[Cite as *Temple v. Temple*, 2015-Ohio-2311.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

RANDALL A. TEMPLE,

PLAINTIFF-APPELLANT, **CASE NO. 9-14-26**

v.

BARNEY B. TEMPLE, **O P I N I O N**

DEFENDANT-APPELLEE.

Appeal from Marion County Common Pleas Court
Trial Court No. 12CV0535

Judgment Affirmed in Part, Reversed in Part and Cause Remanded

Date of Decision: June 15, 2015

APPEARANCES:

Kevin P. Collins **for Appellant**

Clifford C. Spohn **for Appellee**

SHAW, J.

{¶1} Plaintiff-appellant, Randall A. Temple ("Randy"), appeals the judgment entry and subsequent findings of fact and conclusions of law issued by the Marion County Court of Common Pleas dismissing his complaint for a forcible entry and detainer against defendant-appellee, Barney B. Temple ("Barney"), and granting judgment in favor of Barney on his counterclaims. As a result of the trial court's decision, Randy was ordered to pay Barney money damages.

{¶2} Barney is Randy's elderly uncle who has significant hearing and vision impairments. Sometime in early 2009, Randy agreed to assist Barney with daily tasks such as transporting him to appointments, helping him obtain meals and groceries, and managing his financial affairs.

{¶3} On July 7, 2009, Randy accompanied Barney to an attorney's office where Barney's attorney had drafted three documents: (1) a general durable power of attorney appointing Randy as Barney's attorney in fact; (2) a will naming Randy as the executor; and (3) a deed granting Randy the property at 996 Edison Avenue in Marion, Ohio, where Barney resided since 1975. Barney executed these three documents in his attorney's office. With Randy's assistance, Barney signed a check for the cost of the legal services, which included the recording and conveyance fees related to the newly executed deed.

{¶4} Despite payment of the recording fees, no deed was recorded at that time. Instead, Barney retained possession of the original deed and placed it in a kitchen cabinet at his home at 996 Edison Avenue, where he kept other important documents. Randy retained a copy of the deed in a safe at his home.

{¶5} Later in 2009, Barney and Randy agreed to hold a yard sale and an auction to clear the clutter out of Barney's home. Randy organized the events which consisted of the sale of mostly Barney's personal property and some items of Randy's. The parties agreed to split the proceeds and Randy handled the finances. The yard sale was held at Barney's home, lasted two days, and yielded $2,200.00. The auction was held at Randy's home and grossed $1,255.00. After the payment of expenses for "helpers" at the yard sale, and the rental of a "port-a-john" and food at the auction, Randy calculated Barney's share to be $825.00 from the yard sale and $525.00 from the auction. Randy gave Barney the $525.00 from the auction and "borrowed" the $825.00 from Barney's portion of the yard sale proceeds because he was behind on his personal bills.

{¶6} Also in 2009, Barney purchased a 2005 Chevy Tahoe for Randy to use in his photography/DJ business. Barney made an initial down payment and financed the remainder through PNC Bank. The car was titled in Barney's name, but Randy drove the vehicle because Barney did not have an Operator's License

due to his vision impairment. Randy outfitted the vehicle with signs to advertise his business and also used the vehicle to transport Barney.

{¶7} In June of 2011, Barney arranged for Randy to be added as a joint owner of his savings and checking accounts and of his certificate of deposit ("CD") held at PNC Bank in order to facilitate Randy's access to his finances as Barney's power of attorney. Randy was also given a debit card linked to the checking account.

{¶8} In January of 2012, Randy discussed obtaining a debt consolidation loan with his live-in girlfriend, Linda Brammer, whom he had started dating in the fall of 2011. Randy informed Linda that he owned the property located at 996 Edison Avenue, where Barney resided, and pulled out a copy of the deed from his safe to show her. Linda noticed that the document was a copy and told Randy that he needed to locate the original deed if he wanted to obtain a loan using the property as collateral. Randy then went to Barney's home, took the original deed from his kitchen cabinet without Barney's permission, and gave it to the attorney who drafted the deed in 2009.

{¶9} On February 1, 2012, over two and a half years after its execution, the attorney recorded the original deed in the Marion County Recorder's Office and mailed it to Randy after it was recorded.

