FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 13, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Howard F. Fettig,

Plaintiff/Appellee,

vs.

Estate of Anton L. Fettig;; Gerald A. Cullen as Conservator for S.F.F.; Charles E. Fettig; Morgen J. Fettig; Gabriel W. Fettig; all other persons known and unknown having or claiming any right, title, estate or interest in or lien or encumbrance upon the real property described in the complaint, whether as heirs, devisees, legatees or Personal Representatives of the aforementioned parties or as holding any claim adverse to Plaintiffs' ownership or any cloud upon Plaintiffs' title thereto,

Defendants,

Anton Jacob Fettig,

Defendant/Appellant

SUPREME COURT NO. 20190102

Civil No. 27-2018-CV-00372

AND

Morgen J. Fettig.

Plaintiff/Appellee

vs.

Estate of Anton L. Fettig;; Gerald A. Cullen as Conservator for S.F.F.; Charles E. Fettig; Morgen J. Fettig; Gabriel W. Fettig; all other persons known and unknown having or claiming any right, title, estate or interest in or lien or encumbrance upon the real property described in the complaint, whether as heirs, devisees, legatees or Personal Representatives of the aforementioned parties or as holding any claim adverse to Plaintiffs' ownership or any cloud upon Plaintiffs' title thereto,

Defendants,

Anton Jacob Fettig,

Defendant/Appellant

SUPREME COURT NO. 20190103

Civil No. 27-2018-CV-00375

APPELLANT'S BRIEF

Appeal from Summary Judgment
dated February 11, 2019,
District Court of McKenzie County
Northwest Judicial District
The Honorable Robin Schmidt
Civil Case No. 27-2018-CV-00372

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

[1] Whether the District Court properly concluded that a particular deed executed in 2001 was void due to the grantees being minors at the time of execution.

a. If the 2001 Warranty deed was a gift?

b. Does the doctrine of Res Judicata preclude adjudication?

STATEMENT OF THE CASE

[2] This appeal is from two nearly identical cases brought by Howard F. Fettig and Morgen J. Fettig which were filed in June, 2018, (27-2018-CV-375 & 27-2018-CV-372). Appendix pp. 7 &12.

[3] The Plaintiffs in each of those two cases brought nearly identical Motions for Summary Judgment on November 27, 2018. App. pp. 54 & 61.

[4] Counsel for Anton J. Fettig resisted the Motions for Summary Judgment and filed Cross Motions for Summary Judgment in each case on December 26, 2018. App. pp. 68 & 75.

[5] On January 31, 2019, the Court executed Morgen and Howard's proposed Judgments and proposed Order for Summary Judgments. App. pp. 110-119.

[6] Oral argument on the Motions for Summary Judgment was not heard.

[7] The Court did not issue any memorandum opinion or other evidence of the Court's analysis or reasoning in reaching its conclusion.

[8] Notice of Entry of Judgment was served in both cases on February 12, 2019. App. pp. 3 & 6.

[9] Notice of Appeal was filed in each case on April 1, 2019.

STATEMENT OF THE FACTS

[10] In late 2001 Anton L. Fettig (hereinafter "Mr. Fettig") was the owner of certain real property located in McKenzie County, North Dakota, described as:

> Township 149 North, Range 94 West, McKenzie County, North Dakota
> Section 17: S½
> Section 22: W½

(the "Property").

[11] On December 19, 2001, Mr. Fettig executed a Warranty deed, conveying the Property to two of his children Anton Jacob Fettig, and Sand Frank Fettig (the "2001 Deed"). App. pp. 17&19. This deed was recorded December 19, 2001 as Document #341283. Id.

[12] There is no dispute that Anton Jacob Fettig, and Sand Frank Fettig were both minors at the time of the conveyance.

[13] On April 4, 2004, Mr. Fettig attempted to convey the Property back to himself by executing a second Warranty Deed wherein he was both Grantor and Grantee. App. pp. 23 & 25. This Warranty Deed does not make any reference to either of the Grantees named in the prior deed from 2001. Id.

[14] On June 21, 2005, Mr. Fettig executed a Quitclaim Deed for the portion of the Property in Section 17, to his adult son Howard F. Fettig. App. p. 27. This deed was recorded May 11, 2006 as Document #363357.

[15] Similarly, on July 10, 2005, Mr. Fettig executed a Quitclaim Deed for the portion of the Property in Section 22, to his adult son Morgen J. Fettig. App. p. 29. This Deed was recorded May 1, 2006 as Document #363069.

