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ARKANSAS COURT OF APPEAL S

DIVISION I
No. CA 08-1483

JILL ANN SIMPSON LONG, BELVA JEAN SIMPSON MCDONALD, AND JOYCE WEATHERSPOON APPELLANTS	Opinion Delivered June 17, 2009
	APPEAL FROM THE RANDOLPH COUNTY CIRCUIT COURT, [NO. PR-05-63]
V.	HONORABLE PHILIP G. SMITH, JUDGE
TIMOTHY ALLEN SIMPSON APPELLEE	AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellants Jill Ann Long, Belva McDonald, and Joyce Weatherspoon appeal from an order denying their petition to set aside a deed whereby their mother conveyed property to their brother, appellee Tim Simpson. For reversal, appellants argue that the trial court erred by failing to set aside the deed on the basis of fraud or that, alternatively, the trial court erred by refusing to impose a constructive trust. We affirm.

Appellants, appellee, and their brother, Jimmy Simpson, are the children of Paul and Edith Simpson.[1] Paul died in 1998. On February 2, 1999, Edith made a will leaving her home that was situated on ten acres of land to all five of her children. She directed that the property

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[1] Jimmy Simpson is not a party to this litigation.

either be divided equally among them or that the land be sold and the proceeds divided equally. On June 18, 2003, Edith executed a quitclaim deed of the property to appellee. Subsequently on July 17, 2003, Edith executed a correction deed conveying the property to appellee but retaining a life estate in the property. Edith died on December 17, 2003.

Appellants filed a petition for the appointment of an administrator for Edith's estate on July 11, 2005, which they amended in August 2005. In this petition, appellants sought to set aside the correction deed and to declare the property an asset of Edith's estate. Appellants asserted that appellee had committed a fraud by not honoring an agreement to share the property with his siblings. Appellants subsequently filed a petition seeking authority to sell the property. The trial court held a hearing on appellants' petitions on January 8, 2007.

At the hearing, a real estate agent testified that he could sell the property. Appellee was the only other witness who offered testimony. Appellee recalled that his mother began making estate plans in 1993 after reading an article in *Reader's Digest*. He said that she drafted several wills before executing one in February 1999. With regard to the house and ten acres, appellee testified that he did not ask his mother to convey the property to him, nor did he initiate any discussions with her about making a deed. He further testified that he did not threaten or coerce his mother into executing a deed. Appellee explained that his mother asked him to have a deed prepared conveying the property to him. He asked his sister Joyce to tend to the matter because she had dealings with a law firm. Joyce contacted the law firm and had a deed

prepared, which appellee left with his mother in March 2003. Appellee testified that, in May 2003, his mother asked him to drive her into town so that she could sign the deed before a notary public. He stated that his mother became angry and upset after he arrived and that, in response, he tore the deed into pieces because he was not confident that she wanted to divest herself of the property.

Appellee testified that he learned about the June 2003 deed after his mother executed it. He said that his mother wrote him a letter in which she mentioned that she had signed a deed conveying the property to him. He stated that Joyce also sent him an e-mail indicating that she saw a notice in the newspaper about the filing of the deed. Appellee testified that his mother subsequently wrote him a letter expressing reservations about the conveyance, mentioning that she felt homeless because the property was no longer in her name. Appellee stated that he contacted his sisters Jill Ann and Belva and that they consulted with a lawyer who prepared a correction deed, which reserved a life estate to their mother. Appellee testified that he took the correction deed to his mother, that she liked the idea of retaining a life estate, and that she executed the correction deed and filed it at the courthouse.

Appellee further testified that he made no promises to his mother to induce her to convey the property to him. He said that he did not accept the deed on the condition that he would later divide the property with his siblings. Appellee testified that, on numerous occasions, he later promised his mother and siblings that he would sell the property and equally

divide the proceeds. He said, however, that he had since changed his mind after his siblings sued, harassed, and accused him of doing things that he had not done.

At the conclusion of the hearing, the trial court took the case under advisement and asked the parties to submit briefs on the law concerning constructive trusts. After the hearing, appellants filed a petition to admit Edith's will to probate. On August 27, 2008, the trial court entered an order admitting the will to probate but denying appellants' request to set aside the correction deed. The trial court declined to set aside the deed based on a finding that there was no evidence that appellee fraudulently induced Edith to convey title to him, either by threat or coercion, or that appellee procured the deed based on a promise to divide the property equally among Edith's children.

Appellants argue on appeal that appellee perpetrated a fraud by breaking his promise to share the property with his siblings. In the alternative, appellants assert that appellee's broken promise required the imposition of a constructive trust.

The law is clear that equity will intervene to set aside a deed where the deed is executed in consideration of an agreement for the grantee to perform some act and the agreement is made by the grantee for the fraudulent purpose of securing the deed without intending to fulfill the condition upon which the deed was made. *Gross v. Young*, 242 Ark. 604, 415 S.W.2d 624 (1967); *Phillips v. Phillips*, 173 Ark. 1, 291 S.W. 802 (1927). Any failure of the grantee to comply with the agreement upon which the deed was made might be considered as some

evidence of fraud. *Mitchell v. Mitchell*, 231 Ark. 990, 333 S.W.2d 741 (1960). When a deed is challenged based on fraud, the law requires clear and convincing proof before the deed may be set aside. *Davidson v. Bell*, 247 Ark. 705, 447 S.W.2d 340 (1969); *Baker v. Helms*, 244 Ark. 29, 423 S.W.2d 540 (1968).

A constructive trust is an implied trust that arises by operation of law when equity demands. *Tripp v. Miller*, 82 Ark. App. 236, 105 S.W.3d 804 (2003). These trusts are imposed against a person who secures legal title by violating a confidential relationship or fiduciary duty, or who intentionally makes a false oral promise to hold legal title for a specific purpose and, after having acquired the title, claims the property for himself. *Wrightsell v. Johnson*, 77 Ark. App. 79, 72 S.W.3d 114 (2002). The basis of a constructive trust is the unjust enrichment that would result if the person having the property were permitted to retain it. *Tripp*, *supra*. To impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts, and the burden is especially great when title to real estate is sought to be overturned by parol evidence. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996).

Although we review traditional equity cases de novo, the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial court's findings but whether we can say that the trial court's findings are clearly erroneous. *Statler v. Painter*, 84 Ark. App. 114, 133 S.W.3d 425 (2003). A finding is clearly erroneous when,

although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake was made. *A.R. v. Brown*, 103 Ark. App. 1, ___ S.W.3d ___ (2008).

In the case at bar, the trial court found that appellee did not fraudulently induce Edith's transfer of the property to him because the conveyance was not conditioned on a contemporaneous promise on the part of appellee to share the property with his siblings. The trial court's finding regarding fraudulent inducement is not clearly erroneous. Appellee's testimony established that he had no discussions with Edith prior to the conveyance and that he made no promises to Edith to induce her to convey the property to him. Instead, the record shows that the making of the deed was a voluntary act on Edith's part, unaccompanied by any precondition. Although appellee, subsequent to the conveyance, promised to share the property with his siblings, this pledge was purely a gratuitous gesture. *Gross*, *supra*.

Appellants' constructive-trust argument is not preserved for appeal because appellants failed to obtain a ruling on that issue. Although the trial court asked the parties to brief this aspect of the law, the trial court only addressed the issue of fraudulent inducement in its order. We will not review a matter on which the trial court has not ruled, and a ruling should not be presumed. *Stilley v. Univ. of Ark. at Ft. Smith*, 374 Ark. 248, ___ S.W.3d ___ (2008). Appellants filed a timely petition for reconsideration in which they raised the constructive-trust issue, but the court's denial of that motion is not before us. By rule, the motion for

reconsideration was deemed denied after thirty days. Ark. R. App. P.–Civil 4(b)(1). However, appellants filed their notice of appeal from the trial court's order before the thirty-day period expired. As a result, the notice of appeal was effective to appeal the order but not the denial of the motion for reconsideration. *See* Ark. R. App. P.–Civil 4(b)(2). In this circumstance, it was necessary for appellants to file a supplemental notice of appeal in order to appeal the denial of the motion. *Id*. However, appellants filed no supplemental notice of appeal. Because there is no ruling for us to review, we do not address the constructive-trust issue.

Affirmed.

PITTMAN, J., agrees.

MARSHALL, J., concurs.