{¶10} On April 5, 2012, Randy executed a mortgage loan on the 996 Edison Avenue property with PNC Bank in the amount of $60,111.00. The mortgage was recorded on April 16, 2012.

{¶11} Randy did not tell Barney that the deed had been recorded or that the property had been mortgaged. Barney later learned of the recording from a friend who had read about the property transfer in the newspaper. Barney discovered the mortgage existed when he spoke to someone at PNC Bank.

{¶12} In May of 2012, Barney attempted to withdraw $300.00 from his savings account only to find that the account had been liquidated and closed. Barney discovered that Randy had closed his savings account and transferred the proceeds of approximately $3,200.00 to a savings account held solely in Randy's name. Barney confronted Randy who claimed he transferred the money for Barney's protection. Barney informed Randy that he intended to terminate his power of attorney and demanded his money back. Randy returned $2,000.00 to Barney, but kept the remaining $1,200.00.

{¶13} Shortly thereafter, Barney revoked Randy's power of attorney. Barney also retrieved the Chevy Tahoe from Randy's home with the assistance of the Sheriff. Barney's actions prompted Randy to initiate a forcible entry and detainer action against Barney. Linda, Randy's girlfriend, served Barney with the

three-day notice on June 18, 2012, and on July 13, 2012, Randy filed his complaint for eviction in the Marion Municipal Court.

{¶14} On July 24, 2012, Barney filed his answer asserting that Randy was not the owner of the 996 Edison Avenue property because there was no valid delivery of the deed prior to it being recorded. Barney also asserted in his answer that Randy's "right to possession of the property was to be contingent on the event of [Barney] having to reside in a nursing home and the contingency has not yet occurred." (Ans. at 1). In addition, Barney filed two counterclaims for money damages against Randy. In his first counterclaim, Barney alleged that Randy encumbered the 996 Edison Avenue property with a $60,111.00 mortgage without Barney's permission as the owner of the property. Barney named PNC Bank as a third-party defendant. Barney also claimed that Randy breached his fiduciary duty to account for Barney's personal property and further alleged that Randy converted his personal property for Randy's own use.

{¶15} Barney filed a motion to transfer the case to the Marion County Court of Common Pleas due to the fact that his prayer for relief for money damages exceeded $25,000.00, thereby depriving the Municipal Court of jurisdiction. Barney's motion to transfer was subsequently granted and the case was transferred to the Court of Common Pleas.

{¶16} In October of 2012, Barney asked Carrie Hensley to assist him with his finances due to his inability to read his bills and bank statements. Carrie had known Barney for four years because her husband owned a lawn care service and Barney was one of his customers. Carrie agreed to help Barney and as she went through his files she discovered a reoccurring monthly withdrawal of $200.00 from Barney's account to another account not owned by Barney. Barney was unaware of the automatic electronic transfer. Upon further investigation with PNC Bank, it was revealed that in May of 2012, while he was still Barney's power of attorney, Randy arranged for a monthly electronic transfer from Barney's checking account to Randy's savings account. During the nine months, from May 2012 until January 2013, a total of $1,800.00 had been removed from Barney's checking account and placed into Randy's savings account.

{¶17} On November 7, 2013, Randy filed a motion for summary judgment, which was opposed by Barney. On January 13, 2014, the trial court overruled Randy's motion for summary judgment finding "that genuine issues of material fact remain in this action, particularly in regard to the possession of the deed that was executed by the Defendant in 2009. Construing the evidence most strongly in favor of the Defendant, which this Court is required to do for purposes of this hearing, there is evidence that the Defendant never delivered the deed to Plaintiff." (Doc. No. 40 at 1).

{¶18} On May 1 and 2, 2014, the trial court conducted a bench trial. Each party presented the testimony of several witnesses in support of their claims and counterclaims. After the conclusion of the evidence and closing statements, the trial court made its findings on the record:

> **Upon review of the evidence as to the plaintiff's complaint as to the restitution of premises of 996 Edison Avenue in Marion, the Court finds that the plaintiff is not entitled to judgment for restitution in this matter.**
>
> **In making this finding the Court finds that there was not a valid delivery of the deed from the defendant to the plaintiff in this action and that legal title to 996 Edison Avenue is in the defendant—is with the defendant.**
>
> **As defendant is the owner of the property, eviction is not proper. Court finds the complaint for eviction of the plaintiff not well taken and should be dismissed with prejudice.**
>
> **Turning to the defendant's counterclaim, the Court finds the plaintiff has encumbered the defendant's property without the defendant's permission and has placed a cloud on the title of the defendant's property.**
>
> **The Court does find that the defendant is entitled to recover judgment against the plaintiff in the amount of the mortgage balance held by PNC Bank on the property at 996 Edison Avenue in Marion, Ohio as of May 1st, 2014. The Court finds that this portion of the judgment in favor of the defendant against the plaintiff may be satisfied by the plaintiff causing removal and release of the mortgage held by PNC Bank on the property at 996 Edison Avenue in Marion.**
>
> **As to the claims of conversion of the defendant against the plaintiff. The Court finds that the defendant is entitled to recovery against the plaintiff in the amount of $1,800 for the electronic transfer to the plaintiff's account, which occurred**

> **from the defendant's account from May 25th, 2012 to January 25th, 2013. The Court further finds that defendant is entitled to recovery in the amount of $1,200 not returned to the defendant when the plaintiff closed out the defendant's savings account in May of 2012.**
>
> **The Court further finds that the defendant is entitled to recovery in the amount of $825 from yard sale proceeds which were not paid by the plaintiff to the defendant. This totals up to a total amount of $3,825 * * * on the conversion counts.**

(Tr. at 399-401).

{¶19} On May 9, 2014, the trial court issued a judgment entry incorporating its findings, granting judgment thereon, and ordering the relief stated on the record at trial.

{¶20} Upon Randy's motion, the trial court issued a Findings of Fact and Conclusions of Law on June 16, 2014.

{¶21} Randy filed this appeal, asserting the following assignments of error.

ASSIGNMENT OF ERROR NO. I

> **THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN DETERMINING THAT PLAINTIFF-APPELLANT OWED DEFENDANT-APPELLEE FOR $1,200.00 FROM THE SAVINGS ACCOUNT.**

ASSIGNMENT OF ERROR NO. II

> **THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN DETERMINING THAT THERE WAS NO DELIVERY OF THE DEED FROM DEFENDANT-APPELLEE TO PLAINTIFF-APPELLANT.**

First Assignment of Error

{¶22} In his first assignment of error, Randy claims that the trial court erred when it determined that he owed $1,200.00 to Barney for the money he failed to return after he liquidated and closed Barney's savings account, on which he was also named a joint owner.

{¶23} The following evidence was adduced at trial regarding the nature of this account. Barney explained the reason he added Randy as a joint owner to his bank accounts at PNC Bank was because his doctors had informed him that his health was deteriorating. Barney wanted Randy to be able to easily access the bank accounts if Barney needed money. Barney claimed that both he and Randy understood that he would be present when Randy went to the Bank to make transactions on his behalf and that if he was not able to be present, Randy would obtain Barney's permission before engaging in a financial transaction at the bank. Contrary to Randy's testimony at trial, Barney maintained that he did not make a present gift to Randy of the money in his accounts. Rather, Barney testified that he only intended to give the funds in the accounts to Randy if "something happened" to him—i.e., upon Barney's death. (Tr. at 189).

{¶24} Moreover, it was undisputed that Barney was the only party who made deposits into the bank accounts, which came primarily from direct deposits of Barney's social security and pension payments. In other words, Randy did not

contribute any of his money into the "joint accounts." Notably, the document executed by Barney appointing Randy as his power of attorney only permitted Randy to withdraw from the accounts for Barney's benefit.

{¶25} Randy maintained at trial that in May 2012 he transferred the funds of $3,200.45 from the "joint savings" account to his personal savings account for Barney's benefit. Randy had learned that a female friend of Barney's was traveling from out of town to care for Barney. Randy explained that his "Uncle Barney can be very easy to persuade" and that he was concerned this woman would take Barney's money and leave. (Tr. at 362). Randy also believed that Barney had given him the funds in the accounts and that he owned the money. Accordingly, Randy felt that he needed to protect his own interest. The following exchange took place at trial on cross-examination of Randy:

> **Counsel: * * * What did you consider was your money and what did you consider Uncle Barney's money? You were protecting Uncle Barney's money, you said, maybe you were protecting your own money, what was, what was your story here?**
>
> **Randy: I was protecting us both. He gave everything to me. He gave all the accounts, all the money, all the house, it was all mine.**

(Tr. at 371).

{¶26} Randy recalled Barney being very upset when he discovered that Randy had closed the savings account and taken the funds. Randy testified that Barney demanded the money be returned and stated the following at trial:

> **Randy: * * * I said, Uncle, if you want it back that bad, then I knew he was going to fire me as Power of Attorney because he told me that also in that conversation. So a couple of days later I went back to PNC. I went down across from Shelly Chapman. I said, Shelly, take the $2,000 out of my account, out of my account put it back in the checking account. We couldn't put it back in savings because that had been closed. I put it back in his checking. The reason why I only put $2,000 back there [sic] because he has my big screen TV at his house. It was very expensive. I knew with this falling out I was not going to get that TV back. I kept the $1,000 [sic] because I went and bought myself a TV. That's what I did with it.**

(Tr. at 363).

{¶27} Shelly Chapman, a financial sales consultant at PNC Bank, handled many of the banking transactions made by Barney and Randy. Shelly recalled Randy coming in to the bank after he closed the savings account and asking her if he had done anything wrong. She relayed her response at trial:

> *** * * I told him, no, on the bank's side he had every right to do that. But I told him it was Barney's money and he knew it was Barney's money and he should give it back. That was my own personal stepping in.**

(Tr. at 279).

{¶28} On appeal, Randy asserts that at the time he withdrew the money he was a joint owner of the savings account and as such had a right to dispose of the funds as he pleased. Randy also claims that he was trying to protect Barney from the suspect motives of Barney's female friend. Randy further maintains that he

was entitled to keep the $1,200.00 because he loaned Barney a big screen television and he knew that Barney would not likely return it after their falling out.

{¶29} The evidence at trial demonstrates that Randy was made a joint owner of the accounts to facilitate his duties as Barney's agent under the power of attorney document. "* * * [A] power of attorney is a written instrument authorizing an agent to perform specific acts on behalf of the principal. *Testa v. Roberts*, 44 Ohio App.3d 161, 164, (1988). The holder of a power of attorney has a fiduciary relationship with the principal. This fiduciary relationship imposes a duty of loyalty to the principal. *In re Scott*, 111 Ohio App.3d 273, 276 (1996). Thus, an agent "may not make gratuitous transfers of the principal's assets unless the power of attorney from which the authority is derived expressly and unambiguously grants the authority to do so." *MacEwen v. Jordan*, 1st Dist. No. C–020431, 2003–Ohio–1547, at ¶ 12. *In re Meloni*, 11th Dist. No.2003–T–0096, 2004–Ohio–7224, at ¶ 34. The person who holds the power of attorney bears the burden of proof on the issue of the fairness of the transaction. *Testa* at paragraph five of syllabus.

{¶30} Even though Randy testified that he transferred the funds from the "joint savings account" to his own account for Barney's benefit and protection, the trial court was free to assess the credibility of Randy's testimony and determine the weight to be given to that evidence. Randy also testified that he transferred the

money to protect his own interest, which was clearly beyond the scope of his authority as Barney's power of attorney. Moreover, Barney's demand for the return of the money, and Randy's partial compliance, indicate that Barney did not intend for Randy to have unfettered and equal ownership rights to Barney's accounts despite the fact that Randy was named a "joint owner."

{¶31} The Supreme Court of Ohio has distinguished rights with regard to joint and survivorship accounts and joint accounts without survivorship, stating as follows:

> **[T]he opening of an account in joint and survivorship form shall, in the absence of fraud, duress, undue influence or lack of mental capacity on the part of the depositor, be conclusive evidence of the depositor's intention to transfer to the survivor the balance remaining in the account at the depositor's death.**
>
> **On the other hand, in order to maintain consistency in the treatment of survivorship rights, we hold that the opening of the account in joint or alternative form without a provision for survivorship shall be conclusive evidence, in the absence of fraud or mistake, of the depositor's intention not to transfer a survivorship interest to the joint party in the balance of funds contributed by the depositor remaining in the account at the depositor's death. Such funds shall belong exclusively to the depositor's estate, subject only to claims arising under other rules of law.**

Wright v. Bloom, 69 Ohio St.3d 596, 607 (1994).

{¶32} In this case, there was a lack of evidence pertaining to the nature of the joint accounts. Further, even if an account contains a provision for survivorship, it is established that " '[a] joint and survivorship account belongs,

during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.' " *Id*. at 601, quoting *In re Estate of Thompson*, 66 Ohio St.2d 433 (1981). Here, there was no evidence that Randy contributed any of his own money to the PNC accounts and Barney testified that he only intended to give the funds to Randy upon "something happening" to him. It is also notable that Randy was removed as a "joint owner" after Barney terminated his power of attorney. Based on this evidence, we find no error in the trial court's conclusion that the money in these accounts was solely Barney's personal property.

{¶33} Furthermore, we note that because the trial court concluded that the money in the account was Barney's personal property, Randy did not have the authority to essentially exercise self-help and retain the $1,200.00 from the savings account to purchase a new television in order to replace the one he "loaned" to Barney. Accordingly, for all these reasons we do not find that the trial court erred in determining that Randy converted $1,200.00 of Barney's money from Barney's savings account for Randy's own personal use and that Barney was entitled to judgment on this basis. The first assignment of error is overruled.

Second Assignment of Error

{¶34} In his second assignment of error, Randy claims the trial court erred in concluding that there was no valid delivery of the deed from Barney to him and

that he did not own the property at the time he encumbered it with a $60,111.00 mortgage and at the time he filed the eviction action initiating this case.

{¶35} The following evidence was adduced at trial regarding the delivery of the deed. Attorney James Rogers testified that on July 7, 2009, he met with Barney in his office and that Randy was also present. Attorney Rogers could not remember the specific details from the appointment but recalled a discussion focusing on Barney's need for help with handling his daily affairs and Randy assenting to assist Barney in that manner.

{¶36} Attorney Rogers testified that he drafted a power of attorney, a will, and the deed transferring the 996 Edison Avenue property from Barney to Randy. At trial, he noted that Barney's signature appeared on the deed as the grantor and that the deed was notarized on the same day, July 7, 2009. He also reviewed the invoice for his services and stated that the "recording costs" were paid for by Barney at the time of the appointment.

{¶37} Attorney Rogers relayed his surprise upon learning from Randy some two and a half years later that the deed had not been recorded. Specifically, he stated "for the life of me I don't know why that occurred except that I do know that the grantee brought it back in to me at a later date [] and asked me to record it because I had been paid for it." (Tr. at 27-28). Attorney Rogers was insistent that the original deed was not in his possession during the interval between its

execution on July 7, 2009, and Randy returning it to his office in early 2012. He testified that after he recorded the deed on February 1, 2012, he mailed it to Randy. Attorney Rogers explained that it was normal practice for him to mail the deed to the grantee after recording it.

{¶38} Barney recalled the appointment in Attorney Rogers' office and remembered being handed the original deed after he signed it on July 7, 2009. He recounted signing the check for the legal services after Randy wrote out the information in the payee and the amount lines. However, Barney maintained that he could not read the invoice and did not understand that the recording fees were included in the cost. Barney explained that he took the deed home and put it in his kitchen cabinet for "safekeeping." (Tr. at 127.) Barney testified that he kept the deed because he did not intend to give Randy his home at that time. He explained that he executed a deed to his home naming Randy as the grantee because he needed daily assistance due to his deteriorating health and Randy had agreed to help him. Barney was adamant that he only intended to give Randy this home if he entered a nursing home or died.

{¶39} Barney stated that Randy had full access to his home when Randy was his power of attorney. He remembered Randy arriving at this house in early 2012 and taking the deed out the kitchen cabinet without his permission. Barney recounted the following on direct examination:

> **Counsel: Now, I want you to tell the Court what happened. You said you took your deed home?**
>
> **Barney: Yes.**
>
> **Counsel: Where did you put your deed?**
>
> **Barney: In the cupboard.**
>
> **Counsel: Ah. And now do you know how Randy got that deed?**
>
> **Barney: Yes, I do.**
>
> **Counsel: What happened? Tell the Judge.**
>
> **Barney: Your, Honor, he went, come into my driveway. He come into the garage door. I was in the kitchen at the end of the table by the cupboard. He walked up past me. He reach up in the cupboard, and he took the deed to the property.**
>
> **I asked him, I said Randy, what are you doing? I said, that ain't yours, that's mine.**
>
> **And, Your Honor, he just slammed me away from him and said, this is mine. And, Your Honor, it's not. He took—he took the deed out of my cupboard where it was supposed to be in my possession.**

(Tr. at 131-32).

{¶40} For his part, Randy maintained at trial that his Uncle Barney unconditionally gave him the 996 Edison Avenue property. He presented the testimony of several people who claimed they heard Barney state on numerous occasions that the home belonged to Randy and that Randy could do what he wanted with it. Randy stated that it was Barney's decision to transfer the 996

Edison Avenue property to him and recalled being in Attorney Rogers' office when Barney executed the deed.

{¶41} Randy testified that he believed that the 996 Edison Avenue property was transferred to him in 2009 after Barney signed the deed. He also claimed he was unaware that the deed had not been recorded until early 2012 when he attempted to obtain a debt consolidation loan using the 996 Edison Avenue property as collateral. Randy testified that he then called Attorney Rogers' office and the recording of the deed was subsequently completed. Randy claimed that he did not know the whereabouts of the original deed after Barney executed it in 2009 and assumed it was still in Attorney Rogers' possession. He further denied taking the deed from Barney's kitchen cabinet and claimed that he never had the original deed until Attorney Rogers mailed it to him after it was recorded on February 1, 2012.

{¶42} Turning to the legal analysis on this issue, we note that a deed must be delivered to be operative as a transfer of ownership of land. *Kniebbe v. Wade*, 161 Ohio St. 294, 297 (1954). "Delivery imports transfer of possession or the right to possession of the instrument with the intent to pass title as a present transfer. It is essential to delivery that there not only be a voluntary delivery, but there must also be an acceptance thereof on the part of the grantee, with the mutual intention of the parties to pass title to the property described in the deed."

(Emphasis deleted.) *Id*. at 297. If the grantee possesses the deed, then a presumption of delivery exists. *See id.*

{¶43} Recording a deed perfects delivery. *See Candlewood Lake Assn. v. Scott*, 10th Dist. Franklin App. No. 01AP–631(Dec. 27, 2001). However, "a deed does not have to be recorded to pass title. Whether or not recorded, a deed in Ohio passes title upon its proper execution and delivery, so far as the grantor is able to convey it." *Wayne Bldg. & Loan of Wooster v. Yarborough*, 11 Ohio St.2d 195, 212 (1967). Furthermore, "[a]ctual manual delivery of a deed is not always required to effectuate the grantor's intention to deliver; the filing and recording thereof being prima facie evidence of delivery, in the absence of any showing of fraud." *Behymer v. Six*, 5th Dist. Morgan No. CA02–006, 2002-Ohio-6403, at ¶ 13, citing *Frank v. Barnes*, 40 Ohio App. 328, 337 (1931).

{¶44} On appeal, Randy argues that the trial court erred in finding that there was no valid delivery of the deed and therefore no transfer of the 996 Edison Avenue property from Barney to Randy prior to the deed being recorded. Randy asserts that the trial court's conclusions are erroneous because it failed to recognize that: (1) "delivery to the appropriate governmental office for recordation constitutes prima facie evidence of the delivery to the grantee;" and (2) "the general rule that there is a presumption of delivery arising from the possession of a deed by the named grantee." (Appt. Brief at 18) (citations omitted). In making

this argument, Randy overlooks the fact that "[t]he mere manual transfer of a deed does not constitute delivery *unless it is coupled with an intent of a present, immediate and unconditional conveyance of title*." *Kniebbe v. Wade*, 161 Ohio St. 294, 297 (1954) (emphasis added). Thus, there must be clear intent on the part of the grantor to make the deed presently operative. *Id.* at 294.

{¶45} Here, there was ample evidence presented to the trial court that, if believed, sufficiently rebutted the presumptions relied upon by Randy on appeal. Specifically, the record supports a determination by the trial court that Barney did not possess a present intention to transfer the 996 Edison Avenue property to Randy. Barney's intention can be ascertained not only from his testimony at trial, but also from his actions at the time of and subsequent to signing the deed. Barney claimed he purposefully kept the deed after executing it and placed it in his kitchen cabinet for "safekeeping" until he either entered a nursing home or died. Barney's credibility regarding his lack of intent to make an immediate transfer of his home to Randy is supported by the fact that he was the *only* witness who could account for the whereabouts of original deed after he signed it in Attorney Rogers' office.[1] Moreover, both Barney and Randy testified that prior to entering into their agreement for Randy to assist Barney, several relatives and/or acquaintances of

[1] We are cognizant of the fact that it appears from his own testimony that Barney was attempting to effectuate a "lockbox deed," which is not a valid transfer if the grantor dies before making proper delivery of the deed to the grantee during the grantor's lifetime. Despite the questionable legal effect of Barney's conduct in this respect, his actions are nevertheless relevant in determining whether he had the present intent to transfer title to his home to Randy at the time he executed the deed.

Barney had taken advantage of him while promising to help him, which further substantiates Barney's intent to make the deed effective at a later date when the parties' agreement is satisfied and he no longer needs his home.

{¶46} Regarding the care and maintenance of the 996 Edison Avenue property, it was undisputed by the parties that Barney continued to pay the utilities, the lawn service, and the property taxes after the deed was executed in 2009. It was only after Randy recorded the deed in 2012 and became the owner of record that he began to pay the property taxes. To counter this evidence, Randy points to the fact that he paid the homeowner's insurance for a period of time after the execution of the deed in 2009 and before it was recorded in 2012. Randy testified that in the fall of 2009, Barney decided that he no longer wanted to pay the insurance premiums and Randy began making the payments. Barney provided the following testimony on direct examination regarding the insurance.

> **Counsel: Relative to the insurance on this house, did you terminate the insurance on the home? Did you stop it?**
>
> **Barney: Yes, I did.**
>
> **Counsel: All right. And what was your reason for stopping the insurance?**
>
> **Barney: Because the increase of payments, and I own the property and there ain't no law or nobody says that you got to insure something. If you want to insure something you own, it's entirely up to the owner.**

> **Counsel: I see. So you decided you didn't want to pay those premiums anymore?**
>
> **Barney: Right. That's right.**
>
> **Counsel: At that time, did Randy volunteer to pay the premiums? Did he say he'd step in and pay it?**
>
> **Barney: No. He—when I notified—**
>
> **Counsel: You terminated, yeah.**
>
> **Barney: No. When I went—had him to go with me to State Farm office on Delaware and South Main Street to State Farm's office, he—he—I took him over there and I told—I told the lady [sic] worked for State Farm in the office, I said, I'm not gonna pay the insurance for it, I'm droppin' it.**
>
> **Counsel: Well, do you know whether or not Randy picked up the bill?**
>
> **Barney: I sure do. That's what he said. She told—I walked out the door, he stayed in there, and State Farm lady signed him up to insure the house.**

(Tr. at 151-52). Randy stated the following at trial in response to the trial court's questions regarding his decision to assume the insurance payments on the 996 Edison Avenue property.

> **Randy: Because [Barney] told Bill Shepard he didn't want to pay on it no more. And Bill said if a natural disaster would happen or something, he would lose his whole house.**
>
> **Trial Court: Right.**
>
> **Randy: So I kept paying that.**
>
> **Trial Court: Okay.**

> **Randy: And it was put in my name. Well, my name was on there too to pay the—I had to be on there.**
>
> **Trial Court: Okay.**
>
> **Randy: But Uncle Barney was still No. 1 on there, and I was No. 2.**

(Tr. at 105). Contrary to Randy's position on appeal, the fact that he assumed the insurance payments on the 996 Edison Avenue property shortly after the deed was executed in 2009 is not conclusive evidence of Barney's intention for the deed to have been presently operative at that time. Rather, the transcript excerpts above appear to support Barney's argument that he intended to remain the owner of the property despite his execution of the deed months earlier. Notably, accordingly to Randy's testimony the insurance policy listed Barney as the primary and Randy as the secondary further supporting Barney's position that he was still the owner of the home despite his execution of the deed.

{¶47} All of the foregoing evidence, in conjunction with Barney's testimony that he witnessed Randy enter into his home and forcibly take the deed from his kitchen cabinet without his permission, supports the trial court's conclusion that no valid delivery of the deed occurred in this case. We acknowledge that this issue was highly contested and that Randy provided evidence at trial in support of his contention that delivery was perfected and that Barney intended to make a present gift of the property to him. Nevertheless, we

defer to the fact-finder who is best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, eye movements, and gestures of the witnesses testifying before it. *See Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984); *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). Accordingly, we find no error in the trial court's conclusion that there was no delivery of the deed, that there was no valid transfer of title to the 996 Edison Avenue property from Barney to Randy, and that Barney is the owner of the property.

{¶48} Nevertheless, we are compelled to note that the remedy ordered by the trial court fails to implement and even appears to be inconsistent with the factual findings and legal conclusions it made in resolving this matter.

{¶49} First, the critical issue underlying the FED action filed by Randy was the trial court's determination of ownership of the 996 Edison Avenue property. The trial court specifically concluded that Randy was not the owner of the property because there was no valid delivery of the deed from Barney to Randy. It is upon this basis that the trial court dismissed Randy's FED action with prejudice. The inescapable conclusion arising from the trial court's determination of ownership based on the lack of delivery of the deed is that the subsequent recording of the deed was also improper. Yet, there is nothing in the judgment

entry addressing the fact that an invalid deed incorrectly documenting Randy as the property owner remains on file the in Marion County Recorder's Office.

{¶50} Notably, Barney's attorney filed a "Motion for Modification of Judgment Entry" attempting to address this issue by requesting the legal description of the property to be included in the trial court's judgment entry. The motion was denied by the trial court as improperly filed after the final judgment entry. While this motion may not have been the appropriate vehicle to achieve this result, the issue raised as to the trial court's judgment regarding the invalid deed and Barney's ownership of the property is evident. Thus, even though the trial court specifically determined Barney to be the owner of the property, the judgment of the trial court does not effectuate this determination.

{¶51} Second, the trial court granted Barney judgment on his counterclaim and found that Randy had wrongfully encumbered the 996 Edison Avenue property without Barney's permission. The trial court's determination was based upon its legal conclusion that Randy was not the owner of the property when he caused it to be encumbered with the mortgage. This conclusion necessarily invalidates the mortgage because Randy did not have the legal authority to encumber Barney's property. However, in its judgment entry the trial court failed to specifically address the fact that a cloud remains on the title due to the existence of the invalid mortgage. Rather, the trial court simply ordered Barney to recover

money damages from Randy in the amount of the mortgage balance as of May 1, 2014, or in the alternative permitted Randy to satisfy the judgment by "causing removal and release of the mortgage." (Doc. No. 65 at 2).

{¶52} Additionally, the trial court's order does not adequately address the implications of the trial court's judgment as to the status of PNC Bank, who was named as a third party defendant in the action by Barney's counterclaim. We note the record reflects that PNC Bank was properly served twice with notice of this lawsuit and that paragraph two of Barney's first counterclaim specifically apprised PNC Bank that he was challenging the validity of the mortgage based on his ownership rights. Nevertheless, the record reflects that PNC Bank failed to file an answer or make an appearance and has otherwise defaulted on any claim it may have presented in this case. As a result, the trial court must still implement its determination of ownership by entering judgment against PNC Bank and in favor of Barney as to the invalid mortgage on the property.

{¶53} In sum, we affirm the trial court's dismissal of the FED action and the trial court's determination that there was no valid delivery of the deed and therefore no legal transfer of the property. We also affirm the trial court's awards of monetary damages based on the conversion claims set forth in the first assignment of error. However, we reverse the judgment of the trial court as to the remedy ordered pertaining to the mortgage lien on this property and remand this

matter for further proceedings consistent with this opinion. On this limited basis and to this extent only, the second assignment of error is sustained.

{¶54} For the foregoing reasons, the judgment of the Marion County Court of Common Pleas is therefore affirmed in part and reversed in part and this case is remanded to the trial court for further proceedings and the implementation of remedies consistent with the findings and conclusions contained in its judgment entry and in this opinion.

Judgment Affirmed in Part,
Reversed in Part and
Cause Remanded

PRESTON and WILLAMOWSKI, J.J., concur.

/jlr