

STATE OF MICHIGAN
COURT OF APPEALS

MILDRED BLACKWELL,

Plaintiff-Appellant,

v

ALLAN BLACKWELL and DEBRA
BLACKWELL,

Defendants-Appellees.

UNPUBLISHED

October 13, 2005

No. 255717

Antrim Circuit Court

LC No. 03-007934-CK

Before: O’Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying plaintiff’s motion for summary disposition pursuant to MCR 2.116(C)(10) and instead granting summary disposition to defendants pursuant to MCR 2.116(I)(2). We affirm.

Plaintiff owned a house into which she allowed defendants to move. Plaintiff deeded her fee ownership of the house to herself and defendant Allan Blackwell as joint tenants with rights of survivorship. This was intended as her estate plan. The house needed repairs, so plaintiff and Allan jointly obtained a mortgage to get funds with which to conduct repairs. Shortly thereafter, Allan bought a new truck, allegedly with proceeds from the mortgage. However, he also performed repairs to the house. Plaintiff eventually initiated this suit, seeking that the house and mortgage proceeds be returned to her.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id.* at 120. A party opposing summary disposition must present more than a mere possibility or a mere promise that an issue of fact will be established at trial. *Id.* at 121. In equity actions, the trial court’s findings of fact are reviewed for clear error unless “derived from an erroneous application of law to fact.” *Attorney General v Lake States Wood Preserving, Inc.*, 199 Mich App 149, 155; 501 NW2d 213 (1993). Otherwise, equity actions are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004).

Plaintiff argues that the deed at issue cannot truly be considered a deed because plaintiff intended it as a will. We disagree.

Whether a given document is legally a deed or a will turns on whether it conveys a present interest or whether it conveys an interest on the death of the person who executed it. *Benton Harbor Federation of Women's Clubs v Nelson*, 301 Mich 465, 470; 3 NW2d 844 (1942). That determination turns on the intent of the person who executed it, which may be gleaned from the instrument itself, from the circumstances surrounding its creation, and from the manner in which the parties subsequently dealt with it. *Id.* at 471.

It appears that none of the parties are legally sophisticated, so we discount their use of technical terminology. The testimony clearly indicates that plaintiff wanted the document to serve certain practical, outcome-oriented functions: she wished to avoid being forced to sell her house, she wished to ensure that Allan's brother's creditors could not reach any portion of it, and she wished to retain control over the property during her lifetime. Thus, although plaintiff stated that she believed the deed "would be only lasting until I die and then take over," that statement must be considered in context. The testimony indicates that plaintiff did not intend to create a will, but rather a will *substitute*. As a practical matter, plaintiff apparently wished to *avoid* probate, rather than dictate what would happen to the house *in* probate. We therefore find that she intended to create a deed, not a will.

Further, construing the instrument as a deed from plaintiff individually to herself and Allan as joint tenants would substantially, even if not entirely, carry out plaintiff's expressed intent. The language of the instrument created "a joint life estate with dual contingent remainders (i.e., a contingent remainder in fee to the survivor)." *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 136; 657 NW2d 741 (2002). Thus, if plaintiff dies before Allan, he would own the property in fee, but if Allan predeceases plaintiff, she would own the property in fee. Also, plaintiff would retain a present property interest during the remainder of her lifetime. This would have the effect that the property would not pass through probate, where Allan's brother's creditors could reach it, but plaintiff would retain control as long as she lived, complete title passing only when she died.

Plaintiff also argues that the deed is invalid because it was not delivered. However, the deed itself indicates that it was recorded the day after it was signed, which the trial court correctly noted "gives rise to a presumption of delivery," although "this presumption merely shifts the burden of proof onto the party questioning the delivery." *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). "The purpose of the delivery requirement is to show the grantor's intent to convey the property described in the deed." *Id.* Indeed, our Supreme Court has explained as follows:

[T]he act of delivery is not necessarily a transfer of the possession of the instrument to the grantee, and an acceptance by him, but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or to some third person for his use and benefit. [*Schmidt v Jennings*, 359 Mich 376, 381; 102 NW2d 589 (1960).]

We note that plaintiff's retention of the deed after it was signed establishes that it could only have become recorded through some act of hers. Furthermore, physical delivery is not relevant where other acts indicate an intent to deliver the described property interest. The testimony also indicated that plaintiff and Allan both signed the mortgage as grantors, indicating that they believed themselves to be co-owners at the time, a fact that would be consistent with a *present* transfer of ownership, rather than a future transfer. Finally, as discussed, only a present transfer would substantially effectuate plaintiff's expressed desires regarding the property.

Plaintiff finally argues that the deed is invalid because it was not properly witnessed. However, failure to witness a deed properly pursuant to MCL 565.8 only necessarily affects the propriety of recordation under MCL 565.47. Otherwise, "an instrument of conveyance is good as between the parties even though not executed with such formalities as to permit it to be recorded." *Irvine v Irvine*, 337 Mich 344, 352; 60 NW2d 298 (1953). We have found the same rule applicable to nonparties who were merely aware of the instrument. *Evans v Holloway Sand and Gravel, Inc*, 106 Mich App 70, 82; 308 NW2d 440 (1981). Thus, presuming it is unrecordable, it remains valid as to all persons apparently interested in this case.

Thus, the trial court correctly found that plaintiff validly created, executed, and delivered a deed conveying her fee interest in the property from herself as sole owner to herself and Allan as joint tenants with rights of survivorship.

Plaintiff also argues that Allan converted the majority of the mortgage loan proceeds. Again, we disagree.

"Conversion" is "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). To the extent that any of the money was spent on the house, plaintiff agreed that was not wrongful. Thus, the question is whether spending money on the truck would have been a wrongful expenditure of money inconsistent with plaintiff's rights.

The evidence shows that plaintiff was the co-owner of Allan's previous truck, which was traded in as part of the purchasing process for the new truck, and she signed the title, apparently contemporaneously with the purchase. Thus, plaintiff was presumably aware of the transaction and did not object. Furthermore, plaintiff and Allan signed the mortgage as joint grantors, which is expected given that they were co-owners. Thus, the money belonged to both of them, not just to plaintiff. Finally, plaintiff explained that Allan performed a great deal of repairs on the house, just not all of the repairs she anticipated. Thus, Allan presumably spent a significant portion of the mortgage proceeds on the house, even if he spent some on the truck. Therefore, we conclude that even if Allan used some of the money to pay for his truck, the evidence does not show that he wrongfully spent money not belonging to him in a manner inconsistent with plaintiff's rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy