

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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IN RE EVELYN JEAN BUCHINGER  
REVOCABLE LIVING TRUST.

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EVELYN JEAN BUCHINGER REVOCABLE  
LIVING TRUST, by its Trustee, LORI J.  
ZIMMER,

UNPUBLISHED  
February 15, 2011

Appellee,

v

THOMAS R. BUCHINGER,

Appellant.

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No. 295544  
Tuscola Probate Court  
LC No. 09-033145-TR

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Appellant Thomas R. Buchinger (“appellant”) appeals as of right the probate court’s order to reform a deed based on the court’s prior determination that the disputed deed was the result of a mutual mistake and that the subject property was a trust asset. We affirm.

This dispute involves the determination of the rightful ownership of a parcel of residential property located on Clear Lake in Atlanta, Michigan. Prior to 2001, the Clear Lake property belonged to Evelyn Buchinger (Mrs. Buchinger), who also owned two vacant lots in a platted subdivision known as Canada Creek Ranch. Mrs. Buchinger had three children: appellant; Carol Finner; and appellee Lori Zimmer. In 2001, appellee assisted Mrs. Buchinger in preparing estate planning documents, including a trust and two deeds purporting to transfer Mrs. Buchinger’s real property to the trust. Neither deed was recorded at that time.

In early December 2002, the first trust was replaced with one drafted by attorney Andy Richards. Richards met with Mrs. Buchinger and the parties to discuss the terms of the second trust and to execute the necessary documents. It is undisputed that Mrs. Buchinger indicated her intention that the Clear Lake property be transferred to the trust. It is also undisputed Mrs. Buchinger intended to transfer the Canada Creek Ranch property to appellant. However, the deed prepared by Richards purporting to transfer property from Mrs. Buchinger individually to herself and appellant as joint tenants with rights of survivorship contained the legal description

corresponding to the Clear Lake property. This deed (the “disputed deed”) was recorded on December 26, 2002. Mrs. Buchinger died on December 31, 2002. After her death, the discrepancy in the deed was discovered.

When appellee notified attorney Richards of the problem with the deed, Richards prepared another deed. In this second deed, he indicated that a scrivener’s error had occurred, and he corrected the legal description to indicate that the deed conveyed the Canada Creek Ranch lots. This corrected deed was recorded with the Register of Deeds on January 31, 2003. On that same day, the deed that had been drafted by appellee and executed by Mrs. Buchinger on December 5, 2001, which purported to transfer the Clear Lake property from Mrs. Buchinger to the first trust, was also recorded.

Appellee executed a transfer of ownership affidavit indicating that the Clear Lake property had been transferred to the trust, and appellant executed a transfer of ownership affidavit indicating that the Canada Creek Ranch lots had been transferred to him. For several years after Mrs. Buchinger’s death, all three children treated the Clear Lake property as if it belonged to the trust. The siblings split the expenses associated with the property, including taxes and utilities.

In 2006, appellant moved into the Clear Lake property on a full-time basis. The siblings continued to share the expenses of the property until appellant lost his job, at which point appellee covered his share of the expenses. In 2008, appellant made a written offer to purchase the Clear Lake property from his sisters. In researching the state equalized value of the Clear Lake property, appellant learned of the existence of the disputed deed, as well as the subsequent, corrected deed. Thereafter, appellant took the position that he was the rightful owner of the Clear Lake property.

Appellee filed this suit for supervision, instruction, and reformation of the disputed deed. The probate court held an evidentiary hearing limited to whether the disputed deed should be reformed. After the hearing, which included detailed testimony from the parties and Richards, the probate court concluded that a mutual mistake had been made in drafting and executing the disputed deed. The court found as a matter of law that the Clear Lake property was an asset of the trust and that an order reflecting same should be entered that would stand in lieu of any other deed of conveyance.

Appellant first argues that appellee lacked standing to institute and pursue this matter. We disagree.

The determination whether a person has standing is a question of law an appellate court reviews de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). Standing pertains to the right of a party to invoke the power of the court to adjudicate a claimed injury in fact. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). To have standing, a party must have “a legal or equitable right, title, or interest in the subject matter of the controversy.” *MOSES, Inc v Southeastern Michigan Council of Gov’ts*, 270 Mich App 401, 414; 716 NW2d 278 (2006) (internal quotation omitted); see generally *Lansing Schools Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, \_\_\_ NW2d \_\_\_ (2010).

The central issue to be resolved in this matter was the determination of the ownership of the subject property—namely whether the property was a trust asset or had been properly transferred to appellant. As trustee, appellee clearly has an interest in the subject matter of the controversy. Accordingly, the trial court did not err in finding that appellee has standing.

Next, we address appellant’s claim that the probate court improperly considered parol evidence in making its determination in this case.

A trial court’s decision regarding the admission of evidence is reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Generally, parol evidence is not admissible to vary the terms of an unambiguous deed. *Universal Underwriters Inc Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001) (interpretation of an unambiguous document is limited to the actual words used). However, for purposes of reformation, parol evidence can be used to determine whether a mutual mistake existed and to establish the true intentions of the parties. *Scott v Grow*, 301 Mich 226, 239; 3 NW2d 254 (1942).

Resolution of the parties’ dispute required a determination whether a mutual mistake existed related to the deed transferring the subject property to appellant. To make this determination, it was necessary for the probate court to consider evidence beyond the four corners of the document. Thus, the court did not abuse its discretion in allowing parol evidence to be introduced.

Appellant argues the probate clearly erred in its factual determinations that Mrs. Buchinger intended to transfer the disputed property to the trust, rather than to appellant, and that the disputed deed was never delivered or accepted. We disagree.

First, we address appellant’s claim that the trial court clearly erred in determining that Mrs. Buchinger intended to convey the disputed property to the trust. This position is directly contrary to appellant’s own testimony at the hearing below where he conceded that his mother had expressed her intent at the December 2002 meeting to transfer the property to the trust and that she never relayed a different intent between the time of the meeting and the time of her death. “A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Living Alternatives for the Developmentally Disabled, Inc v Dep’t of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Thus, this portion of appellant’s argument must fail.

We are also not persuaded by appellant’s argument that the probate court clearly erred in finding that the deed was not delivered or accepted. A deed becomes effective when delivery occurs, not when the deed is executed or recorded. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). Delivery is required to show that the grantor intended to convey the property described in the deed. *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). Acceptance is necessary for a deed to be valid, as there can be no delivery without acceptance. *Gibson v Dymon*, 281 Mich 137, 140-141; 274 NW 739 (1937). Delivery may be presumed from recording of a deed during a grantor’s lifetime. MCL 600.2110; *Finstrom v Baldwin*, 356 Mich 552, 556; 96 NW2d 798 (1959). However, a deed can be set aside when the presumption of delivery is overcome. *Creller v Baer*, 354 Mich 408, 412; 93 NW2d 259 (1958). In addition,

the subsequent conduct of the parties may be taken into consideration in determining whether there was intention to pass title. See *Tighe v Davis*, 283 Mich 244, 249-250; 278 NW 60 (1938).

The evidence presented below established that appellant was not provided a copy of the deed after it was executed. More telling is the fact that appellant treated the Clear Lake property as a trust asset for several years following Mrs. Buchinger's death. In fact, appellant first learned of the deed's existence at the same time he learned of the scrivener's error deed that was subsequently recorded. In light of this evidence, the trial court did not clearly err in finding that acceptance, and therefore delivery, had not occurred.

Appellant also argues that the trial court improperly considered the fact that he had paid no consideration for the disputed deed. We disagree.

Appellant argued below that he was the rightful owner of the Clear Lake property based on the race-notice statute. The race-notice statute, MCL 565.29, protects the property interests of a bona fide purchaser who first records their interest in land. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). A bona fide purchaser is a party who acquires a property interest for valuable consideration and in good faith, without notice of a third party's claimed interest in the property. 1 Cameron, Michigan Real Property Law (3<sup>rd</sup> ed), § 11.20, pp 395-396). At the hearing, appellant conceded that he had paid no consideration for the disputed deed. Thus, appellant was not entitled to the protection afforded by MCL 565.29. It was proper for the trial court to consider and note this fact in making its ultimate determination.

When a written instrument fails to express the intentions of the parties because of a mistake, the equitable remedy of reformation may be ordered by the court. *Scott*, 301 Mich at 237. A mutual mistake of fact "means an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). Here, the trial court correctly determined that Mrs. Buchinger did not intend to transfer the Clear Lake property to appellant and that he had no expectation of receiving the property. Accordingly, the disputed deed purporting to transfer the Clear Lake property to Mrs. Buchinger and appellant as joint tenants with rights of survivorship was the result of a mutual mistake. As a result, the probate court properly found as a matter of law that the property was a trust asset and entered an order reflecting same.

Finally, appellant's brief includes discussion of unclean hands, adverse possession, and disappointed beneficiaries. None of these claims have merit. The evidence at trial established that appellee never believed that Mrs. Buchinger had intended to convey the property to appellant and, rather than trying to interfere with a proper transfer of ownership to appellant, appellee was instead acting to correct what was believed to be a typographical error. Thus, appellee did not act with unclean hands by doing something inequitable or in bad faith relative to the Clear Lake property. *Richards*, 272 Mich App at 537. Next, the dispute related to the Clear Lake property arose in 2008, which is nowhere near the required 15-year period for adverse possession. *Beach v Lima Twp*, 283 Mich App 504, 524; 770 NW2d 386 (2009), lv granted 485 Mich 1036 (2010). Lastly, this case does not involve a disputed will, so the disappointed beneficiary argument is without merit. See *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 421-422; 655 NW2d 614 (2002). As noted previously, the probate court properly

allowed parol evidence to determine whether there was a mutual mistake in drafting and executing the deed.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder