STATE OF MICHIGAN

COURT OF APPEALS

GRACE D. TURNEY, Personal Representative of the Estate of LEROY TURNEY, deceased, Plaintiff-Appellant, v CLARENCE E. WILSON, and LYNDIA L. WILSON Defendants-Appellees.	UNPUBLISHED November 29, 2005 No. 253332 Monroe Probate Court LC No. 03-00093-CZ

Before: Zahra, P.J., Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order dismissing her complaint. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Fact and Proceedings

Sometime in the mid 1980's, plaintiff, then Grace D. Bartholow, traveled from her home in Ohio to Carleton, Michigan to live and work on the decedent's (Leroy Turney) twenty-five acre farm. At this time, the decedent was married to Goldie H. Turney. In 1994, defendants Clarence and Lyndia Wilson moved from Detroit to Carlton, about 1 to 1½ miles from the decedent's home. Shortly after moving to Carleton, Clarence met the decedent and began helping the decedent with work on his farm. Eventually, the decedent and defendants became good friends.

The decedent approached Clarence, and later Lyndia, about giving them his property. Defendants told the decedent that he should give the property to plaintiff. Lyndia testified that the decedent replied he wanted defendants to have the property because "if you give [the farm] to Grace [plaintiff], Grace's daughter would take it and sell it, and use it for drugs." Defendants asked the decedent to think it over. After about a month had passed, the decedent told defendants that he still wanted to give them his property. Lyndia contacted an attorney she knew from Detroit, Ronald Sopo, and set up an appointment at Sopo's Detroit office.

Defendants testified that they attended a meeting at Sopo's office on April 14, 1997, at which the decedent, Sopo, plaintiff and plaintiff's granddaughter, Samantha, were present. Plaintiff denied that she or Samantha attended this meeting. Sopo could not recall who attended

the meeting. Clarence testified that the decedent "told [Sopo] that he wanted to give [defendants] this land at Carleton West." Further, that Sopo replied, ""do you know what you're doing?" Sopo also asked the decedent, "are you sure you want to do this?" Sopo then "explain[ed] to [the decedent] what he was doing[,]" specifically that the decedent is "giving [defendants] this piece of land at [the decedent's] death." Sopo read the deed aloud, and the decedent signed it.

The deed provides that on April 14, 1997, "Leroy Turney, as survivor of himself and his deceased wife, Goldie H. Turney, "quit claims the property in question to himself, Clarence and Lyndia, "as joint owners with full rights of survivorship and not as tenants in common subject to life estate in Grace D. Bartholow for her natural life." The deed also states that, "[p]rovided on death of Leroy Turney, the surviving joint tenants will pay taxes on property." The deed also indicates the amount paid as "for the sum of 00/100 Dollars, gift, ..."

On the way home from Sopo's office, the decedent handed Clarence the deed and said, "I'm giving it to you because I don't want it to get lost." Clarence testified that Sopo told the decedent, in Clarence's presence, that "nothing changed about his ownership [in the property]," that "he owned everything" and that "he could do anything with the property he wanted to." However, Clarence admitted no one ever explained the deed to him [Clarence]. Defendants later recorded the deed.

Plaintiff testified that, about a month after April 14, 1997, she asked the decedent where he had been on April 14, 1997, and he indicated, "he went to Detroit and got the will." Dave Kemeny, a friend of the decedent, testified that, in 2000, he overheard the decedent tell Clarence "that him and Grace were going to get married, and asked from [(sic)] papers back, some documents." Kemeny testified that the decedent told him "he wanted a roof over Grace's head and said he'd like a trust fund set-up for Samantha, the grandchild, for when she gets older, for college." Clarence, however, testified that the decedent was standing next to him, when "[Kemeny] came up and ask[ed him], . . . we want the papers back, Leroy does." Clarence testified that he told the decedent "if he wants the papers back to come down to the house and we would talk about it." The decedent never showed up. Kenemy also testified that he later asked Lyndia for "the papers back out of concern" for "Leroy's well being," but Lyndia replied, "they would have to talk with their lawyer."

The decedent died on December 6, 2002, and plaintiff was named personal representative of his estate. She filed a complaint in probate court to set aside the conveyance, alleging that the decedent lacked the mental capacity to execute the quit claim deed, that no consideration was given by defendants, and that the decedent was led to believe that he was receiving value above and beyond that of the purported survivorship rights set forth in the deed.

The probate court conducted a bench trial and the parties agreed to narrow the issues to whether there was confidential relationship between the decedent and defendants giving rise to a presumption of undue influence, and whether there had been a valid gift of the property. The probate court concluded that no confidential relationship existed between defendants and the decedent, and that a valid gift had been executed.

II. Undue Influence.

A. Standard of Review

This Court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id*.

B. Analysis

The probate court did not clearly err in finding no undue influence.

"The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantors decision in that transaction." *In re Estate of Karmey*, 468 Mich 68, 73; 658 NW2d 796 (2003). "Although a broad term, confidential or fiduciary relationship has a focused view toward relationships of inequality." *Id.* at 75. The *Karmey* Court also stated that one should not lose sight of the basic principles of the concept of undue influence: To establish undue influence, it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to destroy free agency and impel the grantor to act against his inclination and free will. *Id*. A confidential relationship is one in which dominion may be exercised by one person over another. *Id*.

Although the probate court concluded that no confidential relationship existed, the probate court's conclusion was based on its finding that defendants had not influenced the decedent's decision to give them the property. We agree with the probate court that no there was no undue influence. The record reflects that defendants were initially reluctant to take the property, and asked the decedent to think it over. Defendants even told the decedent that he should give the property to plaintiff. After three weeks, the decedent told defendants that he still wanted to give defendants his property and asked Lyndia to contact an attorney to set up an appointment. Lyndia complied with the decedent's request, and defendants even later drove the decedent to meet the attorney.

To establish undue influence, it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to destroy free agency and impel the grantor to act against his inclination and free will. *Karmey, supra*. Here, the record reflects only that defendants facilitated the decedent's inclination and free will. In addition, attorney Sopo testified that he considered the decedent, and not defendants, to be his client. Although Sopo could not specifically remember what was discussed at the meeting, he testified that normally, or habitually, would have discussed with his client what the client wanted to do with property. Sopo drafted the deed in accordance with the decedent's wishes, which further dispels any suggestion of undue influence. In addition, Clarence testified that Sopo read the deed to everyone at the meeting, and then the decedent signed it. Plaintiff conceded that she was not aware of any threats or use of force by defendants. The probate court's finding that defendants did not influence the decedent's decision to give them the property is not clearly erroneous, and therefore, the probate court properly determined that there was no undue influence.

III. Inter-Vivos Gift

Plaintiff argues that the conveyance must be set aside for want of delivery because the decedent did not intend to pass a present interest in the land when he handed the deed, which plaintiff claims the decedent believed was a will, to Clarence for "safekeeping." We disagree.

A. Standard of Review

This Court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Walters, supra*. A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.*

B. Analysis

A plaintiff who attacks the validity of a gift has the burden of proving that no gift was made. *Vander Honing v Taylor*, 344 Mich 24, 29-30; 73 NW2d 458 (1955).

> In order for a gift to be valid, three elements must be satisfied: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift. Acceptance is presumed if the gift is beneficial to the donee. [*In re Handelsman*, 266 Mich App 433,437-438; 702 NW2d 641 (2005), quoting *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997).]

Plaintiff specifically argues that there was no effective delivery of the deed:

> > As to delivery, it must be unconditional and it may be either actual or constructive; the property may be given to the donee or to someone for him. Such delivery must place the property within the dominion and control of the donee. This means that a gift inter vivos must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the power of recall by the donor. [*Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965) (citations omitted).]

Similarly:

> Delivery of a deed is essential to pass title. The whole object is to indicate the grantor's intent to give effect to the instrument. The test is whether it can be said that delivery of the deeds was such as to convey a present interest in the land. Physical delivery to the grantee raises a presumption of intent to pass title. This presumption, however, is not conclusive and may be rebutted by the evidence. [*Resh v Fox*, 365 Mich 288, 112 NW2d 486 (1961) (citations omitted).]

Along these lines, plaintiff claims that the decedent believed the document was a will, not a deed. This claim buttresses plaintiff's argument that there was no effective delivery because whether a given document is legally a deed or a will turns on whether it conveys a present interest or whether it conveys an interest on the death of the person who executed it. *Benton*

Harbor Federation of Women's Clubs v Nelson, 301 Mich 465, 470; 3 NW2d 844 (1942). That determination turns on the intent of the person who executed it, which may be gleaned from the instrument itself, from the circumstances surrounding its creation, and from the manner in which the parties subsequently dealt with it. *Id*. at 471.

Plaintiff's claim is based on statements from plaintiff and Kemeny indicating that the decedent believed he signed a will. Plaintiff also cites to defendants' testimony that they believed the decedent owned the property until his death, and that until that time, the decedent "had the same rights that he had when he came to Mr. Sopo's office."

Initially, the record does not indicate that the parties are legally sophisticated, and thus we discount their statements made with respect to their understanding of property law concepts. See *Wright v Wright*, 134 Mich App 800, 804-805; 351 NW2d 868 (1984). While the deed does appear to have some testamentary features, i.e. right of survivorship, we agree with the probate court's determination that the decedent did not intend to create a will. The decedent brought his old deed to Sopo's office, and a new deed was drafted in accordance with the decedent's wishes. The deed was read aloud to the decedent, and does not contain any language that would indicate it was a will, such as "I," "will," "give" or "death." Given this evidence, the probate court reasonably found that the decedent did not intend to create a will, but a deed that operates as a will substitute. Therefore, the probate court did not clearly err in finding valid delivery of the deed.

Further, the deed carries out the decedent's intent. The deed created a joint life estate in the decedent and defendants with a contingent remainder in fee to the survivor, subject to plaintiff's life estate. See *Butler v Butler*, 122 Mich App 361, 364; 332 NW2d 488 (1983). There is no dispute that the decedent intended to convey to plaintiff a life estate in the property with remainder to defendants. Given the likely circumstance that the decedent would predecease plaintiff and defendants, the instrument he executed allowed him to presently execute this intent. Further, the deed also provided that the decedent retain an interest in the property while he continued to live there until his death.

Thus, because the decedent intended to create a deed, and thus pass a present interest in the property, we agree with the probate court that the decedent effectively delivered the deed to Clarence. "Physical delivery to the grantee raises a presumption of intent to pass title." *Resh, supra*. Further, we agree that the probate court did not clearly err in finding valid delivery where the decedent, in his capacity as a grantee, presumptively delivered the deed to defendants.[1] "Delivery to one of several joint grantees, in the absence of proof to the contrary, is delivery to all of the grantees." *Schmidt v Jennings*, 359 Mich 376, 382; 102 NW2d 589 (1960), quoting *Mayhew v Wilhelm*, 249 Mich 640, 646; 229 NW 459 (1930). Here, the probate court found that the decedent intended to form a "sort of partnership" with defendants when he signed the document. The record supports this finding, and under these circumstances, we agree with the probate court there was valid delivery.

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[1] The probate court relied on *Gambino v Gambino*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 1997 (Docket No. 190953).

Plaintiff heavily relies on testimony that the decedent stated to Clarence when handing him the deed, "I'm giving it to you because I don't want it to get lost." As mentioned, we discount the legal significance of this statement; such may not indicate the decedent's intent to presently pass title of the property. Contrary to plaintiff's argument, the decedent's statement may not be inconsistent with the decedent's intent to deliver the deed. Rather, the statement may affirm his belief that both he and Clarence had a present interest in the property. Thus, contrary to plaintiff's claim, this statement does not necessarily show an intent not to deliver.

Finally, we note that plaintiff's argument presumes that the decedent believed the document would take effect upon his death. However, just as in *Crane v Smith*, 243 Mich 447, 450; 220 NW 750 (1928), "the deed was drafted by [the grantors] attorney, upon full knowledge of the facts and claims. There was no showing that he made a mistake in stating its agreed terms. The mistake, if any, was purely one of law, an erroneous conclusion as to the legal effect of known facts." *Crane*, *supra* at 450. "Mistake as to the legal effect of a written instrument, deliberately executed and adopted, constitutes no ground for relief in equity." *Schmalzriedt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943), quoting *Crane*, *supra*. Therefore, plaintiff is not entitled to relief.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens