1983

Delbert Kresser And Edward Kresser v. Vaughn Peterson And Glade Arthur Peterson : Brief of Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

DELBERT KRESSER and EDWARD KRESSER,

Plaintiffs-Appellants

vs.

Case No. 19285

VAUGHN PETERSON and GLADE ARTHUR PETERSON,

Defendants-Respondents.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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BRIEF OF RESPONDENT

NATURE OF CASE

This case is an action to set aside, cancel and void a Warranty Deed of real property.

DISPOSITION IN THE TRIAL COURT

The Trial Court ruled that the subject Warranty Deed was delivered, supported by good and valuable consideration, and was a valid conveyance of title to the subject real property. Judgment was granted in favor of the Defendants and against the Plaintiffs; that the Plaintiffs' Complaint pled no cause of action; and that the Defendants were awarded their court costs, including, but not limited to, deposition costs and expenses.

RELIEF SOUGHT ON APPEAL

The Appellants seek reversal of the Trial Court's judgment and entry of a judgment setting aside, cancelling and voiding the subject Warranty Deed, based solely upon the issue that the Deed was not delivered. The Respondents ask the Court to affirm the judgment of the Trial Court.

STATEMENT OF FACTS

The material facts with respect to the issue of delivery of the subject Warranty Deed have been stipulated to within the Pre-Trial Order governing trial of this action. (R.96-104) The Appellants have correctly set forth the stipulated facts, paragraphs one (1) through six (6), in their Brief. However, they have incorrectly set forth the stipulated facts in their paragraphs seven (7) through thirty (30). The Respondents hereby restate the stipulated facts contained within the Pre-Trial Order. (R.96-104)

III. The following facts are admitted or are not to be contested at trial:

a. On May 21, 1949, Edward Kresser, Sr. and Della Pyper Kresser were married in the State of Nevada.

b. At said time, Edward Kresser, Sr. was already the father of two sons, by a prior marriage with Louie Barrett, which sons, Delbert Kresser and Edward Kresser, are the Plaintiffs in this action.

c. At said time, Della Pyper Kresser was already the mother of two sons, by a prior marriage with

Arthur Peterson, which sons, Lloyd Peterson and Glade Peterson, aka Vaughn Peterson and Arthur Peterson, respectively, are the Defendants in this action.

d. Sometime in 1951, Edward Kresser, Sr. and Della Pyper Kresser purchased the real property which is the subject of this action, as joint tenants, which real property is located at 2140 South 1800 East, Salt Lake City, Utah, and more particularly known as:

> All of Lots 36 and 37, Bl. 3, Idlewild Addition, a subdivision of part of the Northeast quarter of Section 21, Township 1 South, Range 1 East, Salt Lake Meridian, in the City of Salt Lake, County of Salt Lake, State of Utah, according to the plat thereof recorded in the office of the County Recorder of said County.

e. After several transactions between themselves, Edward Kresser, Sr. and Della Pyper Kresser owned the subject real property as joint tenants with full rights of survivorship at the time of the death of Edward Kresser, Sr., on April 20, 1970.

f. Fee simple title to the subject real property passed to Della Pyper Kresser, outside the estate of Edward Kresser, Sr., by operation of law, upon the death of Edward Kresser, Sr.

g. On June 16, 1970, Della Pyper Kresser executed a document entitled "Will of Della Pyper Kresser," a copy of which document is attached hereto.

h. Said Will provides as follows:

> I give, devise, and bequeath the house and property at 2140 South 18th East in

> Salt Lake County, State of Utah, described as follows:
>
> All of Lots 36 and 37, Block 3 Idlewild Addition in Salt Lake County, State of Utah,
>
> to Lloyd Vaughn Peterson, Glade Arthur Peterson, Edward Kresser, and Delbert Kresser in equal shares.

i. On July 2, 1976, Della Pyper Kresser executed a hand-written codicil on the bottom of the Will.

j. Said codicil provides as follows:

> It is my wish that at the time of my death, that my son, Lloyd, have first opportunity to purchase my home at 2140 South 18th East.

