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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2702-21

WARD & O'DONNELL, LLC,

Plaintiff-Appellant,

v.

NANCY WARD,

Defendant-Respondent.

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Submitted February 8, 2023 – Decided March 7, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law  
Division, Union County, Docket No. L-1599-20.

Steven J. Zweig, attorney for appellant.

Lindabury, McCormick, Estabrook & Cooper, PC,  
attorneys for respondent (Eric B. Levine, of counsel  
and on the brief).

PER CURIAM

Plaintiff Ward & O'Donnell Westfield, LLC appeals from a March 24,  
2022 order denying its ejectment action against defendant Nancy Ward after the

judge found defendant held a valid life estate in an apartment in plaintiff's building. We affirm.

We recite the facts from the testimony and exhibits marked during the bench trial. While many of the facts were undisputed, there was a factual dispute related to the authenticity of a document marked as D-1 at trial. The document allowed defendant to live rent-free in Apartment 2 in plaintiff's building. The judge had to determine the authenticity of D-1 before adjudicating plaintiff's ejectment action.

Plaintiff owns a building located at 159 East Broad Street in Westfield. It purchased the building in 1997 and completed renovations to the apartments in the building in or around 1998. The apartments in plaintiff's building are rented to tenants.

James Ward (James)<sup>1</sup> is plaintiff's managing partner. Defendant is James's sister. Defendant and her daughter have lived rent-free in Apartment 2 since 1999. Defendant's sister, Mary Josephine Ward-Gallagher (Josephine), previously lived with defendant in Apartment 2.

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<sup>1</sup> Because several parties share the same last name, we refer to them by their first name. No disrespect is intended.

Defendant claimed she held a life estate in Apartment 2 based on D-1, which was signed by James and Josephine in 1999. The document read as follows:

Agreement to allow our sister, Nancy Ward, to live at 159 East Broad Street, Apt. 2, Westfield, NJ 07090 for as long as she wishes to reside at the above address.

As we all agree, Nancy, used her money to pay for the construction of her apartment, which included the kitchen, appliances, bathrooms and all light fixtures and decorating. Due to this fact, Nancy will not have to pay rent for the apartment.

James and Josephine signed D-1 on behalf of the soon to be created plaintiff entity. The formal limited liability company came into existence about five months after James and Josephine signed D-1. Another sister, Eileen Ward-Conway (Eileen), witnessed her siblings' signatures on D-1. Defendant did not sign D-1, but she was aware of the document's existence and its terms.

The entire time defendant lived in Apartment 2, there were no restrictions or limitations placed on her use of the unit. James testified that he knew defendant did not pay rent and he never asked her to pay rent, real estate taxes, or property insurance. James explained that he allowed defendant to reside in the apartment without paying rent because she had just graduated from law

school and did not earn a lot of money. He also testified defendant is his younger sister, and he "loved her."

At times, other family members lived rent-free in apartments in plaintiff's building, including James, James's brother, John, and James's mother. None of these family members enjoyed a right to a lifetime occupancy, rent-free, in their apartment. Defendant was the only family member with a document reflecting a right to live in her apartment without paying rent for as long as she wished.

In May 2018, defendant received a letter from James's attorney, requesting she pay rent or vacate the apartment. According to James, he needed defendant to pay rent as a result of a change in plaintiff's financial circumstances. He testified that "things changed with that particular property, [like] the taxes go[ing] up to \$70,000 in one year."

In 2018, defendant and several other people lived rent-free in apartments in plaintiff's building. James explained all tenants were required to pay rent at that time because plaintiff had "a loan on [the] property with the banks" and needed "to be able to show them the collections." Defendant refused to pay rent or vacate the apartment.

On December 13, 2018, plaintiff sought to evict defendant and filed a landlord-tenant action in the Special Civil Part. On February 6, 2019, a Special

Civil Part judge dismissed the landlord-tenant action because defendant was not a tenant. The judge found tenancy court was not the appropriate forum for dispossessing defendant from the apartment.

Five months later, plaintiff filed an ejectment action in the Special Civil Part. Defendant filed a counterclaim, asserting D-1 gave her a possessory interest in Apartment 2. She also expended significant sums improving and upgrading the apartment in reliance on D-1 and sought to recoup those expenses if plaintiff prevailed on its claims. Because the amount sought in defendant's counterclaim exceeded the monetary limit for the Special Civil Part, she moved to transfer the ejectment action to the Law Division. The Special Civil Part judge heard testimony on defendant's transfer motion over the course of several days in January and February 2020.

On March 6, 2020, the Special Civil Part judge granted defendant's motion and transferred the ejectment action to the Law Division. When the matter was docketed in the Law Division, the parties informed the judge that the matter could be adjudicated without additional testimony because the parties agreed to rely on the record developed during the Special Civil Part hearings.

In the Law Division, defendant moved in limine to bar plaintiff's evidence challenging the authenticity of D-1. In response, plaintiff cross-moved to

compel defendant to produce D-1 for forensic testing. After hearing argument on the motions, the judge asked both counsel to submit information from their document experts detailing the forensic testing process.

On January 6, 2021, the motion judge conducted a hearing related to the testing of D-1. In a January 12, 2021 order, the judge denied defendant's motion and granted plaintiff's cross-motion. The January 12 order required defendant to produce D-1 in its original form to plaintiff's expert for non-destructive ink testing.

About a month later, plaintiff submitted its expert's ink testing results. According to the expert's report, the age of the ink on D-1 was inconclusive—meaning the expert could not rule out that James signed D-1 in 1999. Plaintiff's expert "concluded that the blue ballpoint writing inks used on the [James] Ward and Eileen Ward signatures matched each other and were consistent with inks manufactured and commercially available prior to 1999." On the other hand, defendant's expert witness opined that the signature on D-1 unequivocally belonged to James. Based on the experts' reports, the judge found defendant met her burden of demonstrating that James signed D-1 and plaintiff's "evidence to the contrary was insufficient to overcome [d]efendant's proofs."

The parties then submitted written findings of fact and conclusions of law to the Law Division judge. In a March 24, 2022 order and accompanying seventeen-page written decision, the Law Division judge stated the following findings and conclusions: (1) D-1 was authentic; (2) defendant held a life estate in Apartment 2; and (3) effective May 2018, defendant must pay the pro rata share of the real estate taxes and other expenses attributable to her life estate interest in Apartment 2.

In reviewing the testimony of the witnesses in the Special Civil Part proceedings, the judge "found that all the non-expert witnesses were unreliable and unpersuasive." He explained there were credibility issues regarding the testimony provided by James and defendant, but found the expert witnesses credible.

The Law Division judge determined "Exhibit D-1 granted [d]efendant Nancy Ward a right to exist and remain in the [apartment]." The judge found "it [was] clear that Exhibit D-1 granted what is a limited life estate in the [apartment], as long as the [p]laintiff . . . is the owner of the property." The judge wrote:

Defendant has resided at the Property without having to remit any payment to [p]laintiff based upon a documented grant of rights coupled with a long-standing understanding that she had with the [p]laintiff

evidenced by Exhibit D-1. Exhibit D-1 was signed by [d]efendant Nancy Ward's brother, James Ward and his sister, Mary Josephine Ward-Gallagher, the owners of the property at the time, on behalf of the to be formed [p]laintiff LLC. Therefore, [p]laintiff's claim for ejectment fails as a matter of law. There is no basis for [p]laintiff to ignore [d]efendant Nancy Ward's right to "exist and remain in the Property" unless and until she chooses to affirmatively reject that right, or it is terminated in accordance with law.

The judge further found "D-1 constitutes the expression of a gift of the right to occupy the premises, constituting a 'life estate.'" He relied on the testimony of both Josephine and Eileen in finding that D-1 "reflect[ed] what was agreed upon by the principals of [p]laintiff in 1999." The judge also found James "reiterated the nature of the life tenancy in 2018 when he texted [d]efendant Nancy Ward and confirmed to her that she and her daughter will 'always' live in the Property." The judge further noted defendant lived in the apartment for more than twenty years without paying rent "with the explicit knowledge and consent of James Ward . . . who took no action to the contrary."

The judge also determined Exhibit D-1 satisfied the Statute of Frauds, N.J.S.A. 25:1-13, governing the conveyance of an interest in real estate. He found Exhibit D-1 "contain[ed] all of the elements of an enforceable written agreement . . . . It contain[ed] a description of the real estate . . . . It [was]



signed by the party against whom enforcement is sought . . . [and] identified the transferee . . . as well as the nature of the interest."

Additionally, the judge explained that "[f]ormal recordation of a document . . . giving rise to a life estate [was] not required under the New Jersey Recordation Act." Therefore, contrary to plaintiff's argument, the judge found the failure to record D-1 did not render the document unenforceable.

In support of his decision that defendant held a life estate in the apartment, the judge found defendant "acted as any other holder of a life estate . . . by openly and freely using and improving the [p]roperty." While the judge concluded plaintiff's demand for defendant's payment of rent was "contrary to the rights gifted to the [d]efendant," he found "the law is clear that a life tenant is responsible for and must pay the taxes on her life estate." Thus, effective May 2018, the judge compelled defendant to pay her pro rata share of the real estate or property taxes for Apartment 2.

On appeal, plaintiff raises the following arguments: defendant failed to establish she had a cognizable possessory right to the property; the judge misapplied the burden of proof regarding D-1 and erred in finding D-1 was authentic; the judge erred in finding a life estate could be formed by an inter vivos gift and that plaintiff conveyed an inter vivos gift to defendant absent

plaintiff's "absolute divestiture of ownership, control, and dominion" of the apartment; and the judge erred in finding plaintiff demonstrated a donative intent to grant defendant a life estate. We reject these arguments.

Our review in a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). A trial court's factual determinations will not be disturbed unless "those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Gripenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). However, we review a trial court's interpretation of the law de novo. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019).

Plaintiff first contests the judge's finding that D-1 was authentic. Plaintiff argues that the judge improperly shifted the burden of proof by requiring it to disprove the document's authenticity. We disagree.

Plaintiff cites only limited portions of the judge's decision in support of its argument and ignores the entirety of the judge's findings. Moreover, simply because the judge did not find James and defendant to be credible did not mean defendant was unable to authenticate D-1.

Here, the judge explained defendant met her burden of demonstrating the authenticity of D-1 based on the testimony of Josephine, Eileen, and the parties' experts. The judge expressly found that plaintiff's contrary evidence regarding the authenticity of D-1 "was insufficient to overcome [d]efendant's proofs."

A "writing must be properly authenticated before it is admitted into evidence." State v. Marroccoli, 448 N.J. Super. 349, 364 (App. Div. 2017) (citing State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016)); N.J.R.E. 901. "Our courts have long held 'it is not necessary that the proof should be conclusive but a prima facie showing that the instrument is genuine and authentic is sufficient to warrant its reception.'" Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012) (quoting In re Blau's Estate, 4 N.J. Super. 343, 351 (App. Div. 1949)). For evidence to be admissible, a judge must decide "whether the proponent adduced sufficient evidence, direct and circumstantial, to permit a reasonable jury to conclude by a preponderance of the evidence that the fact was proven." Id. at 420 (citing N.J.R.E. 104(a)). The burden of demonstrating the authenticity of a document "was not designed to be onerous" and "does not require absolute certainty or conclusive proof[.]" Marroccoli, 448 N.J. Super. at 364–65 (alteration in original) (quoting Hannah, 448 N.J. Super. at 89). The proponent of the evidence must demonstrate "that a desired

inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006) (citation omitted).

Plaintiff argues that because James and defendant were deemed equally not credible by the judge, the evidence was in equipoise and, therefore, defendant failed to meet her burden of proving the authenticity of D-1.

However, the judge found the following facts supported the authenticity of D-1. The judge cited plaintiff's expert's opinion that D-1 was signed around 1999 based on the expert's ink testing and that the ink used to sign D-1 was the same ink for both signatures on the document. The judge also relied on testimony provided by Eileen and Josephine concerning the drafting of D-1 and Eileen's witnessing the signing of the document by James and Josephine. We discern no basis on these facts to disturb the judge's finding that D-1 was authentic.

We next consider plaintiff's argument that the judge erred in finding D-1 granted defendant the right to a life estate in the apartment. The judge recognized that a life estate is "ordinarily" created "only by a deed, will, lease or written contract."

Here, the judge provided more than adequate factual and legal support in concluding that defendant possessed a life estate in Apartment 2 notwithstanding the lack of a deed, will, lease, written contract, or other such instrument. The judge properly found that a life estate may be created through other documents without the need for any specific language. See B.D. v. Div. Med. Assist. & Health Servs., 397 N.J. Super. 384, 393–94 (App. Div. 2007) (finding a rent arrangement for Medicaid planning may create a life estate). The judge concluded the parties' course of conduct over twenty years demonstrated a mutual intent to create a life estate despite the lack of a deed, will, lease, or contract.

We turn next to plaintiff's claim that D-1 did not constitute an inter vivos gift. Plaintiff argues it never relinquished absolute dominion over the apartment to satisfy the requirements for an inter vivos gift. We reject plaintiff's argument on this point.

"In order for a valid inter vivos gift to be established there must be proof of (1) a donative intent on the part of the donor; (2) an actual or symbolic delivery of the subject matter, and (3) an absolute divestiture of control, ownership, and dominion by the donor over the subject matter of the gift, at least to the extent practicable or possible under the circumstances." Clark v. Judge,

84 N.J. Super. 35, 56 (Ch. Div. 1964) (citing Farris v. Farris Engineering Corp., 7 N.J. 487, 500–501 (1951)). These elements must be proven by way of evidence that is "clear, cogent, and persuasive." Czoch v. Freeman, 317 N.J. Super. 273, 284 (App. Div. 1999) (quoting Farris, 7 N.J. at 501).

Plaintiff contends defendant cannot establish the third element in support of an inter vivos gift because the subject matter of the alleged gift is an apartment in its building and defendant lacked any ownership interest in Apartment 2. Plaintiff asserts that if it sold the building, defendant's life estate would cease to exist. Thus, plaintiff argues it never relinquished absolute divestiture of control, ownership, or dominion over Apartment 2 to constitute an inter vivos gift.

Plaintiff misinterprets the judge's finding as to defendant's rights under D-1. The document gave defendant the right to occupy Apartment 2 without interference and rent-free for life. Therefore, plaintiff divested itself of the right to grant a life estate in Apartment 2 to another, as distinguished from divesting its ownership rights in the apartment or the building. Clearly, plaintiff did not divest its right to ownership of Apartment 2 or the building, and defendant does not claim any ownership interest in the apartment.

While defendant's life estate in Apartment 2 may not be enforceable if plaintiff sells the building, the potential sale of the building does not affect the vested rights between plaintiff and defendant limited to defendant's use of the apartment during plaintiff's ownership of the building. Thus, the judge properly found that plaintiff relinquished absolute dominion, ownership, and control over Apartment 2 during defendant's lifetime.

Plaintiff next argues there was no evidence of any donative intent to grant defendant a life estate in Apartment 2 and, therefore, no valid irrevocable gift was conveyed. Plaintiff asserts that other members of the Ward family lived in the building rent-free before 2018, and none of these family members held a life estate in their apartment. According to plaintiff, this demonstrates an intent to allow family members to live rent-free in the building so long as the corporate entity was financially able to do so and there was no intent to treat defendant differently from the other family members. We are not persuaded by this argument.

To establish a valid and irrevocable gift, a party must demonstrate the following: "(1) actual or constructive delivery; (2) donative intent; and (3) acceptance." Bhagat v. Bhagat, 217 N.J. 22, 40 (2014). Here, the judge found actual delivery and acceptance because defendant occupied Apartment 2 for

more than twenty years without interference. Additionally, plaintiff accepted defendant's occupancy through James's words and conduct.

Plaintiff focuses its argument on the absence of any donative intent, requiring that "the donor must possess the intent to give." Id. at 40 (quoting Pascale v. Pascale, 113 N.J. 20, 29 (1988)). However, donative intent may be inferred from the circumstances surrounding the transfer of the gift. See Speer v. Speer, 14 N.J. Eq. 240, 241 (Ch. 1862); see also Hill v. Warner, Berman & Spitz, P.A., 197 N.J. Super. 152, 162 (App. Div. 1984).

The judge found ample evidence of plaintiff's donative intent regarding Apartment 2. First, the express language of D-1 supported a donative intent by allowing defendant unrestricted occupancy to Apartment 2 "for as long as she wishes to reside there." Further, James testified that he allowed defendant to live rent-free in Apartment 2 starting in 1999 because of her financial situation and their close familial connection. Additionally, the judge cited the testimony of Eileen and Josephine, demonstrating defendant was intentionally treated in a manner different from other family members.

While plaintiff argues its demand for the payment of rent in 2018 negates a finding of donative intent, this evidence did not affect donative intent in 1999 when plaintiff granted a life estate in Apartment 2 to defendant. James testified




that he had no intention of charging defendant rent in 1999, nor during the twenty years that followed. It was only when the bank reviewed the loan for plaintiff's building that plaintiff required the payment of rent. Thus, plaintiff's financial situation in 2018 had no impact on its donative intent in 1999 when D-1 was signed.

After considering the testimony and evidence, we are satisfied the judge properly found D-1 to be authentic, and that D-1 and the parties' course of conduct for more than twenty years supported an inter vivos gift as well as the requisite donative intent to convey a possessory life estate in Apartment 2 to defendant.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION