a trustee for a natural person.

In deciding whether or how to partition real property, a court exercises its equitable powers. See MCL 600.3301 ("Actions containing claims for the partition of lands . . . are equitable in nature."). When reviewing equitable matters, this Court reviews for clear error the findings of fact in support of the equitable decision rendered and reviews de novo the ultimate decision. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

Defendant asserts that, according to MCL 600.3304, "[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned," but that, according to MCL 600.3308, "a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition." However, the limitation in MCL 600.3308 applies to persons having "*only* an estate in reversion or remainder" (emphasis added), and thus, does not apply to holders of current possessory rights, whether or not those holders of existing possessory rights also happen to hold rights of reversion or remainder.

Moreover, a court entertaining an action for partition is obliged to determine "whether the premises can be partitioned without great prejudice to the parties." MCR 3.401(A)(1). If the court determines that partition cannot be achieved "without undue prejudice to the owners, it may order the premises sold in lieu of partition . . . ." MCR 3.401(C). The trial court specifically and carefully considered whether partition could be achieved without undue prejudice to the owners. It concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved."

We find no clear error in the trial court's determination regarding partition and prejudice to plaintiffs. Partition in kind of the subject parcel is not entirely practical in light of the attendant survivorship rights, and partition to the extent possible likely would engender further burdening of the use of Bussa Lane.

V. DOCUMENTATION

Defendant asserts that the trial court's decision on plaintiffs' contribution claim was flawed because the court relied on 305 pages of documents that plaintiffs withheld from discovery then suddenly produced less than 24 hours before trial. We disagree.

This Court reviews the trial court's evidentiary rulings, including those concerning discovery, for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993); *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). An abuse of discretion occurs when a trial court makes an error of law or its decision falls outside the range of principled outcomes. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

We first note that defendant claims plaintiffs' late submission of the challenged documents occurred less than 24 hours before trial. However, the documents were submitted 24 hours prior to the date *originally scheduled for trial* on the issue of contribution. The matter did not actually

proceed to trial at that time given that the parties agreed to have the trial court decide the question of contribution on the basis of briefing to be completed several weeks later.

In ruling on defendant's motion to disallow the documentation, the trial court specifically considered, among other things, the fact that a decision concerning the contribution issue was still several weeks away. Defendant fails to meaningfully address the trial court's reasoned ruling or the fact that the trial court stated it would evaluate previously unidentified documents and thereafter issue decisions concerning admissibility on a document-by-document basis. Defendant has therefore abandoned this issue on appeal. *Thompson*, 261 Mich App at 356.

VI. CONTRIBUTION

Defendant contends that the trial court erred in granting plaintiffs' claim for full share contribution from defendant for litigation that concluded in 2012 concerning the Bussa Lane easement. We disagree.

As noted, a court deciding whether or how to partition real property exercises its equitable powers. See MCL 600.3301. This includes its decisions concerning how to divide the proceeds of any sale to account for the equities of the situation. MCL 600.3336(2). "When partitioning the premises or dividing the money received from a sale of the premises among the parties the court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits which a party has conferred upon the premises." MCL 600.3336(2).

"The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares." *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975). "The doctrine of contribution between cotenants is based upon purely equitable considerations. It is premised upon the simple proposition that equality is equity. It is not, however, enforced unless reason and justice require that each of the cotenants contribute his proportionate share of the common burden." *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958). Such equitable relief should be granted at the court's discretion " 'according to the circumstances and exigencies of each particular case,' " as suggested by the evidence and guided by " 'the fixed principles and precedents of equity jurisprudence.' " *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947), quoting 39 CJS, Equity, § 10, pp 328-329.

In this case, the trial court held that, "[a]s cotenants and beneficiaries of Leo Bussa, the Parties are jointly and equally responsible for the costs and attorney fees associated with Antrim County File No. 2011[-]008633[-]CH, and for the real estate taxes and expenses associated with maintenance of the Property," and thus that "Plaintiffs are entitled to contribution by the Defendant in this matter," including "for one-quarter of the costs and attorney fees" associated with the earlier litigation. While defendant contends that the prior litigation was elective and conferred no benefit on the property, she admits that she was among the parties who were substituted for Leo Bussa in the prior litigation upon his death and makes no claim that she did not agree with plaintiffs' position in the matter.

Moreover, defendant's assertion that MCL 600.3336(2) does not authorize a court "to consider a failed attempt to increase the property's value" has no merit. The ultimate merits or outcome of litigation bears no impact on the question of responsibility for maintaining it. And litigation intended to benefit an interest in real property does not necessarily cease to be beneficial, for purposes of determining responsibility for its costs, even if it is ultimately unsuccessful. As recognized by the trial court, the prior litigation was initiated to establish the scope of the easement and, ultimately, whether the scope of the easement prevented subdivision development of the property. The outcome of the prior easement litigation was necessary and relevant to each co-owner of the property such that the litigation was a common burden among them. Although the several easement litigants had substantial, if unequal, affected property interests, the presumption that "equality is equity" remains valid and defendant has failed to show that the trial court erred in ordering her to contribute equally to the expenses attendant to the earlier easement litigation.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jonathan Tukel

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

v

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

FOR PUBLICATION
July 1, 2021

No. 343630
Antrim Circuit Court
LC No. 2016-009008-CH

ON REMAND

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

RIORDAN, J. (*concurring in part and dissenting in part*).

I concur with the majority that the circuit court had subject-matter jurisdiction over this case, that it did not abuse its discretion by considering more than 300 pages of documentation offered by plaintiffs, and that it did not err by requiring contribution to plaintiffs. However, I respectfully dissent from the majority's conclusion that the circuit court did not err by ruling that a trust cannot hold title to real property as a joint tenant with rights of survivorship.[1]

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). See also MCL 554.43 ("Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter."). It is true that the common

[1] Because I would conclude that the circuit court erred in this regard, I also disagree with the majority that the circuit court's corresponding partition ruling should be affirmed as well.

law provided that neither corporations nor sovereigns may hold title as a joint tenant because "king and corporation can never die." 2 Blackstone, Commentaries on the Laws of England, p *184. That is, "because a corporation can survive indefinitely, which is contrary to the right of survival of a joint tenancy," a corporation may not hold title as a joint tenant under the common-law rule. 6A Fletcher, Cyclopedia of the Law of Corporations § 2816.

However, as the majority acknowledges, a trust could not exist in perpetuity under the common law. See *Scudder v Security Trust Co*, 238 Mich 318, 320; 213 NW 131 (1927). Thus, the basis for the common-law rule precluding a corporation from holding title as a joint tenant is inapplicable here. Indeed, the majority does not cite any authority providing that a trust may not hold title as a joint tenant under the common law. Rather, the majority offers "common sense" arguments to reach its conclusion. In my view, the common law and statutory framework provide to the contrary, and that is what we should follow to resolve the matter before us.

"A trust is a right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another." *Fox v Greene*, 289 Mich 179, 183; 286 NW 203 (1939). " 'Trusts' in the broadest sense of the definition, embrace, not only technical trusts, but also obligations arising from numerous fiduciary relationships, such as agents, partners, bailees, etc." *Id.* (cleaned up). See also Restatement (Third) of Trusts § 2 ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons . . . .").

Our common law recognizes that a trustee may hold title as a joint tenant. See, e.g., *Norris v Hall*, 124 Mich 170, 176; 82 NW 832 (1900) ("The deed from Dyson to the five trustees expressly stated that they were to hold 'as joint tenants, and not as tenants in common.' "); *Fox*, 289 Mich at 184 ("[P]roperty held by a trustee who is a joint tenant, or tenant in common with another, may be partitioned at the instance of the trustee, or of any person beneficially interested in the trust.").[2] If a trustee may hold title as a joint tenant, it seemingly follows that the trust itself may be deemed as holding title as a joint tenant to the same extent. See *Ford v Wright*, 114 Mich 122, 124; 72 NW 197 (1897) (explaining that a trustee holds trust property). The conclusion that a trust may hold title as a joint tenant is consistent with the Restatement (Third) of Trusts § 40, which explains that "a trustee may hold in trust any interest in any type of property." Comment *b* to that section further explains:

> [L]egal or equitable present interests in real or personal property for life or for a term of years, and presently existing future interests, whether legal or equitable, whether reversionary interests, executory interests, or remainders (contingent, vested, or vested subject to being divested), may be held in trust.

[2] I acknowledge that *Norris* and *Fox* concerned properties in which the joint tenants were all trustees. Nonetheless, such cases illustrate that there was no blanket common-law prohibition against a trustee holding title as a joint tenant.

Accordingly, in my view, the common-law authorities cited above weigh in favor of a rule that a trust may hold title as a joint tenant, or at a minimum, fail to establish a contrary rule.

Alternatively, even if there was a common-law rule providing that a trust may not hold title as a joint tenant, I would conclude that such a rule has been superseded and replaced by statute. The Michigan Trust Code, which is set forth as Article VII of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., is a comprehensive scheme with dozens of provisions addressing virtually every aspect of trust law. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 390; 738 NW2d 664 (2007) (quotation marks and citations omitted). Thus, for example, this Court has held that the Michigan Trust Code sets forth the exclusive grounds for removal of a trustee and that a trustee cannot be removed for additional grounds at common law. *In re Gerald L Pollack Trust*, 309 Mich App 125, 161-163; 867 NW2d 884 (2015).

Relevant to this case, there is no provision within the Michigan Trust Code that precludes a trust from holding title to real property in the same manner as a natural person. This absence is noteworthy because the Michigan Trust Code includes several provisions otherwise limiting trusts and trustees. See, e.g., MCL 700.7404 ("A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve."); MCL 700.7815(3)(b) ("A trustee may not exercise a power to make distributions pursuant to a discretionary trust provision in a manner to satisfy a legal obligation of support that the trustee personally owes another person."). Further, the Michigan Trust Code includes several provisions conferring broad powers upon trusts and trustees to hold, manage, and distribute trust property. See, e.g., MCL 700.7816(1)(b)(*ii*) ("A trustee, without authorization by the court, may exercise all of the . . . [p]owers appropriate to achieve the proper investment, management, and distribution of the trust property."); MCL 700.7817(g) ("[A] trustee has . . . [the power to] acquire property, including property in this or another state or country, in any manner for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, or change the character of trust property."). In my view, the express conferral of such powers, coupled with the absence of any express limitation that would be controlling here, shows the Legislature's intent to supersede and replace any common-law rule that may have existed to prohibit a trust from holding title as a joint tenant.

I respectfully disagree with the majority that "[c]ommon sense and relevant law establish that . . . a trust may not hold property as a joint tenant with rights of survivorship." The common-law rule against a corporation holding title as a joint tenant—which the majority extends here to trusts—is, according to one court, "universally criticized and generally ignored in the United States." *Bank of Delaware v Bancroft*, 269 A2d 254, 255 n 1 (Del Ch 1970).[3] Indeed, the rule

[3] In *Bancroft*, the Delaware Court of Chancery ruled that a trust company may hold title as a joint tenant with rights of survivorship because a Delaware statute conferring the powers of "a legally qualified individual" upon such companies superseded the common-law rule to the contrary.

was revoked in England in 1899 by the Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vic.C. 20. *Id*. As illustrated by this case itself, application of the rule results in a division of interests that, in all likelihood, was completely unforeseeable by both the grantor and the grantees at the time of the trust's creation. Even if such a peculiar outcome is compelled by the common law applicable to corporations and joint tenancies, our Legislature has sensibly abrogated that common law with respect to trusts in order to provide stability and certainty to trustees and those who engage with them.

Accordingly, I respectfully dissent from the majority's conclusion that a trust cannot hold title to real property as a joint tenant with rights of survivorship.

/s/ Michael J. Riordan

See also Bogert, Trusts & Trustees (2d ed) § 145 ("In the United States, where a trust company or bank is made co-trustee with an individual, it is usual to provide in the trust instrument for survivorship in the corporate trustee. If such a provision is not made, . . . the ancient law with regard to the inability of corporations to act as joint tenants is deemed to be still in force . . . .").

Order

Michigan Supreme Court
Lansing, Michigan

March 23, 2022

Bridget M. McCormack,
Chief Justice

163404

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,
Plaintiffs/
Counterdefendants-Appellees,

v

SC: 163404
COA: 343630
Antrim CC: 2016-009008-CH

CHARLENE FORBES, a/k/a ANGIE FORBES,
Defendant/
Counterplaintiff-Appellant.

_____/

On order of the Court, the application for leave to appeal the July 1, 2021 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether the circuit court was vested with subject matter jurisdiction of the plaintiffs' complaint, which sought a determination of interests in the subject property and partition, see MCL 700.1302; MCL 700.1303; (2) whether Michigan law allows a trust to hold title to real property as a joint tenant with right of survivorship; and (3) whether the deeds in dispute in this case were valid insofar as they granted the trustee of a trust a life estate in the real property as a joint tenant with right of survivorship. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Real Property Law and Probate & Estate Planning Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 23, 2022

Clerk

t0316

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tukel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

v.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 163404

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

APPELLEES' APPENDIX OF SELECT SOURCE MATERIALS

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July 20, 2022

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COMMENTARIES

ON

THE LAWS OF ENGLAND;

IN FOUR BOOKS,

BY

SIR WILLIAM BLACKSTONE, KNIGHT,

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

SO ABRIDGED AS TO RETAIN ALL PORTIONS OF THE ORIGINAL WORK WHICH ARE OF HISTORICAL OR PRACTICAL VALUE,

WITH NOTES, AND REFERENCES TO AMERICAN DECISIONS;

FOR THE USE OF AMERICAN STUDENTS.

BY

GEORGE CHASE, LL. B.,

PROFESSOR OF LAW IN THE NEW YORK LAW SCHOOL, NEW YORK CITY, AND DEAN OF THE FACULTY; EDITOR OF STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (AMERICAN EDITION).

THIRD EDITION.

BANKS & COMPANY,

ALBANY, N. Y.

1910

CHAPTER XII.

[BL. COMM.—BOOK II. CH. XII.]

Of Estates in Severalty, Joint-tenancy, Coparcenary, and Common

WE come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a *plurality* of tenants.

*180] *II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy, and sometimes an estate in *jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint-estate, which by virtue of the statute 27 Hen. VIII. ch. 10, is

frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.[1]

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

2. The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

• *First*, they must have one and the same *interest*. One [•181] joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the

[1] Joint-tenancy was favored in the early common law, by reason of certain advantages growing out of this mode of tenure when the feudal system was in force; but at the present day, the tendency of legislation in this country is to abolish it, and convert limitations of estates to two or more persons into tenancies in common, unless the grantees are joint-executors or joint-trustees, or unless it is expressly declared by the deed that the estate shall be held in joint-tenancy. This change has been made because the doctrine of survivorship, incident to such estates, is regarded as unreasonable and burdensome.

inheritance. If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty; or if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail. *Secondly*, joint-tenants must also have a unity of *title*; their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseizin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. *Thirdly*, there must also be a unity of *time*; their estates must be vested at one and the same period as well as by one and the same title As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir: and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested *182] at one time, and the other moiety vested at another. *Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times; because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy there must be a unity of *possession*. Joint-tenants are said to be seized *per my et per tout*, by the *half* or *moiety*, and by *all*: that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them a seizin of one half or moiety, and the other of the other moiety; neither can one be exclu-

sively seized of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common, for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout, et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.†

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate. On the same reason, livery of seizin, made to one joint-tenant, shall enure to both of them: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other. * * * * Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds: and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other; by construction of the statute Westm. 2. ch. 22. So, too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver, yet now by the statute, 4 Ann. ch. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.‡

From the same principle also arises the remaining grand incident of joint-estates; *viz.*, the doctrine of *survivorship;* by

† As to estates by the entirety, see 100 N. Y. 12; 117 Pa. St. 213. But husband and wife may also be tenants in common. (128 U. S. 464.)

‡ The action of account is now obsolete.

which when two or more persons are seized of a joint estate, of inheritance, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel-interest, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The *184] interest of two joint-tenants, *is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king, nor any corporation, can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seized of the entirety, by benefit of survivorship; for the king and the corporation can never die.

*3. We are, lastly, to inquire how an estate in joint- [*185
tenancy may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seized *per my et per tout*, everything that tends to narrow that interest, so that they shall not be seized throughout the whole, and throughout every part, is a severance or destruction of the jointure. And, therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants: for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do: for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII., ch. 1, and 32 Hen. VIII., ch. 32, joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands.[1] 3. The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent, grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will *is no severance of the jointure [*186
for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore

[1] These statutes have been superseded in England by later enactments, prescribing particular methods of procedure to obtain partition. In the various States of this country, also, statutes have been enacted, providing for the partition of estates held in joint-tenancy, or tenancy in common.

a priority to the other, is already vested. 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure: for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it. Yet, if one of the three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship: and if one of the three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure; for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

*187] * In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate; as if there be joint-tenants for life, and they make partition, this dissolves the jointure, and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. And, therefore, if there be two joint-tenants for life, and one grants away his part

for the life of his companion, it is a forfeiture: for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons.[4] It *arises* either by common law or particular custom. By common law, as where a person seized in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

*The *properties* of parceners are in some respects like [*188 those of joint-tenants; they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands; and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the Eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points. 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands, to hold to them and their heirs, they are not parceners, but joint-tenants; and hence it likewise follows, that no lands can be held in co-parcenary, but estates of inheritance, which are of a descendible nature; whereas not only

[4] Estates in coparcenary do not exist in the United States. In similar cases, the lands which descend are held by tenancy in common.

THE

FIRST PART

OF THE

Institutes of the Laws of England;

OR, A

COMMENTARY UPON LITTLETON.

NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quòd possis dicere jure meum est. MART.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR,

AUTHORE EDWARDO COKE, MILITE.

REVISED AND CORRECTED,
With Additions of NOTES, REFERENCES, and PROPER TABLES,
By FRANCIS HARGRAVE and CHARLES BUTLER, Esqrs. of *Lincoln's Inn*,
INCLUDING ALSO
The NOTES of Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM;
AND
An ANALYSIS of LITTLETON, written by an unknown Hand in 1658-9.

THE SEVENTEENTH EDITION,
IN TWO VOLUMES;
With *ADDITIONAL NOTES*,
By CHARLES BUTLER, ESQUIRE.

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Sect. 296.

BUT if lands be given to two men, and to the heires of their two bodies begotten, the donees have a joynt estate for tearme of their lives; and if each of them hath issue and dye, their issues shall hold in common, &c. But if lands be given to two abbots, as to the abbot of Westminster and to the abbot of Saint Albans, to have and to hold to them and to their successors, in this case they have presently at the beginning an estate in common, and not a joynt estate. And the reason is, for that every abbot or other soveraigne of a house of religion, before that he was made abbot or soveraign, &c. was but as a dead person in law, and when he is made abbot (2), he is as a man personable in law onely to purchase and have lands or tenements or other things to the use of his house, and not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common; and if one of them die, the abbot which surviveth shall not have the whole by survivor, but the successor of the abbot which is dead shall hold the moity in common with the abbot that surviveth, &c.

"*IF lands be given to two men, &c.*" Of this sufficient hath been spoken in the Chapter [a] of Joyntenants.

[a] Sect. 285. (Ant. 182. a.)

"*But if lands be given to two abbots, &c.*" In this case of the two abbots in respect of their several capacities, albeit the words be joynt, yet the law [b] doth adjudge them to be severally seised (3).

(2 Saund. 319.) [b] 7 H. 7. 9. b. 16 H. 7. 15. b. 3 H. 7. 11. 10 E. 4. 16. b. 2 Saund. 319.) 5 H. 7. 25. 18 E. 3. 27. 49 E. 3. 25. b. (2 Ro. Abr. 91.

Vide Sect. 200. [c] 4 H. 7. 45. 18 E. 3. 27. b.

The *&c.* in the end of this Section implyeth, that so it is, if any [c] body politique or corporate, be they regular as dead persons in law (whereof our author here speaketh) or secular: as if lands be given to two bishops, to have and to hold to them two and their successours: albeit the bishops were never any dead persons in law, but always of capacitie to take, yet seeing they take this purchase in their politique capacitie, as bishops, they are presently tenants in common, because they are seised in severall rights, for the one bishop is seised in the right of his bishoprick of the one moitie, and the other

[190. a.]

(2) *&c.* in L. & M. and Roh.

(3) Here joint words are construed to make several estates in respect of the *several capacities of the donees.* In a former part *vesting at several times* makes joint words to operate severally. Ant. 88. a.* and mr. justice Wyndham's case, 5 Co. 7. a. there cited in a note. A few passages further, lord Coke gives an instance of joint words passing two entire things to two grantees in consequence of the *several quality of the things granted.* Post. 190. the case of a corrody. See further as to the effect from several capacities in the grantees, post 191. b. and ant. 183. b. near the end.—[Note 73.]

* *Wyndham's case is cited in note 11. of 188. a. which is, probably, the part meant to be referred to, as fol. 88. a. being upon guardianship in socage, is quite irrelevant to the subject of jointenants.*

other is seised in the right of his bishoprick of the other moitie, and so by severall titles and in severall capacities, whereas joyntenants ought to have it in one and the same right and capacitie, and by one and the same joynt title. The like law is, if lands be given to two parsons and their successors or to any other such like ecclesiasticall bodies politique or incorporate, as hath been said. (6 Co. 8. a. justice Wyndham's case.)

If a corodie be granted to two men and their heires, in this case, because the corodie is incertaine and cannot be severed, it shall amount to a severall grant to each of them one corodie; for the persons be severall, and the corodie is personall (1).

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ALSO, if lands be given to an abbot and a secular man, to have and to hold to them, viz. to the abbot and his successors, and to the secular man to him and to his heires, they have an estate in common, causâ quâ suprà.

AND so it is, if lands be given to the parson of *Dale* and to a lay man, to have and to hold to them, that is to say, to the parson and his successors, and to the lay man and his heires, they are presently tenants in common for the causes abovesaid. So of a bishop, &c. *Et sic de similibus.* F. N. B. 49. I. 16 E. 3. joindre en action 27. 16 Ass. pl. 1. 2 R. 3. 16. 7 H. 7. 9. 13 H. 8. 14. (5 Co. 8.)

If lands be given to the king and to a subject, to have and to hold to them and to their heires, yet they are tenants in common, and not joyntenants; for the king is not seised in his naturall capacitie, but in his royall and politique capacitie, *in jure coronæ*, which cannot stand in joynture with the seisin of the subject in his naturall capacitie. So likewise if there be two joyntenants, and the crowne descend to one of them, the joynture is severed, and Pl. Com. in seig. Barkley's case. (Ant. 16. a.)

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(1) Lord Coke cites no authority for this. But in 8 E. 4. 17, there is a case, which tends to confirm and explain his doctrine as to a corody's not being grantable to more than one. The case arose on grant of a corrody by Hen. 6. to two and the longer liver, where one was dead, the question being, whether during the life of the survivor this was sufficient to justify the prior of Friswith, on whom the corrody was chargeable, in refusing a new grantee sent by Edward the fourth. Upon this case NELE serjeant argued for the king, that a *corrody which is for one man cannot be given to two, for two men cannot have the maintenance of one man;* and thence he inferred that the grant to the two was void. But the judges distinguished; for they all said, *that if the corrody be to have certain bread and certain service, this may be granted to twenty men, &c. as to have 20 breads or 6 gallons of ale, &c. but that a corrody to sit every day in the hall of the prior and to be served as the men of the prior are, this cannot be granted to many, for every one of them would have as much as one had heretofore, which would not be reason, &c.*—I was carried to this case in the year-book of E. 4. by a reference in Fitzherbert's *Natura Brevium*, which in the commentary on the writs *de corrodio habendo et de annuâ pensione* contains a great variety of learning on this antiquated subject. See F. N. B. 230. F.—[Note 74.]

and they are become tenants in common. But if lands be given to *A. de B.* bishop of *N.* and to a secular man, to have and to hold to them two and to their heires, in this case they are joyntenants; for each of them take the lands in their naturall capacitie.

(Post. 310. b. 2 Ro. Abr. 91.) [d] 13 H. 8. 14. 16 H. 7. 15. 9 H. 6. 25. 45 E. 3. 25.

If lands be given to *John* bishop of *Noraich* and his successors and to *John Overall* doctor of divinity and his heires, being one and the same person, he is tenant in common [d] with himselfe. But our author's rules do not hold in chattels reals or personals; for if a lease for yeares be made or a ward granted to an abbot and a secular man, or to a bishop and a secular man, or if goods be granted to them, they are joyntenants, because they take not in their politique capacity (2).

☞ Sect. 298. (1) [190. b.]

ALSO if lands be given to two to have and to hold, scil. *the one moity to the one and to his heires, and the other moity to the other and to his heires, they are tenants in common.*

(Cro. Cha. 75. Ant. 183. a. b.)

AND the reason is, because they have severall freeholds and an occupation *pro indiviso*.

(2 Ro. Abr. 89. 90. Ant. 183. b.)

Here is to be observed, that the *habendum* doth sever the premises that *primâ facie* seemed to be joynt; for an expresse estate controlls an implyed estate as hath been said.

Sect. 299.

ALSO, if a man seised of certaine lands infeoffe another of the moitie of the same land without any speech of assignement or limitation of the same moity in severaltie at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common (2) †.

AND

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(2) In a former part lord Coke explains the reason of this to be, that no chattel can go in succession in the case of a sole corporation, no more than a lease for years to one and his heirs can go to heirs. Ant. 46. b. But there are exceptions to this rule. The king is mentioned as one by lord Coke ant. 90. a. Another is, where there is a special custom, as the care* of the chamberlain of London, for orphanage monies. Fulwood's case, 4 Co. 65. a. to which add Arundel's case Hob. 64, and ant. fo. 9. a. note 1, there, 90. a. and the case of a bond to a lay person and an abbot in F. N. B. 120. B.—[Note 75.]

(1) In L. and M. and Roh. this Section is placed immediately after Sect. 300.

(2) † Brooke in his Abridgment title *feoffements de terres* pl. 75, cites this Section of Littleton, and in support of it refers to various cases in Fitzherbert's Abridgment. See further Bro. Nouv. Cas. 154. 124. 6 Co. 1, and Dy. 187. a. pl. 5.

* "care" seems to be here inserted for case.

of 1 Eliz. of Leases made by bishops are, "other than for the term of 21 years, or three lives (without saying, or under) from such time as any such grant or assurance shall begin, whereupon the old accustomed yearly rent, or more" (without limitation of any time) "shall be reserved, &c." And yet a lease for a lesser time is good, and the rent ought to be reserved during the whole term. The stat. of (*a*) 13 Eliz. c. 10. says, "other than for the term of 21 years, or three lives (without saying, or under), from the time as any such lease or grant shall be made, whereupon the accustomed yearly rent, or more, shall be reserved, &c." And many other matters were moved by the counsel on both sides at the Bar in this case, which I purposely omit because the Court gave no resolution of them.

And take great care (good reader) if you contract for any lease, under any of the said, or any other statutes, or with any person who hath power to make leases, by any of the provisoes newly invented and put into indentures, you take good advice of counsel on the sight and good consideration of them in making of your lease; and my hope is, that the report of these cases concerning leases will bring to their memory some things tending to the repose and quiet of poor farmers.

[7 a] JUSTICE WINDHAM'S CASE.

Mich. 31 & 32 Eliz.

In the King's Bench, in a Writ of Error.

A man made a lease of S. Meadow to A. for 10 years, and of C. Meadow to B. for 20 years; and afterwards by indenture reciting the said two leases, makes a lease to another of both for 40 years, to begin after the end or determination of the said several leases made to A. and B. And afterwards the first lease of S. Meadow ends, and the lease of C. Meadow still continues. Held that the *habendum* in the latter lease shall be taken respective, and the last lease of S. Meadow shall begin presently after the end of the first lease thereof, and shall not wait till the lease of C. Meadow be ended.

Joint words shall be taken respectively and severally:—1st. In respect of the several interests of the grantors. 2nd. In respect of the several interests of the grantee. 3rd. In respect that the grant cannot take effect but at several times. 4. In respect of the incapacity and impossibility of the grantees to take jointly. 5th. In respect of the cause of the grant, or *ratione subjectæ materiæ*. 6th. *Ne res destruatur et ut evitetur absurdum.*

Held by Wray. J.C. If tenant in fee lease one acre to A. for life, another acre to B. for life, and another to C. in tail; and afterwards by deed (reciting the said estates) covenants with his brother that after all the estates ended and determined, he and his heirs will stand seised of the said three acres to the use of his brother in tail, upon the death of B. the brother shall have the acre leased to B. S. C. Moor, 191.

In trespass between Francis Wyndham one of the Justices of the Common Pleas plaintiff, and John Debney and others defendants, in the Common Pleas, for trespass done in a meadow called Sexten's Meadow in Trowse in the county of Norfolk, the case was such; the Dean and Chapter of the Holy and Individed Trinity of Norwich were seised of the said meadow called Sexten's Meadow, and of another meadow in the said town called Cheese Meadow; and by indenture under their common seal, 37 H. 8. demised Cheese Meadow to Howlins for 40 years: and afterwards 4 & 5 Phil. & Mary, by indenture under their common seal, demised Sexten's Meadow to the said Howlins and Debney for 21 years. And afterwards 12 Eliz. the said dean and chapter demised to Nicholas Manne both the meadows, with a several *habendum*, *scil.* to have and to hold Cheese Meadow for 40 years after the end of the first lease

(*a*) Co. Lit. 44 b. 6 Co. 37. b. 38. a.

thereof made; and to have and to hold Sexten's Meadow for 40 years after the first lease thereof made, with several reservations of rents. The said Manne assigned his interest to John Hoe, who 15 Eliz. surrendered and took a new lease by indenture of the said dean and chapter under their common seal (in which the first leases were recited) of both the meadows, *habendum sibi ab & post determination' præd' separalium dimission', videlicet, præd' dimissionis præd. Rob. Howlyns in forma præd. fact', & præd, dimissionis præf. Rob. Howlyns & J. Debney, &c. in forma præd. fact', sivè esset per surs. reddit', determinat', &c. usque ad fin' &* [7 b] *termin'* 40 *annor' extunc proxim. sequen', existen' verum numerum annor', mentionat in dict. sursum reddit'. Indentur'. dict'. Nicholao Manne* made: *reddendo, &c.* the ancient rent severally for the said meadows; so that in effect the case is; a man makes a lease of Sexten's Meadow to A. for ten years, and of Cheese Meadow to B. for twenty years; and afterwards by indenture reciting the said two leases, makes a lease to another of both for forty years, to begin after the end and determination of the said several leases made to A. and B. And afterwards the former lease of Sexten's Meadow ends, and the lease of Cheese Meadow continues; and when the last lease as to Sexten's Meadow now in question should begin, was the question; for if it should not begin till the lease of Cheese Meadow be ended, then the plaintiff had entered before his time, for the former lease of Cheese Meadow hath yet continuance. But if the said *habendum* in the later lease should be taken "† *respectivè* or *distributivè*," (*a*) *reddendo singula singulis*, so that when the lease in Sexten's Meadow determines, the new term for forty years therein should begin, then judgment ought to be given for the plaintiff. And after many arguments at Bar and Bench in the Common Pleas, it was resolved and adjudged, that the *habendum* in the later lease should be taken *respectivè*, that is to say, the lease of Sexten's Meadow to John Hoe for forty years should begin (*a*) presently after the end of the first lease thereof made. For every deed shall be taken more (*b*) strongly against the grantor, and more beneficially for the grantee, and it is more strong against the lessor, and more beneficial for the lessee to have the lease of Sexten's Meadow to begin presently after the expiration of the first lease made thereof than to tarry till the lease of Cheese Meadow be ended. As in (*c*) 9 E. 4. 42. b. & 19 H. 6. 4. a. If I release unto you all actions which I have against you and another, in this case notwithstanding the joint words, all actions which I have against you alone are released, for it shall be most beneficially for him to whom the release is made, and most strongly against him who makes it; and the joint words of the parties shall be taken respectively and severally.

1. Sometimes in respect of the several interests of the grantors; as if two (*d*) tenants in common, or several tenants join in a grant of a rent-charge, yet in law this grant shall be several, although the words are joint, as Sir Robert Catlyn, Chief Justice, held in *Browning's case* in Plow. Commentaries.

2. Sometimes in respect of the (*e*) several interests of the grantees, &c. (16) 19 H. 6. 63, 64. a warranty made to two of certain lands shall enure as several warranties in respect that they are severally seised, the one of [8 a] part of the lands, and the other of the residue in severalty, 6 E. 2. * Covenant Br. 49. A joint (*f*) covenant

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† 1 Mod. Rep. 33.

(*a*) Moor, 291. Cr. Jac. 259. 9 Co. 27. b. 10 Co. 85. b. 2 Roll. Rep. 411, 412. Cr. El. 471. Palm. 390. 1 Saund. 184.

(*a*) Jenk. Cent. 272. Cr. Jac. 35. 259. 656. 10 Co. 85. b. 11 Co. 48. a. Plowd. 4. b. 1 Lev. 212. Yelv. 183. 1 Bulst. 42. 1 Brownl. 147. 3 Keb. 85. 1 Sand. 184. Moor. 191. 2 Leon. 106. Cr. El. 199. 3 Keb. 85.

(*b*) Jenk. Cent. 272. Lit. Rep. 371. Co. Lit. 42. a. 9. a. 183. a. 197. a. 6 Co. 36. a. Plowd. 103. b. 287. b. Winch. 96. 7 Co. 23 a. 8 Co. 145. a.

(*c*) Fitz. Release, 14. 4 Co. 50. a. Br. Release, 29.

(*d*) Plowd. 140. b. 161. b. 171. a. 289. a. b. Perk. sect. 106, 107. Hetly, 9. Yelv. 189. Co. Lit. 197. a. 267. b.

(*e*) *Postea*, 19. a.

* *Postea*, 19. a.

(*f*) *Postea*, 19. a.

taken several in respect of the several interests of the covenantees (A). *Vide* 16 Eliz. Dyer, 337, 338. between Sir Anthony (*g*) Cook and Wotton, a good case.

3. Sometimes in respect that the grant cannot take effect, but at several times, as 24 E. 3. 29. a. a remainder limited to the right of heirs of J. S. (*h*) and J. N. (J. S. and J. N. being alive) in which case the words are joint, and yet the heirs shall take severally; for they shall not join in action.

4. Sometimes in respect of the incapacity and impossibility of the grantees to take jointly, as a lease made to an abbot and (*i*) secular man, or a gift to two men, or to two women, and to the heirs of their two bodies begotten, the inheritance is (*k*) several, 7 H. 4. 17. *vide Chapman's case*, Pl. Com.

5. Sometimes in respect of the cause of the grant, or *ratione subjectæ materiæ*, as 15 H. 7. 14. a. One (*a*) coparcener grants a rent to two other coparceners for owelty of partition, although the words are joint, yet the cause of the grant shall be respected, and the rent shall be of the quality of the land, and therefore they shall have the rent in degree and quality of coparcenary, and not jointly. And Knivet, Ch. Just. and Chancellor, said in 38 E. 3. 26. that if two coparceners make a feoffment in fee, rendering rent to them and their heirs, the heirs of both shall inherit, because their right in the land was several, (*b*) 22 E. 4. 25. b. and (*c*) 2 R. 3. 18. b. A joint submission to arbitrament taken severally in respect of the several causes, &c.(B).

6. Sometimes *Ne res destruatur, & ut evitetur absurdum*, as in 6 H. 7. 7. b. *in* (*d*) *cessavit*, where the tenure is alleged by homage, fealty, and rent, and the demandant counts, that *in faciendo servitia præd' cessavit*, shall be by construction taken to such services only, of which a man may cease (*e*) 17 E. 6. 1. b. & 2. a. *The Prior of Tikeford's case* in a *scire facias* against the successor of the prior on a judgment given in a writ of annuity for the arrearages in the time of the predecessor, and of the successor, and the writ was that the predecessor and successor *nondum reddiderunt:* to which, exception was taken that the predecessor was supposed not to render *that*

(A) The general rule established by the authorities cited in the note to *Eccleston* v. *Clipsham*, 1 Saund. 153. is, that wherever the interest of the covenantees is joint, although the covenant be in terms joint and several, the actions follow the nature of the interest and must be brought in the name of all the covenantees, but where the interest of the covenantees is several, they may maintain separate actions although the language of the covenant be joint, *per Curiam Withers* v. *Bircham*, 3 B. & C. 255. S. C. 5 Dow. & Ryl. 106; and accordingly where by a deed reciting the grant of two distinct annuities to A. & B. during the life of the grantors and the survivor, it was witnessed that C. covenanted with A. & B., and their executors to pay the annuities, or either of them, when the grantors should make default in payment; A. died: the Court held that the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C. *Vid.* also *James* v. *Emery*, 5 Price, 533. & *post.* note. A. *Slingsby's case*, 18. b.

(*g*) 1 Anders. 53, 54. N. Benl. 228, 229. Dyer, 337, 338. pl. 39. *Postea*, 19. a.

(*h*) Co. Lit. 188. a. 2 Roll. 89. 13 Co. 57. Fitz. Joinder in Action, 10. 30 Ass. pl. 47.

(*i*) Perk. sect. 106. Lit. sect. 296, 297. Co. Lit. 190. a. 2 Saund. 319.

(*k*) Co. Lit. 183. a. b. 184. a. 8 Co. 87. a. 7 H. 4. 16. b. 17. a. Lit. sect. 283, 284. 1 Co. 84. b. 2 Anderson, 12. 138. Br. Joint-tenants, 40.

(*a*) Hob. 172. Br. Rent, 8. Br. Joint-tenants, 20. 3 Keb. 215. Co. Lit. 169. b. Dy. 153. pl. 14. 29 Ass. pl. 23. Fitz. Partition, 12. Plow. 134. b.

(*b*) Br. Condition, 182. Br. Arbitrement, 41. 8 Co. 98. a. b.

(*c*) Bridg. 91. Plowd. 289. b. Br. Arbitrement, 44.

(B) Words in deeds or wills, receive a different construction according to the nature of the estate to which they are applied. *Southby* v. *Stonehouse*, 2 Ves. 616. *Elliot* v. *Jekyl*, 2 Ves. 683. *Vid. Mansell* v. *Burridge*, 7 T. R. 352. a joint and several contract taken jointly in respect of the joint subject-matter.

(*d*) Fitz. Cessavit, 5. Br. Cessavit, 23. Br. faux latin 76. Doctrine placit, 97. 289, 290. 15 Ed. 4. 33.

(*e*) Fitz. Brief. 663. 6 Ed. 3. 12. pl. 5.

which the successor ought, *& non allocatur ;* for *reddendo singula singulis*, by reasonable construction, the words may well stand together. *Vide* 21 E. 3. 48. a. in a *per quæ servitia*, F. N. B. 14. in *monstraverunt :* and the reason of all these cases is, either *quod* (*f*) *res non destruatur*, or that the grant shall be taken more strong against the grantor, and shall take effect as near as may be according to the intent of the parties. And such construction concurs with two of the said reasons in the principal case. 1. It shall be taken more strongly against the lessor. 2. This [8 b] construction will concur with the intent and meaning of the parties, for after the *habendum* and the number of the years these words are added, *existen' verum numerum annor' in dict' sursum reddit' indent' mentionat'*, in which indenture the *habendum* was several, so that the intent of the parties was to have several beginnings in this new lease, &c. and the lessor and lessee never imagined but that the leases should begin severally, and not that the lessee should wait for Sexten's Meadow, until the lease of Cheese Meadow, which is another distinct lease, and a distinct thing, should end. And so it was adjudged, and the plaintiff had execution. Upon which judgment a writ of error was brought; and after many arguments it was resolved by Sir Christoph. Wray, Sir Thomas Gawdy, and the whole Court of King's Bench, that the lease to Hoe should have several beginnings. And so this case was resolved by both Courts. And afterwards the same term in a case between Pollard and Alcocke in the Court of Wards, Wray, Chief Justice, clearly held, that if a man be seised of three acres of land in fee, and makes a lease of one acre to A. for life, of another acre to B. for life, and of the other to C. in tail, and afterwards by deed (reciting the said estates) covenants with his brother, that after all the said estates ended and determined, he and his heirs would stand seised of the said three acres to the use of his brother in tail, &c. That in this case presently by the death of B. the brother should have the acre leased to B. and should not tarry till all the estates, *scil.* the other estate for life, and the estate-tail be ended : but *reddendo singula singulis*, by the covenant the estate in the several acres should vest presently in the brother, and should take effect in possession, as the several estates in possession end or determine : which was granted by the whole Court. And in the case of Pollard, Wray cited and relied on the said case of Justice Windham. And afterwards the plaintiffs in the writ of error, perceiving the opinion of the Court, did not proceed in their writ of error (c).

[9 a] BRUDNEL'S CASE.

Trin. 34 Eliz.

In the King's Bench.

An administrator obtained judgment and died, his executors sued a *scire facias* on the judgment, and outlawed the defendant. Held the outlawry is erroneous. If a lease be made to A. during the life of several, upon the death of one of the *cestui que vies*, the estate is not determined, but A. shall have the land during the life of the survivor of them.

But if a man lease land for 100 years, if A. and B. shall so long live, if one die the lease is ended.

Also, if a freehold lease be made during the time that C. and D. shall be justices of the peace, &c. on failure of one of them to continue justice, the estate shall determine.

Qy. Whether an administration committed to one during the minority of four, is determined by the death of one, the others still being within age?

Thomas Brudnel, administrator of Anthony Rone, brought an action of debt on

(*f*) 1 Co. 76. a. 2 Co. 72. b. 8 Co. 95. b. 3 Keb. 288. 2 Jones, 69. 5 Co. 55. b. 1 Mod. Rep. 109. 2 Leon. 106. Cr. El. 199. Jenk. Cent. 272. Lit. Rep. 220. 2 Bulstr. 132.

(c) *Vid. Veal* v. *Roberts*, Cro. Eliz. 199. S. C. 2 Leon. 105. *Ayler* v. *Chep.*, Cro. Jac. 259. *Cook* v. *Gerrard*, 1 Saund. 180, and the cases cited there.

RESTATEMENT OF THE LAW
Second

TRUSTS 2d

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§§ 1–260

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vests in the transferor, and the transferee cannot thereafter by acceptance vest the title in himself. If, however, the trust is a testamentary trust in course of administration by a court, the court may allow him to withdraw his disclaimer. The court will not allow such withdrawal if it would be prejudicial to the interests of the beneficiaries.

f. Disclaimer in part. If a trustee manifests an intention to accept a trust in part and to disclaim in part, this will have the effect of an acceptance of the whole. If the trustee accepts the trust as to a part of the trust property, this is an acceptance of the trust of the whole trust property.

If two separate trusts are created and the same person is named as trustee of both, he may accept one and disclaim the other, unless a different intention of the settlor is manifested by the terms of the trust.

Unless a different intention of the settlor is properly manifested, if the same person is appointed both executor and trustee under a will, he may accept as executor and disclaim as trustee, and conversely he may disclaim as executor and accept as trustee.

If the trustee accepts the title to the trust property, this is an acceptance of the trust although the trustee at the same time states that he refuses to perform the trust. He cannot accept the property and disclaim as to the duties.

g. Effect of disclaimer. If the trustee disclaims, the effect of the disclaimer is to pass the title back to the transferor or his estate and retroactively to free the trustee of any liability as trustee to the beneficiary or as holder of the title to the trust property to any one. The trust, however, does not fail. See § 35.

§ 103. Death of One of Several Trustees

Upon the death of one of several trustees, the title to the trust property is in the survivors as trustees.

Comment:

a. Trustees as joint tenants. If there are two or more trustees, they hold as joint tenants. When one dies, the other or others hold the title to the trust property by survivorship.

Although in most of the States by statute joint tenancy is abolished or the presumption of a joint tenancy is abolished or

survivorship as between joint tenants is abolished, these statutes do not apply to trustees.

The rule stated in this Section is applicable where a corporation and an individual are co-trustees. If the individual trustee dies, the corporation becomes sole trustee.

b. On the question whether a new trustee will be appointed to take the place of the deceased trustee, see § 108, Comment *b*.

§ 104. Death Intestate of Sole Trustee

Upon the death intestate of a sole trustee, the title to the trust property passes subject to the trust, if realty, to his heir, and, if personalty, to his personal representative, unless it is otherwise provided by the terms of the trust or by statute.

Comment:

a. The common-law rule. Although the title to the trust property passes to the heir or administrator, he is not permitted to administer the trust unless by the terms of the trust he is so authorized. If he is not so authorized, a new trustee will be appointed. See § 108.

b. Statutory provisions. In many States it is provided by statute that on the death of a sole trustee the title to the trust property shall vest in a court or shall be suspended until a new trustee is appointed by the court.

§ 105. Death Testate of Sole Trustee

Upon the death of a sole trustee who has devised or bequeathed the trust property, the title to the trust property passes subject to the trust to the devisee or legatee, unless it is otherwise provided by the terms of the trust or by statute.

Comment:

a. The common-law rule. Although the title to the trust property passes to the devisee or legatee, he is not permitted to administer the trust unless by the terms of the trust he is so authorized. If he is not so authorized, a new trustee will be appointed. See § 108.

THE

LAW OF TRUSTS

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two trustees as tenants in common; but in that case there are in reality two trusts, each trustee holding an undivided interest in trust. Thus in *Livermore v. Livermore*[3] a testator left his estate to his four children in equal shares to be held by each of them during his life in trust to receive the income for his own use for life, and after his death the share of each child was to go to his issue. He gave the children a power of sale. The court said that the children were tenants in common, each holding an undivided quarter in trust for himself and his issue, and held that all the trustees together could make an effective conveyance of any part of the property.

In several states it is provided by statute that on the death, renunciation or discharge of one of several co-trustees, the trust survives to the others.[4]

The question whether on the death of one of several trustees a new trustee will be appointed to fill the vacancy is considered elsewhere.[5]

§ **103.1. Where a corporation and an individual are co-trustees.** An interesting question arises where property is conveyed inter vivos or by will to a corporation and an individual as joint trustees. At common law it was said that a corporation and an individual or two corporations could not hold property as joint tenants but only as tenants in common.[1] The notion was that since the corporation might have a life of unlimited duration there never could be survivorship in favor of the individual. This is not true, however, since the life of the corporation may be limited in duration or it may dissolve.

[3] 231 Mass. 293, 121 N.E. 27 (1918). Compare Boston Franklinite Co. v. Condit, 19 N.J. Eq. 394 (1869).

[4] *Alabama:* Code 1940, tit. 58, § 73. *California:* Civil Code, § 2288. *Idaho:* Code 1947, § 68-102. *Maine:* Rev. Stat. 1964, tit. 33, § 160. *Michigan:* Stat. Ann., § 27.3178 (302). *Montana:* Rev. Codes 1947, § 86-607. *North Dakota:* Cent. Code, § 59-02-21. *Ohio:* Rev. Code, § 219.27. *South Dakota:* Code 1939, § 59.0219. Compare Ore. R.S., § 93.190.

[5] See § 108.1.

As to the right of surviving trustees to exercise powers conferred upon the original trustees, see § 195.

§ **103.1.** [1] Co. Lit. 190a; 2 Saunders 716 (Williams ed. 1871).

See De Witt v. San Francisco, 2 Cal. 289 (1852); Moore Lumber Co., Inc. v. Behrman, 144 Misc. 291, 259 N.Y. Supp. 248 (1932), noted in 32 Colum. L. Rev. 749; Telfair v. Howe, 3 Rich. Eq. 235, 55 Am. Dec. 637 (S.C. 1851).

See Bank of America National Trust & Savings Association v. Long Beach Federal Savings & Loan Association, 141 Cal. App. 2d 618, 297 P.2d 443 (1956), holding that there may be a joint tenancy of the beneficial interest although some of the joint tenants are charitable corporations.

But compare American Bible Society v. Mortgage Guarantee Co., 217 Cal. 9, 17 P.2d 105 (1932).

At any rate, it was formerly held in England that since an individual and a corporation could not hold as joint tenants, and since trustees hold as joint tenants, an individual and a corporation could not be made co-trustees.[2] By an English statute enacted in 1899 it was provided that bodies corporate might hold as joint tenants with individuals.[3] After the enactment of this statute the English court held that where a person had power on the death of one of two trustees to appoint a successor trustee, he might name a corporate trustee to act as co-trustee with the survivor.[4] All this ancient and technical learning has been generally ignored in the United States; and there is no question that the not uncommon practice of naming a trust company and an individual as co-trustees is perfectly valid.[5] The two trustees can act as joint trustees as long as each of them is in existence and has not for any reason ceased to be trustee; and when the individual dies the corporation becomes sole trustee, and can continue to act as sole trustee unless it is otherwise provided by the terms of the trust.

§ **104. Death intestate of sole trustee.** At common law the rules governing the descent and distribution of property on the death of the owner were applied to property held in trust. If a sole trustee died, real property held by him in trust passed to his heir and personal property to his personal representatives.[1] Neither the heir nor the personal representatives, however, were authorized to administer the trust, unless it was otherwise provided by the terms of the trust.[2] They took the legal title to the property and held it not as express trustees but as constructive trustees. The court would appoint a new trustee and would compel a conveyance of the property by the heir or personal representatives to the trustee so named. All this was the result of the separate administration of law and equity.

[2] Law Guarantee & Trust Society v. Bank of England, 24 Q.B.D. 406 (1890).

[3] Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vict., c. 20.

[4] In re Thompson's Settlement Trusts, [1905] 1 Ch. 229.

[5] See Hofheimer v. Seaboard Citizens National Bank, 154 Va. 392, 896, 153 S.E. 656 (1931), *cert. denied*, 283 U.S. 855 (1931).
See 1 U. Chi. L. Rev. 629 (1934).
In Matter of Connolly, 158 Misc. 93, 285 N.Y. Supp. 126 (1935), where a testator named as co-trustees a trust company and his widow who was life beneficiary, the court held that it would not permit the corporate trustee to resign without the appointment of a new co-trustee. See § 108.1.

§ **104.** [1] See In re Crunden and Meux's Contract, [1909] 1 Ch. 690.

[2] Mortimer v. Ireland, 11 Jur. 721 (1847); In re Ingleby, 13 L.R. Ir. 326 (1883).

THE LAW
OF
TRUSTS AND TRUSTEES

A Treatise Covering the Law Relating to Trusts and Allied Subjects Affecting Trust Creation and Administration

WITH FORMS

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the benefits that the testator desired to give the beneficiaries could not be given them otherwise.[18]

The attitude of the common law courts toward deeds to trustees was probably influenced by the exception for the conveyance of equitable fees. Equitable estates in fee were allowed to be transferred by deed without use of formal words.[19] Hence an equitable fee might be vested in beneficiaries without the use of the word "heirs." Since the principal trust estate, the equitable or beneficial interests, could pass at common law without formality, it would seem logical to hold that the secondary trust estate, the representative or bare legal estate, even though a fee, could also pass without the use of "heirs." The equitable fee could, so to speak, carry the legal fee along with it because of its greater importance.

As previously stated, the estate or interest of the trustee may be of any type or size. It may, for example, be a contingent right or defeasible or subject to a condition,[20] or it may consist of a fractional or undivided interest in property.[21]

§ 145 Character of the trustee's holding—Joint tenancy

Individual Trustees as Joint Tenants

It is advantageous that co-trustees hold as joint tenants because of the nature of their powers and duties and the advantages of survivorship. As will be shown later,[1] trustees of a private trust are usually required to act unanimously. For purposes of administration they are regarded as a unit. This

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not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest."

[18]Fisher v. Fisher, 41 N.J. Eq. 16, 2 A. 608 (Ch. 1886); Blount v. Walker, 31 S.C. 13, 9 S.E. 804 (1889).

[19]Tringham's Trusts [1904], 2 Ch. 487; Holmes v. Holmes, 86 N.C. 205, 1882 WL 2756 (1882); Fulbright v. Yoder, 113 N.C. 456, 18 S.E. 713 (1893); Bratton v. Massey, 15 S.C. 277, 1881 WL 5899 (1881); Foster v. Glover, 46 S.C. 522, 24 S.E. 370 (1896); Hayward v. Ormsbee, 11 Wis. 3, 1860 WL 4568 (1860).

Contra: Nelson v. Davis, 35 Ind. 474, 1871 WL 5263 (1871); McElroy v. McElroy, 113 Mass. 509, 1873 WL 9148 (1873).

[20]Town of Franklin v. Gillespie, 157 Tenn. 78, 6 S.W.2d 323 (1928).

[21]Restatement Third, Trusts § 40 (2003).

[Section 145]

[1]See § 554, *post*.

result fits in very well with the theory of joint tenancy that, for certain purposes at least, there is a group or unitary holding.[2] It is almost universal, therefore, to construe grants to trustees as creating a joint tenancy between them, if a contrary intent is not otherwise expressed.[3]

The joint tenancy of trustees is not like the ordinary joint

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[2]*See generally* Restatement Third, Trusts § 34, cmt. d (2003) (also stating that if one co-trustee resigns or dies, the remaining co-trustees may act without appointment of a successor); Unif. Trust Code §§ 703, 704 and comments (same).

As to the features of joint tenancy, see American Law of Property §§ 6.1 to 6.4.

Where a testamentary trust created by a resident of New Jersey and administered in New Jersey named four trustees, one a trust company in New Jersey and three individuals who were residents of Pennsylvania, the latter were not subject to a personal property tax in Pennsylvania on three-fourths of the value of the trust intangibles. The trust was a unit and had a situs in New Jersey. In re Dorrance's Will, 333 Pa. 162, 3 A.2d 682, 127 A.L.R. 366 (1939). Cf. Greenough v. Tax Assessors of City of Newport, 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621, 172 A.L.R. 329 (1947) rehearing denied 332 U.S. 784 (trust property subject to tax on basis of one trustee's proportionate interest in the trust's intangibles having a situs in another state.)

When two or more persons are named as trustees in a trust instrument and one of them fails or ceases to be trustee for any reason, the remaining trustee may continue to act alone, even when the instrument authorizes the naming of a successor trustee, unless the instrument requires that the vacancy be filled. Rubinson v. Rubinson, 250 Ill. App. 3d 206, 190 Ill. Dec. 10, 620 N.E.2d 1271 (1st Dist. 1993).

[3]Parsons v. Boyd, 20 Ala. 112, 1852 WL 270 (1852); Webster v. Vandeventer, 72 Mass. 428, 6 Gray 428, 1856 WL 5698 (1856); Gray v. Lynch, 8 Gill 403, 1849 WL 3217 (Md. 1849); Jackson ex dem. Erwin v. Moore, 6 Cow. 706, 1827 WL 2295 (N.Y. Sup 1827).

Where three trustees held the trust property as joint tenants each did not own a pro rata share of stock held in the names of the trustees. Nor could constructive ownership be attributed to the trustees individually for federal income tax purposes. Rothenberg v. U.S., 233 F. Supp. 864, 64-2 U.S. Tax Cas. (CCH) P 9753, 14 A.F.T. R.2d 5759 (D. Kan. 1964), judgment aff'd, 350 F.2d 319, 65-2 U.S. Tax Cas. (CCH) P 9663, 16 A.F.T.R.2d 5591 (10th Cir. 1965).

Two persons decreed to be constructive trustees are joint tenants, so that the successors of one who died are not necessary parties to an action to compel the transfer of the property. Pierce v. Smith, 253 Mich. 45, 234 N.W. 162 (1931).

While joint tenancy has generally been abolished in Washington, an exception is made of property conveyed to trustees. Wash. Rev. Code § 64.28.020(1). And see statutes cited in n. 51.

See also Colo. Rev. Stat. Ann. § 38-31-101(3).

tenancy of persons who hold property for their own benefit. The latter owners may partition and each may sell his interest and change the relationship into a tenancy in common.[4] In the ordinary case, however, trustees have no power to partition the trust property and sever the trust[5] by a conveyance or other action. Their powers are confined to joining with their cotrustees in conveying the whole estate or a part of it.[6]

The power which a settlor has to mold the trust to his individual taste no doubt enables him to vest an estate in trustees as tenants in common,[7] or to change their usual rights and powers as joint tenants.[8]

The settlor can provide for successors to the original trustees,[9] but upon assuming office a successor named by the settlor normally holds the trust property in joint tenancy with the other trustees.[10]

To make the trustees tenants in common and not joint tenants would be to abolish survivorship among them and thus indirectly provide for successorship. While ordinarily this would be undesirable, there seems to be no reason why a settlor may not do so. It is probable also that a settlor could give each of several trustees a power to partition the trust, either by direct action or by conveyance of a share in the property to a successor trustee. Such provisions, however, would be unusual.

Corporation as Joint Tenant

The common law theory was that a corporation could not be a joint tenant because it customarily had perpetual life. Hence there could generally be no survivorship in another with whom the corporation was joined.[11] This disability of

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[4]American Law of Property § 6.20.

[5]Baldwin v. Humphrey, 44 N.Y. 609, 1871 WL 9644 (1871).

[6]See § 1002, *post*.

[7]Saunders v. Schmaelzle, 49 Cal. 59, 1874 WL 1441 (1874).

[8]See § 542, *post*.

[9]Unif. Trust Code § 704; *see generally* Restatement Third, Trusts § 34 and comments.

[10]*See generally* Restatement Third, Trusts § 34, cmt. d and Reporter's Note (2003).

[11]Law Guaranty Soc. v. Bank of England, 24 Q.B.Div. 406.

Herbert T. Tiffany and Basil Jones, The Law of Real Property § 423 (3rd ed.).

the corporation has been abolished in England by statute.[12] In the United States, where a trust company or bank is made co-trustee with an individual, it is usual to provide in the trust instrument for survivorship in the corporate trustee. If such a provision is not made, and the ancient law with regard to the inability of corporations to act as joint tenants is deemed to be still in force,[13] the corporate and private trustees will be tenants in common. Upon the death of the natural person, in the absence of statute, title to a half interest will pass to the representatives of the deceased trustee. A progressive court might well hold that the ancient disability of the corporation to be a joint tenant was dependent on reasons that are no longer important in modern society, and that a corporation may be a joint tenant as a trustee.[14]

Statutes on Joint Tenancy and Trustees

Many states' joint tenancy statutes either abolish it entirely, or exclude from it the feature of survivorship, or create a presumption against joint tenancy and in favor of tenancy in common. Under the more modern rule the statutes provide that a joint tenancy is created by a transfer to trustees.[15]

In a number of states the statutes regarding successor

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[12]Bodies Corporate Act, 62 & 63 Vic. c. 20.

And see In re Thompson's Settlement Trusts [1905], 1 Ch. 229.

[13]See De Witt v. City of San Francisco, 2 Cal. 289, 1852 WL 566 (1852); Moore Lumber Co. v. Behrman, 144 Misc. 291, 259 N.Y.S. 248 (Mun. Ct. 1932); Telfair v. Howe, 3 Rich.Eq. (S.C.) 235 (1851).

[14]A corporation can be a joint tenant with an individual, even though the doctrine of survivorship does not fully apply. Bank of America Nat. Trust & Sav. Ass'n v. Long Beach Federal Sav. & Loan Ass'n, 141 Cal. App. 2d 618, 297 P.2d 443 (2d Dist. 1956).

An individual and a trust company were named as co-trustees of testamentary trusts. No provision was made in the will in the event the individual trustee died or resigned during the existence of the trusts. The court held that where by law a trust company was capable of holding trust property in the same manner as a legally qualified individual, the trust company became sole trustee by right of survivorship upon the death of the individual trustee. Bank of Delaware v. Bancroft, 269 A.2d 254 (Del. Ch. 1970), **citing text, § 145.**

[15]Alaska Stat. § 34.15.110; Ariz. Rev. Stat. Ann. § 33-431; Cal. Civ. Code § 683; Colo. Rev. Stat. Ann. § 38-31-101; Del. Code Ann. tit. 25, § 701; D.C. Code § 42-516; Haw. Rev. Stat. Ann. § 509-1; Idaho Code § 55-508; 765 Ill. Comp. Stat. Ann. 1005/2; Ind. Code § 32-17-2-1; Iowa Code Ann. § 557.15; Ky. Rev. Stat. Ann. § 381.130; Me. Rev. Stat.

trustees expressly provide for survivorship among multiple trustees.[16]

In a number of states following the New York statutory system of trusts, statutes provide that the trustee of an express trust takes the whole estate, and the beneficiaries take no estate or interest.[17] The construction of these statutes will be discussed in considering the nature of the interest of the beneficiary.[18]

§ 146 Trustee's interest—Creditors—Dower and curtesy

The trustee's interest is a bare legal interest, not entitling him to any benefit or profit from the trust property. This interest cannot be taken for the benefit of his creditors. The beneficial equitable interest is in the beneficiary and the creditors of the trustee cannot attach or garnish that interest.[1] On the death of the trustee the trust assets do not

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Ann. tit. 33, § 160; Mass. Gen. Laws Ann. ch. 184, § 7; Mich. Comp. Laws § 554.45 (real property); Minn. Stat. Ann. § 500.19(2); Miss. Code Ann. § 89-1-7 (presumption in favor of tenancy in common excludes devises or conveyances in trust); Mo. Rev. Stat. Ann. § 442.450; Mont. Rev. Code Ann. § 70-1-307; Nev. Rev. Stat. Ann. §§ 111.060, 111.065; N.J. Stat. Ann. 3B:11-3; N.Y. Est. Powers & Trusts Law § 6-2.2; N.C. Gen. Stat. Ann. § 28A-13-5; Or. Rev. Stat. Ann. §§ 93.190, 93.200; S.D. Codified Laws § 43-2-12; Va. Code Ann. § 55-21 (treats a joint tenant as a tenant in common, does "not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to others"); Wash. Rev. Code § 64.020; W.Va. Code § 36-1-20.

[16]760 Ill. Comp. Stat. Ann. 5/13; N.J. Stat. Ann. 3B:14-1; Wis. Stat. Ann. § 701.17.

And see § 6(b) of the Uniform Trustees' Powers Act, as follows:

> (b) If 2 or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

For adoptions of this Act, see § 551, *post*.

[17]Mich. Comp. Laws Ann. § 555.16; Mont. Rev. Code Ann. § 72-36-206; N.Y. Estate Powers & Trusts Law § 7-2.1; S.D. Codified Laws § 43-10-14; Wis. Stat. Ann. § 701.05.

[18]See § 184, *post*.

[Section 146]

[1]Equitable Trust Co. of New

THE LAW

OF

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By HERBERT THORNDIKE TIFFANY

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By BASIL JONES

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CHAPTER 9

CO-OWNERSHIP

§ 417. Co-ownership of lands or estates.

While, as a general rule, lands or estates therein are held by one person in severalty, that is, in his own right only, without any other person being joined or connected with him in the ownership, this is not necessarily the case, and two or more persons may have undivided interests in the land; the common characteristic of all such interests being that the owners have no separate rights as regards any distinct portion of the land, but each is interested, according to the extent of his share, in every part of the whole land.[1] Such co-ownership bears different names, and presents different characteristics, according to the various methods and circumstances of its creation. Each of the various forms of co-ownership will be here considered separately, and subsequently some characteristics common to two or more of them will be considered.

[1] See 2 Blackst. Comm. 179; 2 Cruise, Dig. tit. 18, c. 1, § 1; Digby, Hist. Real Prop. (4th Ed.) p. 274.

Not infrequently co-ownership occurs in connection with rights and possibilities of future possession, as when land is limited by way of remainder [2] or executory interest in favor of two or more persons, or of a class of persons. Such a mode of co-ownership, however, calls for no particular comment as regards the undivided character of the individual interests, and we will in this chapter restrict our consideration of co-ownership to the cases in which it involves, or may involve, a co-possession of the land.

§ 418. Joint tenancy—Nature and requisites.

In the case of a joint tenancy all the tenants have together, in the theory of the law, but one estate in the land and this estate each joint tenant owns conjointly with the other cotenants. All the joint tenants, whether only two or more than two, constitute for some purposes but one tenant, or, as it has been more specifically stated, each joint tenant is regarded as the tenant of the whole for purposes of tenure and survivorship, while for purposes of alienation and forfeiture each has an undivided share only.[3]

In a joint tenancy there are said by Blackstone to be four unities, to wit, unity of interest, unity of title, unity of time, and unity of possession, or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.[4] Of these unities, only the unity of possession exists in all forms of co-ownership.[5]

[2] See Mundhenk v. Bieric, 81 Ind. App. 85, 135 N. E. 493.

[3] Co. Litt. 186a; 1 Preston, Estates, 136; 4 Kent, Comm. 360, note (a); Challis, Real Prop. 368. See, particularly, the exceedingly learned notes by William Green, Esq., in Wythe's Va. Rep., Appendix, pp. 361, 391.

This is apparently the meaning of the statement in the books that each tenant holds "per my et per tout," whether "my" means "half," or whether it means "nothing,"—a matter on which there has been a conflict of opinion. See 2 Blackst. Comm. 182; note in Wythe's Va. Rep. Appendix at p. 393; note in 7 Com. Bench Rep. at p. 455; Challis, Real Prop. (3rd Ed.) 367.

[4] 2 Blackst. Comm. 180; Siberell v. Siberell, 214 Cal. 767, 7 P. (2d) 1003, citing Tiffany, Real Prop. (2nd Ed.) § 191; Liese v. Hentze, 326 Ill. 633, 158 N. E. 428.

It is said by Mr. Challis that this theory of the four unities has perhaps attracted attention rather by reason of its appearance of symmetry and exactness than by reason of its practical utility, and that it means merely that each joint tenant stands in all respects in exactly the same position as each of the others, and anything which creates a distinction either severs the tenancy or prevents it from arising. Challis, Real Prop. 367.

[5] And even unity of possession, as before suggested, may not exist, as in the case of co-owners in remainder.

The unity of interest refers to the necessity that all the tenants have interests of the same duration, and accordingly one cannot be joint tenant for life and another joint tenant for years; one cannot be joint tenant in fee simple and the other joint tenant in tail. This requirement is a result of the theory that together they have but one estate.[6] However, it has to do with the interests created by the instrument creating the joint tenancy, and is not violated merely because the relative rights of the joint tenants to dispose of their partial interests may differ in certain respects by reason of dower or other rights and limitations resulting from the independent operation of law.[7]

The requirement of unity of time involves a necessity that the interests of all the joint tenants vest at the same time. Thus, at common law, if a conveyance was made to A for life with remainder to the heirs of B and C, and during the continuance of the particular estate B and C die at different times, the heir of B and the heir of C cannot be joint tenants, since their interests do not vest at the same time.[8] The requirement of unity of time has been regarded as not applicable, when the limitations can be regarded as taking effect by way of use,[9] the theory being apparently that in such a case the whole property passes out of the grantor at one time, vesting in the donee who is first ascertained or becomes capable, to be divested out of him, as regards an undivided interest or interests, by way of shifting use, in favor of the donee or donees subsequently ascertained or becoming capable. And a like view has been taken as

[6] Co. Litt. 188a; 2 Cruise, Dig. tit. 18, c. 1, §§ 12–15; 2 Blackst. Comm. 181; 4 Kent, Comm. 357.

An estate may, however, be limited to two persons in joint tenancy for less than a fee, as for their lives, with remainder to one of them in fee, in which case, if he who has the fee dies first, the survivor, by right of survivorship, has the whole property for the balance of his life, or they may have a joint tenancy for their lives, with several inheritances. 2 Blackst. Comm. 181, and Chitty's note; Litt. §§ 283, 285; Co. Litt. 188a; 4 Kent, Comm. 357; 24 Halsbury's Laws of England, 202 note.

[7] Thus, where a wife conveys to her husband a half-interest in her property with the expressed intention of creating a joint tenancy, the fact that she can convey her interest at will, while he cannot convey his interest free from her dower right without her consent does not prevent the estate so created from being a joint tenancy. In re Horler's Estate, 180 App. Div. 608, 168 N. Y. Supp. 221.

[8] Co. Litt. 188a; 2 Blackst. Comm. 181. See Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327, 62 A. L. R. 511.

[9] Samme's Case, 13 Co. Rep. 56; Hales v. Risley, Pollexf. 373; Sugden's Gilbert on Uses, 135 note 10; 2 Preston, Abstracts, 67.

regards a gift to two or more persons by will, the divesting in that case taking place by way of executory devise.[10] At common law, on the other hand, the different moieties must pass out of the grantor at different times in order to vest in the grantees at different times.

Since joint tenants in theory have together but one estate, they both necessarily have the same amount of interest. For instance, one joint tenant cannot have a one-fourth interest and the other a three-fourths interest. It is ordinarily, however, inequitable that they should have the same beneficial interests if they contribute unequally to the payment of the purchase price, and accordingly it is the rule in England that while they hold the legal title in equal shares, there is a resulting trust to each in proportion to his contribution.[11] In this country the question does not appear to have been the subject of decision.

§ 419. — The doctrine of survivorship.

The leading characteristic of joint tenancy is the fact that, on the death of one joint tenant, the other joint tenant or tenants who may survive him, if it is an estate of inheritance, have the whole estate. Thus, if there are three joint tenants, on the death of one the two survivors have the whole, and, on the death of one of these survivors, the last survivor has the whole, and, on the death of this last survivor, the whole passes to his heirs, or to his personal representatives, if it is a leasehold estate.[12] This doctrine of survivorship appears to be the result of, or at least associated with, the theory that the joint tenants together own but one estate, a theory which, rigidly applied, would recognize no distinct interest in one to pass on his death to his heirs or devisees, his claim being, as against the others, merely extinguished in that case. The survivor takes no new title by survivorship, but holds under the deed by virtue of which he was originally seized of the whole.[13]

[10] 2 Jarman, Wills, 118; Fearne, Cont. Rem. 313; Oates v. Jackson, 2 Strange 1172; Kenworthy v. Ward, 11 Hare 196.

[11] See Lewin, Trusts, (12th Ed.), 186, citing Lake v. Gibson, 1 Eq. Cas. Abr. 291; Rigden v. Vallier, 3 Atk. 291.

[12] Litt. § 280; 2 Blackst. Comm. 183; 4 Kent, Comm. 360. See also 33 Corpus Juris, 903.

[13] Smith v. Douglas County, Neb., 254 Fed. 244; Palmer v. Mansfield, 222 Mass. 263, 110 N. E. 283, L. R. A. 1916C 677.

See Washburn, Real Prop. (6th Ed.) § 912.

"Joint tenancy arises under the common law, and the doctrine of survivorship thereunder grows out of the application of common-law principles wholly independent of statute. Joint

The right of the survivor to succeed to the interest of a deceased joint tenant takes precedence of any devise made by the latter,[14] nor can it usually be affected by any charge placed by the latter on his interest, or by a grant by him of a right of use or profit.[15] It may, however, be destroyed at the option of either joint tenant by a "severance" of the tenancy, as hereafter explained.[16]

In some states the doctrine or incident of survivorship has been expressly abolished by statute.[17]

tenants hold under the conveyance or instrument by which the tenancy is created." Attorney General v. Clark, 222 Mass. 291, 110 N. E. 299, L. R. A. 1916C 679, Ann. Cas. 1917B 119. See also In re Harris, 169 Cal. 725, 147 Pac. 967.

This question has been of great importance in recent years by reason of state and federal succession taxes. As this turns upon the construction of the various tax statutes rather than upon the law of real property, it is not within the scope of this work. Reference may be had to Hughes, Federal Death Tax, § 34 et seq., and to the decisions collected in 84 A. L. R. 180; 61 Corpus Juris, p. 1649, § 2448. See also Tyler v. United States, 281 U. S. 497, 74 L. Ed. 991, 50 Sup. Ct. 356, 69 A. L. R. 758.

14 Litt. § 287; Co. Litt. 185b; 4 Kent, Comm. 358; Wilkins v. Young, 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032, 7 L. R. A. (N. S.) 701; Duncan v. Forrer, 6 Binn. 193; Swift v. Roberts, 1 Wm. Bl. 467, 2 Ambl. 617.

However, the will of a surviving joint tenant made during his cotenant's life will pass the property theretofore held in joint tenancy without the necessity of a republication, provided the terms of the will are broad enough to include it. Eckardt v. Osborne, 338 Ill. 611, 170 N. E. 774, 75 A. L. R. 509.

15 Co. Litt. 185a; 4 Kent, Comm. 360; 2 Cruise, Dig. tit. 18, c. 1, §§ 53–56; Freeman, Cotenancy, § 14.

16 See § 425.

17 3 Sharswood & B. Lead. Cas. Real Prop. 15; Freeman, Cotenancy, § 35; 1 Dembitz, Land Titles, § 27, p. 197.

Apparently this is true in Ohio, except where survivorship is definitely contracted for. See In re Hutcheson's Estate, 120 Ohio St. 542, 550, 166 N. E. 687; Foraker v. Kocks, 41 Ohio App. 210, 180 N. E. 743.

In North Carolina the statute abolishing survivorship has been construed not to apply to a gift to two or more persons for life. Powell v. Allen, 75 N. C. 450.

In Pennsylvania, such a statute is held to apply only in so far as the language of the devise or conveyance fails to indicate an intention to create a right of survivorship. Jones v. Cable, 114 Pa. St. 586, 7 Atl. 791; In re McCallum's Estate, 211 Pa. 205, 60 Atl. 903. In the latter state, in spite of the statute, a gift to two persons expressly as joint tenants and not as tenants in common has been regarded as sufficiently showing an intention to give a right of survivorship. Redemptorist Fathers v. Lawler, 205 Pa. 24, 54 Atl. 487. Occasionally a gift in terms to two persons, with a provision that "after their death" the land should pass to another, has been regarded as showing an intention to create a right by

§ 420. — Failure of gift to one joint tenant.

Somewhat analogous to the doctrine of survivorship, and like it based on the theoretical nature of a joint tenancy, is the rule that in the case of a devise to two or more persons, in such form or under such circumstances as otherwise to make them joint tenants, if it is ineffective as to one by reason of his death or incapacity to take, or for some other reason, the devise is effective in favor of the other person or persons, as to the entire subject of the gift, they taking the whole.[18] And the same rule applies in the case of a conveyance inter vivos to two or more persons as joint tenants, which is for any reason not effective in favor of one of such persons.[19]

Statutes, such as have been adopted in a number of states, doing away with survivorship as an incident of joint tenancy, can evidently not be regarded as doing away with joint tenancy itself. Occasionally, however, such a statute has been regarded as applying in case of the death of one of the persons named, even when it occurs before the death of the testator,[20] but the contrary view, which has also been judicially asserted,[21] appears to be preferable

way of survivorship as between such persons, within the exception to the operation of the statute, the survivor having the possession until his death. Kerr v. Vernon, 66 Pa. St. 326; Jones v. Cable, 114 Pa. St. 586, 7 Atl. 791; Lazier v. Lazier, 35 W. Va. 567, 14 S. E. 148. And see McCallister v. Folden, Assignee, 110 Ky. 732, 62 S. W. 538.

In Connecticut, without the aid of any statutory provision, the courts have refused to recognize a right of survivorship. Houghton v. Brantingham, 86 Conn. 630, 86 Atl. 664. If the right is to be joined to the estate it must be done by a definite provision. State Bank & Trust Co. v. Nolan, 103 Conn. 308, 130 Atl. 483.

In Oregon, the doctrine of survivorship has never obtained, except as to trustees and executors. Stout v. Van Zante, 109 Ore. 430, 220 Pac. 414.

18 **Connecticut.** Rockwell v. Swift, 59 Conn. 289, 20 Atl. 200.

Maryland. Craycroft v. Craycroft, 6 Harr. & J. 54.

Massachusetts. Jackson v. Roberts, 14 Gray 546.

New York. Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

South Carolina. Ball v. Deas, 2 Strobh. Eq. 24, 49 Am. Dec. 651.

Vermont. Gilbert v. Richards, 7 Vt. 203.

England. Humphrey v. Tayleur, 1 Ambl. 136.

19 McCord v. Bright, 44 Ind. App. 275, 87 N. E. 654; Overton v. Lacy, 6 T. B. Mon. (Ky.) 13, 17 Am. Dec. 111; Shelly's Case, 1 Co. Rep. 93b, 101a; Davies v. Kempe, Carter 5, Orl. Bridgm. 386; Sheppard's Touchstone (Preston's Ed.) 71, 82, 235; and the numerous authorities cited in Wythe's Va. Rep. Appendix at pp. 373–375.

20 Coley v. Ballance, Winston's Eq. (N. C.) 89; Kennedy's Appeal, 60 Pa. St. 511; Yard's Appeal, 86 Pa. St. 125; Strong v. Ready, 9 Humph. (Tenn.) 168.

21 Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; Lockhart

on principle. The common-law rule that, in case one of those to whom a devise is made as joint tenants, dies before testator, the survivors take the whole, involves the application, not of the doctrine of survivorship, but, as above indicated, of a general rule, based on the theoretical nature of the tenancy, that if one of the joint devisees fails to take, for any cause whatsoever, the others take the whole.[22]

§ 421. — Creation.

The common-law judges, though not perhaps at first,[23] at a quite early period commenced to favor joint tenancy as against tenancy in common, with the result that, by a conveyance to two or more persons, with nothing to indicate a contrary intention, a joint tenancy was regarded as created. This leaning in favor of joint tenancy would seem to indicate a desire to lessen the feudal burdens of the tenants, since only one suit and service was due from all the joint tenants,[24] and on the death of one joint tenant the other acquired his share free from the burdens in favor of the lord which ordinarily accrued on the death of the tenant of land.[25] With the practical abolition of tenures, however, the reason for such policy ceased, and thereafter courts of equity, regarding the right of sur-

v. Vandyke, 97 Va. 356; Hoke v. Hoke, 12 W. Va. 427.

22 This appears to be conclusively demonstrated by Mr. Green, in the Appendix to Wythe's Va. Rep.

In holding that the Virginia statute abolishing survivorship does not apply until the estate in joint tenancy has vested, the court, in Lockhart v. Vandyke, 97 Va. 356, 33 S. E. 613, quoted 2 Minor Inst. 1049 as follows: "The general doctrine at common law is that a devise lapses in all cases where the devisee dies before the testator. And if the devise be to several, as tenants in common, and one of them dies in the testator's lifetime, his share does not lapse, but survives; for, although such joint devisees are not joint tenants until the testator's death, yet the gift to them is a gift per my et per tout, and so, if one should die, whereby, as he has nothing separately, his interest ceases to exist, the other or others are entitled to the whole, as at first, but with no one to share it with them. And, as the parties have not become joint tenants, the statute abolishing survivorship does not apply."

23 The early law appears to have been uncertain. See Wythe's Va. Rep. Appendix at p. 377 and anonymous article in 13 Sol. Jour. at p. 885.

24 Co. Litt. 70b; 2 Co. Inst. 34; 2 Blackst. Comm. 193; Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334, citing Tiffany, Real Prop. (2nd Ed.) § 191.

25 See Butler v. Archer, Owen 152; Fisher v. Wigg, 1 Salk. 390; 13 Sol. Jour. at p. 885; Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334, citing Tiffany, Real Prop. (2nd Ed.) § 191.

vivorship as productive of injustice, in making no provision for posterity, showed a disposition to lay hold of any indication of intent in order to construe an instrument as creating a tenancy in common, and not a joint tenancy.[26] The same position has been taken by the courts generally in this country.[27] In spite, however, of the prejudice on the part of the courts against joint tenancies, in the absence of any statutory provision on the subject existing at the date of the instrument in question, a conveyance or devise to two or more will ordinarily create a joint tenancy if there are no words indicating an intention that they shall take separate interests.[28]

If land be given to two persons and the heirs of their two bodies, and they be persons who may possibly intermarry, they would have, at common law, an estate in fee tail special, which will, upon the death of either, be enjoyed by the survivor during his or her life, and upon his or her death will, in case they intermarry, pass to the heirs of their two bodies.[29] On the other hand, if the donees are persons who cannot possibly marry, as being of the same sex, or as being nearly related, it will be assumed that by the expression "heirs of their two bodies," was meant the heirs of the body of

[26] 2 Blackst. Comm. 180, Chitty's note; 4 Kent, Comm. 361; 2 Cruise, Dig. tit. 28, c. 1, §§ 33–37; 2 Jarman, Wills, 1123; Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334, citing Tiffany, Real Prop. (2nd Ed.) § 191; Martin v. Smith, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; Lake v. Craddock, 3 P. Wms. 158; Jolliffe v. East, 3 Brown Ch. 25; Rigden v. Vallier, 2 Ves. Sr. 258. See editorial note in 23 Harv. Law Rev. 214.

[27] **Kansas.** Noble v. Teeple, 58 Kan. 398.

Kentucky. Barclay v. Hendrick's Heirs, 3 Dana 378.

New York. Westcott v. Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306.

Pennsylvania. Caines v. Grant's Lessee, 5 Binn. 120.

South Carolina. Telfair v. Howe, 3 Rich. Eq. 235, 55 Am. Dec. 637.

[28] **California.** Greer v. Blanchar, 40 Cal. 194.

District of Columbia. Seitz v. Seitz, 11 App. D. C. 358.

Illinois. Stukis v. Stukis, 316 Ill. 115, 146 N. E. 530; Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334, citing Tiffany, Real Prop. (2nd Ed.) § 191.

Kansas. Noble v. Teeple, 58 Kan. 398.

Kentucky. Barclay v. Hendrick's Heirs, 3 Dana 378. And see Powell v. Powell, 5 Bush. 619.

North Carolina. Campbell v. Herron, 1 Conf. R. 291.

Pennsylvania. Martin v. Smith, 5 Binn. 16.

South Carolina. Young v. De Bruhl, 11 Rich. L. 638.

Virginia. Lockhart v. Vandyke, 97 Va. 356, 33 S. E. 613.

[29] Co. Litt. 20b, 25b; Bac. Abr. Joint Tenants (G.); Edwards v. Champion, 3 De G., M. & G. 202, 215.

each, with the result that upon the death of the survivor, the heir or heirs of the body of each will have a moiety as tenant in tail, the joint tenancy giving place to a tenancy in common.[30] In the case, likewise, of inability of the two donees to intermarry, if the gift is in terms to them and their heirs, or to them and the heirs of each of them, the gift has been construed as one to the two donees as joint tenants for life, with remainder to their heirs general as tenants in common.[31] In so far as in any jurisdiction tenancy in common is substituted for joint tenancy, without any statutory change in regard to estates in fee tail, the donees would, under gifts such as those above referred to, take as tenants in common, but otherwise, it seems, the operation of the gift would be similar to its operation at common law.

In the case of a conveyance or devise to A and B and to the survivor of them, the tendency has been to regard the language used as showing an intention to create a cotenancy in A and B for their lives, with a contingent remainder in favor of the survivor,[32] unless words

30 Litt. § 283; Williams, Real Prop. (21st Ed.) 137; Fearne, Cont. Rem. 36.

31 Wilson v. Atkinson, [1892] 3 Ch. 1, discussed in 6 Harv. Law Rev. at p. 321.

At common law, if land is given to two persons for their lives, and after their deaths to the heirs or heirs of the body of one of them, the latter has a fee simple or fee tail by force of the Rule in Shelley's Case, while the former has merely a life estate. The former has, however, as joint tenant, a right of possession, after the death of the other, for the balance of his own life. Litt. § 285; Co. Litt. 184a; Breed v. Osborne, 113 Mass. 318; Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910. A like view has been applied when the gift was to husband and wife and after their deaths to the heirs of one of them, a tenancy by the entireties being created, however, instead of a joint tenancy. Den v. Hardenburgh, 10 N. J. L. 42; Kimble v. Mayor & Common Council of City of Newark, (N. J. Eq.) 102 Atl. 637. See also Graham v. Sinclair, 83 Ind. App. 58, 147 N. E. 634.

32 **United States.** Apgar v. Christophers, 33 Fed. 201.

Illinois. Mittel v. Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655.

Kentucky. Ewing's Heirs v. Savary, 3 Bibb. 235.

Massachusetts. See Bowditch v. Attorney General, 241 Mass. 168, 134 N. E. 796, 28 A. L. R. 713.

Michigan. Schulz v. Brohl, 116 Mich. 603, 74 N. W. 1012; Jones v. Snyder, 218 Mich. 446, 188 N. W. 505 (holding that in such case a conveyance of his interest by one of the joint tenants passed nothing after his death where he did not survive the other joint tenant).

New Jersey. Hannon v. Christopher, 34 N. J. Eq. 459.

Ohio. Lewis v. Baldwin, 11 Ohio 352.

Pennsylvania. Arnold v. Jack, 24 Pa. St. 57.

England. Vick v. Edwards, 3 P.

of inheritance, used as applying to both A and B, or other circumstances, indicate an intention to create a fee simple in each.[33] In either case, at common law, A and B would take as joint tenants, but the statutes creating a presumption in favor of tenancy in common would tend to prevent this result,[34] and any rights accruing by reason of survivorship would be based on the express limitation in favor of the survivor. By reason, moreover, of the modern statutes creating a presumption in favor of the passing of a fee simple rather than a life estate, language which at common law made A and B joint tenants for life with remainder to the survivor, might occasionally be regarded as making them tenants in common in fee simple, subject to cross executory limitations between them, that is, with a limitation over, as to the moiety of A, in favor of B, in case of A's death before B, and a like limitation over in favor of A, as to B's moiety, in case of B's death before A.[35]

A conveyance by a husband and wife of property owned by the wife to themselves cannot create an estate in joint tenancy, but is effective to convey the husband an undivided half interest in the property, even though the deed declares that it is intended to convey a joint tenancy, and not a tenancy in common.[36] However, it has been held that a joint tenancy may be created in such a manner where the statutes provide that an owner may convey to himself jointly with another and that conveyances between husband and wife shall be valid to the same extent that they would be if they were sole.[37]

§ 422. — Joint disseisors.

At common law, if two or more persons disseise another to their own use, the disseisors are joint tenants,[38] and so it would seem that, at the present day, if two persons acquire land by adverse posses-

Wms. 372; Re Harrison, 3 Anst. 836; Quarm v. Quarm, [1892] 1 Q. B. 184.

33 Oakley v. Young, 2 Eq. Cas. Abr. 537 pl. 6; Doe d. Young v. Sotheron, 2 B. & Ad. 628.

34 See Cheney v. Teese, 108 Ill. 473.

As to creation under statutes regulating joint tenancies, see § 424.

35 See Rowland v. Rowland, 93 N. C. 214.

36 Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327, 62 A. L. R. 511.

37 Ames v. Chandler, 265 Mass. 428, 164 N. E. 616; In re Vandergrift's Estate, 105 Pa. Super. Ct. 293, 161 Atl. 898 (estate by entirety); Lawton v. Lawton, 48 R. I. 134, 136 Atl. 241.

See also Edmonds v. Commissioner of Internal Revenue, 90 F. (2d) 14; 37 Yale Law Jour. 682.

38 Litt. § 278; Co. Litt. 181a.

sion, they hold as joint tenants,[39] unless there are special circumstances in the case to show that their interests are several.[40] To a case of title thus acquired by adverse possession, a statutory provision that a conveyance or devise to two or more persons shall prima facie create tenancy in common can obviously have no application.[41]

§ 423. — Corporate incapacity as joint tenant.

It is a rule of the common law that an individual and a corporation cannot be joint tenants, and that consequently a transfer to them will make them tenants in common. For this there appear to be two reasons: firstly, that as a corporation has perpetual succession, there is no mutual right of survivorship,[42] and, secondly, that the legal ownership of a natural person, which passes to his heirs or to his personal representatives, is so essentially different from the legal ownership of a corporation with perpetual succession that the two interests are incapable of coalescing in the manner necessary for the creation of a joint tenancy.[43] This rule would seem to be of some practical importance at the present day, by reason of the tendency to regard trustees as joint tenants rather than tenants in common,[44] and the not infrequent usage of appointing an individual and a trust company as joint trustees.

Not only is a corporation without capacity to take as joint tenant with an individual, but it appears to be without capacity to take as joint tenant with another corporation.[45] It is so stated by early writers,[46] as regards corporations sole, with a somewhat obscure explanation, that there is, in the case of different corporations of that character, such a diversity of right and capacity as necessarily to exclude the identity of interest essential to joint tenancy.

39 Putney v. Dresser, 2 Metc. (Mass.) 586; Ward v. Ward, 6 Ch. App. 789. See also 33 Corpus Juris, 904, n. 57.

40 Smith v. Savage, [1906] 1 Ir. Rep. 469 (beneficiaries under a trust, who take possession as equitable tenants in common, and hold for the limitation period, acquire title as tenants in common).

41 Putney v. Dresser, 2 Metc. (Mass.) 586.

42 2 Williams' Saunders at p. 319, note (4) to Bennet v. Holbech; Law Guarantee, etc., Society v. Bank of England, 24 Q. B. Div. 406. See also Fleming v. Fleming, 194 Iowa 71, 174 N. W. 946.

43 See authorities last cited, and also 2 Blackst. Comm. 184.

44 See § 425.

45 Dewitt v. City of San Francisco, 2 Cal. 289; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637. See Fletcher Cyc. Corp. (Perm. Ed.) § 2816.

46 Litt. § 296; Co. Litt. 190a.

§ 424. — Statutory regulations.

In pursuance of the same policy as that of the courts in hostility to joint tenancy, it has been provided by statute in many states that a conveyance or devise to two or more persons shall create a tenancy in common, and not a joint tenancy, unless a contrary intent is plainly apparent, or, in some states, is expressly declared.[47] In some states, the legislature has entirely abolished joint tenancy, making what would have been a joint tenancy at common law a tenancy in common.[48] As has been seen heretofore, in some jurisdictions the doctrine of survivorship has been abolished by statute.[49]

In some states, the statutes abolishing joint tenancy, or restricting the cases in which such tenancy may arise, have been held not to apply in the case of conveyances or gifts to two or more trustees, since it is desirable that they hold as joint tenants, rather than as tenants in common, so that a division of the legal title upon the death of one may be avoided,[50] and a provision to this effect is frequently contained in the statute.[51]

In states in which the statute provides that a conveyance or devise to two persons shall not create a joint tenancy unless an intention so to do is expressly declared, the terms of the grant or devise must negative the presumption arising from the statute that the intention is to create a tenancy in common.[52] However, it is not neces-

[47] 4 Kent, Comm. 361; 3 Sharswood & B. Lead. Cas. Real Prop. 21; 1 Stimson's Am. St. Law, § 1371(B); Freeman, Cotenancy, § 35.

The English Law of Property Act of 1925 (15 Geo. V. c. 5, § 1, [6]) provides that "a legal estate is not capable of subsisting or of being created in an undivided share in land." It further provides that where "land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall . . . operate as if the land had been expressed to be conveyed to the grantees, or, if there are more than four grantees, to the first four named in the conveyance, as joint tenants upon the statutory trusts" thereinafter mentioned. (§ 34.) Such land is held "upon trust to sell the same and stand possessed of the net proceeds." (§ 35.) See 15 Halsb. Stats. of Eng. 211–213.

[48] 1 Stimson's Am. St. Law, § 1371(A); 3 Sharswood & B. Lead. Cas. Real Prop. 20.

[49] See § 419.

[50] **Alabama.** Parsons v. Boyd, 20 Ala. 112.

Maryland. Gray v. Lynch, 8 Gill. 403.

Massachusetts. Webster v. Vandeventer, 6 Gray 428.

Michigan. Kemp v. Sutton, 233 Mich. 249, 206 N. W. 366.

Oregon. Stout v. Van Zante, 109 Ore. 430, 220 Pac. 414.

[51] 1 Stimson's Am. St. Law, § 1371(B) (3); 3 Sharswood & B. Lead. Cas. Real Prop. 26.

[52] Overheiser v. Lackey, 207 N. Y.

sary to use the exact words of the statute in order to show an intention to create a joint tenancy. It is sufficient if the language employed be such as to show clearly and explicitly that the parties intend that the lands are to pass in joint tenancy.[53] A conveyance to two "as joint tenants" has been held sufficient to create a joint tenancy,[54] as has also the statement that the donees are to hold "jointly,"[55] but in other decisions a contrary view has been adopted.[56] A gift to two or more persons and the survivor or survivors of them has been regarded as showing an intention to create a joint tenancy,[57] as has a gift to two persons for their joint

229, 100 N. E. 738, Ann. Cas. 1914C 229.

In the case of a conveyance by deed, where the intention to create a joint tenancy is made clear in the recitals, the fact that it is not stated in the granting and habendum clauses does not make it inoperative. Stukis v. Stukis, 316 Ill. 115, 146 N. E. 530; Murray v. Kator, 221 Mich. 101, 190 N. W. 667.

[53] Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334. See also Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N. E. 827; Petition of Buzenac for an Opinion, 50 R. I. 429, 148 Atl. 321.

Under the Michigan statute the right of survivorship in the devisees of a class can be preserved as an express condition of the devise by provisions in a will directly so providing but without designating the estate devised as a joint tenancy in express words. Kemp v. Sutton, 233 Mich. 249, 206 N. W. 366.

[54] Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N. E. 827.

[55] Case v. Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Mundhenk v. Bierie, 81 Ind. App. 85, 135 N. E. 493.

In another case, the word "jointly" used in the premises was read into both the granting and the habendum clauses and the estate was held to be one in joint tenancy. Murray v. Kator, 221 Mich. 101, 190 N. W. 667.

[56] **Delaware.** Davis v. Smith, 4 Harr. 68.

Illinois. Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779; Cooper v. Martin, 308 Ill. 224, 139 N. E. 68.

Mississippi. Doran v. Beale, 106 Miss. 305, 63 So. 647.

Missouri. Cohen v. Hubert, 205 Mo. 537, 104 S. W. 84.

New York. Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738 (in will not drawn by lawyer).

Wisconsin. Weber v. Nedin, 210 Wis. 39, 246 N. W. 307 (dictum).

The use of the word "jointly" in the premises, in referring to the parties, does not create an estate in joint tenancy where the conveyance is to the parties "and their heirs and assigns," as the latter words negative the survivorship which is essential to a joint tenancy. Fries v. Kraeklauer, 198 Wis. 547, 224 N. W. 717.

In Wright v. Knapp, 183 Mich. 656, 150 N. W. 315, even the words "jointly, the survivor to have full ownership," were regarded as effecting the creation, not of a joint tenancy but of a tenancy in common. See the criticisms in 28 Harv. Law Rev. 631, 24 Yale Law Jour. 432.

[57] Wood v. Logue, 167 Iowa 436, 149 N. W. 613, Ann. Cas. 1917B 116;

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only difference between a deed to husband wife and one to two persons not husband and wife is, that in the former case the parties become joint tenants, while in the latter, tenants in common. A deed may be made, of course, making husband and wife tenants in common, if it is so specified in the deed.

Tenancy by partnership.—When property, either real or personal, is owned by a partnership, this tenancy arises. This tenancy differs from a joint tenancy in that all property held by a partnership is liable for the payment of partnership debts and one partner has a right to sell any part or all of the property without the consent of the co-partner. It differs from joint tenancy in that there is no right of survivorship, and from a tenancy in common in that in that it can be created only by agreement between the partners. All these tenancies resemble each other in that the tenants have an undivided interest in the property. See the chapter on Partnership in this book.

Joint tenancy not favored.—The doctrine of joint tenancy was favored by the English common law, and originated in the Feudal System. The tendency of American decisions and legislation has been to restrict joint tenancy, because it causes property to go on the death of a joint owner where he would not ordinarily have it go. In Wisconsin the statutes provide that "all grants and devises of land, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." The following section then declares that the above shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

There is no statute in Wisconsin applying to personal property, but the leaning of the courts is to declare all forms of ownership as being in common, rather than joint. The exceptions above mentioned leaves mortgages as at common law. In case a mortgage is given to two or more persons who have debts due them severally, they will be considered as owners in common of the mortgage; if they are joint owners of the debt, they will become joint owners of the mortgage. An exception is made in regard to devises and grants in trust for the reason that trustees take no beneficial interest, and it is more expedient to have the survivor of the trustees carry out the trust. The same is true of devises or

grants to executors. The exception in regard to conveyances to husband and wife is explained in the section explaining tenancy by entirety.

In case of a bequest of personal property, if it is made jointly, a joint estate would still be created in Wisconsin. Thus, it has been decided in Wisconsin that where a life insurance policy was made payable to a wife and daughter and one of them died before the insured, that the policy created in the beneficiaries a joint tenancy, and that the survivor was entitled to the whole insurance money. The question of whether property is held by joint tenancy or tenancy in common can be best disposed of by having a statement inserting in the deed or other evidence of transfer, stating the tenancy created.

Rights of co-tenants.—In all of the tenancies mentioned, except tenancy by the entirety, there is a unity of possession in the property by all the tenants. From this it follows that each tenant is entitled to the possession of the whole property with the other tenants and the possesion by one tenant of the entire property, so long as he does not exclude the rest, is lawful. Where one of the tenants has entire possession, the other or others may take possession if they can do so without a breach of the peace. A co-tenant of personal property has the right to the possession of the whole of it, and the only way for the others to get control is to take possession when a suitable occasion for doing so can be found. No co-tenant can do anything to the injury of the common property, however, without incurring liability to the other or others, and he can make no contract with third parties which will bind any one but himself. There is a relation of trust between co-tenants on account of their unity of possession, which precludes any tenant from acquiring an advantage over the others in dealing with the property. Thus, one co-tenant cannot acquire a tax title against the others, nor assert a superior title, unless he obtain it by purchase from an independent source. In case one tenant pays a mortgage or taxes against the common property, he is entitled to re-imbursement from the others. In case a co-tenant makes a profit out of the common property he is accountable to the others for their share. He cannot be deprived of the possession of the common property while the relation of co-tenancy exists, but can be held responsible for its misuse