RENDERED: May 23, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000387-MR

LOUISE HOWELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 98-CI-03686

DARRELL A. HERALD, EXECUTOR
OF THE ESTATE OF JOHN R. TURNER — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

DYCHE, JUDGE. We have considered the record below, the briefs of the parties, and the oral argument. We find that the opinion of the trial court correctly and adequately sets out the applicable facts of this case, applies the correct law to those facts, and reaches the correct result. We adopt that opinion, in part, as our own.[1]

[1] Footnote 1 has been omitted from the text of the circuit court's opinion.

The Decedent, John Raymond Turner ("Turner") was a prominent and wealthy Breathitt County businessman who owned, among other assets, real property in a number of Kentucky counties, including Fayette County and in Florida. The Defendant Louise Howell ("Howell") was Turner's niece. In 1987, Turner established a comprehensive estate plan through the execution of a will. In that will, he left $1 to each of his relatives, including Howell. All of the assets of Mr. Turner's estate were bequeathed to the Marie R. and Ervin Turner Educational Foundation (the "Foundation"), which was created in his Will.

Apparently, in 1996, Turner began considering the possibility of making an *inter vivos* gift of real property to Howell. To that end he spoke with this attorney, George Fletcher ("Fletcher"), about how such a gift might be made while allowing Turner to retain control over the property subject to the gift as long as possible. In early 1997, Turner underwent coronary artery surgery, and later in that year, he was diagnosed with untreatable lung cancer.

According to the deposition testimony of George Fletcher (which the Court takes as true for purposes of considering the Estate's Motion), in January, 1998, Turner discussed making an *inter vivos* gift to Howell of certain pieces of real property by means of power-of-attorney that Turner would give Fletcher shortly before Turner's death.

On February 26, 1998, Turner was admitted to St. Joseph's Hospital in Lexington. A few days thereafter Fletcher visited Turner in the hospital and brought Turner a power-of-attorney prepared pursuant to their January conversation. Turner's response was to postpone the issue, saying he would be going home and would address the matter then. By March 4, 1998, Turner had

been informed his condition would not improve, and he was making the decision whether to die at the hospital or at home in Jackson. On that date, Fletcher went to the hospital and again offered Turner the opportunity to sign the power-of-attorney. The only evidence of what was said on the occasion of the signing the Power of Attorney, comes from Fletcher who testified that he said, "'*John, this is the power of attorney that we talked about. Do you want me to make the deeds with this?' and he said, 'Yes, I do.' I can't say that he quoted yes, I do, but he said, 'Yes, that is what I want you to do' or something like that, in an affirmative response, and that he and I were connecting and that is what he wanted to do.*" The deeds were then prepared by Fletcher, and they were executed by him as Turner's attorney-in-fact during business hours on March 6, 1998. Turner died two days later on March 8, 1998.

According to Fletcher, the deeds remained in his possession, incomplete and unsuitable for recordation, until after Turner's death. By coincidence, Fletcher went to the hospital to see Turner on March 8, 1998 shortly after Howell had been notified of Turner's death. At that time, and for the first time, Howell was informed of Turner's attempted *inter vivos* gift to her of real property and of the deeds, which were in Fletcher's possession. Howell executed the fair market value certificates on the deeds on March 13, 1998, and they were subsequently recorded.

Based on the above facts, the issue before the Court on the cross-motions for summary judgment is whether the deeds were legally delivered to Howell prior to Turner's death to complete an *inter vivos* gift.[2]

[2] In her memoranda and in the argument of her counsel, Howell has urged that the Court should not apply the law of *inter vivos* gifts to the resolution of this issue. However, Howell does not deny that the conveyances by which she

> The requirements for a valid *inter vivos* gift are set forth in numerous Kentucky cases, among them Gernert v. Liberty Nat. Bank & Trust Co., 284 Ky. 575, [579,] 145 S.W.2d 522, 525 (1940):
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> > In those cases—-and numerous others cited in our opinions therein—-we set forth the facts necessary to constitute an inter vivos gift, which are: (a) that there must be a competent donor; (b) an intention on his part to make the gift; (c) a donee capable to take it; (d) the gift must be complete, with nothing left undone, (e) the property must be delivered and go into effect at once; and (f) the gift must be irrevocable.
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> The delivery of an *inter vivos* gift may be "actual, symbolical or constructive." Pikeville Nat. Bank & Trust Co. v. Shirley, 281 Ky. 150, [156,] 135 S.W.2d 426, 430 (1939). Since real property cannot itself be physically delivered, the delivery of a gift of real property is typically made symbolically through the delivery of the deed to the property. The delivery of the deed may be "actual" (by physical delivery to the donee or grantee) or "constructive" (by delivery to one who serves as the agent of the donee or grantee). In either event, the requisite donative intent must be

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claims to have received the real property from Turner were, in fact, *inter vivos* gifts. Consequently, the Court can discern no valid reason to exclude the law of *inter vivos* gifts from its consideration. Moreover, the Court notes, that most, if not all, of the cases on which Howell relies involve *inter vivos* gifts of real property.

To the extent they may apply to the consideration of a motion for summary judgment, the Court also recognizes the burden placed on the proponent of an *inter vivos* gift to prove that gift by clear and convincing evidence. Hale v. Hale, 189 Ky. 171, 224 S.W. 1078(1920); Combs v. Roark's Adm'r, 221 Ky. 679, 299 S.W. 576 (1927). Under the circumstances of this case, however, the Court believes that the outcome is the same regardless of the application of that enhanced standard or the placement of the burden of proof.

accompanied by some act by which the donor/grantor irrevocably relinquishes control over the subject matter of the gift.[3] Kirby v. Hulette, 174 Ky. 257, 192 S.W. 63 (1917). This is true whether the *inter vivos* gift is one of personal property or real property. Rand v. Rand, 132 F. Supp. 929 (E.D. Ky. 1955)(aff'd 234 F.2d 631 (6th Cir. 1956)).

In this case, Turner signed the power-of-attorney making Fletcher his attorney-in-fact on March 4, 1998. At that time Fletcher was also Turner's attorney-at-law. Fletcher prepared the deeds and signed them as Turner's attorney-in-fact on March 6, 1998. He did not deliver them to Howell or to anyone else for her benefit prior to Turner's death on March 8, 1998. As noted above, Howell was unaware of the deeds prior to Turner's death, and they remained in Fletcher's sole possession until after Turner's death.

Howell argues that Fletcher's continued possession of the deeds inured to Howell's benefit and constituted a constructive delivery of the deeds to Howell. The Court cannot accept that position because, as a matter of law, Fletcher was Turner's agent, both as his attorney–in-fact and his attorney-at-law. Reily v. Fleece, 259 Ky. 330, 82 S.W.2d 341 (1935), McAlister v. Whitford, Ky., 365 S.W.2d 317 (1962).

As [Turner's] agent, Fletcher's continued possession of the deeds could not constitute a relinquishment of control by Turner. Fletcher's Affidavit, tendered on November 16, 2001, states that Turner "never mentioned such a reservation" to rescind the deeds. It does not say, however, that Turner ever relieved Fletcher of his role as

[3] For purposes of considering the Estate's motion, the Court assumes that Turner had the necessary donative intent.

Turner's agent. Howell urges that the decisions of the Kentucky Court of Appeals in Sullenger v. Baker, [296] Ky. [240], 176 S.W.2d 382 (1943) and Moore v. Moore, Ky., 239 S.W.2d 987 (1951) support her position. The Court disagrees. In both Sullenger and Moore, the recipient of the deeds was not in any legal agency relationship with the donor. Consequently, it was possible in those cases for the recipient to act solely as the agent of the donee in holding the deeds. That was not the case with Mr. Fletcher who was Turner's attorney-at-law and attorney-in-fact.

The Court also notes that in Cartwright v. Bishop, Ky., 298 S.W.2d 14 (1957), the Court appears to have focused on the so called "common depository" cases as the prime example of successful constructive delivery scenarios. While not dispositive of this case in any way, the Court views the reference in Cartwright as indicating a possible retreat from cases such as Sullenger and Moore and what appears to be prior efforts of the appellate courts to save a gift, if at all possible, through the liberal application of constructive delivery theories.

The Court believes the situation in this case is more analogous to that found in Suter v. Suter, 278 Ky. 403, 128 S.W.2d 704 (1939).[4] There, the deed was placed with the donor's attorney. The Court found that the attorney was the agent of the donor, and the donor had not relinquished control of the deed.

[4] The Court recognizes the dicta in Howard v. Arnett's Adm'r, [294] Ky. [167], 171 S.W.2d 228 (1943) and the implication that Howell argues should be drawn from Sasseen v. Farmer, [179] Ky. [632], 201 S.W. 39 (1918) to the effect that in limited circumstances delivery can take place where the grantor himself retains control of the deed but openly and clearly indicates he is holding the deed for someone else's benefit, thus constituting himself the grantee's agent. However, the Court finds that Fletcher's position as the agent of Turner makes those cases inapposite to this one.

The Court also finds the "common depository" cases such as Noffsinger v. Noffsinger, 303 Ky. 344, 197 S.W.2d 785 (1946) to be inapposite to the circumstances of this case.

Howell argues that the statements made by Turner to Fletcher in their conversations during the months prior to Turner's signing of the power-of-attorney and the preparation of the deeds can provide the necessary expression of an intent to deliver the deeds and a relinquishment of control over the deeds to complete the *inter vivos* gift. The Court can find no support for that proposition in any of the cases cited by Howell. Further, even if statements made prior to the existence of the deeds themselves were competent to show an intention to deliver the unprepared deeds, the Court believes that under cases such as Kirby v. Hulette, supra; Fitzpatrick v. Layne, 291 Ky. 523, 165 S.W.2d 13 (1942); and other authorities cited by the Estate, any expression of an intent to deliver the deeds would still have to be accompanied by a relinquishment of control over the deeds themselves. The Court can find no such relinquishment of control by Turner in this case. Indeed, because of the agency relationship between Fletcher and Turner, the Court believes that, as a matter of law, Fletcher's continued possession of the deeds cannot possibly be construed to be a constructive delivery of the deeds to Howell.

For the above reasons, the Court finds that the deeds which were attached to the Complaint in this matter as Exhibits G through J and which are recorded at Deed Book 3106 page 2199, Sarasota County (Florida) Court Clerk's office; Deed Book 487 page 354, Madison County (Kentucky) Clerk's office; Condo Deed Book 37 page 41 Fayette County (Kentucky) Clerk's office; and Deed Book 186 page 182, Breathitt County

> (Kentucky) Clerk's office were not delivered prior to Turner's death and that any attempted *inter vivos* gift of the real property represented by those deeds failed.

The judgment of the Fayette Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

Respectfully, I dissent. On appeal, Louise Howell stresses the central importance of her uncle's intent to give her the gift of the real property prior to his death. In the majority opinion, the court focuses on the issue of whether the documents were actually received by Howell before her uncle's death. This approach does not reflect the purpose of the law permitting inter vivos gifts.

The uncontroverted facts in the record show that, prior to his death, decedent Turner retained counsel, George Fletcher, to prepare a deed transferring the real property from Turner to Ms. Howell. Fletcher was not the executor of the Turner estate. Turner also instructed Fletcher to prepare a power of attorney form allowing Fletcher to execute the deeds granting the real property to Howell just prior to Turner's death. Fletcher executed the deeds according to Turner's instructions, pursuant to the power of attorney granted him by Turner, and prior to Turner's death.

Immediately after Turner's death, Fletcher informed Howell of the inter vivos gift of real property made to her by Turner. Howell took possession of the gift, and properly recorded the deeds. The executor of Turner's estate admits that Turner executed the power of attorney in favor of Fletcher. The executor also admits that Fletcher executed the deeds pursuant to the power of attorney. Despite these uncontroverted facts, the executor contends that Howell did not take possession of the deeds until after Turner's death, and for this reason there was no valid inter vivos gift.

The majority concedes that a gift of a property deed may be made constructively, by giving the deed to one serving as the agent of the donee. The majority argues, however, that Fletcher was Turner's agent, and that no gift was made while the deeds were in Fletcher's possession. The majority asserts that because Fletcher held the deeds, Turner had not relinquished control of the property.

Kentucky law is clear in holding that where a donor voluntarily loses unfettered control over an asset, a valid inter vivos gift has been made. Siter v. Hall, Ky., 294 SW2d 767, 770 (1927). This is so even where enjoyment of the gift by the donee is postponed, in accordance with the donor's intent, until after the donor's death. Id. This is generally recognized in cases where the corpus of a trust cannot be

accessed by the donee until after the donor's death. 294 SW2d at 770. Similarly, the beneficiary of a life insurance policy is held to have been given a valid inter vivos gift of the policy proceeds, even though the proceeds cannot be claimed by the beneficiary until the insured's death. See: Thompson's Ex'x v. Thompson, Ky., 226 SW 350, 351 (1920).

In construing documents relating to a donor's estate, the court must "effectuate the lawful intention of the donor." Citizen's Fidelity Bank & Trust Co. v. Bernheim Foundation, Ky., 205 SW2d 1003, 1006 (1947). Action showing relinquishment of control over the asset in favor of the donee creates a valid inter vivos gift. Baldwin's Ex'r v. Barber's Ex'rs, Ky., 151 SW 686, 687 (1912). This is so even where the agent represents the donor as well as the heir. Id. Delivery of a trust corpus to a trustee is sufficient to create a valid inter vivos gift of the trust corpus to the trust beneficiaries, even where the beneficiaries do not know that the trust exists. Goodan v. Goodan, Ky., 211 SW 423, 424 (1919). Delivery must be determined "according to the nature and character of the thing given. . . ." Bryant's Adm'r v. Bryant, Ky., 269 SW2d 219, 221 (1954). Delivery does not require an actual handing of the property to the donee, but can be accomplished by any act showing a relinquishment of ownership to the property. Id.

Delivery of the asset to a third party to give to the donee creates a valid inter vivos gift. Pikeville Nat. Bank & Trust Co. v. Shirley, Ky., 135 SW2d 426, 429 (1939). Because Turner gave Fletcher his power of attorney and specific instructions to execute a deed in favor of Howell, which Fletcher did, a valid inter vivos gift was made. The actions of the donor, the actions of the attorney, and the deeds in the name of Howell, who is a natural object of Turner's affection, all support this finding. Rakhman v. Zusstone, Ky., 957 SW2d 241, 244 (1997). Fletcher was the agent of Turner only insofar as he was required to sign the deeds over to Howell prior to Turner's death, which he did. At that point, Fletcher was simply holding the assets until the time came to disburse them. For this reason, I would find that a valid inter vivos gift was made.

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