STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Barry and Patricia Hartwell,
Petitioners,

v

MTT Docket No. 387627

Cannon Township,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith, III

CORRECTED ORDER STRIKING RESPONDENT'S RESPONSE

CORRECTED ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

On September 8, 2011, Petitioners filed a Motion to Strike "Respondent's Response" requesting the Tribunal to strike Respondent's supplemental pleading filed on June 27, 2011, and a Motion for Summary Disposition requesting the Tribunal to find the uncapping of the subject property in 2010 improper. On September 15, 2011, Respondent filed its responses to the Motions.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Respondent did not file a motion requesting that the Tribunal permit it to amend its answer or otherwise receive "permission" from the Tribunal to file an amended answer and, as such, its "Response" filed on June 27, 2008, was improperly filed and should be stricken. Additionally, there are no genuine issues with respect to material facts with regard to whether the subject property was improperly uncapped in tax year 2010. Petitioners' Motion for Summary

Disposition seeks a determination that the death of Albert Hartwell does not constitute a transfer of ownership within the meaning of MCL 211.27a. The Tribunal has considered Petitioners' request and finds that the Michigan Supreme Court's determination in *Klooster v Charlevoix*, 486 Mich 932; 795 NW2d 578 (2010), favors a finding that the subject property was improperly uncapped since Albert Hartwell was an "original owner" as defined in *Klooster*. Therefore, there was no transfer of ownership and the property was improperly uncapped. As such, summary disposition at this time is appropriate.

PETITIONERS' CONTENTIONS

In regard to the Motion to Strike, Petitioners contend that Respondent's response was untimely filed and was, in fact, a second answer that was filed without leave to amend, in violation of TTR 225.

With respect to the Motion for Summary Disposition, Petitioners contend they "acquired the property in question via a deed from Mr. Hartwell's father, Albert Hartwell. The deed . . . dated September, 2005, adds Petitioners as joint tenants with right of survivorship." Petitioners' Brief p. 1-2. Additionally, Petitioners claim the language in the deed is customary and ordinarily used to create a joint tenancy with right of survivorship. Petitioners cite *Klooster* to argue "no transfer of ownership within the meaning of MCL 211.27a occurred as the result of Albert Hartwell's death and the uncapping of the taxable values by the township was improper in 2009 and 2010." Petitioners' Brief p. 5.

Petitioners contend that even if Respondent's "Response" is considered by the Tribunal, the Motion for Summary Disposition should still be granted on the

grounds Respondent has failed to assert a valid defense. Petitioners state that Respondent is incorrect in asserting that the interest created in the September 27, 2005, deed was not a joint tenancy because of the specific survivorship language used. Petitioners cite *Albro v Allen*, 434 Mich 271; 254 NW2d 85 (1990), to define the difference in an ordinary joint tenancy and a joint tenancy with right of survivorship. Thus, "[t]he language 'undivided one-half interest' included in the deed denoted that Petitioner's share of the property would be held as tenants by the entireties. It does not negate the express language of the deed creating an indestructible joint tenancy." Petitioners' Brief p. 5.

Petitioners claim that summary disposition is appropriate due to Respondent's original Answer being insufficient. Petitioners cite to TTR 245 and contend that the rule required Respondent to raise defenses in the Answer which "fully advise the opposing party and the tribunal of the nature of the defense." The claim is that the language in Respondent's Answer either is that no valid defense is stated or, alternatively, causes no material fact to be in dispute. Petitioners contend "[i]n any event, the township has failed to state or assert any legal defense to this petition and Petitioners are entitled to summary judgment as a matter of law." Petitioners' Brief p. 3.

RESPONDENT'S CONTENTIONS

In its Response to Petitioners' Motion to Strike, Respondent contends that it properly supplemented its Answer filed on May 3, 2011, with its "Response" filed on June 27, 2011. Alternatively, Respondent contends "if the Tribunal finds that the Response was not authorized by the June 11, 2011, permission, the Township

moves the Tribunal to accept the Response as a supplement under Rule 225(2)." Respondent's Opposition to Petitioners' Motion to Strike p. 2

Respondent contends that either tenancy in common or life estates with dual contingent remainders were created by the September 2005 deed. Respondent cites *Albro*, which states that a joint tenancy is an undivided interest in the whole. Thus, Respondent claims the language in the deed cannot create a joint tenancy with right of survivorship because "the 2005 Hartwell deed clearly conveyed and simultaneously retained only an undivided 'one-half' interest in the grantees." Respondent's Response p. 2 The language "one-half" precludes a joint tenancy as it is not an interest in the **whole** as required in *Albro.*

Alternatively, Respondent argues that the "survivorship" language did not create a joint tenancy because this only creates "life estates with dual contingent remainders." Respondent's Response p. 3. Again citing *Albro*, Respondent illustrates that contrary to Petitioners' contention "life estates with dual contingent remainders" is not the same thing as a joint tenancy. Thus, the interest Petitioners were granted was not a joint tenancy with right of survivorship and the property was properly uncapped upon the death of Albert Hartwell.

Respondent claims its Answer was sufficient and denied Petitioners' allegation in Paragraph 8 stating a joint tenancy with right of survivorship was created by the 2005 deed. Respondent further contends that "[n]o affirmative defense is necessary because that is the legal issue in this case; did Mr. Hartwell create an irrevocable joint tenancy or not in the entire property." Respondent's Response p.1

Respondent contends there was no irrevocable joint tenancy or joint tenancy with rights of survivorship.

FINDINGS OF FACT

Petitioners were granted an interest in the real property located at 4605 Egypt Valley Avenue, Cannon Township, Michigan by a deed dated September 27, 2005. The parcels at issue in this case are (A) 41-11-32-276-001; (B) 41-11-32-400-001; and (C) 41-11-32-400-004. The grant in the deed states it is:

> BETWEEN **Albert Hartwell**, a single man, whose address is 4065 Egypt Valley Ave., Ada, Michigan 49301, first party
>
> And
>
> **Albert Hartwell**, of 4065 Egypt Valley Ave., Ada, MI 49301, an undivided one-half interest, and **Barry Hartwell** and wife **Patricia Hartwell**, second parties, of 3985 Egypt Valle Ave., Ada, MI 49301, an undivided one-half interest, joint tenants with right of survivorship as between first and said second parties.

On April 24, 2009, Albert Hartwell passed away. In tax year 2010, Cannon Township uncapped the taxable values for the parcels in question due to the death of Albert Hartwell. On March 11, 2010, Petitioners appeared before the March Board of Review.

The Petition was timely filed on May 6, 2010. Respondent was placed in default for failure to file an Answer on April 26, 2011. Respondent timely cured the default by filing an Answer and a Motion to Set Aside Default. On June 27, 2011, Respondent filed “Respondent’s Response.”

APPLICABLE LAW

Petitioners move for summary disposition pursuant to MCR 2.116(C)(9). A motion brought under MCR 2.116(C)(9) seeks a determination of whether the opposing party has failed to state a valid defense to the claim asserted against it. *Nicita v Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996). Only the pleadings are considered in a motion under MCR 2.116(C)(9). MCR 2.116(G)(5). "The well-pleaded allegations are accepted as true, and the test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Nicita, supra* at 750.

Petitioners also move for summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The

moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

CONCLUSIONS OF LAW

The Tribunal finds that Respondent's "Response" filed on June 27, 2011, was actually an attempt to file either a second answer or a supplemental answer. Pursuant to TTR 225, only one answer may be filed and answers may be amended only if the Tribunal grants leave to amend. Respondent's contention that it was granted leave to amend its answer is not reflected in the Record. On June 9, 2011, Respondent's default was set aside; however, this did not grant Respondent a second opportunity to answer or amend its answer. Therefore, Petitioners' Motion to Strike "Respondent's Response" is justified.

The Tribunal has carefully considered Petitioners' Motion for Summary Disposition under MCR 2.116(C)(10) and the Tribunal finds that granting Petitioners' motion is warranted, based on the pleadings and other documentary

evidence filed with the Tribunal. Petitioners' Motion prevails because Petitioners have proven through affidavits, pleadings, and documentary evidence that there is no genuine issue with respect to any material fact. Further, for the reasons set forth herein, the Tribunal finds that a joint tenancy with the right of survivorship exists, there was no "transfer of ownership" and the uncapping of the subject property was improper. As such, granting judgment in Petitioners' favor is appropriate.

First, Respondent contends that no joint tenancy with rights of survivorship existed; thus, the interest held by each party in the deed dated September 27, 2005, must first be defined before determining if the death of Albert Hartwell was a "transfer of ownership" under MCL 211.27a(6). Petitioners contend they held a joint tenancy with rights of survivorship with Albert Hartwell at the time of his death. On the other hand, Respondent contends that Petitioners held either "a tenancy in common or separate life estates with dual contingent remainders." Respondent's Brief, p 4.

Respondent's reliance on *Albro* is misplaced because the issue in that case deals with the right to partition in a joint tenancy with rights of survivorship. Additionally, Respondent uses *Albro* for definitional purposes to explain what interest Respondent believes Petitioners hold in the subject property. The Tribunal finds Respondent has mistakenly relied on the definition of "separate life estates with dual contingent remainders" as this is defined in *Albro* to have the same meaning as "joint tenancy with rights of survivorship," which is the same interest Respondent contends cannot exist:

> In the standard joint tenancy, the right of survivorship may be destroyed by the severance of the joint tenancy. . . If one joint tenant conveys his interest to a third party, then the remaining joint tenant and the grantee become tenants in common, thus destroying the element of survivorship. The "joint tenancy" involved in this case, while unfortunately sharing the same appellation as the typical joint tenancy, is an interest of a different nature. It is created by express words of survivorship in the granting instrument in addition to those creating a joint tenancy, such as "and to the survivor of them" . . . [or] "with right of survivorship" . . . At the crux of this case is the distinction between the "joint tenancy with full rights of survivorship" and the ordinary joint tenancy. **The "joint tenancy with full rights of survivorship" is comprised of a joint life estate with dual contingent remainders.**

Albro, at 274-275. (Emphasis added.) Thus, Respondent's contention that Petitioners hold the subject property as "joint life estates with dual contingent remainders" in effect makes Respondent in agreement with Petitioners that Petitioners have a joint tenancy with rights of survivorship.

Alternatively, Respondent contends that Petitioners' interest is not in the entire estate and thus cannot be a joint tenancy with rights of survivorship. Respondent relies upon the language in the deed of "an undivided one-half interest." While Respondent is correct in defining a joint tenancy with rights of survivorship as an undivided interest in the whole, this Tribunal believes the language of "an undivided one-half interest" even though poorly chosen, was merely language intended by the drafter to indicate that there were not three separate interests in the property, but rather only two: one held by Albert Hartwell, and the second held by the married couple of Barry Hartwell and wife Patricia Hartwell. This is supported by *Butler v Butler*, 122 Mich App 361; 332 NW2d 488 (1983), where the Court discusses conveyances made to husband and wife. The Court states "[w]here a

conveyance of real property was made to husband and wife and a third person, the husband and wife were regarded as **one person** and therefore took but one moiety as tenants by the entirety." *Id.* at 365. (Emphasis added.)

Respondent is again correct in stating that tenants in common is the default interest when conveying to two or more persons *unless* there is a contrary intent clearly and unambiguously stated in the conveyance. The Tribunal finds in this case the default interest is inapplicable because a contrary intent has clearly been expressed in two ways. First, the conveyance is to "Barry Hartwell and wife Patricia Hartwell" the language "and wife" indicates an intent to create a single interest in the two individuals as a tenancy by the entireties. In addition, even amid the poor choice in wording of "an undivided one-half interest" the drafter chose to add the specific language "joint tenants with right of survivorship." These words very clearly and unambiguously express the true intent of the drafter, which is to create a joint tenancy with rights of survivorship. See *Albro*, at 274-275. Thus, the deed dated September 27, 2005, created a joint tenancy with rights of survivorship in two parties: (1) Albert Hartwell, and (2) the married couple Barry Hartwell and wife Patricia Hartwell (Petitioners).

Since the Tribunal has determined that a joint tenancy with rights of survivorship existed, it can now be determined if the events of either the creation of the joint tenancy with rights of survivorship or the death of Albert Hartwell constitute a "transfer of ownership" allowing uncapping. Under the General Property Tax Act, taxable values are determined pursuant to MCL 211.27a and calculated by multiplying the prior year's taxable value by the inflation rate multiplier for the current year. Except for additions and losses to a property, annual increases in a

property's taxable value are "capped" and limited to 5% or the rate of inflation, whichever is less. However, in the year following a transfer of ownership this limitation is eliminated and the property's taxable value is "uncapped" and set at 50% of the property's true cash or fair market value. A "transfer of ownership" is defined by MCL 211.27a(6) as "the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." There are, however, seventeen specific conveyances that are not considered "transfers of ownership" for uncapping purposes, including the joint-tenancy exception found in MCL 211.27a(7)(h). This exception, which is applicable under the facts of the instant appeal, states as follows:

> A transfer creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created. A joint owner at the time of the last transfer of ownership of the property is an original owner of the property. For purposes of this subdivision, a person is an original owner of property owned by that person's spouse.

Respondent contends that there was a transfer of ownership of the subject property under MCL 211.27a(6) on either September 27, 2005, when the deed was executed creating the joint tenancy with right of survivorship, or in the alternative, on April 24, 2009, when Albert Hartwell passed away terminating the joint tenancy with rights of survivorship. At issue then are two separate and distinct potential uncapping events: (1) the creation of the joint tenancy between Albert Hartwell

and Petitioners, and (2) the termination of the joint tenancy by operation of law upon the passing of Albert Hartwell, which vested Petitioners with ownership of the subject property in fee simple absolute.

With respect to the creation of the joint tenancy with rights of survivorship, the 2005 conveyance of the property from Albert Hartwell to himself and Petitioners, as joint tenants with right of survivorship, would not be a "transfer of ownership" for uncapping purposes because Albert Hartwell is considered an "original owner." As noted by the Court in *Klooster*, there are "two requirements for satisfying the joint-tenancy exception…the 'original-ownership requirement' and the 'continuous-tenancy requirement.'" *Id*. The Court noted the importance of properly construing the term "original owner" in a joint tenancy exception analysis, which "examines ownership of the property both before and after the conveyance at issue to ensure that continuity of original ownership bridges the transfer" and held as follows:

> To determine who is an "original owner of the property" within the narrow context of the joint-tenancy exception, one must first identify the most recent transfer of ownership that uncapped the property and then determine who owned the property as a result of that uncapping conveyance. The joint-tenancy exception provides that "[a] joint owner at the time of the last transfer of ownership . . . is an original owner" and that "[f]or purposes of this subdivision, a person is an original owner of property owned by that person's spouse." MCL 211.27a(7)(h). There are thus three possibilities for who may constitute an "original owner" under the joint-tenancy exception: (1) a sole owner at the time of the last uncapping event, (2) a joint owner at the time of the last uncapping event, and (3) the spouse of either a sole or joint owner of the property at the time of the conveyance at issue (i.e., the conveyance that may uncap the property). See *id.*

While the exact date and facts and circumstances of the transfer are unknown, the most recent uncapping event would have been the original conveyance to Albert Hartwell. Since Albert Hartwell is an original owner it was "[a] transfer creating…a joint tenancy between 2 or more persons" and at least one of the persons, namely, Albert Hartwell, "was an original owner of the property before the joint tenancy was initially created." MCL 211.27a(7)(h). With respect to the second requirement of the joint-tenancy exception, the Court in *Klooster* held that "[f]or purposes of applying the continuous-tenancy requirement of the joint-tenancy exception, a person who becomes a joint tenant as a result of a conveyance is 'a joint tenant when the joint tenancy was initially created.'" *Id*. The Court reasoned that

