IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00889 COA

IN THE MATTER OF THE LAST WILL AND

TESTAMENT OF H. D. STEPHENS:

MICHAEL D. STEPHENS APPELLANT

VS.

DUDLEY J. STEPHENS, INDIVIDUALLY, AND

AS EXECUTOR AND TRUSTEE OF THE LAST

WILL AND TESTAMENT OF H. D. STEPHENS APPELLEE

DUDLEY J. STEPHENS

CROSS-APPELLANT

v.

MICHAEL D. STEPHENS; HOWARD T. STEPHENS; MARGARET STEPHENS, GUARDIAN OF SONYA STEPHENS; AND STEVE CRAIG STEPHENS

CROSS-APPELLEES

TRIAL JUDGE: HON. JOHN C. ROSS, JR.

COURT FROM WHICH APPEALED: PRENTISS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ED W. JENKINS

ATTORNEYS FOR APPELLEE:

EUGENE BURTON GIFFORD, JR.

RHONDA N. ALLRED

NATURE OF THE CASE: WILLS & ESTATES; TRUSTS

TRIAL COURT DISPOSITION: PLAINTIFF'S COMPLAINT DISMISSED

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

This case arose out of a dispute among family members over property in Lee and Prentiss counties. Dudley J. Stephens (D. J.), one of the sons of the deceased, was the record owner of both pieces of property; however, the Chancery Court of Prentiss County found that the Lee County property should pass under the Last Will and Testament of the father, Howard Dudley Stephens

(H. D.), and the Prentiss County property should not pass under the will. It is from that decision that Michael appeals and D. J. cross appeals. Finding no error, we affirm.

FACTS

The Last Will and Testament of H. D. Stephens was probated in the Chancery Court of Prentiss County. D. J. was appointed as Executor of the estate pursuant to the terms of the will. In his will, H. D. devised eleven to thirteen acres of real property in Lee County to D. J. as trustee for all seven of H. D.'s children. In addition, a building in Prentiss County known as "Down's Video" was devised to Michael Stephens. A conflict arose once it was discovered that H. D. had already conveyed both pieces of property to his son, D. J., by separate deed years before his death. D. J. was removed as Executor of the estate in order to avoid a conflict of interest.

Howard T. Stephens and other devisees filed a complaint regarding the Lee County land. The court found that the Lee County property should pass under the will due to failure of delivery of the deed. Michael filed a separate complaint for declaratory and injunctive relief concerning ownership of Down's Video. The court found that the conveyance of Down's Video to D. J. should be upheld; Michael's claim was dismissed that D.J. only held the property in trust was dismissed.

From the judgment of the chancery court, Michael perfected an appeal regarding Down's Video. D. J. cross appealed the issue involving the Lee County property.

DISCUSSION

"Our scope of review of findings of fact is severely limited. Findings of fact made by a chancellor which are supported by credible evidence, may not be set aside on appeal." *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985). However, we will not hesitate to reverse if we find that the chancellor's decision was "manifestly wrong, or that the court applied an erroneous legal standard." *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (citing *Smith v. Smith*, 607 So. 2d 122, 126 (Miss. 1992)).

Because this case involves disputes by different parties over two separate pieces of property, we will discuss the arguments separately.

1. The Down's Video Property

The Down's Video property was purchased by H. D. Stephens on March 30, 1988 from William Frank and Blanche Frazier for $20,000. Though H.D. paid the purchase price, the Fraziers deeded the property directly to D. J. Stephens. D. J. promptly recorded the deed. Michael Stephens argues that the deed created a resulting trust for the benefit of H. D., and therefore, the property should have passed through the estate of H. D. at his death. There is no contention that this deed was procured by undue influence. However, Michael presents the following case law to argue that D.J. only held the property in trust:

> [W]hen a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person who pays the purchase price. *Ryals v. Douglas*, 205 Miss. 695, 39 So.2d 311 (1949); V Scott, *Trusts* § 440 (3d ed. 1967); *Restatement (Second) of Trusts* § 440 (2d ed. 1959).

Stevens v. Hill, 236 So. 2d 430, 432-33 (Miss. 1970). "Proof of facts necessary to establish a trust by implication of law, i.e., a constructive or resulting trust, must be clear and convincing." *Allgood*, 473 So. 2d at 421. The presumption is subject to rebuttal:

By evidence that (1) the person who paid the purchase price manifested an intention that no resulting trust should arise, (2) the payor intended to make a gift or a loan to the transferee, (3) the payment was in discharge of a debt, (4) title was taken in the name of a relative, or (5) the purpose for placing title in the transferee was to further an unlawful purpose.

Stevens, 236 So. 2d at 433 (citing *Restatement (Second) of Trusts* § 441 (2d Ed. 1959)). The burden is upon the transferee to rebut the presumption. *Stevens*, 236 So. 2d at 433.

The chancellor conducted a hearing to determine the validity of this argument. Based on that hearing the court held:

There was testimony to the effect that H. D. Stephens intended this real property ultimately to pass to his son Michael. However, the Court is of the opinion that this is simply not established and that it

was at all times from the date of purchase the property of D. J. Stephens. This fact is borne out by the proof that D. J. Stephens paid fourteen to fifteen thousand dollars of his own money to repair the roof on the building situated on this real property. The court finds this conveyance of this real property to D. J. Stephens to be valid, and the claim of Michael Stephens thereto not well taken and hereby dismissed.

Two grounds for rebutting the presumption of a trust are relevant to our case. Exception two rebuts the presumption of a resulting trust when the property was a gift. Michael challenges the argument that this transaction was merely a gift from father to son by claiming that the testimony at trial established that H. D. intended that this property eventually go to Michael. However, there also was testimony that it was not until H. D.'s illness that he made a desire known that he wanted the property eventually to go to Michael. A resulting trust must exist, if at all, at the time of conveyance. *Brown v. Gravlee Lumber Co.*, 341 So. 2d 907, 910 (Miss. 1977). Any evidence that H.D. intended eventually to give the property to Michael if his behavior became more acceptable, is far from persuasive in the absence of evidence that H. D. became satisfied with the behavior.

Exception four rebuts the presumption of a resulting trust when the title to the property is placed in the name of a relative. The supreme court has stated that "[c]ommon experience teaches that gifts frequently occur between family members, and where a parent has voluntarily given a part of his property to a child we do not interfere, even when a confidential relationship is shown." *Anderson v. Burt*, 507 So. 2d 32, 36 (Miss. 1987). Michael argues that merely having the property in the name of a relative is not enough to rebut the presumption of a resulting trust. He relies on case law that found a resulting trust in existence between relatives. However, those cases involve situations where the evidence was clear and convincing that the parties started with the understanding that the property would be held in trust for the benefit of the trustee. *See, Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985); *Savell v. Savell*, 290 So. 2d 621, 624 (Miss. 1974); *Ryals v. Douglas*, 39 So. 2d 311, 316 (Miss. 1949). The evidence in this case is not clear and convincing that this was the understanding when the property was conveyed to D. J. The evidence shows that H. D. intended to have Down's Video placed in D. J.'s name. There was no evidence that clearly indicated that at the time of the conveyance, H. D. intended that the property be held in trust. The property at all times from the date of purchase was in D.J.'s name. Furthermore, unlike other property that H.D. purchased and placed in relatives' names, D. J. spent fourteen to fifteen thousand dollars of his own money to repair the roof of the Down's Video building.

The trial court was not manifestly in error in holding that the deed of Down's Video to D. J. Stephens was valid.

2. The Lee County Property

D. J. Stephens cross appealed the decision that the deed to the Lee County property was never delivered to him, and therefore, the property passed under the will. "The final and complete act which makes a deed effectual is delivery. Whilst no specific formalities are necessary, the grantor must *consent* that the deed shall pass irrevocably from his control, and the grantee must accept it." *Graham v. Graham*, 213 Miss. 449, 57 So. 2d 175, 175 (Miss. 1952) (emphasis added). The supreme court has stated that "[t]he possession of the deed by the grantee and also the fact that a

deed has been recorded raises a presumption of delivery. However, those presumptions are rebuttable presumptions and proof that there was no delivery overcomes same." *Reeves v. Reeves*, 374 So. 2d 791, 793 (Miss. 1979).

Here the chancery court found that there was never delivery of the deed. The evidence the chancellor relied upon to make his decision included: (1) The deed was executed at a time when H.D. Stephens was undergoing marital problems that ultimately led to divorce; H.D.'s ex-wife testified the deed was only intended to shield the property from marital claims; (2) H. D.'s 1990 will assumed he still owned the property; (3) The deed was executed on December 5, 1980 but not recorded until August 17, 1990; (4) H. D. still had control over the property -- receiving and turning down offers to buy the property after 1980; (5) H. D. made improvements and paid taxes on the property through 1990; and (6) no gift tax return was filed by D. J., even though he testified that the property was a gift.

D.J. was the only person to testify that there had been an affirmative delivery. Other relatives stated that H.D. kept deeds in a metal box and that D.J. removed the box after H.D. became terminally ill. Though no one could say that the relevant deed was still in H.D.'s possession until his final illness, the chancellor was entitled to conclude that D.J.'s testimony that the deed had been delivered in 1980, but that he forgot to record it, was not believable. *Estate of Holloway v. Holloway,* 631 So. 2d 127, 133 (Miss. 1993). The supreme court has stated that "[d]elivery is largely

a matter of intention of the grantor." *McMillan v. Gibson*, 76 So. 2d 239, 240 (Miss. 1954). The court reasonably inferred that delivery was never intended. There was no manifest error.

THE JUDGMENT OF THE CHANCERY COURT OF PRENTISS COUNTY IS AFFIRMED ON DIRECT AND CROSS APPEALS. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE APPELLANT AND TO THE CROSS-APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.