IN THE COURT OF APPEALS OF IOWA

No. 3-738 / 12-0153
Filed October 23, 2013

BETTY LU OXENREIDER, Individually and as Executor for The Estate of DON JOHNSTON,
Plaintiffs-Appellants,

vs.

ANDREW J. MCALEXANDER, BECKEY M. WHITE N/K/A BECKY M. MCALEXANDER, JERRY MCALEXANDER, ROSALEE MCALEXANDER, and DEBRA VAN HORN,
Defendants-Appellees.

Appeal from the Iowa District Court for Ringgold County, Sherman W. Phipps, Judge.

Betty Lu Oxenreider, individually and as Executor for the Estate of Don Johnston, appeals from the district court's dismissal of their action after a bench trial. **AFFIRMED.**

A. Zane Blessum, West Des Moines, for appellants.

Robert W. Reynoldson of Reynoldson & Van Werden, L.L.P., Osceola, for appellees.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

Betty Lu Oxenreider, individually and as Executor for the Estate of Don Johnston (the Estate), appeals from the district court's dismissal after a bench trial of the action against Andrew McAlexander, Beckey White (n/k/a Beckey Alexander), Jerry McAlexander, Rosalee McAlexander, and Debra Van Horn (collectively, the McAlexanders). She argues the district court erred in ruling the conveyances of real property were gifts. She concedes the court correctly found there were no agreements to pay for the property. We affirm, finding the district court properly found the conveyances were gifts and dismissed the action.

I. Facts and proceedings.

Don and Naomi Johnston owned three tracts of farm land: a 130-acre tract where their home was situated (the Home Tract), an eighty-acre tract southwest of the Home Tract (the Southwest Tract), and a one-third interest in a 320-acre tract of land south of the Home Tract (the South Tract). Their interest in the South Tract was shared with Don's two siblings. Naomi and Don deeded about three acres of the Southwest Tract to Andrew McAlexander. They also provided for Andrew to build a home on that property. The deed for these acres recited the consideration for the transfer was one dollar and other valuable consideration. The Estate and Oxenreider do not dispute that conveyance to Andrew.

Don and Naomi had a close relationship with the McAlexanders. Andrew's grandfather was Naomi's brother. Don and Naomi were aunt and uncle to Jerry McAlexander, Larry McAlexander, and Deborah Van Horn.

Naomi died in 2008; after her death Don made further conveyances of their property to others. In June 2008 Don signed three deeds to transfer the remainder of the parcels of land. All of the deeds were filed with the county recorder the next day. One deed conveyed the entire remaining Southwest Tract to Jerry McAlexander,[1] Larry McAlexander, and Debra Van Horn in equal shares. The conveyance reserved a life estate for Don. This deed stated the conveyance was made "for the consideration of one hundred sixty thousand" dollars. The next conveyance was made to Andrew McAlexander and Beckey White (the two later married and are now Andrew and Beckey McAlexander) as joint tenants of the entire Home Tract for the consideration of two hundred and sixty thousand dollars along with other valuable consideration. This conveyance also reserved in Don a life estate. The reservation of the life estate for both tracts was to provide Don with farm income for the rest of his life. Finally, the last conveyance was of his one-third interest in the South Tract to Betty Lu Oxenreider and Lyle Johnston—Don's siblings. This transfer was made for the consideration of one dollar and other valuable consideration. This last conveyance is not at issue on appeal. No money was paid to Don for any of the transfers of land.

Jerry became aware of the transfer shortly after it was recorded. Oxenreider became aware of the transfers after taking Don to pay his real estate taxes later that year. Andrew knew immediately—he was present when Don signed the deeds. At trial, Andrew reported Don told him not to worry about the

[1] Jerry died in May 2010 and therefore was not named as a party to this suit. Instead, Rosalee McAlexander is named in the suit as she is the executor of Jerry's estate.

consideration line on the deed, that it was a formality suggested by Don's attorney.

In August of 2009, Don decided he had "made a mistake" in making the three June 2008 conveyances. He wrote the recipients through his attorney requesting they deed the land back to him. After the recipients refused to deed the land back to him, Don filed suit against them in August of 2010. Don was deposed prior to trial. He testified that he wanted the land back after the McAlexander family did not want to take care of him anymore. He stated that by transferring them the land, he thought they would care for him and the land, though none of them had actually promised to do so. He also stated in his deposition that no one in the McAlexander family promised to take care of him for the rest of his life, and none of them told him they would pay him for the transfer of the deeds.

Don died in April of 2011. The case was continued by the Estate and Oxenreider. Trial was held October 25 and 26, 2011.

At trial, the attorney involved in the conveyance explained the inclusion of the consideration line on the deeds to the McAlexanders:

> It was a gift. It was never intended to be a sale. I met with Don and he wanted to gift these three properties. And Don had expressed to me that he was concerned, two of his favorite people were Jerry McAlexander and Andrew McAlexander. And he expressed he was concerned about that there might be hard feelings amongst the McAlexander family if Andy or some of the others got more than they would.
>
> And, the reason we didn't put a consideration on Betty and Gene, Lyle Gene's [Lyle Johnston's], I don't think he thought there was going to be a problem there. And also he stated to me at least once, maybe twice, that he didn't really want Betty and his brother to know about his affairs.

> And so it was a gift with the stated consideration. It was never to be any money paid from transferees, donees to the donors transfer. . . .
>
> If I had to do it over I wouldn't [put a stated value on the gift]. . . . I thought I was going to help alleviate some problems, but as it turned out, it caused problems.

The court dismissed the suit with prejudice. The Estate and Oxenreider appeal.

II. Analysis.

We review this equity proceeding de novo.[2] Iowa Ct. R. 6.907; *Raim v. Stancel*, 339 N.W.2d 621, 622 (Iowa Ct. App. 1983). The Estate and Oxenreider argue on appeal that the district court erred in finding the transfers were a gift. They argue there was no evidence of present intent and purpose to pass title as a gift, and there was no actual delivery of the deeds.

> In order for a deed to constitute a valid gift there must be (1) donative intent, (2) delivery, and (3) acceptance. The intent of the grantor is the controlling element in the delivery of a deed. If a condition as to the vesting of title is attached to the delivery of the gift, the gift fails. Therefore, a valid gift is made when a nonconditional delivery is tendered; otherwise it is not a valid inter vivos gift.

Raim, 339 N.W.2d at 623–24 (internal citations omitted). The McAlexanders reply that the issue of whether the conveyance was a gift was not preserved for our review.

A. Error preservation.

The McAlexanders state the only issue brought before the court at the trial court level was whether they committed a "breach of the agreement for failure to make payment and consideration for the sale of the (subject real estate)."

[2] Both parties agree that this action was captioned in equity and tried, at least in part, in equity. Therefore, both parties agree our review is de novo.

Therefore, they reason, the issue of whether the transfers were properly characterized as a gift was not preserved for our review.

The amended petition in this case alleges a breach of agreement regarding both land transfers for failure to make payment in consideration of the sales of the property. The district court concluded no payment was necessary as the transfer were gifts. In reaching this conclusion, the district court looked at Don's expectation regarding payment—his intent at the time of the conveyance. Only after this analysis did the court conclude that the transfers were gifts. The underlying policy of our error-preservation rules is that a district court must be presented with and rule upon an issue. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). To refute the Estate and Oxenreider's claims for payment for the property, the McAlexanders argued the conveyances were gifts. The McAlexanders presented extensive testimony about the nature of their relationship with Don to establish intent to gift the property. The court's explicit finding that the conveyances were gifts was a necessary element of its finding that Oxenreider and the Estate failed to prove their claim for payment. We find the issue is preserved for our review.

B. Intent and purpose.

The donor must have a clear intention to pass all right, title, and dominion over the gift to the donee. *Gray v. Roth*, 438 N.W.2d 25, 29 (Iowa Ct. App. 1989). When we look at the intent to make a gift, we look to the "present intent"—the intent at the time the gift was made. *In re Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996). In his deposition, Don stated he did not expect payment and that no promise to care for him was made. Only later, when the

McAlexanders failed to care for him in the way he anticipated, Don realized he "made a mistake." While the deeds themselves recite consideration, no agreement to pay has been shown, and all of the testimony at trial indicates that Don intended the transfers to be gifts at the time he made them. The district court correctly found Don intended to gift the properties to the McAlexanders.

C. Delivery.

> We have repeatedly held and it is the law generally that the intent of the grantor is the controlling element in the delivery of a deed. Delivery is largely a question of intent; and, if from all the circumstances it appears that the grantor intended by his acts to pass present title, there may be a sufficient delivery, although grantees have never had manual possession of the deed. If it were intended to pass title, and all parties so treated it, the delivery was sufficient.

Hilliard v. Hilliard, 39 N.W.2d 624, 626 (Iowa 1949) (internal citations and quotation marks omitted). Oxenreider and the Estate argue the transfer was insufficient as none of the deeds was ever manually handed to the recipients of the properties. Instead, Andrew was given a copy of the deed and was present for the signing; the other members of the family found out later about the conveyance. Oxenreider cites no authority to support the proposition that this delivery was insufficient. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). We find

the delivery was sufficient to support the finding Don gifted the properties to the McAlexanders.[3]

AFFIRMED.

[3] Oxenreider also raised the issue for the first time in oral argument that Don's letter requesting the land be given back to him constituted revocation of his gift. Oxenrieder did not argue this before the district court, nor did she raise it in her brief. We therefore do not consider this issue. *Mitchell v. Cedar Rapids Comm. Sch. Dist*, 832 N.W.2d 689, 695 (Iowa 2013) ("Although our error preservation rules are not designed to be hypertechnical, we require that the nature of any alleged error be timely brought to the attention of the district court.") (citations omitted). *Dilley v. City of Des Moines*, 247 N.W.2d 187, 195 (Iowa 1976) ("[W]e do not consider issues raised for the first time in oral argument.").