

FILED

AUG - 9 1979

IOWA SUPREME COURT

413

IN THE COURT OF APPEALS OF IOWA

**WILLAMINA E. UPTON, Individually,
and as Executor of the Estate of Harry
W. Upton, Deceased, and LOUISE ANN
RHINEHART,**

Plaintiffs-Appellees,

vs.

**GLENN H. UPTON and MAHASKA
COUNTY, IOWA,**

Defendants-Appellants.

Filed August 9, 1979

**185
2-62145**

Appeal from Mahaska District Court - L. R. Carson, Judge.

Defendant appeals from judgment for plaintiffs in their partition action.

AFFIRMED.

Heslinga & Heslinga of Oskaloosa, Iowa, for defendants-appellants.

McCoy & Faulkner of Oskaloosa, Iowa, for plaintiffs-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Upton appeals from judgment for plaintiffs in their partition action. On appeal he asserts that: (1) the evidence fails to sustain the trial court's finding that the February 26, 1964 deed from plaintiffs' decedent to defendant was not delivered; and (2) the trial court erred in applying theories of estoppel and waiver to nullify that deed.

Decedent, Harry W. Upton, and defendant were brothers and co-owners of approximately 490 acres of farmland in Mahaska County. Plaintiffs are the executor of decedent's estate and beneficiaries of decedent's will, who were devised an undivided one-half interest in that property. Decedent died in March of 1971. In January of 1972, Edward Schmidt, a practicing attorney from Oskaloosa, Iowa with whom decedent had had some dealings, was murdered. During a subsequent search of Schmidt's office, two quit claim deeds from decedent to defendant were found in an envelope. The deeds were executed on June 3, 1963 and February 26, 1964, respectively, and each purported to convey the same property which was approximately 390 acres of the 490 acres owned in common by the brothers. The deed dated February 26, 1964 was recorded on March 17, 1972. On March 2, 1972, plaintiff brought suit for partition claiming an undivided one-half interest in the entire 490 acres.

Ordinarily, a properly executed and recorded deed carries with it a rebuttable, presumption of delivery. Avery v. Lillie, 260 Iowa 10, 15, 148 N.W.2d 474, 477 (1967); Jeppesen v. Jeppesen, 249 Iowa 702, 708, 88 N.W.2d 633, 637 (1958). This presumption, however, is weaker where the deed is recorded after the death of the grantor. Avery, 260 Iowa at 15, 148 N.W.2d at 477; Jeppesen, 249 Iowa at 708, 88 N.W.2d at 637. All parties in this appeal agree that the party claiming the deed was not delivered has the burden of proving such nondelivery by clear, satisfactory and convincing evidence. Avery, 260 Iowa at 15; Klosterboer v. Engelkes, 255 Iowa 1076, 1080, 125 N.W.2d 115, 117 (1963). Establishing delivery of a deed is essentially a fact question of the grantor's intention and may be shown by evidence of his or her acts or words or both. Avery, 260 Iowa at 16, 148 N.W.2d at 477. This matter having been tried below in equity, we review the evidence of nondelivery de novo. Iowa R. App. P. 4.

The dispositive issue in this appeal is whether or not the deed, as executed by decedent in favor of defendant, was ever delivered. The trial court found that it was not. In this regard the defendant relies only upon the February 26, 1964 deed and makes no claim based upon the earlier deed.

There is no dispute to the fact that from at least 1956 until decedent's death, decedent and defendant filed partnership income tax returns. The depreciable assets on the property in issue were treated as being owned one-half by each partner and the annual income, or loss, generated by their farming operation was divided equally. Testimony was also given that, during this period, the property taxes on the land were paid out of a joint account owned by decedent and defendant.

Testimony from decedent's former wife, Maxine Upton, indicates that in 1964 she and decedent contemplated divorce. She testified that decedent was, at that time, having an affair with another woman. During this period, the evidence indicates attorney Schmidt prepared the deed in issue, which was executed on February 26, 1964. On September 24, 1964, attorney Schmidt acknowledged the execution of a contract, which testimony indicates he drafted, in which Maxine Upton relinquished to decedent any interests she had in the property purportedly conveyed by the earlier deed. Decedent and Maxine Upton were divorced in December of 1967. Pursuant to the provisions of that decree, on March 25, 1969, Maxine Upton executed a quit claim deed which again relinquished to decedent any interests which she had in the property purportedly conveyed by the deed in issue. Maxine Upton further testified that decedent executed the deed for the sole purpose of protecting his family in the event that he was sued for alienation of affection by the spouse of his paramour. This eventuality never occurred.

The evidence further shows that in 1966, Kaser Construction Company was granted an exclusive option to lease part of this property for the purpose of quarrying limestone, sand and gravel. Both decedent and defendant executed the lease. The lease called for royalty payments to be made to them as co-owners and all royalty payments were made accordingly. From 1968 until the death of decedent, decedent and defendant participated in a federal feed grain program. The forms which both parties signed indicate that decedent was registered as an owner-operator and defendant as an owner. The payments from this program were made to both parties in equal shares.

In 1968, at decedent's criminal trial for receiving or aiding in concealing stolen property, he testified that he and defendant owned land together. The transcript of that trial reveals the following testimony by decedent:

Q. You own interest in land? A. I do.

Q. Where is that land? A. Three and a half miles north of Fremont.

Q. And who do you own interest in that land with?
A. My brother, Glenn Upton.

Q. How long have you owned interest in that land with him? A. About 15 years.

In that same trial defendant, Glenn Upton also testified, under oath, that he and decedent owned property together. In response to a question regarding the extent of his farming operation, defendant stated: "Well, I have a farm. I do some farm management for other people, but I and a brother own a farm together down in White Oak Township." The land which he described in that testimony is the same land which he now claims by way of the deed executed by decedent in 1964.

There was also evidence offered of a partition fence dispute with Verda Loyd, an adjacent landowner, which culminated in the dispute being submitted to the township trustees as fence viewers in August of 1970. At that meeting, testimony indicates decedent was representing both himself and defendant as owners of one of the properties. The decision of the fence viewers treated defendant and decedent as co-owners of the property in question. The fence was not installed as ordered and Verda Loyd contacted an attorney. Defendant also employed an attorney, Harold B. Heslinga, who drafted a letter, dated December 22, 1970, stating his firm was "...represent[ing] Glenn H. Upton and Harry Upton, the owners of certain farm land adjacent to the land [in question] ...". This is the same property that was purportedly conveyed by the deed in issue.

On February 23, 1971, decedent executed his last will and testament. In that instrument he recited: "I own an undivided interest in approximately 500 acres of land in ... Mahaska County, Iowa ..." This is the same property that was purportedly conveyed by the deed in issue.

Continued possession and control of property and exercise of acts of dominion over it are inconsistent with an intent to transfer ownership. Jeppesen v. Jeppesen, 249 Iowa 702, 710, 88 N.W.2d 633, 638 (1958). We conclude, as did the trial court, that decedent's conduct in the present case is inconsistent with the intention of relinquishing his interest in the property. From the time the deed was executed until his death, his behavior with respect to the property was as that of an owner.

Defendant's conduct is also inconsistent with his claim that he is the sole owner of the property. After decedent's death, he invited plaintiffs to a meeting concerning the partition fence dispute where, testimony indicates, he introduced plaintiffs to Verda Loyd and her son as either "Harry's heirs" or "interested part[ies]." The records show he split the payment from the federal feed grain program with decedent's estate for the 1972 crop year. Testimony further indicates that, for the 1972 crop year, he requested plaintiff-executor's participation in a meeting to settle accounts with the tenant farming the property and that later, he requested she have the tenant served with a notice of termination. The evidence presented shows that up until the time when the deed in issue was discovered, defendant was treating plaintiffs as co-owners of the property with himself.

The trial court's finding of nondelivery is supported by the requisite quantum of clear, convincing and satisfactory evidence. This evidence is determinative in this case. We, therefore, need not consider errors assigned under the theories of estoppel or waiver since even if defendant was to prevail on these issues, he would still not be entitled to reversal of the decision of the trial court.

AFFIRMED.