[16] Mr. Fettig passed away on January 23, 2016. App. pp. 30 & 31.

LAW AND ARGUMENT

STANDARD OF REVIEW.

[17] A district court's decision on a motion for summary judgment is a question of law that an appellate court reviews de novo on the record. Lario Oil & Gas co. v. EOG Resources, Inc., 2013 ND 98, ¶5, 832 N.W.2d 49 (internal quotation marks omitted). In determining whether summary judgment was appropriately granted, the evidence is viewed in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. Id.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE 2001 DEED WAS VOID DUE TO THE AGE OF THE GRANTEES.

Gift Deed v. Contract

[18] The District Court erred in deciding that the 2001 Deed was void due to the age of the Grantees because it applied the rules of contracts and failed to applying a gift analysis.

[19] The Plaintiffs in these related cases, Morgen J. Fettig and Howard F. Fettig ("Morgen and Howard") claimed that they were the respective owners of the property because the 2001 Deed was void as a matter of law because the grantees listed in that deed were minors at the time of the conveyance.

[20] Morgen and Howard argued that minors cannot receive real property due to statutory restrictions on minors' capacity to enter contracts.

[21] They point to North Dakota Century Code statutes that state that minors have only such capacity as is specified in statutes relating to such persons. N.D.C.C. §9-02-02.

[22] They also cite N.D.C.C. §14-10-10, stating that "[a] minor may make any contract other than contracts specified in section 14-10-09 in the same manner as an adult, subject only to the minor's power of disaffirmance." The section referenced therein, N.D.C.C. §14-10-09 says that "a person under the age of eighteen may not make a contract relating to real property or any interest therein or relating to any personal property not in that person's immediate possession or control."

[23] This line of analysis pursued by Morgen and Howard only applies to minors' ability to enter legally enforceable contracts though.

[24] The requirements of a legal contract include:

a. Parties capable of contracting
b. The consent of the parties
c. A lawful object; and
d. Sufficient cause or consideration;

N.D.C.C. §9-01-02.

[25] Morgen and Howard contend that the grantees' age made them incapable of contracting under subsection (a), making the 2001 Deed void.

[26] However, the deeds at issue in this case were not part of any contractual agreement, thus the capacity of the grantees is immaterial. Viewing the 2001 Deed through a contractual analysis is a strawman argument.

[27] The elements of a legal gift are very different from those of a legal contract. For a valid gift, there must be: 1) an intent to give, 2) delivery of the gift, and 3) an acceptance of the gift by the donee. In re Kaspari's Estate, 71 N.W.2d 558 (N.D. 1955).

[28] Capacity to enter contracts by the donee is not one of the elements.

[29] Anton L. Fettig clearly intended to give the property to the Grantees, as shown by his decision to deed the property to them.

[30] The deed was delivered by being recorded, and thus the grantor showed an intent to immediately transfer ownership. ("The execution and recording of a deed create a presumption of sufficient delivery and fix the time when the deed became effective." Eide v. Tveter, 143 F. Supp. 665, 671 (D.C. N.D. 1956), *citing* Schenck v. Dibel, 242 Iowa 1289, 50 N.W.2d 33, 1951 Iowa Sup. LEXIS 480.

[31] In addition, it is clear that Anton L. Fettig intended to no longer be the owner of the property. Morgen and Howard included as an exhibit to their Complaints, an email from a United States Department of Agriculture employee Margit Williams, wherein it is evident that Anton L. Fettig had previously forwarded to her a copy of the 2001 Deed to show that he was no longer the owner of the land. App. pp. 21 & 22. It was in this email where Margit Williams opined (we think incorrectly) that all deeds must follow the rules of contracts or are unenforceable. Id. It is not at all clear what experience or expertise, if any, Margit Williams possessed as to North Dakota real estate law, or even if she was licensed as an attorney in North Dakota considering her office was apparently in Minnesota.

[32] Finally, acceptance of the land being conveyed here may be presumed, as there was no renunciation, of the gift. "Regarding the element of acceptance, it appears to be the rule that, in the absence of renunciation, acceptance of a gift will be presumed when it is unaccompanied by any condition to be performed by the donee, especially where the gift is from parent to child and it operates entirely to the donee's benefit." In re Estate of Paulson, 219 N.W.2d 132, 136 (N.D. 1974), *quoting* Bunt v. Fairbanks, 81 S.D. 255, 134 N.W.2d 1, 3 (S.D. 1965).

[33] All of the elements of a gift are present in this case, and the circumstances and context make it clear that this was intended to be a gift, and not an arms-length contract of the type that legal capacity is required.

[34] Just because minors are unable to enter in to contracts does not mean that they are prohibited from owning real estate. Owning land is not the same as contracting to purchase land. Minors may acquire property by gift without entering in to any contract requiring legal capacity that they would lack due to their age, or other deficiency.

[35] The 2001 Deed at issue was a warranty deed from Anton L. Fettig. He was an adult at the time of this conveyance. The section of the deed detailing the consideration paid was left blank. App. pp. 17 & 19. Further, there is no allegation that any money was exchanged as part of this transaction, or that there was any purchase agreement or contract involved with the transfer.

[36] If the transaction in question had been a contractual arrangement, then the capacity of the grantees may have been relevant. That doesn't apply here though because it was a gift, and the question of minors' capacity to enter contracts is not material to a determination of the validity of the 2001 Deed.

[37] This Court has been presented with at least two cases where real property was conveyed to the grantor's minor child, and the deed was recognized as valid, and not void, because of the age of the grantee. Hunt v. Holmes, 64 ND 389, 252 N.W. 376, 397 (N.D. 1934), Hulet v. Northern P.R. Co., 14 ND 209, 103 N.W. 628 (N.D. 1905).

[38] The Hunt v. Holmes case was an action brought by a judgment creditor, attempting to invalidate a transfer by a father to his minor daughter. The Plaintiff's argument in that case was that the father knew he was indebted to the Plaintiff creditor, and the transfer to the

daughter was a fraudulent attempt to protect the property from execution. The Court failed to find any fraudulent intent by the father, reversed the lower court, and held the conveyance to have been valid. Hunt v. Holmes, 64 ND 389, 252 N.W. 376 (N.D. 1934).

[39] The Hulet v. Gates., case was a dispute as to the validity of a deed from Northern Pacific Railroad Company, whereby William Hulet arranged for the deed to name his then thirteen-year-old daughter, as grantee. The deed was not immediately delivered to the daughter, or recorded, so the case revolved around the question of delivery of the deed. The Court's ultimate ruling stated:

> On the evidence as a whole we are fully satisfied that the deed from the railroad company was intended both by the grantor and this appellant [William Hulet] to convey the land to the respondent [the minor daughter] at the time of its delivery, and that there was a sufficient delivery to effect the purpose intended.

Hulet v. Gates, 14 ND 209, 103 N.W. 628 (N.D. 1905). If transfers of real property to minors are void as a matter of law, as claimed by the Plaintiff, then the courts in these cases, or the parties attempting to invalidate these transfers, would have raised or commented on the issue, but they did not.

[40] Versions of N.D.C.C. 14-10-09, restricting minors' right to contract, have continuously been in effect since 1877, and were in effect when both the Hunt and Hulet cases were decided by this Court.

[41] In support of their position that "a deed made by a minor was absolutely void and did not confer any right upon the grantee as the deed was void when executed", App. pp. 58 & 65, ¶25. Morgen and Howard cited an Oklahoma case Lawson v. Bridges, 1935 OK 314, 171 Okla. 502, 43 P.2d 111 (1935). Reviewing the facts and disposition of this case highlight the problems with Morgen and Howard's argument. The Lawson case involved a case where the

Plaintiffs in that case were attempting to invalidate an earlier real estate transfer done by one of the Plaintiffs when she was a minor. Id. The Court in that case did invalidate the transfer made by the minor, for many of the reasons argued by Morgen and Howard. Id. However, the Court in Lawson did not find that the transfer to the minor was void, which is the pertinent question in the current case.

[42] A similar situation is presented with the South Dakota case presented by the Morgen and Howard. Gruba v. Chapman, 36 S.D. 119, 153 N.W. 929 (S.D. 1915). App. pp. 59 & 66, ¶27. In that case, a minor was already the owner of real estate, and the Court was asked to rule on the validity of a mortgage executed by the minor while she was under the age of 18. Id. The Court in Gruba found that the mortgage was void, but the Court did not make any ruling that the transfer to the minor was void, or that the minor could not own property, which is the argument that the Morgen and Howard have made in this case.

