

RENDERED: SEPTEMBER 2, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001123-MR

CHARLIE GRAY AND RUTH ANN GRAY

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 02-CI-00687

NANCY GRAY, ALENE GRAY HOFFMAN,
MAXINE GRAY DELONG, CHARLES DELONG,
CALLOWAY GRAY, JR., AND
ELIZABETH ANN GRAY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Charlie Gray and Ruth Ann Gray appeal the judgment of the Knox Circuit Court finding in favor of plaintiffs Alene Gray Hoffman, Maxine Gray Delong, Charles Delong, Calloway Gray, Jr., and Elizabeth Gray, in this dispute over the ownership of property given to all parties by their

mother, Nancy Gray, now deceased. The circuit court held that Charlie Gray's deed did not give him title to the 2.77 acre tract upon which the farmhouse occupied by Calloway and Elizabeth Gray sits, but instead that Calloway had acquired title by adverse possession via parol gift, having occupied that tract since 1975. Charlie argues on appeal that the court's finding that the deeds to his siblings and their spouses were valid was erroneous, because delivery of the deeds never occurred, and that the court's finding that Calloway had adversely possessed the 2.77 acre tract was not supported by the evidence. We disagree and affirm the judgment.

The seeds of this dispute were planted when Nancy Gray had an attorney draft deeds to each of her four children, giving them fifty acres each with the reservation of a life estate for Nancy Gray and a restriction that the property not be sold without the consent of the surviving siblings. The deeds were executed on May 10, 1994, and given to Charlie to place in a lockbox until Nancy's death. The description of the property given to Charlie contained the house Calloway had built and was occupying, and the evidence indicated that this was done by mistake, since later, in 1996, Nancy had given a new deed to Calloway including the tract upon which the house sits, which he then recorded. Instead of waiting until his mother passed away, Charlie recorded his deed in November 1994, with an instruction

to the county clerk that the recording not be published in any newspaper. The other deeds remained in the lockbox until Nancy's death.

This action was filed by Nancy and Calloway in June of 1998, originally styled as an action to revise the deed to Charlie, alleging that Nancy had mistakenly included the land on which Calloway's home sits in Charlie's deed. Nancy passed away during the pendency of this action, and Calloway, the real party in interest, maintained the action after her death. Calloway claimed that even if the deed could not be revised, he was nevertheless the owner of the tract through adverse possession by parol gift, as he had been given the tract in 1975 and constructed a home on it, which he has occupied ever since. Charlie and Ruth counterclaimed, alleging that they alone had title to the property and that the deeds to Alene and Maxine were invalid for lack of delivery.

The circuit court held a bench trial, and in written findings of fact, held that Calloway had superior title to Charlie with respect to the 2.77 acre tract upon which his house sits. The court mistakenly wrote that Calloway had received and recorded his deed in July of 1994, but later amended the findings to reflect that Calloway did not receive his deed until 1996, holding that Calloway had instead gained title by adverse possession, as he had openly lived on the land and held himself

out at as the rightful owner since 1975. The court cited Layne v. Norman, 221 S.W. 869 (Ky. 1920), for the proposition that even though title to land cannot pass by an oral gift, where one enters land and takes possession under color of an oral gift, title may vest by adverse possession if he occupies the land for fifteen uninterrupted years. The court found that Calloway had done so, and that the rightful title of the tract upon which his home sits had vested in him. The court also held that the clear intent of Nancy Gray was that delivery should occur when she passed away, and therefore were not invalid for want of delivery, since she had given up physical control over the deeds and entrusted them to her son Charlie for delivery at the proper time. This appeal followed.

With respect to the finding that Calloway had adversely possessed the tract upon which his home sits, we hold that the court's finding is supported by the evidence. The term of Calloway's occupation of the land was well over the fifteen years required even when Nancy executed the deeds to her children in 1994. The inclusion of the tract on which the house sits in the deed to Charlie was obviously a mistake, but even if it had not been, Calloway would have superior title as title had vested by adverse possession. All the elements required for adverse possession are met, and it was not error for the court to find that Calloway had obtained title through this method.

With respect to the other deeds, while it would seem that Nancy chose a rather circuitous method of doing so, her intention was clearly to retain physical possession of the property while she was alive and to pass title to her children according to the deeds upon her death. She memorialized this intent by means of the deeds of May 1994 and clearly intended for the interest to exist at that time. The deeds, therefore, were not invalid for want of delivery to the intended grantee, since she had entrusted the deeds to Charlie for safekeeping. The court below cited Kirby et al. v. Hulette et al., 192 S.W. 63, 69 (Ky. 1917) for the proposition that the delivery of a deed to a third person, to be held by him and delivered to the grantee upon the grantor's death, nonetheless constitutes valid delivery if the grantor retains no other control and does not reserve the right to recall the deed. It appears in this case that Nancy had done so by executing the deeds and giving them to Charlie with the instructions that they were to be given to her children at her death. We are not certain why Nancy resorted to such secrecy by instructing Charlie to keep the deeds and not record them until her death, but her intent, however guarded it may have been, was for her children to receive a share of the family farm, and therefore she had the requisite intent to part with title at the time.

For the foregoing reasons, the judgment of the Knox
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

Paul Baker
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