IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 2, 2008 Session

# CARLYNN MANNING ET AL. v. DALE K. SNYDER ET AL.

**Appeal from the Chancery Court for Polk County**
**No. 7149 Jerri S. Bryant, Chancellor**

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**No. E2008-00183-COA-R3-CV - FILED MARCH 26, 2009**

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Following the death of Edith Leona Hickey ("the Deceased"), Carlynn Manning and Gerald Z. Hickey ("Plaintiffs") filed a declaratory judgment action to set aside a quitclaim deed and dissolve a trust known as the "Irrevocable Trust of Edith Leona Hickey" ("the Trust"). The beneficiary of the Trust was Susan Hendricks ("the Beneficiary"). The deed and the Trust document were drafted by counsel and the quitclaim deed was recorded. Plaintiffs assert that the deed was not "delivered" and that the trustee of the Trust is not capable of acting as trustee. Plaintiffs also argue that the deed was void because it, according to them, contained "no description." In addition, Plaintiffs claim that whiteout was used on the Trust document to change the trustee from Sheridan E. Snyder ("Mrs. Snyder") to her husband Dale K. Snyder ("Mr. Snyder"), rendering the Trust void. Plaintiffs also assert that the Trust instrument is void because there was no actual delivery of the deed to the trustee at the time the Trust was created. The trial court held that the quitclaim deed was delivered in that there was not clear and convincing evidence that the Deceased intended to retain control over the deed and delay its delivery. In addition, the court held that Mrs. Snyder is capable of acting as trustee. The court found that the whiteout change on the Trust instrument was ineffectual to change the trustee, and the court reformed the Trust document, as permitted by Tenn. Code Ann. § 35-15-415 (2007), to give effect to the Trust as originally written. The court also held that actual physical delivery of the quitclaim deed to the trustee at the time the Trust was created was not necessary to the creation of a valid trust. Plaintiffs appeal. We affirm.

**Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

William J. Brown, Cleveland, Tennessee, for the appellants, Carlynn Manning and Gerald Z. Hickey.

Johnny L. Woodruff, Chattanooga, Tennessee, for the appellee, Susan Hendricks.

No appearance by, or on behalf of, Dale K. Snyder and Sheridan E. Snyder.

## OPINION

I.

This case was tried over a period of two days in June 2007. The trial court heard closing arguments in August 2007. The trial court made the following findings of fact:

> The [P]laintiffs in this case . . . are the biological children of [the Deceased];
>
> [The Beneficiary] was the adopted daughter of [the Deceased];
>
> Defendants [Mr. Snyder] . . . and [Mrs. Snyder] . . . are parties because of being named in certain instruments executed by [the Deceased];
>
> [The Deceased] made an appointment with Attorney G. William Little ( . . . "Mr. Little") in October 1998, to create a will;
>
> Mr. Little was of the opinion [the Deceased] had the mental capacity to create a will and prepared one for her;
>
> During the meeting to prepare the will, [the Deceased] told Mr. Little she had given to plaintiff Carlynn Manning what she intended for her to have during her lifetime, and intended to split one piece of property between Zane Hickey and [the Beneficiary];
>
> Later, on June 30, 1999, [the Deceased] also told Mr. Little she was feeling pressure from her children about her property and wished to create an irrevocable trust to prevent plaintiff Carlynn Manning from challenging what [the Deceased] wanted done; this resulted in drafting of [the Trust];
>
> The Trust document originally named Mrs. Snyder as trustee with defendant Mr. Snyder as substitute or backup trustee;
>
> After a discussion with Mrs. Snyder, whiteout was used on the documents and the trustee was changed to Mr. Snyder;
>
> There was no evidence [the Deceased] approved of this change;

> When this change was made . . . the grantee, Mrs. Snyder, [on] the Quitclaim Deed [was not changed];
>
> The Quitclaim Deed was recorded with the Register of Deeds of Polk County and returned to Mr. Little, who retained them [sic] in his file;
>
> Although Mr. Little was clearly the agent of the Grantor and [the Deceased], there was no evidence [the Deceased] intended to retain any control over the deeds [sic] or to delay delivery;
>
> Mrs. Snyder was and is capable of handling the duties of trustee;
>
> Plaintiff Carlynn Manning knew about the will drafted by Mr. Little in October, 1998;
>
> Because of this knowledge, Plaintiff Carlynn Manning put pressure on [the Deceased] to change her will, and [the Deceased] related this to Mr. Little prior to creation of the Trust;
>
> Many statements made by Plaintiff Carlynn Manning were inconsistent, and [the Beneficiary] was far more credible than Plaintiff Carlynn Manning.

(Paragraph numbering in original omitted.)

II.

The parties make no specific statement of issues.[1] The issues[2] Plaintiffs discuss in their brief are:

> Whether the trial court correctly made a finding of fact that the Deceased did not intend to retain control over the Deed or to delay its delivery.
>
> Whether the trial court correctly made a finding of fact that Mrs. Snyder was and is capable of handling the duties of trustee.

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[1] "The brief of the appellant shall contain under appropriate headings and in the order here indicated: . . . (4) A statement of the issues presented for review." Tenn. R. App. P. 27(a)(4). It is not sufficient to first state the issues in the argument section of the brief. Despite this deficiency in Plaintiffs' brief, we have chosen to address their issues.

[2] Plaintiffs do not argue the issue of competency of the Deceased. We thus proceed under the assumption that Plaintiffs do not appeal the trial court's conclusion that the Deceased "was competent to create the Trust, intended to create the Trust and received independent advice to do so."

Whether the Quitclaim Deed was valid and thus effective to transfer the interest from the Deceased into the Trust.

Whether a valid Trust was created given that there was no actual physical delivery of the Quitclaim Deed to the trustee.

III.

Our review is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. Tenn. R. App. P. 13 (d); ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). Our review of the trial court's conclusions on matters of law, however, is *de novo* with no presumption of correctness. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005). We likewise review the trial court's application of law to the facts *de novo*, with no presumption of correctness. ***Clark v. Clark***, No. M2006-00934-COA-R3-CV, 2007 WL 1462226, at *3 (Tenn. Ct. App. M.S., filed May 18, 2007).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor and other indices of credibility. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***Bolin v. State***, 405 S.W.2d 768, 771 (Tenn. 1966). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999), ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315-16 (Tenn. 1987).

IV.

A.

The trial court made factual findings as follows: "Although Mr. Little was clearly the agent of the Grantor and [the Deceased], there was no evidence [the Deceased] intended to retain any control over the deeds or to delay delivery . . . ." The court further stated, "Therefore, the Court cannot find by clear and convincing evidence that delivery was not intended."

The trial court correctly stated that "clear and convincing evidence" is the burden on litigants who seek to set aside a deed. ***Myers v. Myers***, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994) ("[W]e note that to set aside a deed, it is well-settled that the proof must be clear, cogent and convincing.") (citations omitted). *See also* ***Estate of Acuff v. O'Linger***, 56 S.W.3d 527, 531 (Tenn. Ct. App. 2001).

Plaintiffs argue that the conclusion that the Deceased did not intend to retain any control over the deed or to delay delivery is not supported by a "preponderance of the evidence." Plaintiffs misperceive the burden, however. The burden was not on the Beneficiary to show that the deed was

delivered, but on Plaintiffs to show by "clear and convincing evidence" that the Deceased did not intend to relinquish her control over the deed and intended to delay its delivery. *See* ***Jones v. Jones***, No. 01-A-019005CH00192, 1991 WL 129197, at *4 (Tenn. Ct. App. M.S., filed July 17, 1991).

It is undisputed that the Deceased did not have possession of the deed after it was executed. Rather, she left the original deed with her attorney. In addition, at his deposition – made an exhibit at trial – Mr. Little testified, "[W]e would have been very specific that the transfer was truly irrevocable [sic] there would be no way for her to get those assets back out." Plaintiffs argue that the deed was not delivered because the attorney kept the original and did not send it on to the trustee. They assert that a physical transfer of the deed to the trustee was necessary.[3]

It is true that an undelivered deed does not effectively pass title from the grantor to the grantee. ***Miller v. Morelock***, 185 Tenn. 466, 473, 206 S.W.2d 427, 430-31 (Tenn. 1947) (citation omitted) (title not passed when grantor requested deed not be recorded and then asked for, and received, deed back into his possession); ***Mast v. Shepard***, 56 Tenn. App. 473, 476-77, 408 S.W.2d 411, 413 (1966) (citations omitted). Whether a delivery has occurred, however, is ascertained by determining the intent of the grantor and may be inferred from circumstances. ***Early v. Street***, 192 Tenn. 463, 471, 241 S.W.2d 531, 534 (Tenn. 1951) (citations omitted). Under the law of conveyancing, "delivery" connotes more than the manual transfer of the deed itself; the concept is to place the deed beyond the grantor's control. ***Traders' Nat'l Bank v. First Nat'l Bank***, 142 Tenn. 229, 234, 217 S.W.977, 978 (1919) (test of delivery is power of grantor to recall same).

In this case, the deed was placed beyond the control of the Deceased in that it was left in the possession of her attorney *and* he recorded the deed in the Office of the Register of Deeds of Polk County. When a deed is recorded, a presumption of delivery and acceptance arises. ***Ottinger v. Brown***, 43 Tenn. App. 44, 50, 306 S.W.2d 5, 8 (1957); ***Ellison v. Garber,*** 39 Tenn. App. 668, 677, 287 S.W.2d 564, 568 (1956). There is nothing in the facts of this case to suggest that the Deceased's attorney either violated an instruction of the Deceased not to record the deed or was acting beyond his authority when he placed the deed of record at his own expense. *See* ***Ottinger***, 43 Tenn. App. at 51, 306 S.W.2d at 8.

The presumption raised by recordation can only be rebutted "by clear and convincing evidence that delivery was not intended or did not take place." ***Jones v. Jones***, 1991 WL 129197, at *4. Furthermore, "[w]here the proof presented to rebut the presumption of delivery raises an issue of credibility, it is for the trier of fact to determine whether the presumption has been overcome." ***Id***. (citation omitted).

In this case, Plaintiffs rely on testimony to the effect that, at various times after the execution and recording of the deed, the Deceased told people that she was going to give them part of her property. Plaintiffs testified that "she asked them to take her to see William Little to straighten it out

[3]Mr. Little asked Mrs. Snyder to act as trustee and she suggested that her husband act as trustee because he was the one with a closer relationship to the Deceased.

on the issue of whether she still owned the property and whether she could convey it out to others." The trial court, which heard all the witnesses and made a specific finding on credibility, held that there was *no* evidence the Deceased intended to retain any control over the deed or to delay delivery.

The issue of delivery in this case raises an issue of credibility. When based on an assessment of the credibility of the witnesses, as was the case here, the trial court's findings are entitled to considerable weight on appeal. ***Id.*** (citing ***Tenn-Tex Properties v. Brownell-Electro, Inc.***, 778 S.W.2d 423, 425-426 (Tenn. 1989); ***Gilliam v. Gilliam***, 776 S.W.2d 81, 84 (Tenn. Ct. App. 1988); ***Royal Ins. Co. v. Alliance Ins. Co.***, 690 S.W.2d 541, 543 (Tenn. Ct. App. 1985)). When the entirety of the record is considered in the light of the trial court's credibility determinations, we conclude that the evidence does not preponderate against the trial court's finding of fact that the Deceased did not intend to retain control over the quitclaim deed or to delay delivery.

B.

Plaintiffs claim that the trial court's finding that Mrs. Snyder "was and is capable of handling the duties of trustee" was "not supported by any evidence." Both Mr. Snyder and Mrs. Snyder gave depositions, which were admitted as exhibits at trial. It was Mrs. Snyder's testimony that she owns Tri State Land Title and is a title agent. She also owns The Closing Place and is an escrow agent. Her company is certified as a title company in Tennessee, North Carolina and Georgia. She was also trained as a paralegal and worked for an attorney for 14 years. This evidence supports the trial court's finding that Mrs. Snyder is competent to serve as trustee.

In the answer filed on behalf of both the Snyders, with respect to the duty to act as trustee, they said: "Snyders have stood ready to consummate the duties conferred upon them since agreeing to assume those duties, but have not been provided a survey with which to carry out the task. Snyders contacted G. William Little, III after the death of [the Deceased] requesting that he prepare the necessary documents . . . ." The answer confirms that the Snyders are both willing to serve.

We disagree with Plaintiffs' conclusion that the trial court's finding of fact was "not supported by any evidence." And we do not find that the evidence preponderates against the finding. We thus affirm the trial court's factual determination that Mrs. Snyder was, and is, capable of handling the duties of trustee.

C.

Plaintiffs claim that the quitclaim deed was not an effective transfer of the interest of the Deceased into the Trust. First, Plaintiffs say that the deed lacks a sufficient description to transfer any interest and is thus void under the statute of frauds. In the space provided for a description, the quitclaim deed before the court states, "The purpose of the Quit Claim Deed is to release any and all interest the Grantor has in real property located in Polk County, Tennessee." Plaintiffs claim that this is "no description."

It is true that documents conveying an interest in property must include a "description" of the property. *See* ***Swiney v. Swiney***, 82 Tenn. 316, 318, 1884 WL 3339, at *4 (1884). The general rule, however, is that if the instrument describes the property "in such manner that it can be located and distinguished from other property, it is good." ***Wallace v. McPherson***, 187 Tenn. 333, 340, 214 S.W.2d 50,53 (1947).

In ***Brummit v. Brown***, 159 Tenn. 612, 21 S.W.2d 626 (1929), the Supreme Court considered whether a deed was void under the statute of frauds because it did not contain an adequate description. The court held the following description to be sufficient: "All my undivided interest in the estate of my father, Frank A. Brown, of Hamblen County, Tennessee, who was deceased on the 7th day of March 1928." ***Id.*** at 159 Tenn. at 616, 21 S.W.2d at 627. The Court stated:

> [I]it seems to be well settled . . . that a deed or mortgage describing the subject matters as all of the grantor's property, or all of his property in a certain locality, is not void for want of sufficient description. These holdings seem to rest upon the theory that the description can be made certain by reference to the deeds of record conveying the lands.

***Id***. at 159 Tenn. 618, 21 S.W.2d at 628. In this case, the deed referred to "all interest the Grantor has in real property located in Polk County, Tennessee." We hold that the description was legally sufficient to transfer the Decedent's interest and the deed is not void under the statute of frauds. To confirm this point, as the Beneficiary's brief points out, a surveyor was able not only to locate the Decedent's land and establish its boundaries, but also to produce a survey based on the subject description.

Plaintiffs also argue that the deed is void because at the time it was executed Mr. Snyder and not Mrs. Snyder was the trustee. When the Deceased executed the quitclaim deed and the Trust document, Mrs. Snyder was named trustee and Mr. Snyder was named successor trustee. The depositions of the Snyders confirm what occurred next. Mrs. Snyder testified that when the attorney for the Deceased called her, with the Deceased in the room with the attorney, to confirm that she would act as trustee, she said that she preferred that her husband, who had a closer friendship with the Deceased, be trustee and she would be successor trustee. At the time, her husband was in chemotherapy for cancer. Mrs. Snyder insisted that her husband was going to live and should be trustee. At some point whiteout was used on the Trust document making Mr. Snyder trustee and Mrs. Snyder successor trustee. Mrs. Snyder was named as the grantee of the deed and that was not changed.

Pursuant to Tenn. Code Ann. § 35-15-401 (2007), which sets forth the methods of creating a trust, the trial court found that the changes to the Trust document were ineffectual. Then the court reformed the Trust document to read as it did at the time the Deceased signed it with Mrs. Synder being the trustee and her husband being successor trustee. The trial court noted that the reformation gives "effect to the Quitclaim Deed and follows the intent of the [the Deceased]."

The trial court's reformation is permitted by statute. The Tennessee Uniform Trust Code, Tenn. Code Ann. § 35-15-101 *et seq.* (2007), contains a specific provision allowing reformation. Tenn. Code Ann. § 35-15-415. We affirm the action of the trial court in reforming the Trust document and agree that doing so effectuates the intention of the Deceased as well as gives effect to the quitclaim deed that names Mrs. Snyder as grantee.

Plaintiffs argue that the trial court erred in reforming the Trust document because Mrs. Snyder never agreed to be trustee. It is not necessary that a nominated trustee assent at the time a trust is created; he or she may later expressly or impliedly accept the trusteeship. *See* Tenn. Code Ann.§ 35-15-401 (comments); Tenn. Code Ann. § 35-15-701 (2007). And, in any event, the factual premise is incorrect. Both Mr. Snyder and Mrs. Synder answered this lawsuit saying, "Snyders have stood ready to consummate the duties conferred upon them *since agreeing to assume those duties* . . . ." (Emphasis added.) Plaintiffs also argue that Mrs. Snyder "never accepted any responsibility nor has any interest in accepting the responsibility of being a trustee." Plaintiffs do not speak for Mrs. Snyder, however, and they disregard the deposition testimony and the answer of the Snyders in this case.

Plaintiffs further argue that to date the Snyders have failed to act and did not participate in the trial. Once again, Plaintiffs ignore what the Snyders have said in their answer and deposition testimony. First, in their answer, the Snyders clearly indicate that they decided not to incur the expense of an attorney to defend them in this lawsuit, which they described as "a fight in which they have no dog." They both gave depositions, however, and they indicated their intention to proceed when they have a survey of the property and when this litigation is resolved.

Plaintiffs make much of what they characterize as "overwhelming evidence" that the Deceased did not intend to transfer title to her property during her lifetime. The trial court viewed that evidence differently, however.

In the telephone conference in which the trial court rendered its opinion, the court noted that the Deceased had her attorney "draft her an irrevocable trust document to prevent Carlynn Manning from challenging what she . . . wanted done." The trial court concluded:

> The Court is looking at some of the credibility in this case of the different parties and find[s] [the Beneficiary] to be far more credible than Carlynn Manning. It appears [the Deceased] wanted [the Beneficiary] to have the land that she helped pay for. Carlynn put pressure on her mom because she knew about the will and many statements made by Carlynn Manning during the trial were inconsistent.
>
> The Court cannot speculate as to whether [the Deceased] told the children about the property that she was giving to them as being the truth, as being what they wanted to hear, or just as something to get

> them to leave her alone. But she did indicate to Mr. Little that she was feeling pressure from her children.
>
> I find that mom intended to create an irrevocable trust and deed and she received independent advice to do this. She was competent to do this. And while the lawyer through no fault of [the Deceased] altered the documents, those alterations were ineffectual under Tenn. Code [Ann. § ] 35-15-401. There's no proof that [the Deceased] approved the change and . . . this Court will reform the trust document to make [Mrs. Snyder] the trustee and [Mr. Snyder] the alternate, as was originally executed by [the Decedent], and this gives effect to the quitclaim deed and follows the intent of the grantor.
>
> Trust[ee] [Mrs.] Snyder was and is capable [of] handling being the trustee. This is consistent with the statements of the witnesses and the documents and the transfer was effective with delivery being effective. This trust document will be reformed by this Court to effectuate the intent of the trustor.

As previously noted by us in this opinion – but it warrants re-stating – trial courts are in a unique position to evaluate witness credibility. *See* ***Bolin v. State***, 405 S.W.2d 768, 771 (Tenn. 1966). We will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. We do not find such evidence in this case. In addition, we affirm the trial court's holding that the quitclaim deed was valid and transferred the Deceased's interest into the irrevocable Trust.

D.

Plaintiffs argue that the Trust instrument is void as a matter of law; they argue that a trust never existed. In support of this argument they quote one line of the statute within the Tennessee Uniform Trust Code that sets out how a trust may be created, as follows:

> A trust may be created by:
>
> (1) The *transfer of property* to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death . . . ."

Tenn. Code Ann. § 35-15-401 (emphasis by Plaintiffs). Plaintiffs conclude: "Where there is no transfer or delivery of property to the Trustee, as in this case[,] the trust fails and is void as a matter of law." The only law Plaintiffs cite is the section quoted above.

Contrary to Plaintiffs' position, however, the comments to the official text of section 401 of the Tennessee Uniform Trust Code make clear that Plaintiff's construction of the section is erroneous. First, the commentators note, "The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount." ***Id***. at (Comments to Official Text). Section 401 is based on Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts §17 (1959). ***Id***. The commentators state that "[u]nder the methods specified for creating a trust in this section, a trust is not created until it receives property." ***Id.*** But the commentators further provide:

> [T]he property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. . . . (Internal citations omitted.)
>
> * * *
>
> While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. *See* Restatement (Third) of Trusts § 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. *See* Restatement (Third) of Trusts § 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 35-36 (1959).

***Id.*** In addition, the commentators say that "[a] declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer." ***Id.*** The comments make clear that Plaintiffs' argument that there had to be an actual physical transfer from the Deceased, or Mr. Little as her agent, to the Snyders of the original quitclaim deed and the personal property that were the assets of the Trust at the time the trust was executed is incorrect. As the Beneficiary's brief correctly notes, the trust instrument makes abundantly clear the Deceased's intention to convey title to her real estate and certain specified items of personal property to the trustee, and that the trustee was to see that the named beneficiary receives those items after the Deceased's death.

There is no requirement of an actual physical transfer of the *res* of a trust to the trustee contemporaneously with the signing of the trust instrument. We thus hold that the Trust instrument in this case is not void.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Carlynn Manning and Gerald Z. Hickey. This case is remanded to the trial court for such further proceedings as may be required.

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CHARLES D. SUSANO, JR., JUDGE