> [t]he adverb "when" refers to a distinct point in or period of time. See *The American Heritage Dictionary, Second College Edition* (1982) (defining "when" as "[a]t the time that" and "during the time at which"). "When" is not complete in itself, however, and requires some contextual referent to the event or period of time to which it applies. As "when" is used in the joint-tenancy exception, it is not durational; it refers to the moment in time "when the joint tenancy was initially created . . . ." MCL 211.27a(7)(h). At that moment, each cotenant acquired the status of a joint tenant by virtue of the instrument creating the joint tenancy. Had the Legislature meant to say "before," it would have done so, as it did earlier in the joint-tenancy exception (i.e., "if at least 1 of the persons was an original owner of the property *before* the joint tenancy was initially created"). *Id*. (emphasis added).

When Albert Hartwell conveyed the subject property to himself and Petitioners in September of 2005, he created a nonsuccessive joint tenancy because at the time of that conveyance, as reflected in the deed, sole ownership of the property was vested in him. Since Albert Hartwell was the sole owner, only the "original-

ownership requirement" of MCL 211.27a(7)(h) need be considered, as the Supreme Court in *Klooster* held that "the continuous-tenancy requirement applies only if the property was held in a joint tenancy at the time of the conveyance." *Id*. Therefore, the requirements of the joint tenancy exception are met and the 2005 conveyance is not a "transfer of ownership" causing uncapping.

As for the termination of the joint tenancy between Albert Hartwell and Petitioners, the Michigan Supreme Court, in *Klooster*, noted that "[u]nless an applicable exception exists, the interest that vests in the last survivor in a joint tenancy with rights of survivorship *would* constitute a transfer of ownership because the fee simple that vests in the survivor is a 'conveyance of title... the value of which is substantially equal to the value of the fee interest.'" *Id.* The Tribunal again finds, however, that the fee simple that vested in Petitioners, as a result of the passing of Albert Hartwell, while it was a conveyance pursuant to the Supreme Court's holdings in *Klooster*, is nonetheless excluded from the definition of a "transfer of ownership" under the joint-tenancy exception of MCL 211.27a(7)(h), which excludes either transfers creating or terminating joint tenancies. As explained above, the two requirements of this exception are the "original-ownership requirement" and the "continuous-tenancy requirement." Since Albert Hartwell was an "original owner" and the joint tenancy was a nonsuccessive joint tenancy, the exception applies and his death does not constitute a "transfer of ownership."

Thus, neither the September 2005 nor April 2009 conveyances would be "transfers of ownership" for uncapping purposes as they are both excluded under the joint tenancy exception because Albert Hartwell is considered an "original owner." Any

future conveyances, even those creating a joint tenancy, would constitute a "transfer of ownership" for uncapping purposes because Petitioners are not deemed to be "original owners" under the statute. Original ownership is determined at the time of the last uncapping event. Since Petitioners have not been owners during an uncapping event they cannot be "original owners" and any future transfer will thus uncap the property. As such, the Tribunal finds no genuine issue of disputed fact exists.

JUDGMENT

IT IS ORDERED that Petitioners' Motion to Strike is GRANTED.

IT IS FURTHER ORDERED that Petitioners' Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the property's taxable value ("TV") for the tax year at issue is as follows:

Parcel Number: 41-11-32-276-001

Year	TV
2010	$93,804

Parcel Number: 41-11-32-400-001

Year	TV
2010	$18,844

Parcel Number: 41-11-32-400-004

Year	TV
2010	$71,617

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's taxable values as shown in this Order within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755.

IT IS FURTHER ORDERED that the officer charged with refunding the affected taxes shall issue a refund as required by the Order within 28 days of the entry of the Order. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010 and (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011.

MICHIGAN TAX TRIBUNAL

Entered: November 9, 2011 By: Kimbal R. Smith III
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