

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RUSSELL STEWART, BLANCHE
 MUELLER, ARTHUR LISTER, JACK
 LISTER, and JEANNE SCHOENHOLZ,

Appellants,

vs.

AUDREY HAARSTICK and
 GLADYS ADAMS,

Appellees.

Filed November 10, 1977

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 2-59088

Appeal from Taylor District Court - A. V. Hass, Judge.

Plaintiffs, residuary legatees under the will of the grantors, appeal the trial court determination that the giving of an executed deed to an attorney with instructions to record it after the death of the grantors constituted a valid delivery to the grantees, the defendants herein.

AFFIRMED.

Marshall Camp and Paul Boysen, Jr., of Camp, Harsh and Boysen, of Creston, and Thomas E. Mullin and Richard O. McConville, of Mullin, Mullin, McLaughlin and Harvey, of Creston, counsel for appellants.

Ronald Bonnett and David L. Christensen, of Wilson, Bonnett and Christensen, of Lenox, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiffs, residuary legatees under the will of one of the two grantors, Roy and Etta Stewart, appeal the trial court determination that the giving of an executed deed to an attorney with instructions to record the deed after the death of the grantors constituted a valid delivery to the grantees, the defendants in this action.

On January 11, 1972, Roy and Etta Stewart, brother and sister, went to the office of their attorney, Ralph Jones, in Bedford, and told him that they wished to deed their real property in Taylor County to their nieces, the defendants, as a gift in return for the many kindnesses they had shown over the years. After the deed was prepared and executed, the Stewarts informed Jones that he was to keep the deed until they passed away, at which time he was to see that it was duly recorded. Jones thereupon put the deed in an envelope, sealed it and wrote "Deed to Audrey and Gladys after both pass" across the front. While in Jones' office, the Stewarts prepared wills dividing their property between plaintiffs and defendants.

The day after these transactions occurred, the Stewarts entered into a voluntary conservatorship, in which they requested that Claude Adams, the husband of defendant-Adams, be appointed their conservator. Because of continuing poor health, Claude went to see Jones to request that he be permitted to keep the Stewarts' papers in Clarinda near his home there. Although Jones had known Claude for 15-20 years and regarded him as a reliable, honest individual, he took the precaution of specifying that the deed was to be placed in a safe deposit box in a Clarinda bank which had been rented in the names of Roy Stewart, Etta Stewart or Claude Adams. Jones also directed that Claude was to keep both keys to the box in order to retain sole possession and thereby restrict access to it.

Approximately one month later, Etta died and Roy lived intermittently with one or the other of the defendants. Subsequently, Claude also died and, pursuant to his request, his daughter was substituted as Roy's conservator. She testified that she received the two keys from her father along with the instructions for recording the deed when Roy died. Upon his death, the deed was taken to Jones' office and was thereafter duly recorded according to the Stewarts' request.

On appeal, plaintiffs essentially argue that the transfer of the deed in this case did not constitute a valid delivery from the grantors to the defendants. Our review of

this matter is *de novo*. Rule 4, Rules of Appellate Procedure. Although we give weight to the findings of the trial court, we are not bound by them. Rule 14(f)(7), R. App. P.

Delivery is essential to the validity of this deed. Title does not pass through an undelivered conveyance. *Kane v. Campisano*, 255 Iowa 745, 753, 124 N.W.2d 172 (1963). Where the deed is duly executed, the plaintiffs have the burden of proving its nondelivery by clear, satisfactory and convincing evidence, even though the recording is done after the grantors' death. *Ferrell v. Stinson*, 233 Iowa 1331, 1336, 11 N.W.2d 701 (1943). For a valid delivery, the grantor must intend the deed to be presently effective as a transfer without any reservation of control. *Avery v. Lillie*, 260 Iowa 10, 15-16, 148 N.W.2d 474 (1967). Consequently, the intent of the grantors is our primary consideration. *Huxley v. Liess*, 226 Iowa 819, 823, 285 N.W. 216 (1939). This intent may be manifested by either actions or words or both. *Avery v. Lillie*, *supra*, at 16.

The Iowa court has spoken on the issue presented in this case in *Bohle v. Brooks*, 225 Iowa 980, 985, 282 N.W. 351 (1939):

"This court has frequently been confronted with the problem of whether or not a present interest in real estate is conveyed where delivery of the instrument has not been made to the grantee, but to a third party with instructions to deliver to the grantee or record on the death of the grantor. Examination of our former pronouncements thereon reveals that where an instrument is so delivered, with no reservation of a right to recall the same, that there is a sufficient delivery. . . .

"The effect of thus placing the instrument in the hands of a third person with instructions to deliver after the death of the grantor is to reserve a life estate in the grantor, with the title immediately passing to the grantee, but with his right to possession and enjoyment postponed until the grantor's death." (citations omitted)

Accord, *Avery v. Lillie*, *supra*, at 16; See 26 C.J.S. Deeds § 46 (1956).

Although the Stewarts were both in their 80's when they executed this deed, the record reflects that they had full possession of their mental faculties and merely desired to make a gift to the defendants. After the deed was executed, the grantors made no attempt to revoke, retrieve or make any inquiry about it. A consideration of these factors, together with the rest of the record, leads us to conclude that the Stewarts intended the deed to be immediately effective as a transfer without any reservation of control.

The case of *Ferrell v. Stinson*, *supra*, seems especially applicable to the instant case. There, the grantor executed a deed in favor of the defendants, the principal

claimants of her bounty, and then had it put in an unlocked metal box in her closet. Apparently, the housekeeper promised to and later did mail the deed to the defendants upon the grantor's death. After evaluating the grantor's intent, the court concluded that a valid delivery to the defendants had been made, and stated:

"The rule that a valid delivery may occur without actual transfer of possession of the deed is particularly true where, as here, the conveyance is one of voluntary settlement among the objects of the grantor's bounty. (citations omitted)

"Where there is a good-faith voluntary conveyance to those who naturally have a claim upon the grantor's bounty, courts of equity are strongly inclined to uphold the deed and will do so unless impelled to the opposite conclusion by strong and convincing evidence. There is in such a case a high degree of mutual confidence between the parties. In this class of cases courts of equity do not put so much importance in the mere manual possession of the deed as in the intent of the grantor. If his intent to pass title presently to the grantee is satisfactorily shown, equity usually sustains such a conveyance, even where the grantor retained manual possession of the deed." (citations omitted) 233 Iowa at 1338.

See Gruber v. Palmer, 230 Iowa 587, 298 N.W. 926 (1941).

Consequently, we agree with the trial court and hold that the transfer of the deed in this case constituted a valid delivery from the grantors to the defendants. Since we conclude that plaintiffs' other arguments are without merit, the judgment of the district court is affirmed.

AFFIRMED.