k. On April 15, 1977, Della Pyper Kresser executed a Warranty Deed, which was also acknowledge, which conveyed all of her right, title and interest in the subject real property to Della P. Kresser (herself), Lloyd V. Peterson (a Defendant herein), and Glade A. Peterson (a Defendant herein), as joint tenants with full rights of survivorship, a copy of which Warranty Deed is attached hereto.

l. On April 18, 1977, the subject Warranty Deed was recorded in the office of the Salt Lake County Recorder in Book 4476, at Page 964, as Entry No. 2933125 of said records. Said Warranty Deed was recorded by Della Pyper Kresser, at her request, and so noted by the Recorder at the top of the Deed.

m. After the Warranty Deed was recorded, it was returned to Della Pyper Kresser, by the Recorder, at

her address of 2140 South 1800 East, Salt Lake City, Utah 84106.

n. Della Pyper Kresser died on October 19, 1981.

o. Della Pyper Kresser was the exclusive occupant of the property until her death.

p. During all times relevant hereto, Della Pyper Kresser was one hundred percent (100%) independent as to her business and personal affairs.

q. The Warranty Deed was located in a safe deposit box at Continental Bank and Trust Company, several days prior to her death by her son, Lloyd Peterson, a Defendant herein, which safe deposit box was rented by Della Pyper Kresser as "Tenant", Lloyd Peterson, as "Joint Tenant", and Glade Peterson as "Joint Tenant", pursuant to the Safe Deposit Rental Agreement attached hereto.

1. Neither Lloyd Peterson nor Glade Peterson knew the deed was in the safe deposit box.

2. Neither Lloyd Peterson nor Glade Peterson had ever gone to the box prior to the location of the deed in the safe deposit box.

3. Della Pyper Kresser left no instructions about the box or contents with Lloyd Peterson or Glade Peterson, or anyone else that they were aware of.

r. Lloyd Peterson did not have Della Pyper Kresser's express permission or authority to take the deed from the safe deposit box, except as to permission or

authorization granted in the language within the Safe Deposit Rental Agreement, if any.

s. Neither Lloyd Peterson nor Glade Peterson had authorized possession of the key to the safe deposit box at any time except as to any authorization granted in the Safe Deposit Rental Agreement, if any.

t. Neither Glade Peterson nor Lloyd Peterson ever saw the Warranty Deed prior to the location of it in the safe deposit box.

u. Neither Lloyd Peterson nor Glade Peterson paid the ten dollars ($10) mentioned in the Warranty Deed.

v. Della Pyper Kresser felt great love and affection for her natural sons, Lloyd Peterson and Glade Peterson, the Defendants herein, during all times relevant hereto.

w. At the time Della Pyper Kresser executed her Will, she intended that the subject real property should be passed through her estate and distributed to Lloyd Peterson, Glade Peterson, Delbert Kresser, and Edward Kresser, Jr., as her devisees, pursuant to the terms of her Will.

x. At the time Della Pyper Kresser executed the subject Warranty Deed, she intended that present title to the subject real property be transferred to her natural sons, Lloyd Peterson and Glade Peterson, the Defendants herein.

y. During the life of Della Pyper Kresser, she paid all taxes, hazard insurance, and utilities on the subject real property.

z. Shortly prior to the execution of the Warranty Deed, during its execution, and shortly thereafter, Della Pyper Kresser verbally represented to Mayme Peterson (the wife of Defendant Lloyd Peterson), Blanche Liebelt (the sister of Della Pyper Kresser), and DeNiece Starich (the Notary Public in front of whom the Warranty Deed was signed) that she (Della Pyper Kresser) desired and intended to transfer present title in the subject real property to herself and her natural sons, Lloyd Peterson and Glade Peterson, the Defendants herein.

aa. Shortly prior to the execution of the Warranty Deed, during its execution, and thereafter, Della Pyper Kresser verbally represented to Mayme Peterson (the wife of Defendant Lloyd Peterson), Blanche Liebelt (the sister of Della Pyper Kresser), and DeNiece Starich (the Notary Public in front of whom the Warranty Deed was signed) that she (Della Pyper Kresser) did not desire or intend that the subject real property pass to Delbert Kresser and Edward Kresser, Jr.

bb. No undue influence or fraud was perpetrated upon Della Pyper Kresser or the Plaintiffs herein, by the Defendants at anytime relevant hereto.

cc. This action affects title to or an interest in real property located within Salt Lake County, State of Utah.

This action was brought by the Plaintiffs/Appellants to set aside, cancel or void the subject Warranty Deed. If they are successful, the property will revert to the estate of Della Pyper Kresser and pass in equal shares to both of the Appellants and both of the Defendants/Respondents. If they are not successful, the property will have previously been conveyed to only the Respondents by the Warranty Deed and will have been adeemed from the estate.

ARGUMENT

The Trial Court was faced with the important responsibility of determing whom an elderly lady desired to receive her home upon her death. Since, by virtue of her death, she was not able to personally oversee that her wishes would be fulfilled, she was forced to rely upon written declarations of her intent and hope that her children would respect these declarations, and, if need be, a court of law correctly interpret them. This Court is faced with a like responsibility.

POINT ONE

DELIVERY OF A DEED IS NECESSARY FOR AN EFFECTIVE CONVEYANCE OF AN INTEREST IN REAL PROPERTY

Before a deed is an effective conveyance of an interest in real property, it must be delivered. Wiggill v. Cheney, 597 P.2d 1351 (Utah 1979); 23 Am.Jur.2d, Deeds §76 (1965).

POINT TWO

DELIVERY IS ACCOMPLISHED THROUGH ACTUAL DELIVERY OF THE DEED OR CONSTRUCTIVE DELIVERY OF THE DEED

As a legal concept, "Delivery" is a remnant of our Anglo-Norman heritage of common law. It has been fully embraced by all jurisdictions, and its modern requirements are a result of decades of judicial interpretation. As stated in 23 Am.Jur.2d, Deeds §78, p.131:

> While it is impossible to state in exact terms what shall or shall not constitute a delivery of a deed, as a legal term, "Delivery" of a deed imports that possession, or the right to possession, of the instrument, which is in other respects complete, has passed from the grantor to the grantee with intent to pass title as a present transfer. It is the final act which consummates the deed, signifying that it is in operation and effect, and without which the deed would be inoperative to pass the title.
>
> In other words, the delivery of a deed in the law of conveyancing is a transfer of it from the grantor to the grantee or his agent or to some third person for the grantee's use, in such manner as to deprive the grantor of the right to recall it at his option, and with intent to convey title. (Emphasis added.)

Delivery is a matter of intent of the grantor. Such intent is to be determined from the facts and circumstances surrounding the preparation and execution of the deed. Losee v. Jones, 120 Utah 385, 235 P.2d 132 (1951). This determination should look to the relationship between the parties, the property involved, the reasons for execution, and prior and post-execution statements and actions. First Security Bank of Utah v. Burgi, 122 Utah 445, 251 P.2d 297 (1952).

There is a vital distinction between the use of the word "delivery" as simply designating the transfer of physical custody of a deed, and the use of the term in the legal sense. The intention of the grantor to lose legal dominion and control of the deed is controlling. He must do whatever the law requires to place the deed beyond his ability to recall it, thus evidencing his manifest intent to transfer his title. Formal or ceremonial acts, such as impressing a seal or touching a seal already affixed, or placing a handful of dirt in the grantee's hand, have long been declared legal anachronisms, and replaced by physical delivery of the deed (actual delivery) or recordation of the deed (constructive delivery).

The Appellants attempt to persuade this Court that the common law of Utah recognizes actual delivery of a deed as the only method by which a grantor could signify his intent that it is in full operation and effect. In

order to prevail upon appeal, they must convince this Court that constructive delivery has no legal effect whatsoever.

In order to do so, the Appellants cite 23 Am.Jur.2d, Deeds §89, p.138, for the proposition that actual delivery of the deed to the grantee is an absolute requirement. Their citation reads as follows:

> A sufficient delivery of a deed requires that there be a manifestation of the intention of the grantor to relinquish all dominion and control over the instrument and to have it become presently effective as the transfer of title. There is no delivery in law where the grantor keeps the deed in his possession with the intention of retaining it, particularly where he keeps possession of the property as well...if a grantor retains the right to control or reclaim a deed, there is no delivery even though grantor never exercises such right. (Emphasis added.)

Not only do they ignore the qualifying words within their own citation that clearly indicate that the grantor must retain possession of the deed with the intention of retaining it or with the right to reclaim it before there will be no delivery, they have carefully hand-picked portions of the full citation, deleting any reference to constructive delivery, especially by recording of the deed by the grantor. The full text of Section 89 reads as follows:

> While delivery may be by words or acts, or by both combined, and while it is not essential to legal delivery of the deed that physical possession of the instrument be transferred from grantor to grantee, it is essential to legal delivery of a deed that the grantor lose dominion and control over the instrument.

A sufficient delivery of a deed requires that there be a manifestation of the intention of the grantor to relinquish all dominion and control over the instrument and to have it become presently effective as a transfer of title. There is no delivery in law where the grantor keeps the deed in his own possession with the intention of retaining it, particularly if he keeps possession of the property as well. If a grantor retains the right to control or reclaim a deed, there is no delivery even though the grantor never exercises such right. Where the proof fails to show that the grantor did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial. In other words, delivery may be effected by any act manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or of the right of recalling it; but if he does not evidence an intention to part presently and unconditionally with the deed, there is no delivery.

Apart from proof of delivery by a showing of a change of physical custody, a deed is constructively delivered when the grantor has parted with the right to retain it. In all cases where a deed is found in the grantor's possession, the question is, did the grantor have the right to retain the deed as against the grantee? The mere fact that his continued possession gives him the physical opportunity to destroy the deed is immaterial because he has not the right to do so; and if he should destroy it, the deed would nevertheless be operative by reason of the prior constructive delivery. On the other hand, the dominion over the instrument must pass from the grantor with the intent that it will pass to the grantee, if the latter will accept it; and if the deed remains within the grantor's control and liable to be recalled, there is no delivery, notwithstanding he has parted with its immediate possession. Hence, it is held that no effectual delivery is

made where the grantor's instructions, on a fair construction, show that he does not contemplate absolute release of control. Nor is an effective delivery made where the grantor and grantee place mutual deeds in a box to which they have equal opportunity of access and where the grantor exercises control of the contents. In the case of a deed executed by joint grantors, the continued custody and control of the instrument by one grantor will preclude the instrument from taking effect as a conveyance.

While these legal principles are clear, each case presents distinctive facts upon which they must operate, so that it is often difficult to determine whether the particular facts establish such a transfer of a deed to constitute a legal delivery of it and make it operative as a conveyance. No precise formula of acts or words is necessary to effect delivery, and there is no universal test, applicable to all cases, whereby the sufficiency of delivery can be determined. It can be stated generally, however, that there is a sufficient legal delivery where the grantor by his acts or words, or both, manifests his intention to relinquish all dominion and control over the instrument and to have it become presently effective as a transfer of title. (Emphasis added.)

POINT THREE

THE SUBJECT WARRANTY DEED WAS CONSTRUCTIVELY DELIVERED BY DELLA PYPER KRESSER, AS GRANTOR, TO THE RESPONDENTS, AS GRANTEES

As the stipulated facts indicate, Della Pyper Kresser owned fee simple title in the subject real property. On April 15, 1977, she executed a Warranty Deed, which was also acknowledged, which conveyed all of her right, title and interest in the subject real property to

Della P. Kresser (herself), Lloyd V. Peterson (a Defendant/Respondent herein), and Glade A. Peterson (a Defendant/Respondent herein), as joint tenants with full rights of survivorship. On April 18, 1977, the Deed was recorded in the office of the Salt Lake County Recorder, in Book 4476, at Page 964, as Entry No. 2933125 in said records, by and at the request of Della Pyper Kresser, as noted at the top of the Deed by the Recorder. After recording, it was returned to Mrs. Kresser at her residence by the Recorder. It remained in her possession until shortly prior to her death. (R.99, 143)

At the time she executed and recorded the Deed, she intended that present title to her home be transferred to herself and the Respondents herein as joint tenants. This intent was specifically stipulated. She manifested her intent by verbally instructing the wife of one of the Respondents, her sister and confidant, and the Notary Public in front of whom the Deed was signed, that she desired and intended to transfer present title in her home to herself and the Respondents, and that she did not desire or intend that her home pass to the Appellants pursuant to her Will. (R.101, 145)

These uncontroverted and stipulated facts clearly constitute constructive delivery of the subject Warranty Deed.

Recordation of a deed is prima facia evidence of delivery. Northcrest, Inc. v. Walker, 122 Utah 268, 248

P.2d 692 (1952). In cases where the deed is returned to the grantor after recordation, the mere fact of its possession by the grantor is immaterial, for he has extinguished his right to destroy it or recall it. Under the law it is effective and he is bound by its terms. 23 Am.Jur.2d, Deeds §89, p.139.

A party opposing a deed must prove its invalidity by the clearest and most convincing of evidence. Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966); Northcrest v. Walker Bank and Trust Co., supra. In addition, where a deed has been recorded, the only way delivery can be defeated is to show an absolute lack of intent by the grantor to transfer his title. Since recordation and lack of intent to transfer title are diametrically opposed, for a grantor normally would not record a deed if he did not intend on it taking effect, the Courts place the highest burden of proof upon the party challenging the deed to show no intent. Gold Oil Land Development Corp. v. Davis, 611 P.2d 711 (Utah 1980); Controlled Receivables, Inc. v. Harman, supra; Allen v. Allen, 115 Utah 303, 204 P.2d 458 (1949); Chamberlin v. Larsen, 83 Utah 420, 29 P.2d 355 (1934).

This presumption is so strong, the Utah Supreme Court has upheld delivery in every case where the deed was recorded by the grantor, regardless of whether physical possession of the deed was thereafter retained by the

grantor or relinquished to the grantee. Controlled Receivables, Inc. v. Harman, supra; Allen v. Allen, supra.

In the Allen case, supra, the grantor quit-claimed her house to her two children, but retained a life estate. She recorded the deed, but had the recorder return it to her, where she kept it in her possession until her death. There was never a manual delivery of the deed. The court found that the facts did not rebut the presumption of delivery, especially by the clearest and most convincing of evidence. Since they are similar to the facts in the case at bar, a review of the court's reasoning sheds light upon the importance that is placed on recordation versus the return of the deed by the Recorder to the grantor after recordation. It reasoned:

> In the present case, then, we have two acts indicative of an intention to make an immediate conveyance--the rentention of the life estate and the recording. What then of the retention of the deed after recording? As the grantor had reserved a life estate in herself, there is some reasonable explanation for her desire to retain it as evidencing her interest. Furthermore, since the conveyance was to two persons it appears logical that she would desire to have possession of the deed herself. Thus, the return of the deed to her after recording does not necessarily militate against the presumption of delivery arising from that recording under the circumstances of this case. The recording of the deed and placing the names of others on the property is somewhat in the nature of a public declaration that she intended the instrument to become effective immediately. People as a rule do not deliberately put a flaw in the title to their property, thereby handicapping its

> later disposal, unless they really intend to transfer some interest to the person whose name is thus placed in the record. (Emphasis added.)

Allen v. Allen, supra, 204 P.2d at 460-461.

In the Controlled Receivables case, supra, the grantor transferred his title to a strawman who then transferred it to the grantor's four children and the grantor, as joint tenants. The deeds were then recorded by the strawman and returned to the grantor, who retained their possession for fifteen years without objection. Some years later, the grantor challenged the deeds for nondelivery. Since the operative facts are similar to the case at bar, the court's respect for recordation and the subsequent return of the deeds to the grantor, who also was a cograntee (as in the case at bar), is worth reviewing. The court reasoned:

> With respect to the fact that Claude [grantor] retained possession of the deeds, it is of little or no significance in rebutting the presumption of delivery in this case. A delivery to one cotenant is generally regarded as a delivery to all. This rule is particularly applicable in the instant case, for at the time of the execution of the conveyance Claude's children were all minors. It is only natural that he, as parent and guardian, should be the custodian of the deeds. (Emphasis added.)

Controlled Receivables, Inc. v. Harman, supra, 413 P.2d at 809.

In the Allen and Controlled Receivables cases, supra, the court looked to the actions of the grantor to

determine her intent. If they evidenced a desire to transfer present title in the real property, then constructive delivery was upheld, regardless of whether actual, physical delivery occurred. In Allen, the court considered two acts as indicative of the grantor's intention to immediately convey title; i.e. the retention of a life estate and recording. In the case at bar, Mrs. Kresser also retained an interest in her home, a joint tenancy interest, and she recorded the Deed. Further, Mrs. Kresser was only one of three grantees. As in the Allen case, she solved the problem of which grantee should retain the Deed by choosing herself. As the court indicated in Allen, this choice was logical and did not militate against delivery.

In Controlled Receivables, the court relied heavily upon the grantor's act of recording, and placed little significance in the fact that he retained possession of the deed after recording, especially in light of the fact that the grantor was also a cograntee. The court ruled that delivery to one grantee was delivery to all grantees. In the case at bar, Mrs. Kresser was a cograntee.

The Controlled Receivables case, supra, further demonstrates the weight given to recording as indicative of the grantor's intention and as constructive delivery. In that case, the deed and its delivery were being attacked by its grantor, not by third parties to the transaction (as in

the case at bar). Even in these circumstances, delivery was upheld and the grantor was not allowed to change his mind and retake title to the property several years down the road. The court should be even less willing to allow third parties to the deed attack its validity and delivery, as in the case at bar. This is especially so where the parties expressly stipulated that the deed represented the grantor's intentions and where she made contemporaneous statements to several people that the deed was consistent with her desire, and she is now deceased and unable to protect her wishes.

In only three cases, the Utah Supreme Court has ruled no delivery where the deed was recorded. First Security Bank of Utah v. Burgi, supra, 251 P.2d 297; Gold Oil Land Development Corp. v. Davis, supra, 611 P.2d 711; and Norling v. Anderson, 535 P.2d 1252 (Utah 1975). In the first, the deed was recorded by the grantee, not the grantor, after the grantor's death. In the second, a blank deed was filled out by the grantee and recorded by him, without the knowledge and authorization of the grantor. In the third, the deed was removed from the grantor's safety deposit box when she was sick and incapacitated and recorded by a grantee.

Again, in every case where the grantor has recorded the deed, the court has upheld constructive delivery, based upon the reasoning that:"[p]eople as a rule do not deliberately put a flaw in the title to their

property, thereby handicapping its later disposal, unless they really intend to transfer some interest to the person whose name is thus placed in the record." Allen v. Allen, supra, 204 P.2d at 461.

The Appellants cite two cases of nonrecording by the grantors as being dispositive of the case at bar: Wiggill v. Cheney, supra, 597 P.2d 1351; and Norling v. Anderson, supra, 535 P.2d 1252.

In the Wiggill case, the grantor signed a deed and placed it in a safety deposit box which was in her sole and complete control. She left instructions that only upon her death was the box to be opened. The court correctly held that there was no delivery of the deed. It ruled that: "in order for a delivery effectively to transfer title, the grantor must part with possession of the deed or the right to retain it." (Emphasis added.) Wiggill, 597 P.2d at 1352.

In the Norling case, the deed was prepared and signed by the grantee who placed it in her safety deposit box where it remained until it was removed and recorded by a grantee while the grantor was seriously ill and mentally incompetent. Again, the court correctly held that there was no delivery of the deed.

Unlike the case at bar, there was no evidence of intent to transfer present title. There was no recording

by and at the request of the grantor. In both cases, the grantee recorded the deed after the grantor's death or incapacity. There were no declarations of the grantors' desire to transfer immediate title to the grantees. There was no act by the grantors that would terminate their right to retain possession of the deeds and right to recall their transfer of title.

The Appellants go to great length arguing that, in the case at bar, Mrs. Kresser, the grantor, placed the deed in her safety deposit box after it was recorded. They completely fail to understand or purposely fail to reveal to the court that the operative facts of delivery occurred long before Mrs. Kresser placed the deed in her safety deposit box.

Again, delivery occurred upon her manifestation of intent to convey present title. Such intent was stipulated. She declared her intent to several individuals shortly before, during and after the Deed's execution and recordation. Finally, she consummated its delivery by performing the one act, willingly and knowingly, that would terminate her right to retain the Deed and her prior interest in the property. She recorded it.

POINT FOUR

THE BURDEN OF GOING FORWARD WITH THE EVIDENCE AND OF PERSUASION WAS UPON THE APPELLANTS, WHICH BURDEN WAS NOT MET

Recordation of a deed is prima facia evidence of delivery. 23 Am.Jr.2d, Deeds §89, p.139, supra. In fact, if a deed has been acknowledged and recorded, a presumption arises that delivery has occurred. This presumption is entitled to "great" and "controlling" weight, and must be rebutted by the party asserting nondelivery by the clearest and most convincing evidence. Controlled Receivables, Inc., supra, 413 P.2d 807; Gold Oil Development Corp., supra, 611 P.2d 711; and Allen, supra, 204 P.2d 458.

In addition to rebutting the presumption of delivery, the Appellants had the burden of persuading the Trial Court that the deed was invalid because of nondelivery, which burden could also have been met by only clear and convincing evidence. Northcrest, supra, 248 P.2d 692; and Controlled Receivables, Inc., supra.

The Appellants cite the Allen case supra, and Chamberlain v. Larsen, 83 Utah 420, 29 P.2d 355 (1934), for the proposition that something more than recording is necessary to prove delivery. They go to great lengths arguing that this something more does not exist in the case at bar.

The Appellants further cite Singleton v. Kelly, 61 Utah 244, 212 P.63 (1922) for the proposition that the intention of the grantor is not relevant when there is no

evidence of actual delivery. This is not the law. This court has recognized that delivery may be accomplished constructively. See e.g. Allen v. Allen, supra. Furthermore, while the grantor's intention is not conclusive on the question of delivery, intent is the controlling factor where constructive delivery is involved. First Security Bank of Utah v. Burgi, supra, 251 P.2d 297; Losee v. Jones, supra, 235 P.2d 132. Singleton, however, does not apply to the case at bar. Mrs. Kresser, as the grantor, committed numerous acts that indicate delivery. As the above cited treatise and cases indicate, her actions were the most relevant and competent evidence possible on the issue of delivery.

The Appellants next argue that Mrs. Kresser's will, executed seven years prior to the Warranty Deed, and her codicil, executed approximately nine months prior to the Warranty Deed, are evidence of her intent to not deliver the Warranty Deed. Fortunately, a decedent has the opportunity to change her mind about the disposition of her property up to the very second of her death. During the seven years between her Will and the subject Warranty Deed, and the nine months between her codicil and the Deed, Mrs. Kresser obviously changed her mind about the disposition of her home. She hinted of this change in her codicil, and conclusively declared her change of desire at the time the Deed was executed and recorded (R. 98-99, 142-143). More importantly, the parties have stipulated that she intended

to transfer her home to the Respondents by way of the Deed, thus disinheriting the Apellants. There is no room left for the Appellants belated argument that she intended otherwise.

Their arguments clearly show that they do not understand the concept of ademption of property from a decedent's estate and the concept of delivery. Again, delivery is the intent to transfer present title and the manifestation thereof. First Security Bank of Utah v. Burgi, supra, 251 P.2d 297; Losee v. Jones, supra, 235 P.2d 132; 23 Am.Jur 2d, Deeds §89 (1965).

It is established by facts, actions and statements, usually of the grantor, that show this intent. One action has been identified by the courts as especially indicative of this intent, recording, and worthy of special significance. As the Utah Supreme Court stated in Allen v. Allen, supra, 204 P.2d 458:

> The recording of the deed and placing the names of others on the property is somewhat in the nature of a public declaration that she intended the instrument to become effective immediately. People as a rule do not deliberatly put a flaw in the title to their property, thereby handicapping its later disposal, unless they really intend to transfer some interest to the person whose name is thus placed in the record.

Id. at 461. See also LeMehaute v. LeMehaute, 585 S.W.2d 576 (Mo.App. 1979); Corbett v. Corbett, 249 N.E. 585, 107 S.E.2d 165 (1959).

In the case at bar, the burden of proving delivery, hence the validity of the deed is not upon the Respondents. It rests upon the party asserting the invalidity of the deed, the Appellants herein, both as to rebutting the presumption and going forward with the evidence, and as to persuasion. Chamberlin v. Larsen, supra, 29 P.2d 355; Controlled Receivables, Inc. v. Harman, supra, 413 P.2d 807; Northcrest, Inc. v. Walker, supra, 248 P.2d 692.

Neither the Trial Court nor the Supreme Court need weigh any conflicting evidence of delivery, i.e. the grantor's intent to convey present title and manifestation thereof. The parties have stipulated that at the time she executed the Warranty Deed, she intended to transfer present title to herself and the Respondents as joint tenants. She manifested this intent by declaring to the wife of one of the Respondents, her sister, and the Notary Public in front of whom the Deed was signed, that she (the grantor) desired and intended to transfer, by the Deed, the real property to herself and the Respondents as joint tenants, and desired and intended to not have the property pass to the Appellants under her earlier Will. Finally, three days later she committed the ultimate act evidencing her intent, she took the Deed to the Salt Lake County Recorder's office and recorded it.

Delivery was complete at this point. The fact that the Deed was returned to her by the Recorder and

subsequently stored in her safety deposit box until shortly before her death is meaningless. To assert that this establishes nondelivery is nothing more than a desperate attempt to defeat her wishes by playing games with legal anachronisms that have long since disappeared into antiquity. Actual, physical, manual delivery of a deed is no more required for effective "delivery" than depositing a handful of turf or twig of the land in the hand of the feofee in the name of seisin of the land. Constructive delivery in the manner chosen by Mrs. Kresser, the grantor herein, has long since been accepted by the law as effective delivery.

The Trial Court had all of the evidence before it and knew the law of delivery. It refused to be caught up in the Appellants' argument that actual delivery was the only method of effective delivery. It found that Mrs. Kresser fully intended to transfer present title by the Deed and absolutely manifested this intent, notwithstanding the fact that it was returned to her after recording. (R.125, 144) The Appellants simply failed in their burden of persuasion by failing to convince the Trial Court by clear and convincing evidence that recordation coupled with Mrs. Kresser's intent and manifestations thereof were inconsistent with delivery.

On review, this Court is obliged to view the evidence and all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of

fact. The findings and judgment of the Trial Court should not be disturbed when they are based upon substantial, competent and admissable evidence. Nypetco Associates v. Jenkins, No. 17564 (Utah, September 14, 1983). If there is conflicting evidence, the findings of the Trial Court will not be upset on appeal except upon a showing that the evidence, viewed in the light most favorable to the verdict, so clearly preponderate in the Appellants' favor that reasonable persons could not differ on the outcome. Gillespie v. Southern Utah State College, No. 17850 (Utah, August 25, 1983).

Given the great weight of evidence that establishes constructive delivery of the Deed, no reason exists for this Court to overturn the Trial Court's findings.

CONCLUSION

Based upon the foregoing, Defendants respectfully request this Court to affirm the judgment of the trial court.

DATED this 19th day of October, 1983.

GREGORY S. BELL & ASSOCIATES

By Lester A. Perry
Lester A. Perry

Certificate of Mailing

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, this 19th day of October, 1983, to the following:

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Leigh Rick Kirwan