NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-1023

WILLIAM LESTER THOMASON & PEGGY THOMASON APPELLANTS V. MARILYN COOPER KING APPELLEE	**Opinion Delivered** APRIL 1, 2009 APPEAL FROM THE WHITE COUNTY CIRCUIT COURT, [NO. CV 2006-284] HONORABLE BILL MILLS, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Appellants Peggy and William Lester Thomason appeal from an order of the White County Circuit Court reforming two warranty deeds. Both deeds conveyed property from Joyce Thomason, the mother of appellant Lester Thomason and appellee Marilyn Cooper King: one deed conveyed the *west five acres* of the East Half of the East Half of the Southeast Quarter of the Southeast Quarter of Section 9, Township 8 North, Range 5 West to Ms. King, and the other deed conveyed the *east five acres* of the same ten-acre tract to Mr. Thomason. The circuit court found that the intent of all of the parties was to convey the South Half of the East One-Quarter of the Southeast Quarter of the Southeast Quarter of Section 9, Township 8 North, Range 5 West, consisting of five acres, more or less, to Ms. King and the North Half of the same tract, consisting of five acres, more or less, to Mr. Thomason. The court ordered the deeds reformed accordingly. We affirm the order of

reformation.

Joyce Thomason executed the deeds that are the subject of this case in favor of her children on December 10, 1993. She also deeded a nine-acre tract to Ms. King and a ten-acre tract to Mr. Thomason. Before deeding the property to her three children (one is not a party to this lawsuit), Ms. Thomason owned a forty-acre tract, except for one acre, which was owned by Ms. King. Ms. Thomason also owned and lived in a home on the property. This lawsuit arose when the parties discovered in 2006 that the home was on the five-acre tract conveyed to Mr. Thomason in the 1993 deed. Ms. King filed a petition to reform the 1993 deeds in May 2006.

Both parties testified that they thought the property with the home on it had been conveyed to Ms. King in 1993. Indeed, from 1993 until Ms. King had the property surveyed in 2006 in anticipation of a possible sale, no one knew that the house was actually on the property deeded to Mr. Thomason. Ms. King testified that she believed the home was on the adjacent nine-acre tract deeded to her by her mother, in which her mother had reserved a life estate. Ms. King and Mr. Thomason testified that they each had also conveyed a life estate in their five-acre tracts to their mother.

In 2004, after the death of Ms. Thomason, Ms. King rented the house to tenants. Mr. Thomason never asked for rent or made any claim to the house. Ms. King also obtained insurance on the house. She testified that, after the property was deeded over to her and while her mother was still living in the home, Mr. Thomason refused to mow her mother's

yard. Ms. King testified that her mother paid taxes on the nine-acre tract and on the home while she was living, and that Ms. King had paid the taxes since her mother's death. Mr. Thomason has never paid taxes on the home. Ms. King testified that both she and Mr. Thomason had acted as if she had been conveyed the south five acres of the ten-acre tract and he had been conveyed the north five acres of the ten-acre tract. He had let his property, that is, the north five acres, "grow up" and had built deer stands. She stated that they had not treated the property as if it had been divided into east and west five-acre tracts as described by the deeds. Ms. King also testified that Mr. Thomason had been angry with her since the property was conveyed in 1993 because he thought that he should have been given the home.

Mr. Thomason agreed that, since 1993, everyone thought that the house had been deeded to Ms. King. He also testified that everyone thought the ten-acre tract had been divided north and south rather than east and west. He admitted that he had never paid taxes on the house because he thought it was Ms. King's. He said that he did not learn that he owned the property where the house was located until 2006, when the property was surveyed in order to sell it.

The circuit court found that Ms. Thomason intended to divide the ten-acre parcel into north and south five-acre tracts rather than east and west tracts, with Ms. King receiving the south half where the home was located and Mr. Thomason receiving the north half. It ordered the deeds reformed accordingly. Mr. Thomason brought this appeal from that order,

contending that the evidence of mutual mistake was not clear, convincing, and decisive.

The burden of proof in reformation cases is by clear and convincing evidence. *Jones v. Jones*, 27 Ark. App. 297, 299, 770 S.W.2d 174, 175 (1989). However, even where the burden of proof is by clear and convincing evidence, we defer to the superior position of the trial judge to evaluate the evidence, *Akin v. First National Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988), and the proof need not be undisputed. *Lambert v. Quinn*, 32 Ark. App. 184, 798 S.W.2d 448 (1990). Although we review traditional equity cases de novo, the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial judge's findings but whether we can say that the trial judge's findings are clearly erroneous. *Statler v. Painter*, 84 Ark. App. 114, 119, 133 S.W.3d 425, 428 (2003).

A court may, through reformation, correct the description in a deed where the deed incorrectly reflects the property that the parties intended to be conveyed. *Id.* The mistake of a draftsman, whether he is one of the parties or merely a scrivener, is an adequate ground for reformation if the writing fails to reflect the parties' true understanding. *Id*. Whether a mutual mistake warranting reformation occurred is a question of fact. *Id*. (citing *Lambert*, 32 Ark. App. at 188, 798 S.W.2d at 450).

In *Galyen v. Gillenwater*, 247 Ark. 701, 447 S.W.2d 137 (1969), the supreme court affirmed the trial court's reformation of a deed where the common grantor to both parties intended to convey the back half-acre to appellants and the front half-acre to appellees, but the deed mistakenly conveyed eighty-nine feet of property intended to be conveyed to

appellees to appellants. The evidence was not undisputed, but the court noted that it was not necessary to present evidence that was undisputed to establish a mutual mistake and the true intentions of the parties. *Id*. at 704, 447 S.W.2d at 139.

In *Kohn v. Pearson*, 282 Ark. 418, 670 S.W.2d 795 (1984), the supreme court reversed the point that was appealed, failure of a charitable trust, and also remanded for the trial court to reform the 1913 deed, conveying property in trust, to correct a mistake. The deed conveyed a two-acre tract of land to the Rosecreek community to be used as the site for a church. After the deed was recorded in 1916, Rosecreek built a church house on the site, which was used as a church and for other community affairs until 1982. After the lawsuit was filed, the parties discovered that the deed described the two-acre site for the church house as lying on the south forty rather than on the north forty of a large tract of land where the church was actually built. On de novo review, the supreme court found that for more than sixty-seven years the residents of Rosecreek, and both parties, had assumed that the two-acre tract where the church was built had been correctly described in the 1913 deed. The court ordered the trial court to reform the deed, stating that "[s]uch conduct proves beyond reasonable controversy that the mistake was mutual." *Id*. at 421, 670 S.W.2d at 797.

Finally, while we affirmed a trial court's refusal to reform a deed in *Statler*, we noted that reformation on the facts presented normally would have been appropriate; however, appellees were bona fide purchasers and would have been prejudiced by the reformation. 84 Ark. App. at 120, 133 S.W.3d at 429. In *Statler*, the legal description incorrectly failed

to include a .29-acre strip of land because of an admitted mistake made by the surveyor. The error was not discovered for several years. The testimony was undisputed that both the sellers and the buyers, appellants, intended for the disputed strip of land to be included in the sale to appellants. It was not. However, because the disputed strip of land later had been conveyed by deed to appellees, who were bona fide purchasers, we affirmed the trial court's refusal to reform the deeds. *Id*.

In the case at bar, all of the testimony established that Ms. Thomason intended to convey the property on which her house was located to Ms. King, not Mr. Thomason. Ms. King paid the taxes and insurance on the house, and Mr. Thomason testified that he thought Ms. King owned the property with the house on it. Further, both parties testified that, for over ten years, they had treated the ten-acre tract as having been divided into north and south five-acre parcels and not into east and west parcels. We hold that the circuit court's findings are not clearly erroneous. Accordingly, we affirm the court's order of reformation.

Affirmed.

GLOVER and MARSHALL, JJ., agree.