STATE OF MICHIGAN

COURT OF APPEALS

LOUIS DUCHENY, Personal Representative of the Estate of WALLEN DUCHENY, Deceased,

Plaintiff-Appellee,

v

DONALD KEITH GREEN, JR,

and

LOIS GREEN,

Defendants-Appellants.

UNPUBLISHED
September 4, 1998

No. 194048
Antrim Circuit Court
LC No. 93-006094 CH

Before: White, P.J., and Saad, and Markey, JJ.

PER CURIAM.

Defendants appeal by right a judgment in favor of plaintiff titling seventy-two acres of real property (the "farm") on Torch Lake to the estate of Wallen Ducheny. We affirm.

Defendants claim that Wallen Ducheny transferred the farm, reserving a life estate, to defendant Lois Ducheny via a deed executed in 1966, and that the trial court erred in finding that two 1991 deeds, which would have transferred the farm to Donald Green Jr., reserving a life estate in Wallen Ducheny, were invalid. The trial court found, among other things, that Wallen Ducheny never delivered any of the deeds with the intent to make a presently operative conveyance of an interest in land.

This Court reviews de novo the determinations of a trial court sitting in an equity case. *Havens v Schoen*, 108 Mich App 758, 762; 310 NW2d 870 (1981). However, this Court reviews for clear error the findings of fact in support of an equitable decision. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). A finding of fact is not clearly erroneous unless there is no evidence to support it or the reviewing court is left with the definite and firm conviction that a mistake has been made. *Townsend v Brown Corporation of Ionia, Inc*, 206 Mich App 257, 263; 521 NW2d 16 (1991). The burden of proving delivery and the requisite intent by a preponderance of the

evidence rests with the person relying on the deed. *Camp v Guaranty Trust*, 262 Mich 223; 247 NW 162 (1933). Some proof must exist that the grantor intended to make a presently operative conveyance to the grantee. *Wandel v Wandel*, 336 Mich 126; 57 NW2d 468 (1953). Manual transfer of the deed is not indispensable to delivery, but it is evidence of delivery. The controlling factor in determining the question of delivery in all cases is the intention of the grantor. *McMahon v Dorsey*, 353 Mich 623, 626; 91 NW2d 893 (1958). The key is whether the grantor manifested intent of a "completed legal act." *Id*. Subsequent conduct of the parties may be taken into consideration in determining whether there was an intent to pass title. *Resh v Fox*, 365 Mich 288, 292; 112 NW2d 486 (1961).

We have considered defendants' claims of error in regard to the trial court's findings pertaining to the 1966 and 1991 deeds and are not persuaded that reversal is warranted. In our opinion, while there was evidence presented at trial which would support a finding that Wallen Ducheny did intend to transfer a present interest in the farm, the trial court's finding to the contrary was also supported by the evidence; consequently we are simply not left with the definite and firm conviction that the trial court made a mistake. We need not determine what Wallen Ducheny actually intended or what actually occurred. We must simply determine whether the trial court's findings were clearly erroneous, and whether, based on those findings, the trial court made the right decision. After a review of the entire record, we cannot conclude that the trial court's findings were clearly erroneous. Moreover, based on those findings, we believe the trial court made the correct disposition.

Next, defendants claim that the trial court abused its discretion in considering the contents of a probate court file that was introduced following the close of proofs without allowing defendants the opportunity to present evidence and testimony regarding the file's content. We disagree.

During closing argument, the file was discussed, and the trial court asked for, and defense counsel provided, an explanation of the apparently inconsistent positions. Defendants did not, however, object to the trial court's consideration of the file or request an opportunity to present testimony regarding the file. Thus, relief will not be allowed on appeal.

Next, defendants claim the trial court erred in refusing to reopen proofs to allow defendants to introduce evidence that Wallen Ducheny had named Lois Green as an insured party on the farm's insurance policy. We fail to see how defendants are prejudiced to the extent that reversal or a remand is required. This was a bench trial. Lois Green testified at trial that she thought she may be a named insured. The declaration certificate showing that Lois Green was a named insured was attached to defendants' motion. Therefore, the trial court, presumably, reviewed the certificate and defendants' argument, and obviously did not think it invalidated its earlier ruling, or raised new issues necessitating further proofs. In other words, the trial court, also the factfinder, did not believe that that fact alone altered the outcome. The question then becomes whether that fact alone could or should have changed the outcome. In our opinion, even if we assume Lois Green were a named insured on the farm policy, that fact merely becomes one more to consider and does not render the trial court's conclusion improper. Because defendants fail to show how a hearing or additional proofs on the matter could add anything of substance, reversal or a remand is unwarranted.

Last, defendants claim that the trial court abused its discretion in finding that defendants' post-trial motion was a frivolous filing and imposing sanctions on defendants without a hearing. Plaintiff counters that this Court lacks jurisdiction over this issue because defendants appealed the trial court's order granting sanctions separately in Docket No. 194739, which was filed after this appeal and dismissed on jurisdictional grounds. We disagree. This issue is properly raised in this appeal as it is a post-judgment order that affected with finality the rights of the parties. See *Gharardini v Ford Motor Co*, 394 Mich 430; 231 NW2d 643 (1975).

The trial court's finding with regard to whether a claim is frivolous will not be disturbed on appeal unless it is clearly erroneous. *Vermilya v Dunham*, 195 Mich App 79, 84; 489 NW2d 496 (1992). If a claim is deemed frivolous, the trial court has no discretion; it must sanction the violating party. See *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996).

Defendants' post-trial motion was essentially a challenge to the trial court's findings on disputed issues of fact. Both the motion and the brief in support of the motion rehash and reargue the same facts and law as those argued at trial. Consequently, it is unreasonable to believe that the trial court as the trier of fact would change its decision. As a result, we that the trial court did not clearly err when held that defendants' motion was frivolous and without merit.

Defendants also claim that they were denied due process by the trial court's imposition of sanctions without a hearing. In *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480 NW2d 596 (1991), this Court dealt with sanctions awarded under MCR 2.114 and MCL 600.2591; MSA 27A.2591 and stated that due process "does not require a full trial-like proceeding, but does require a hearing to the extent that a party has a chance to know and respond to the evidence." In the case at bar, no hearings were held. Defendants were, however, on notice of plaintiff's claim of frivolousness, and the trial court offered defendants the opportunity to be heard, but defendants never responded. Under that scenario, defendants effectively waived their opportunity to be heard.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad