

IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00087 COA

IN RE: THE ESTATE OF MARTHA

S. FULLER: CHARLIE BEALL APPELLANT

v.

MERRY MARTHA FOSTER A/K/A MIMI

FULLER FOSTER APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DENISE OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: SAMUEL C. JOHNSON

ATTORNEY FOR APPELLEE: JACK G. MOSS

NATURE OF THE CASE: REPLEVIN ACTION FOR CERTAIN ITEMS OF PERSONAL PROPERTY

TRIAL COURT DISPOSITION: PERSONAL PROPERTY RESTORED TO MIMI FULLER FOSTER

MANDATE ISSUED: 9/16/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

This is a replevin action. Charlie Beall claims that two years before the death of his aunt, Martha S. Fuller, she gave him her household full of furniture. However, Martha's will directed that all of her furniture go to her niece, Mimi Fuller Foster. Additionally, before she died, Martha sent Mimi a bill of sale for all the furniture. Mimi filed an action for replevin, stating the will and the bill of sale were evidence of her right to immediate possession of the furniture. Charlie asserted the affirmative defense of valid inter vivos gift. The chancellor found that Charlie failed to prove a valid inter vivos gift. Charlie presents the following issues on appeal:

I. DID THE CHANCELLOR ERR IN HOLDING THAT CHARLIE BEALL BORE THE BURDEN OF PROVING HIS AFFIRMATIVE DEFENSE OF A VALID INTER VIVOS TRANSFER, AS OFFERED IN A REPLEVIN ACTION?

II. DID THE CHANCELLOR ERR IN HOLDING THAT CHARLIE BEALL WAS A FIDUCIARY FOR A THIRD PARTY GRANTOR, AND THUS BORE THE BURDEN OF PROVING HIS DEFENSE OF AN INTER VIVOS TRANSFER AS OFFERED IN A REPLEVIN ACTION?

III. DID THE CHANCELLOR ERR IN HOLDING THAT CHARLIE BEALL FAILED TO OVERCOME THE PRESUMPTION OF UNDUE INFLUENCE IN HIS ALLEGED FIDUCIARY CAPACITY WITH A GRANTOR?

IV. DID THE CHANCELLOR ERR IN HOLDING THAT CHARLIE BEALL CAME INTO POSSESSION OF CERTAIN CHATTELS AS THE RESULT OF AN INVALID INTER VIVOS TRANSFER?

V. DID THE CHANCELLOR ERR IN DETERMINING WHICH PARTY BORE THE BURDEN OF PROOF IN THE TRIAL OF THE REPLEVIN ACTION?

We affirm the lower court. We consider Charlie's issues in toto below.

FACTS

Martha S. Fuller died on October 2, 1994. Having no children, her only relatives were her sister, with whom she lived until her death, her sister's son, Charlie, and her niece, Mimi. Her last will, dated September 3, 1993, left all of her belongings to her niece, Mimi Foster. Charlie had possession of all Martha's furniture at her death. He claims that Martha gave him her furniture two years earlier. However, Charlie's testimony is vague and never clearly sets out how Martha gave him the furniture, besides her asking him one unspecified day if he wanted it and his replying yes. Martha lived in Raymond, Mississippi, and for several years prior to her death, lived with her sister who was almost completely deaf and blind. The two ladies hired sitters to stay with them, cook their meals, and perform light housecleaning duties. Martha's own house was next door to her sister's. Her home was filled with a variety of beautiful furniture and antiques. According to Charlie, Martha told him sometime in September, 1992, that he could have all of her furniture. On November 10, 1992, Martha deeded her house to Charlie. Charlie did not pay any consideration for the house. Martha then sold the house in May, 1993. The record is unclear, but at some point Charlie either reconveyed the house to Martha, and/or gave her all the proceeds from the sale of her house. The testimony is contradictory as to when exactly Charlie took possession of the furniture. Charlie stated that he began moving the furniture from Martha's house in late 1992 and continued until the sale of the house. However, sitters that stayed with Martha testified that Charlie began moving the furniture at the time the house was sold. After the house was sold, Martha gave Charlie power of attorney but later revoked it.

In early September, 1994, Martha was diagnosed with leukemia and given only a few weeks to live. She had a will drafted leaving everything to Mimi. Additionally, she mailed Mimi a bill of sale for all of her furniture. The bill of sale executed by Martha acknowledged that her furniture was in Charlie's possession and directed him to keep it until called for by Mimi. In December, 1994, Mimi contacted Charlie about getting the furniture. Charlie refused, and Mimi filed this replevin action.

Carol Brewer, one of the sisters' sitters, testified that Martha would become very upset when Charlie came and moved the furniture. Brewer stated that Martha wanted Mimi to have the furniture, but she understood that the furniture had to be moved because the house was being sold. According to Brewer, Martha was upset over her inability to take care of her furniture, and not having any other recourse, let Charlie put the furniture in storage. Rosie Pascal, another sitter, stated that she and Martha had conversations about the furniture, and Martha had told her that she wanted Mimi to have the furniture.

Mimi testified that she first discussed the furniture with Martha in late winter or early spring of 1993, when Charlie began removing the furniture from the house. Martha called Mimi, and was extremely upset that Charlie was taking the furniture. Mimi told Martha that she did not know what to do to

help her. Apparently Rosie Pascal and Louise Sills, a neighbor, had also phoned Mimi because of their concern over Charlie removing the furniture. Later when Martha was hospitalized for leukemia, she told Mimi that she wanted her to have the furniture. Before Martha's death, Mimi received the bill of sale for all of the furniture, although she paid no consideration.

DISCUSSION

Mimi, seeking to retain the furniture by replevin, has the burden of proving her right to its immediate possession. She offers Martha's will and the bill of sale. Charlie likewise has the burden of proving his affirmative defense. *Patrick v. Michigan Nat'l Bank*, 220 So. 2d 273, 275 (Miss. 1969). "When it is shown that one party has title to certain property and another claims that property by virtue of a gift from the owner, the party asserting the gift bears the burden of proof; the quantum of proof is 'clear and satisfactory proof.'" *Ross v. Brasell*, 511 So. 2d 492, 496 (Miss. 1987). The one claiming by inter vivos gift must prove each of the following elements:

(1) a donor competent to make a gift, (2) a voluntary act of the donor with donative intent, (3) the gift must be complete with nothing else to be done, (4) there must be delivery to the donee, (5) the gift must be irrevocable.

Matter of Estate of Holloway v. Hawkins, 515 So. 2d 1217, 1223 (Miss. 1987). Moreover, with an inter vivos gift, there exists a "presumption of undue influence even without the abuse of a confidential relationship. Such gifts are presumptively invalid." *Madden v. Rhodes*, 626 So. 2d 608, 618 (Miss. 1993).

In the case *sub judice*, the chancellor stated the issue at trial: "To me the question is either Mr. Beall is lying or he's not or he was under a misrepresentation. That's the issue, if you want me to narrow it down." The chancellor later stated, "The focus here is not on whether or not undue influence was exerted, because something had to happen to the property when the house was sold; it had to go somewhere." This was said, despite the chancellor's ultimate finding that a confidential relationship existed and undue influence was exerted.

In her opinion, the chancellor recited the elements required to prove an inter vivos gift, but somehow got hooked on the existence of a confidential relationship between Charlie and Martha. Ultimately, the chancellor found that "Charlie failed to rebut the presumption that a confidential relationship existed and that Martha's acts were entirely voluntary." The chancellor's opinion states the following:

[A] confidential relationship existed between Martha and Charlie. Martha's actions after the house was sold indicate that she was very protective of her property and she considered herself still to own the furnishings that were in the house. Understandably, Charlie had to do something with the furniture and it was reasonable for him to move it out of the house after it was sold. It probably was frustrating to Martha that she had nowhere to store the furniture. The circumstances surrounding the sale of the house and the disposition of property established that she wanted to maintain ownership of the contents in the house, but she had nowhere to store them.

We agree with these findings of the chancellor; however, we do not agree that the gift was defeated solely because of a confidential relationship and undue influence. Applying the elements of a valid inter vivos gift, we believe that Charlie proved only one by clear and satisfactory proof: first the donor must be competent-the record reflects that there was never any question as to Martha's competency. The second element requires free and voluntary action on behalf of the donor with the intention to make a gift. Charlie failed to prove such. The evidence established that Martha was extremely upset over Charlie's removal of the furniture but had no choice but to let him store the furniture for her. Moreover, Martha expressed to several people her intent that the furniture be given to Mimi. Element three demands that the gift be complete with nothing left to be done. There was no clear and satisfactory proof at trial that Martha ever considered the furniture as a gift to Charlie. The fourth element requires delivery by the donor and acceptance by the donee. "Delivery requires relinquishment of all dominion and control." *Estate of Holloway v. Hawkins*, 515 So. 2d 1217, 1223 (Miss. 1987). While Charlie may have had possession of the furniture with Martha's knowledge, he failed to prove that Martha acquiesced in any way to his having ownership of the furniture. The chancellor found, and we agree, that the circumstances showed that Martha wanted to retain ownership of the furniture but needed a place to store it. As for the fifth element, Charlie failed to provide sufficient evidence that there was a gratuitous and irrevocable gift.

The chancellor's findings will not be disturbed on appeal minus an abuse of discretion, manifest or clear error, or the application of an erroneous legal standard. *Madden v. Rhodes*, 626 So. 2d 608, 616 (Miss. 1993). "And the chancellor, being the only one to hear the testimony of the witnesses and observe their demeanor, is to judge their credibility. [She] is best able to determine the veracity of their testimony."... *Id.* We agree with the chancellor's decision that Charlie failed to prove that Martha's acts were free and voluntary. But we also conclude that he failed to prove three of the other four elements of a valid inter vivos gift. Accordingly, we affirm the chancellor's decision that Mimi is entitled to immediate possession of Martha's furniture as specified by Martha's will.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT FINDING MIMI FOSTER ENTITLED TO IMMEDIATE POSSESSION OF MARTHA FULLER'S FURNITURE AND OTHER HOUSEHOLD POSSESSIONS IS AFFIRMED. COSTS OF THIS APPEAL TAXED TO APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.