[43] The Lawson and Gruba cases weigh against the point that Morgen and Howard tried to make. The substantive issues in those cases were dealing with any limitations the [minor] owners may have had on entering contracts while being underage, after becoming an owner, which is not the issue here because this case does not involve a transfer by a minor owner.

Res Judicata

[44] Morgen and Howard claim that the question of this case was decided in prior litigation, and that under the doctrine of res judicata, Defendants are barred from disputing the same ruling in this case.

[45] The elements of res judicata are:

> (1) A final decision on the merits in the first action by a court of competent jurisdiction;
> (2) The second action involves the same parties, or their privies, as the first;

(3) The second action raises an issue actually litigated or which should have been litigated in the first action;
(4) An identity of the causes of action.

Mo. Breaks, LLC v. Burns, 2010 ND 221, ¶1, 791 N.W.2d 33, 36.

[46] In analyzing these elements as applied to this case, Morgen and Howard breezily claimed that the parties in this action are identical to the parties in an earlier action brought by Charles Fettig. App. pp. 92-93. In particular, Morgen and Howard state "Charles' Case and this matter both involve the same parties." App. p. 93, ¶8. However, the Plaintiff in the earlier case was not Morgen and/or Howard. It was Charles Fettig, who is not a party to this action, so the parties are not identical.

[47] Morgen and Howard may claim that because they were named as parties in the earlier action brought by Charles, that they therefore have privity with Charles, and that this dispenses with the mutuality requirement.

[48] Privity exists "if one is so identified in interest with another that he or she represents the same legal right," Kulczyk v. Tioga Ready Mix Co., 2017 ND 218, ¶11 902 N.W.2d 485 (internal citations omitted). "Fundamental fairness underlies determinations of privity and res judicata." Id. *citing* Riverwood Commercial Park v. Standard Oil Co., 2007 ND 36, ¶14, 729 N.W.2d 101.

[49] Howard and Morgen were named as Defendants in that earlier action, not as Plaintiffs. If they made this argument they would be saying that they, as Defendants, were in privity with the Plaintiffs in that case. Since they were Defendants in the earlier case, it is very difficult to see how they would be "so identified in interest" with the earlier Plaintiff so as to "represent the same legal right" as articulated by Kulczyk v. Tioga Ready Mix Co., 2017 ND at ¶11.

[50] Application of res judicata here would also go against the idea of "fundamental fairness" applicable to determinations of this sort. The issue was initially presented through

a quiet title action pertaining to one small portion of all of the land potentially affected. It would be dramatically unfair to apply the earlier judgment from the quiet title action as to a certain parcel of real estate as against all other parcels that might be affected, but which weren't at issue in the original quiet title suit.

[51] It appears that Morgen and Howard's only connection to the original quiet title suit was being named as Defendants. The amended Complaint from the prior case does not describe any facts or causes of action affecting Morgen J. Fettig, or Howard F. Fettig, or their interests. It references anyone that may have a claim to an interest in the real property described therein (Lots 3 & 4, S½NW¼, SW¼, Section 5, Township 149 North, Range 94 West, McKenzie County, North Dakota). App. pp. 82-89. That property is different than the land involved in the two underlying cases here. The Complaint in that earlier lawsuit dealt only with claims pertaining to the listed real estate and did not address in any way claims as to the real estate at issue in this case. It does not appear that Morgen or Howard made any appearance or participated in any way in that earlier case.

[52] In Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972) the Plaintiff, Mrs. Armstrong, sought damages to her person, resulting from the death of her husband, allegedly caused by the Defendants. Id. Mrs. Armstrong had recovered judgment against the defendants in a prior action for the wrongful death of her husband, in her representative capacity. Id. In that prior case, a jury found the defendants to have been negligent and liable for the wrongful death. Id. While the prior action was brought by Mrs. Armstrong in her representative capacity, the case on appeal was brought by Mrs. Armstrong in her individual capacity. Id. The Defendants claimed that Mrs. Armstrong could not use collateral estoppel or res judicata offensively since the second lawsuit was brought in a different capacity than the first, and she therefore didn't

have privity with the first lawsuit. Id. The Court agreed with the Defendants, applied the mutuality rule, and found that since she did not have any interest in the first case through her individual capacity, that res judicata did not apply. Id. at 288.

[53] So, applying the rule from Armstrong v. Miller, since Morgen and Howard did not have any interest in the Charles Fettig lawsuit, and certainly weren't plaintiffs in that case, they cannot now use res judicata offensively to take advantage of the earlier ruling in this case.

[54] Morgen and Howard's claim of res judicata is also deficient as to the fourth element: "an identity of the causes of action." The cause of action in the earlier case was a quiet title action as to the real estate described as Lots 3 & 4, S½NW¼, SW¼, Section 5, Township 149 North, Range 94 West, McKenzie County, North Dakota. The current case involves separate and distinct real property, and thus the causes of action are not identical, and the mutuality rule prevents the application of res judicata here.

CONCLUSION

[55] For the reasons presented above, we respectfully request the District Court's Order granting Summary Judgment be reversed.

Dated this 16th day of May 2019.

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Lawyers for the Appellees
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By: /s/ Nathan M. Bouray
Nathan M. Bouray, Lawyer #06311

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing brief complies with the page limit of N.D.R.App.P. 32(a)(8). The brief contains a total of 16 pages.

Dated this 16th day of May 2019.

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By: /s/ Nathan M. Bouray
Nathan M. Bouray, Lawyer #06311

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SUPREME COURT NO. 20190102

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AFFIDAVIT OF SERVICE

Morgen J. Fettig.
Plaintiff/Appellee
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SUPREME COURT NO. 20190103

Civil No. 27-2018-CV-00375

STATE OF NORTH DAKOTA)
: ss.
COUNTY OF STARK)

[1] Karen Walton, being first duly sworn, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

[2] That on the 13th day of May, 2019, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served upon the person hereinafter named a true and correct copy of the following documents in said matter:

1. **APPELLANT'S BRIEF; AND**
2. **APPELLANT'S APPENDIX**

by causing the same to be served electronically through Odyssey, the Court's e-filing program, and addressed to the following person(s):

Christina M. Wenko
Olivia L. Krebs
Mackoff Kellogg Law Firm
Email: cwenko@mackoff.com
Email: okrebs@mackoff.com

[3] That to the best of affiant's knowledge, information, and belief, such email addresses as given above are the actual email addresses of the parties intended to be so served.

[4] and caused the same to be deposited in the United States Mail at Dickinson, North Dakota, securely enclosed in a sealed envelope, mailed by First Class Mail, with postage duly prepaid, and addressed to the following persons:

Gerald A. Cullen as
Conservator for S.F.F.
1204 S Broad St, #511
Brooksville, FL 34601

Gabriel W. Fettig
PO Box 717
New Town, ND 58763

Charles E. Fettig
1130 Chestnut Lane
Beulah, ND 58523

[5] That to the best of affiant's knowledge, information, and belief, such addresses as given above were the last known addresses of the parties intended to be so served.

Dated this 13th day of May, 2019.

Karen Walton

Subscribed and sworn to before me this 13th day of May, 2019.

PEGGY L. SCHIWAL
Notary Public
State of North Dakota
My Commission Expires May 9, 2020

Peggy L. Schiwal, Notary Public

Howard F. Fettig,
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AFFIDAVIT OF SERVICE

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SUPREME COURT NO. 20190103

Civil No. 27-2018-CV-00375

STATE OF NORTH DAKOTA)
: ss.
COUNTY OF STARK)

[1] Karen Walton, being first duly sworn, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

[2] That on the 16th day of May, 2019, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served upon the person hereinafter named a true and correct copy of the following documents in said matter:

1. **CERTIFICATE OF COMPLIANCE (PAGE 16) OF APPELLANT'S BRIEF; and**
2. **APP120 – APP127 of APPELLANT'S APPENDIX**

by causing the same to be served electronically through Odyssey, the Court's e-filing program, and addressed to the following person(s):

Christina M. Wenko
Olivia L. Krebs
Mackoff Kellogg Law Firm
Email: cwenko@mackoff.com
Email: okrebs@mackoff.com

[3] That to the best of affiant's knowledge, information, and belief, such email addresses as given above are the actual email addresses of the parties intended to be so served.

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[5] That to the best of affiant's knowledge, information, and belief, such addresses as given above were the last known addresses of the parties intended to be so served.

Dated this 16th day of May, 2019.

Karen Walton

Karen Walton

Subscribed and sworn to before me this 16th day of May, 2019.

Peggy L. Schiwal

Peggy L. Schiwal, Notary Public

PEGGY L. SCHIWAL
Notary Public
State of North Dakota
My Commission Expires May 9, 2020

EBELTOFT SICKLER
LAWYERS