ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CA 07-230

DEE KANKEY and VIRGINIA KANKEY, his wife

APPELLANTS

V.

BILL KANKEY and CHARLOTTE KANKEY, his wife, and DALE KANKEY

APPELLEES

DECEMBER 19, 2007

APPEAL FROM THE IZARD COUNTY CIRCUIT COURT
[NO. E-01-204]

HONORABLE STEPHEN CHOATE, JUDGE

AFFIRMED

This appeal arises out of a dispute among three brothers regarding ownership of certain acreage in Izard County. After a partition suit, a court-ordered public sale, and the confirmation of that sale, one brother sought to set the sale aside and have a new trial based upon his contention that their grandmother had deeded many of those acres solely to him. The trial court disagreed, denied a new trial, and this appeal resulted. We affirm.

The material facts leading to this appeal are not in dispute. Lola Kankey owned nearly 900 acres in Izard County, which she deeded to her three sons, appellant Dee Kankey, and appellees Bill and Dale Kankey, as tenants in common. After Lola died in 2000, the brothers could not agree on a division of the property, so in 2001 appellees Bill and Dale filed a petition to partition the land in Izard County Circuit Court. Appellant Dee and his

wife Virginia resisted the action to partition. The trial court appointed the circuit clerk as commissioner and ordered the property sold at a public sale. On August 16, 2006, the circuit clerk filed a Report of Sale, reporting that the subject property was sold to the highest bidder at a price of $1,500,000. On August 24, 2006, the trial court signed an order confirming the commissioner's sale, which was filed in the circuit court on August 28, 2006.

On September 1, 2006, appellant Dee filed a motion seeking to set aside the order confirming the commissioner's sale on the basis that he had found in his mother's effects a long lost deed from his grandmother, Neaily Hammond, to him dated March 1, 1973, granting him sole ownership of approximately 214 acres of the acreage at issue. Mrs. Hammond died in 1976. On the basis of "newly discovered evidence," appellant sought to invalidate the public sale and reopen the case. The trial court held a hearing on September 11, 2006.

At the hearing, appellant testified that he had been looking for this deed for a long time but had just run across it days ago in his mother's chest of drawers. Appellant testified that he had lived with and assisted his grandmother back in the 1970s, and Mrs. Hammond executed this deed to give him her part of the land. Appellant said that his grandmother sent the deed to his mother (Mrs. Hammond's daughter). He said he had seen it once, but his mother put it away somewhere and it was lost. Appellant admitted that he never alleged the existence of the lost deed in the litigation leading up to the public sale. Appellant admitted that his mother paid the taxes on this land and kept possession of the land until her death. Appellant did not dispute that his grandmother spent significant portions of each year visiting

her daughter (appellant's mother) in the house where the deed was located and would have done so in the years between 1973 and her death in 1976. While the deed recites a consideration of $1000, appellant did not testify to having paid this to his grandmother and admittedly did not have the deed recorded. Appellant stated that he acquired other lands by deed that he purchased, and those deeds were in a lock box and had been recorded. He stated that the reason this deed was not recorded was because his mother did not want him to do so.

The motion for a new trial was denied, and in the order, the judge made the following findings:

> Dee Kankey never had delivery of the deed nor possession of the deed. That there was no intent to deliver the deed and that the property in question was possessed for a number of years by [Dee's] mother who paid the taxes on it, and that control was lacking and that the deed was not valid.

It is from this order that appellant appeals.

While appellant's counsel at times mentioned Ark. R. Civ. P. 60, it is clear that the substance of the relief sought was pursuant to Ark. R. Civ. P. 59(a)(7), which specifically provides for a new trial on grounds of newly discovered evidence. Moreover, this motion was filed within ten days of the judgment confirming the sale, consistent with the requirements of Ark. R. Civ. P. 59(b).

A motion for new trial is addressed to the sound discretion of the circuit court, and the circuit court's refusal to grant it will not be reversed on appeal unless an abuse of discretion is shown. *See Jones v. Double "D" Props., Inc*., 352 Ark. 39, 98 S.W.3d 405

(2003). A new trial based on newly discovered evidence is not favored. *St. Louis S.W. Ry. Co. v. White*, 302 Ark. 193, 788 S.W.2d 483 (1990). The decision whether to grant a new trial based on newly discovered evidence is a decision within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Liggett v. Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987).

In addition, we will not reverse the trial court's findings of fact unless they are clearly erroneous. *Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000). We will also not reverse a trial court's confirmation of a judicial sale if the trial court did not abuse its discretion. *Kellett v. Pocahontas Fed. Sav. & Loan Ass'n*, 25 Ark. App. 243, 756 S.W.2d 926 (1988).

Appellant contended that he was the rightful owner, since 1973, of approximately 214 of the acres at issue. A delivered deed passes title as between the parties even though it has not been recorded. *See Ferguson v. Haynes*, 224 Ark. 342, 273 S.W.2d 23 (1954). Ordinarily, for there to be a delivery of a deed, the grantor must intend to pass title immediately, and the grantor must lose dominion and control over the deed. *See*, *e.g.*, *Crowder v. Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990); *Broomfield v. Broomfield*, 242 Ark. 355, 413 S.W.2d 657 (1967); *Smith v. Van Dusen*, 235 Ark. 79, 357 S.W.2d 22 (1962). In the *Broomfield* and *Smith* decisions, our supreme court held that the intention to convey title must be manifested by what is said and done by the grantor and grantee. The question of delivery of a deed is one of intention. *See Cribbs v. Walker*, 74 Ark. 104 (1905). *Compare Adams v. Dopieralla*, 272 Ark. 30, 611 S.W.2d 750 (1981). Where the deposit of

a deed is with a third person, it must be irrevocable, and, if it is subject to the control of the grantor, its delivery has no binding effect. *Rogers v. Snow Bros. Hardware Co.*, 186 Ark. 183, 52 S.W.2d 969 (1932).

In this instance, we are not convinced that the trial court abused its discretion or clearly erred. Appellant's testimony about this lost deed was less than clear regarding conveyance and acceptance of the deed. Moreover, there was evidence from which the trial court could conclude that appellant failed to exhibit behavior consistent with ownership, particularly in light of the litigation that ensued between him and his brothers for years following their mother's death in 2000. In addition, Mrs. Hammond retained some access to the deed during her lifetime. Any decisions regarding the truth of appellant's version of the facts are left to the fact finder, the trial court herein. We conclude that appellant has failed to demonstrate reversible error.

Therefore, we affirm.

PITTMAN, C.J., and BIRD, J., agree.