

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000727-MR

ESTATE OF MARY BOONE,
BRIDGETT KLEIN, EXECUTRIX;
AND BRIDGETT KLEIN

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E MCDONALD-BURKMAN, JUDGE
ACTION NO. 09-CI-004481

CHARLES JOSEPH HANS,
EXECUTOR OF THE ESTATE OF
ANNA HANS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: The issue before us is whether the Jefferson Circuit Court properly entered summary judgment finding, upon the death of her co-tenant Mary

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) 21.580.

Boone, Anna Hans² became the fee simple owner of real property pursuant to a deed in which Boone and Hans held title as joint tenants with right of survivorship. Appellant Bridget³ Klein, Executor of the Estate of Mary Boone, contends the residuary clause in Boone's Last Will and Testament in favor of Klein should prevail over the deed. Alternatively, Klein contends, if the court finds Hans is the fee simple owner of the property, the court should impose a constructive trust because Hans orally agreed to honor Boone's wishes, as set forth in her Last Will and Testament, and not assert any claim to the property. Finding no error, we affirm.

Facts

The decedent, Mary Boone, and Hans were sisters. On August 4, 1995, one Mary Floors conveyed to Boone and Hans, by general warranty deed, real property located at 5501 McDeane Drive in Jefferson County, Kentucky (McDeane Property or Residence). The relevant language of the deed states:

That, for a valuable consideration in the amount of (\$85,000.00), the receipt of which is hereby acknowledged, [Floors] hereby convey[s] unto [Mary Boone and Anna C. Hans], for and during their joint lives with the remainder in fee simple to the survivor of them, with covenant of General Warranty, the following described property located in Jefferson County, Kentucky. [The legal description of the real property followed.]

² Hans passed away on April 16, 2010. On August 24, 2010, this Court granted the motion of Charles Joseph Hans, Executor of the Estate of Anna Hans, to substitute as appellee.

³ In the body of the notice of appeal, Bridget is spelled "Bridgett." In numerous relevant documents created by the parties, however, Bridget is spelled with one "t." We have adopted the spelling used by the parties who authored those documents.

The deed was properly executed and notarized and, on August 7, 1995, the deed was properly recorded in the Jefferson County Clerk's Office. We will refer to this deed as the 1995 Deed. The validity of the deed is not in question.

On May 16, 2002, Boone executed the first of two wills. We will refer to this will as the 2002 Will. This first will included a provision that devised "any real estate that I may own or have and [sic] ownership interest in to ANNA HANS[.]"

On March 21, 2005, Boone revoked the first will and executed a new one. We will refer to this will as the 2005 Will. The residuary clause of this will stated, "All the rest and residue of my estate, real, mixed and personal, wheresoever situate and of whatever nature, including any property which may be acquired by me, or to which I am become entitled . . . in fee simple absolute to my niece BRIDGET KLEIN"

As we explain below, no further facts are necessary for our review. However, because Klein's arguments are based on other facts and allegations, we will summarize them.

Hans did not pay any of the \$85,000 purchase price for the property, nor did she pay any of the taxes, insurance, or maintenance costs. Boone lived at the McDeane Property for the remainder of her life. Hans resided at a separate home, but visited Boone regularly.

In 2000, Klein, Boone's niece, moved into the McDeane Property and assumed Boone's care.

In conjunction with creation of the 2005 Will, Boone's attorney sent a letter and a quit-claim deed to Hans asking her to relinquish her interest in the McDeane Property. Hans refused to do so. However, Klein alleges that upon receiving the letter, Hans called Boone and told her she would do whatever Mary Boone desired regarding transferring the property when Boone died.

On April 4, 2009, Boone passed away, and Klein submitted Boone's 2005 Will to the Jefferson District Court for probate. Shortly thereafter, Boone's attorney sent a second letter to Hans again asking Hans to release her interest in the McDeane Property. She again declined to do so.

Procedure

When Hans refused to release her interest in the McDeane Property, Klein, in her capacity as Executor of the Estate of Mary Boone, filed suit in Jefferson Circuit Court claiming that, despite the 1995 Deed, the property should not pass to Hans, but instead be included as part of Boone's estate and pass pursuant to the terms of Boone's 2005 Will. Neither the complaint nor the amended complaints challenge the validity of the 1995 Deed in any way; on the contrary, the original complaint, and the first and second amended complaints each specifically acknowledge "the fact that legal title to the Residence is now in the name of Ann [sic] C. Hans"

Reading the second amended complaint liberally (and in the context of the arguments before the circuit court and this Court), Klein alleges, in the alternative, (1) that to the extent title to the real property constituted Boone's gift to Hans, there was no delivery; and (2) that "equitable title should be in the [Estate of Mary Boone or Klein] in accordance with the legal principles of a Constructive Trust"

On November 12, 2009, Hans filed a motion for summary judgment claiming, by virtue of the 1995 Deed, that Boone made a valid *inter vivos* gift of real property to Hans and, upon Boone's death, Hans became the sole owner of the McDeane Property by operation of law. Hans further claimed no evidence existed which would support imposing a constructive trust. The circuit court granted Hans's motion. This appeal followed.

Standard of Review

Our task in reviewing a grant of summary judgment is to determine whether the circuit court correctly found that no genuine issue exists as to any material facts and whether, based on such facts, appellee is entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). We must examine the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When reviewing a summary judgment order, only legal questions and the existence, or non-existence, of material facts are considered. *Scifres*, 916 S.W.2d at 687-88. Therefore, a grant

of summary judgment is reviewed *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we turn to the case before us.

Validity of deed and passage of title

The assailability of a deed is limited by, among other things, the merger doctrine, which holds “that all prior statements and agreements, both written and oral, are merged into the deed.” *Borden v. Litchford*, 619 S.W.2d 715, 717 (Ky. App. 1981). However, there are exceptions including “fraud, mistake, or contractual agreement[s] clearly not intended to be merged into the deed.” *Miller v. Hutson*, 281 S.W.3d 791, 795 (Ky. 2009) (quoting *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 532 (Ky. App. 2005) (citation omitted)). No exception applies in this case.

There is no allegation of fraud or mistake. There is no evidence of any contractual agreement from which we could read into the unambiguous deed any intention on the part of Boone to reserve a power to revoke Hans’s title to the property. *See Sand v. Sand*, 321 S.W.2d 234, 236 (Ky. 1959) (Even where a deed conditioned transfer of title on payments to third parties, the court found “[t]he language of the present instrument contains nothing that indicates the reservation of a power to revoke it.”).

The merger doctrine thus prohibited the circuit court from considering evidence that Hans’s acquisition of the McDeane Property involved a gift, whether it was evidence of a gift from Boone to Hans of the property itself, or Boone’s gift to Hans of her share of the consideration to pay for the property.

In any event, Klein acknowledges title passed to Hans upon Boone's death. As a matter of law, this is entirely consistent with "the right of survivorship, by which, upon the death of one joint tenant, the entire tenancy remains to the surviving co-tenants, not to the heirs or other representatives of the deceased, the last survivor taking the whole estate[.]" *City of Louisville v. Coleburne*, 22 Ky.L.Rptr. 64, 56 S.W. 681, 682 (Ky. 1900); *see also Sanderson v. Saxon*, 834 S.W.2d 676, 678 (Ky. 1992) ("[J]oint tenancy . . . is an estate held by two or more people who (in the case where the estate is held by only two) are not husband and wife. Each is jointly entitled to the enjoyment of the estate so long as all live; however, the interest of a joint tenant, at his or her death, passes to the survivor."). Klein's collateral attack upon the subject deed, other than by exception to the merger doctrine, must necessarily fail.

Despite concluding that the circuit court properly refused to consider any evidence of a gift, but because Klein urges it, we will briefly discuss her argument that, while Boone intended a gift, she did not intend to "deliver" it until her death.

Any gift to Hans was effective upon the deed's recordation

Disregarding the unambiguous nature of the subject deed, Klein argues that because Boone treated the physical property as hers alone, she did not do all that was necessary to complete a gift to Hans. Specifically, Klein argues that while Boone did intend to make a gift of the property to Hans, she "intended to make [it]

only at her death”; furthermore, Klein finds it significant that “Mary Boone retained control of the [property] until her death.”

Klein’s view leads her to refer to the property and the transactions as Boone’s “revocable *inter vivos* gift” to Hans. This is erroneous since an *inter vivos* gift is irrevocable. *Cochran’s Adm’x v. Cochran*, 273 Ky. 1, 115 S.W.2d 376, 383 (1938) (“A ‘gift *inter vivos*’ is one between living persons to operate, if at all, in the donor’s lifetime, immediately and irrevocably”; (citation and internal quotation marks omitted.)). However, we believe Klein is actually arguing that Boone never “delivered” the property to Hans because she never relinquished possession to Hans. *See Leasor v. Bailey*, 714 S.W.2d 156, 158 (Ky. App. 1986) (“[D]onor may revoke his intended gift any time prior to delivery and acceptance.”).

If Klein could somehow bypass the merger doctrine and the statute of frauds, we would still affirm the circuit court because this argument also fails.

Klein fails to understand that it is the delivery of the deed and not the relinquishment of physical possession of the real property that controls here. *See generally Howell v. Herald*, 197 S.W.3d 505 (Ky. 2006) (valid gift where deeds were prepared and delivered to third party until death of grantor). What is necessary to complete a gift of real property is the conveyance of title. To constitute a valid gift of real property

“[t]here must be a gratuitous and absolute transfer of the property from the donor to the donee which takes effect immediately and is fully executed by delivery of the

property by the donor and the acceptance thereof by the donee.” *Knox v. Trimble*, Ky., 324 S.W.2d 130, 132 (1959). “[T]he general rule is that the lodging of a deed for record in the proper office by the grantor is sufficient to constitute a delivery.” *Nunn v. Justice*, Ky., 278 Ky. 811, 819, 129 S.W.2d 564 (1939). *See also Linthicum v. Pruden*, Ky., 313 Ky. 527, 233 S.W.2d 98 (1950). “[W]here property is conveyed as a gift, the transaction is by its very nature unilateral, and the grantee’s intent or conduct (other than acceptance) plays no part in fixing the rights of the parties.” *Twiford v. Huffaker*, Ky., 324 S.W.2d 403, 406 (1959).

Rakhman v. Zusstone, 957 S.W.2d 241 (Ky. 1997).

Furthermore, the case before us has some significant attributes similar to those in *Linthicum v. Pruden* in which our highest court said,

[R]ecordation of the instruments raises a presumption of delivery, [citation omitted], and even acceptance, where, as here, the instruments were recorded by the grantor and knowledge of such fact was communicated to the grantees whose subsequent conduct was compatible with acceptance and incompatible with nonacceptance. [citation omitted]. Moreover, the letter which Mr. Anderson wrote at the direction of his client requesting conveyance back was evidence that Mr. Marret, Sr., . . . was of the opinion not only that the 1931 deeds had been delivered but likewise that they had been accepted.

Linthicum v. Pruden, 313 Ky. 527, 233 S.W.2d 98, 99 (Ky. 1950). Just as Mr. Marret’s attorney in *Linthicum* wrote to Mr. Marret’s donee, Boone’s attorney wrote to Hans “requesting conveyance back”; this supports the conclusion that Boone recognized that her gift had been delivered and accepted. *See also Haynes v. Barker*, 239 S.W.2d 996, 997 (Ky. 1951) (“[T]he lodging of the deed for record in the proper office by the grantor is sufficient to constitute a delivery.”).

Constructive Trust

Finally, Klein argues that this court should invoke its equity powers to impose a constructive trust for the benefit of Klein based on the alleged telephone conversation between Boone and Hans in 2005 in which Klein alleges Hans agreed to honor Boone's 2005 Will and not assert any claim to the McDeane Property. Klein contends that Hans's failure to honor her oral promise to Boone resulted in a constructive trust. This argument is without merit.

The power reposed in courts of equity to set aside deeds solemnly entered into between the parties is an extraordinary one and is a power not lightly exercised.

Fortney v. Elliott's Adm'r, 273 S.W.2d 51, 54 (Ky. 1954).

A constructive trust is a court-created mechanism used "to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." George Gleason Bogert, et al., *The Law of Trusts and Trustees* § 471 (2d ed. West 1979). Thus, "[w]hen legal title to property has been acquired or held under such circumstances that the holder of that legal title may not in good conscience retain the beneficial interest," equity vests title in the wronged party and converts the fraudulent party into a trustee. *Keeney v. Keeney*, 223 S.W.3d 843, 849 (Ky. App. 2007). A constructive trust may be invoked when "title to the property is obtained through fraud, misrepresentation, concealment, undue influence, or taking advantage of one's weaknesses or necessities, or through similar means or circumstances." *Moore v. Terry*, 293 Ky. 727, 170 S.W.2d 29, 32

(1943). Thus, it is a “fraud-rectifying” trust and not an “intent-enforcing” trust.

Bogert, *The Law of Trusts and Trustees* § 471.

Klein acknowledges that no fraud occurred at the time Boone executed the 1995 Deed. Rather, Klein contends the wrongdoing occurred after Boone’s death when Hans failed to honor her oral agreement with Boone that she would not allow title to the McDeane Property to pass pursuant to the terms of Boone’s 2005 Will. In essence, the crux of Klein’s argument is that Hans misled her sister when she changed her mind after her sister had died.

Even after we view the evidence in a light most favorable to Klein and accept all her allegations as true for purpose of reviewing the summary judgment, we simply cannot conclude that Hans’s conduct justifies any court’s exercise of equitable powers to change the unambiguous terms of the subject deed. No equitable relief is available here. To hold otherwise would allow a party to obtain a constructive trust every time a person makes a gratuitous promise to give someone property and subsequently changes her mind before giving it; not coincidentally, this would run contrary to the law discussed above as it relates to *inter vivos* gifts. *Leasor*, 714 S.W.2d at 158 (“[D]onor may revoke his intended gift any time prior to delivery and acceptance.”). Constructive trusts are not designed merely to avoid the unwanted results of a legal solution that presents itself as readily as it does in this case.

Conclusion

The 1995 Deed created a joint tenancy with right of survivorship between Hans and Boone. At Boone's death, fee simple title absolute to the McDeane Property automatically vested in Hans. The McDeane Property is not part of Boone's estate and, thus, not controlled by the terms of Hans's 2005 Will. The Jefferson Circuit Court's order granting summary judgment is affirmed.

ALL CONCUR.

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