

IN THE COURT OF APPEALS OF IOWA

No. 3-093 / 11-0830
Filed March 27, 2013

MICHAEL WILLIAMSON,
Plaintiff-Appellant/Cross-Appellee,

vs.

**GEORGE WILLIAMSON, As Executor
of the Estate of Catherine H. Williamson,**
Defendant-Appellee/Cross-Appellant.

**GEORGE WILLIAMSON, As Executor
of the Estate of Catherine H. Williamson,**
Counterclaim Plaintiff-Appellee/Cross-Appellant,

vs.

MICHAEL WILLIAMSON,
Counterclaim Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Ida County, Steven J. Andreasen,
Judge.

Michael Williamson appeals the district court's grant of specific performance of what he alleges was only part of a real estate contract. George Williamson, in his individual capacity and as executor of the estate of Catherine Williamson, appeals the district court's denial of counterclaims. **AFFIRMED IN PART AND REVERSED IN PART.**

Joseph Halbur, Carroll, for appellant.

Thomas P. Lenihan, West Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

This is an appeal in an action for specific performance seeking an order for a court officer deed for land allegedly sold on contract. The claim is premised upon a tender of the amount due. The amount due and the land subject to the contract are in dispute. The estate and George have also appealed the denial of some of their counterclaims. Upon our review, we affirm in part and reverse in part.

I. Background Facts and Proceedings.

Michael and George are brothers and sons of Catherine and Gordon Williamson. Their dispute concerns two parcels of rural real estate and some personal property.

Gordon owned a parcel of land known as the Farm Acreage. He died in December 2005. During Catherine's lifetime, she purchased two parcels of land, the east field and the west field, which were adjacent to Gordon's property. The couple also owned a homestead in the city of Battle Creek. Catherine died in April 2008.

Catherine and Gordon offered various forms of support to their sons during their lifetimes. They allowed Michael to live rent-free in the house on the Farm Acreage. Catherine and Gordon also paid at least \$35,000 of George's legal fees and forgave a \$20,000 promissory note related to George's dissolution in 1999 and a slander judgment in favor of his ex-spouse in the sum of \$50,000.

Catherine and Gordon made a series of conveyances to their sons on August 7, 2000. They conveyed the Farm Acreage to Michael by quit claim

deed, for consideration of “love and affection”. They also conveyed their Battle Creek residence to their sons as tenants in common.

In an effort to protect family property from execution of George’s ex-wife’s judgment, George and Michael conveyed the property back to their parents in 2001. In 2003, Catherine and Gordon re-conveyed the Battle Creek residence to Michael only.

On August 7, 2000, Gordon and Catherine also executed an installment contract to sell farmland to Michael for \$75,000. The short form real estate contract¹ described the land conveyed by reference to an attached legal description. The instrument recorded on August 8, 2000 did not include the west field.² After Catherine’s death, Michael re-recorded the contract on February 19, 2009, with a different legal description reflecting transfer of both the east and west fields.

Michael obtained a mortgage secured by both the east and west fields in 2007. Ida County plat records list Michael as the owner of both parcels. Michael paid real estate taxes on both parcels from 2001 through November 2009.³

On March 5, 2004, Daniel D. Williamson, Gordon’s brother, was appointed conservator for Catherine. In December 2005, Gordon passed away and, notwithstanding the existence of the conservatorship, Catherine executed a

¹ The contract was prepared by Gordon’s brother, attorney Daniel Williamson.

² A certified copy of the contract obtained from the Ida County recorder’s office reflects a legal description of the east field only. The trial court acknowledged that an individual could change the attachment within the recorder’s office, but there was no clear evidence establishing that a fraudulent substitution occurred.

³ We accept as fact that Michael paid these taxes although the county auditor’s records apparently do not reflect the payor of the taxes.

general power of attorney naming Michael as her attorney-in-fact. Catherine revoked that power of attorney on January 24, 2006. She entered a nursing home in February of 2006 and changed her will to leave her estate to George alone.

In 2006, the brothers had substantial ongoing conflict.⁴ George requested return of personal property with primarily sentimental value, which Michael allegedly refused. Michael allegedly accused George of stealing a safe and jewelry from Catherine's home in Battle Creek, and made allegations of dependent adult abuse against George.

In February 2006, Daniel Williamson declined to serve as Catherine's conservator, citing personal and professional conflicts of interest.⁵ George and his son sought to be appointed substitute conservators for Catherine. George alleges his action was prompted by Catherine's concern about dissipation of her property and assets. Days later, Michael also sought to be appointed the successor conservator, alleging Catherine was not competent to appoint her grandson as her attorney-in-fact and George as her alternate attorney-in-fact, and that her signed consent to substitution of the conservator was not knowingly and voluntarily executed. The district court appointed an attorney to serve as

⁴ The trial court observed the brothers' testimony was based on their individual beliefs and perceptions, which were "tainted by both parties' animosity and hatred toward one another."

⁵ We also note that Daniel never posted bond to initially qualify as conservator.

guardian ad litem for Catherine⁶ and also ordered appointment of a special master to investigate allegations of impropriety and criminal activity.⁷

The special master conducted hearings and filed a report. George objected to the report. The special master then filed an enlarged report, and the court set a hearing.⁸ The probate court entered its findings of fact, conclusions of law, and decree on August 20, 2007. The court adopted the special master's findings of fact.⁹ It noted the "fundamental issue presented continues to be the

⁶ The guardian ad litem (GAL) interviewed Catherine at the nursing home. Catherine stated she was concerned about personal property disappearing from her home in Battle Creek. The GAL reported that while she seemed very lucid the caregivers at the nursing home noted that it was one of her "more lucid" days, and that George had been visiting frequently in the days immediately preceding the GAL's visit. The GAL's report stated, "I got the impression, and I feel I must pass it on to the Court, that [nursing home staff] thought Catherine Williamson's statements today may have been somewhat influenced by George's recent visits." However, Catherine stated in the interview that Michael had not "paid a nickel" on the contract and she did not think that was fair.

⁷ The United Bank of Iowa was appointed to serve as conservator on June 23, 2006. However, the Bank soon sought to resign due to difficulty with the brothers in August 2006. The scope of the special master's investigation was defined by the probate court in its ruling on the bank's application to resign as conservator. The ruling states that the special master "shall be granted broad authority to investigate the numerous allegations of impropriety and criminal activity by both Michael Williamson and George Williamson in this matter." The special master's enlarged report stated in its conclusion: "As for a claim by George to one half of the real property and/or rents; George cannot benefit from his wrongful transactions. The land belongs to Michael with some reserved life use by Catherine." While this conclusion was relevant to the parties' alleged agreement to evade execution of George's ex-wife's judgment, it does not consider or decide the issue of identifying the amount of land subject to the real estate contract.

⁸ The enlarged report identified issues raised, which included George's claims that Michael failed to make rent and installment payments for the farm real estate and failed to honor oral trust agreements as to the ownership of both the Battle Creek homestead and the farm real estate. The findings of fact determined that "Gordon and Catherine sold their farm on contract to Michael August 8, 2000." However, "their farm" was not defined.

The parties, counsel, the guardian ad litem, and the special master all appeared at a hearing on August 17, 2007, regarding the special master's report, George's objections, and the pending application for appointment of a successor conservator. No evidence was offered or received due to time limitations.

⁹ The court provided separate conclusions addressing only the appointment of a conservator.

competing applications of George and Michael Williamson to be appointed conservator for their mother's estate.”

In April 2008, Catherine passed away. George was appointed executor of Catherine's estate.¹⁰

In April 2009, Michael tendered a check to the estate in the sum of \$39,033.61, an amount he believed represented a payoff of the contract balance. The estate refused to negotiate the instrument because it was tendered as payment in full, and the estate contends the amount tendered did not satisfy the amount due. Michael demanded delivery of the deed to the farmland pursuant to the real estate contract, but George in his capacity as executor denied the request, claiming that Michael failed to satisfy his obligations for payment of the purchase price and real estate taxes,¹¹ and was therefore not entitled to receive the deed in satisfaction of the contract.

On May 27, 2009, Michael filed a petition for specific performance of the contract for purchase of the farmland. George, in his capacity as executor, filed an answer with affirmative defenses contending Michael not only failed to make payments in satisfaction of the written contract, but he also failed to make payments to George, which were allegedly due pursuant to an oral trust agreement between Gordon, Catherine, George, and Michael.¹² George claims

¹⁰ Michael resisted this appointment, but later withdrew the resistance. In February 2009, Michael sought to have probate of Catherine's will set aside. The court dismissed his action.

¹¹ Michael paid real estate taxes on both the east and west field from 2001 through 2009.

¹² George counterclaimed for \$81,850.83 plus interest in payments he alleges were due him by the terms of the oral trust.

the agreement was to sell the real estate to Michael for fifty percent of the then fair market value.

Michael initiated this action against George in his capacity as executor of Catherine's estate. However, George filed a counterclaim in both his individual capacity and his capacity as executor of Catherine's estate, alleging Catherine and Gordon intended for their children to "share equally in the value" of the real estate. He asserted claims for declaratory judgment of the farm real estate and the Battle Creek residence,¹³ replevin and conversion claims regarding personal property, as well as claims of abuse of process, defamation, invasion of privacy, wrongful possession, fraudulent misrepresentation, and slander of title. George never sought joinder to be a party to this action in his individual capacity.

The district court acknowledged that to the extent the findings and conclusions of the special master were specifically adopted by the probate court in the conservatorship proceedings, the parties may be precluded from relitigating those issues.¹⁴

After finding that the testimony of both parties lacked credibility, the district court concluded:

¹³ George alleges the Battle Creek residence was subject to the same oral trust as the farmland and that after Catherine and Gordon conveyed the land to Michael alone, Michael was to hold a fifty percent interest in the residence as trustee for the use and benefit of George. Though George seeks to defend against Michael's claim for specific performance with affirmative defenses including estoppel and the equitable doctrine of unclean hands, he does not deny that if the oral trust he alleges existed it did so to fraudulently evade his ex-wife's collection of a judgment against him by execution on the real estate.

Michael asserts the Battle Creek residence was ruined when the bank controlled it, as the basement flooded and many of the contents of the home were ruined. He alleges the home has no value now, and is in fact a burden.

¹⁴ The trial court took judicial notice of the conservatorship and estate files.

Michael is entitled to an order of specific performance in regard to the farm contract. Michael has complied or substantially complied with his payment obligations. To the extent he did not fully satisfy such payment obligations, he tendered a check to the [e]state and was ready, willing and able to fully comply with his payment obligations. The tender was refused by the [e]state.¹⁵

With respect to the land made the subject of the contract, the court concluded that Michael was only entitled to specific performance as to the east field. The court acknowledged some evidence to the contrary but “the best evidence in regard to the terms of the farm contract and the land included in such farm contract . . . is the certified copy of the original farm contract.” In reaching this conclusion, the court also questioned the need for Michael to rerecord the original farm contract and the timing of such rerecording when the “disputes and the litigation were in full force.” Thus, the estate was granted a declaratory judgment with respect to the west field.

The court further determined: (1) the estate was not entitled to any additional damages resulting from rents or profits from the west field; (2) personal property previously stored in the homestead, now in Michael’s possession, was either gifted to Michael or Catherine and Gordon consented to Michael’s possession; (3) George failed to establish his conversion claim including the pool table that was located in the Battle Creek residence at the time

¹⁵ Full payment under the installment contract had not yet been accepted at the time of the trial court’s ruling. The estate did not negotiate the check representing the installment payment due March 1, 2009 due to insufficient funds. It refused the April 2009 check, claiming the amount was not sufficient to pay off the balance due.

The court ordered the estate to accept payment from Michael and to convey a warranty deed if and when Michael satisfied the payment obligations as calculated by the court. George and the estate contest the court’s calculation of the amount due under the contract.

of Catherine's death; and (4) George established his claim against Michael for conversion of a box of personal affects. All other counterclaims and amended counterclaims were dismissed.

Michael appeals, contending issue preclusion should apply, entitling him to specific performance of the contract for both the east and west field parcels.

On appeal George and the estate contend the court erred in determining the contract balance due from Michael and in awarding specific performance with respect to the east field. They further contend Michael is indebted to the estate for \$5000 in rent he received from a tenant for use of the west field, and for conversion of some of Catherine's personal property located in the Battle Creek dwelling. George personally contends that Michael converted a pool table of his that was located in the Battle Creek residence.

II. Scope and Standard of Review.

Actions for specific performance of a contract are matters of equity. We review equitable matters de novo. Iowa R. App. P. 6.907. While we give weight to the factual findings of the district court, we are not bound by them. Iowa R. App. P. 6.904(3)(g). The burden of proof when the relief requested is specific performance is clear, satisfactory, and convincing. *McCarter v. Uban*, 166 N.W.2d 910, 912 (Iowa 1969).

The parties dispute the scope of review of the district court's determinations on the counterclaims. We review decisions on declaratory judgment actions based on how the matter was tried in the district court. *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006).

To determine the proper standard of review, we consider the “pleadings, relief sought, and nature of the case [to] determine whether a declaratory judgment action is legal or equitable.” We also consider “whether the court ruled on evidentiary objections” as an important, although not dispositive, test of whether the case was tried in law or equity.

Id. (citations omitted).

George’s and the estate’s counterclaims and amended counterclaims were captioned and filed in the equity case initiated by Michael. In his claim for declaratory judgment on the farm real estate, he sought equitable relief including an equitable lien and a resulting or constructive trust. His conversion and replevin claims seek either return or damages in lieu of return of personal property.

Though George and the estate injected some counterclaims cognizable in law, such as the claim for rent, Michael did not object to their trial in equity, ask that the law actions be bifurcated in presentation or into separate trials, or attempt to have them transferred to actions at law. Although the court ruled on evidentiary objections, except hearsay objections, during the course of trial, neither party claims evidence was improperly excluded. Thus, the trial court’s ruling on objections does not prevent a de novo review. See *id.* at n.6.

We conclude the nature of the pleadings and the court’s decision support a finding that this case was fully tried in equity; thus, we review all issues on appeal de novo. Iowa R. App. P. 6.907.

III. Discussion—Michael’s Appeal.

A. Issue Preclusion.

On appeal, Michael only contends the district court erred by failing to give preclusive effect to a conclusion of the special Master. Because the probate court adopted the findings of fact made by the special master in Catherine’s conservatorship proceedings, he claims issue preclusion bars the trial court’s contrary determination with respect to the west field parcel.

Issue preclusion is a form of res judicata intended to prevent litigants from suffering the “vexation of relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation.” *Employers Mut. Cas. Co. v. Van Haften*, 815 N.W.2d 17, 22 (Iowa 2012). A party asserting issue preclusion must establish four elements:

“(1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.”

Id. (quoting *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011)).

While the special master’s report’s findings of fact were adopted by the probate court, the special master did not make a determination as to the amount of land subject to the contract for purchase, nor was that issue designated as an issue for the special master to investigate and determine. Moreover, neither the terms of the contract nor the quantity of land involved were material to the probate court’s determination or essential to its ruling regarding the withdrawal and substitution of Catherine’s conservator. In fact, the controversy regarding

the identity and quantity of land subject to the farm real estate purchase contract did not arise until long after the special master's hearings.¹⁶

We acknowledge that the probate court referenced the real estate contract in ascertaining Michael had a conflict of interest in serving as Catherine's conservator. As argued by Michael, the probate court specifically stated, "Michael has a conflict of interest. He is the contract vendee on a real estate contract to purchase farmland from his mother (75 acres purchased in the year 2000 for \$70,000) and he intends to rent his mother's residence." However, the amount of land subject to the contract was not at issue, nor was it material to the probate court's determinations.¹⁷

We conclude issue preclusion does not apply to bar the district court's ruling that the real estate contract does not encompass the west field. Accordingly, we affirm on this issue.

¹⁶ In fact, Michael concedes in his argument to our court that the issue concerning the quantity of land subject to the contract did not arise until subsequent to the special master's report. Michael's re-recording of the real estate contract occurred nineteen months after the probate court entered its findings of fact, conclusions of law, and decree on August 20, 2007. George's amendment to his counterclaims identifying the discrepancy in the legal descriptions was not filed until March 2010, nearly three years after the probate court's decision was filed.

¹⁷ In the order filed August 20, 2007, the probate court denied Michael's and George's applications to be appointed successor conservator; denied the bank's application to withdraw; enjoined Michael and George from having contact with the conservator; permitted Catherine to retrieve some personal possessions; discharged the guardian ad litem; fixed fees for the special master; and discharged the special master.

IV. Discussion—Estate’s Cross-Appeal.

On cross-appeal, the estate has raised three issues.¹⁸ The estate claims the court erred in awarding specific performance of the real estate contract for the purchase of the east field.¹⁹ The estate also claims the court erred in determining that Michael was entitled to continued possession of personal property that belongs to the estate. Finally, the estate claims the court erred in dismissing the estate’s claim for rent received by Michael in 2008 for the west field.²⁰

A. *Land Subject to the Farm Real Estate Purchase Contract.*

We must first address Michael’s claim in his reply brief that our de novo review requires the conclusion that the contract to purchase farm real estate covered both the east and west field parcels. In his initial brief Michael relied solely on the theory of issue preclusion. In his reply brief Michael attempts to enlarge the claim for specific performance on various other grounds or theories. However, “an issue cannot be asserted for the first time in a reply brief.” *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992). Accordingly, we decline to address Michael’s other arguments in favor of specific performance for both parcels.

¹⁸ George and the estate also seek attorney fees pursuant to the real estate contract. We decline to address this request for relief because it has not been identified as an issue on appeal. Iowa R. App. P. 6.903(2)(c), (g).

¹⁹ George and the estate further request that if specific performance is granted, the amount to be paid by Michael should be modified and established in the sum of \$58,346.27, plus interest, from April 23, 2010.

²⁰ All but one of the issues raised in the cross-appeal were raised jointly by George and the estate. However, we note George has never been properly joined in his individual capacity in these proceedings. Accordingly, we address these three issues as if raised solely by the estate. The only issue raised solely in George’s individual capacity relates to his claim for conversion of his pool table. We have addressed standing in footnote 37.

B. Specific Performance--East Field.

The estate claims Michael is not entitled to specific performance of the contract with respect to the east field parcel because he had not fully performed his payment obligations under the installment contract prior to filing his petition on May 27, 2009.

Specific performance of a contract to convey real estate is not a right, but rather, is granted or denied as a matter of judicial discretion. *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995).

It is to be granted only in extraordinary, unusual cases in which irreparable harm will result in its absence, not as a matter of grace. In determining whether to grant a request for specific performance, we must examine the particular facts of the situation and will generally grant the request when it would subserve the ends of justice and deny to do so where it would produce a hardship or injustice on either party.

Id. Specific performance is a remedy available particularly in cases of real estate transactions because the court presumes real estate to possess a unique quality such that mere monetary damages may not always constitute adequate remedy for a breach of contract. *Id.*

“The object of specific performance is to best effectuate the purposes for which a contract was made, and it should be granted upon such terms and conditions as justice requires.” *Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988). “Although the grant of specific performance is equitable, this court will not remake or revise a contract the parties have freely agreed to; we will give the parties the benefit of the contract they have made as far as possible.” *Brietbach*,

541 N.W.2d at 843–44. Here, the purchase agreement states “time is of the essence.”

“A cardinal rule of contract construction is that ‘time is of the essence.’” *SDG Macerich Prop. v. Stanek Inc.*, 648 N.W.2d 581, 586 (Iowa 2002). Where the parties set out a specific time for performance in the contract, they have made time of the essence. *Id.* at 587.

However, a conscientious and diligent but unsuccessful effort to tender, without fault of the plaintiff, may be successful in equity. Richard A. Lord, 15 *Williston on Contracts* § 47:3, at 519 (4th ed. 2000). Where time is *not* of the essence, it is sufficient if a plaintiff in equity alleges readiness and willingness to perform, as the court may make its decree conditional upon performance by the plaintiff. *Id.*

Until this action neither George nor the estate pursued a remedy upon Michael’s default with respect to the east parcel. Although each claims Michael has not made payments since 2008, neither has pursued any of a seller’s remedies for default by a purchaser, supporting the conclusion that time was not of the essence as between the parties, or it was waived by George and the estate. *Beckman v. Kitchen*, 599 N.W.2d 699 (Iowa 1999) (time of the essence provision in contract may be waived, and if waived, notice is required before timely performance is required).²¹ Here, George individually sought declaratory

²¹ A seller has several remedies when a purchaser defaults on a real estate contract. *Pierce v. Farm Bur. Mut. Ins. Co.*, 548 N.W.2d 551, 556 (Iowa 1996). The seller has “a right to elect whether (1) to keep good their tender of performance, demand the balance of the purchase price, and sue for specific performance; (2) to terminate the contract because of the vendee’s

judgment as to the west field parcel in his counterclaim filed in February 2010. The estate sought declaratory judgment as to the west field parcel in March 2010.

Generally, a plaintiff seeking specific performance must establish that he has tendered performance before his action was commenced. *Huie v. Falde*, 197 N.W. 58, 59 (Iowa 1924). However, the rule must be applied according to the facts of each case. In an equitable action, if a party is ready, willing, and able to perform, and so notifies the other party, he may not be required to complete performance prior to maintaining an action for specific performance. *Id.*; see also *Williston on Contracts* § 47:3, at 523.

Michael made attempts to pay off the installment contract as early as 2007. He entered negotiations with the bank to pay off the contract and purchase all of Catherine's remaining property then held by the bank, including her life estate in the Battle Creek residence. An appointment for this transaction was scheduled for April 14, 2008. However, Catherine passed away on April 8.

Michael also tendered a payoff check to the estate in April 2009. The check indicated that it was tendered as payment in full. The estate disputed the amount of the payoff under the contract, and thus, refused payment.

Michael attempted to tender payment in full again, during the course of the trial. He admitted a mistake as to one failed payment resulting in an improper

breach, keep their land and sue for damages for the breach; (3) to rescind the contract in toto; or (4) to enforce a forfeiture under the statute." *Id.* (quoting *Abodeely v. Cavras*, 221 N.W.2d 494, 497–98 (Iowa 1974)).

calculation of the payoff balance, but asserted permission from the bank to pay the full sum and repeated attempts to do so.

Evidence of good intention is not enough to demonstrate an ability to perform. *First Trust Joint Stock Land Bank v. Resh*, 285 N.W. 192, 196 (Iowa 1939). However, here Michael also makes the necessary showing of the ability to perform. Michael testified that attorney Lenihan called his bank to inquire if the April 2009 check would be honored and the bank confirmed that it would be. His testimony was not refuted. He further testified that his bank at the time of trial had specifically agreed to honor any checks for payment of the real estate contract.

A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation.

Willard v. Tayloe, 75 U.S. 557, 569 (1869).

Michael testified that he was ready, able, and willing to pay any remaining balance due under the contract, and that at the time of trial he had been ready for four years, but the estate refused to give him an amount due. Michael tendered what he believed to be a proper payoff check prior to initiating his action for specific performance. He then provided another check on the day of trial in the amount of \$41,488.51, adjusted to compensate for an earlier payment that was dishonored.²²

²² Michael claimed he was unaware that one of his installment payments had been rejected due to insufficient funds. He alleges there was a mistake related to switching banks.

Moreover, because the conveyance at issue took the form of an installment contract, Michael acquired an equitable interest in the property by virtue of the payments that he made or those that were forgiven by Gordon and Catherine.²³ “The basic underlying assumption of an action for specific performance is that the contract at issue was not fully performed, thereby necessitating the court to step in and exercise its equitable powers to order the defendants to perform on the contract.” *Breitbach*, 541 N.W.2d at 843. Under these facts, we agree with the trial court that Michael established a showing of willingness and ability to perform. Thus, the timing of his tender does not preclude a conditional award of specific performance. We affirm the grant of specific performance conditioned upon payment in full of the amount we determine below. Michael shall be granted sixty days from the entry of procedendo to comply.

C. Calculation of Payoff Balance.

The parties dispute the amount owing on the real estate contract at the time of trial and whether Michael’s tender of \$39,033.61 in April 2009 was sufficient to pay the outstanding balance and entitle him to relief on his claim of specific performance. The trial findings of fact include in part:

In regard to payments, the Court finds Michael has not personally made all installment payments required by the farm contract. The Court further finds, however, that all installment payments up until the creation of the Estate were satisfied. Michael made one or two payments in the first few years. Gordon and Catherine otherwise forgave such installments or Gordon made the payment for Michael. Gordon’s and Catherine’s tax returns reflect

²³ Neither George nor the estate initiated a forfeiture proceeding under Iowa Code chapter 656.

the interest income related to the farm contract payments. Michael then made payments to the Conservatorship, as reflected by checks and/or conservatorship reports, and tendered a payoff check to the Estate in April 2009 of \$39,033.61. Even if this was not the correct payoff amount, it was more than the installment required. Such tendered payment would also have satisfied any delinquency that existed due to a prior check being returned for insufficient funds.

Ultimately, the district court determined Michael's tender supported the conclusion that Michael had complied or substantially complied with the contract and was entitled to specific performance of the contract.

Certainly the questions of what has been paid or what has been gifted or forgiven were highly disputed in this action. Trying to resurrect this history when both Gordon and Catherine are deceased is troublesome. Notwithstanding the best of efforts of counsel, "All the king's horses and all the king's men / Couldn't" resurrect these facts "together again."²⁴ The district court ultimately concluded that to obtain the relief of specific performance, Michael was obligated to pay \$49,847.06, plus per diem interest of \$7.79, from April 23, 2010. This sum is consistent with Michael's exhibit 235. The estate and George believe the proper amount of the payoff is \$58,346.27, plus per diem interest of \$10.39, from April 10, 2010.

We find some solace in piecing the evidence together, and support for the district court's calculation in the conservator's reports. The conservator, the

²⁴ A famous poem by Mother Goose, Humpty Dumpty sat on a wall. The poem in its entirety states: "Humpty Dumpty sat on a wall. Humpty Dumpty had a great fall. All the king's horses and all the king's men / Couldn't put Humpty together again. The Dorling Kindersley Book of Nursery Rhymes (2000).

bank, was appointed on the joint application of Michael and George. As recently summarized by our supreme court:

After a conservatorship is established, the law authorizes the conservator to take possession of all the property of the ward. Iowa Code § 633.640. Correspondingly, the law imposes a duty on the conservator to protect, preserve, and account for the property, and to perform all other legal duties required by law. *Id.* § 633.641. The ward has no general power to convey or dispose of property once a conservatorship is established unless authorized by the court. *Id.* § 633.637. Moreover, self-dealing by a conservator is specifically prohibited except by court order. *Id.* § 633.155. A conservator may make gifts on behalf of a ward from assets of the conservatorship, but only when authorized by the court under special circumstances. *Id.* § 633.668. The conservator is required to file annual reports with the court that include an inventory of the property of the conservatorship. *Id.* § 633.670. The report must also account for all disbursements and activities concerning the condition of the conservatorship. *Id.* §§ 633.670–671. Overall, the conservator serves the interest of the ward and the statutory protections exist to accomplish this goal.

Iowa Supreme Court Attorney Disciplinary Bd. v. Murphy, 800 N.W.2d 37, 43 (Iowa 2011).

The bank filed its initial report and inventory in the conservatorship on October 24, 2007, showing the balance of the contract to be \$53,092.14. The bank's amended final report identified the assets held in the conservatorship to include the real estate contract with a remaining balance owed in the sum of \$43,747.00 as of February 17, 2009.²⁵ Based on the bank's calculations, as of April 22, 2010, the principal due would be approximately \$47,100.

Neither Michael nor George objected to the listing of this asset or its value, after being provided notice and time to object. The amended final report was approved by court order, filed April 7, 2010, subject only to other unrelated

²⁵ This sum is set forth in attachment C to the report.

objections filed by George. Interest accrues on the unpaid balance at the rate of 6.5 percent per annum. The last payment made by Michael before the trial was in 2008, as his March 2009 installment payment was returned for insufficient funds. Clearly, Michael's tender of \$39,033.61 in April 2009 was insufficient to pay the full balance due and owing on the contract. Michael, of course, would also be entitled to credit for any payments subsequent to the trial. We find support for the district court's calculation, not upon issue preclusion principles, but rather because the bank served as an independent conservator agreed upon by both Michael and George, and was required to ascertain the assets and debts of the ward. Iowa Code §§ 633.640, 633.641.

Here, the conservator's amount is very near the amount determined by the district court and the amount calculated by Michael. The district court had the benefit of observing and hearing all the "pieces" of the evidence and determining where to give weight and where to withhold weight by observing the demeanor of the witnesses, as opposed to the cold record we review *de novo*. We affirm the district court's calculation of the proper payoff sum subject to any deductions for payments made by Michael subsequent to the trial, if any.

D. West Field Rents.

George and the estate also seek a judgment in the sum of \$5000 for rent collected by Michael for the 2008 crop year for the west field. Michael does not dispute that he received this sum. Although the issue was not initially pled, it was pled in the estate's amendment to counterclaim X. Moreover, it was tried by

consent and resolved by the district court. *Gibson Elevator, Inc. v. Molyneux*, 668 N.W.2d 565, 567-568 (Iowa 2003).²⁶

The district court denied the estate's claim stating:

The Court further finds and concludes that the Estate is not entitled to any monetary damages in relation to the west field. Neither Gordon nor Catherine ever sought payment from Michael for his use of the west field. As noted throughout this Court's Ruling, Gordon, in particular, and Catherine routinely made gifts to Michael or forgave financial obligations. Michael also was paying the taxes on the west field during the years of his use. The Estate also submitted little, if any, evidence as to the amount or value of rents and profits claimed. Although the Court finds and concludes that title to the west field should be declared to be held by the Estate by (sic), no additional damages are awarded in relation to rent or profits from that west field through the date of this declaratory judgment.

We agree with the estate that the fact that Catherine may have previously made gifts of forgiveness is not pertinent to this issue, as Catherine was subject to a conservatorship from March 5, 2004 until her death on April 8, 2008. However, there is evidence that Michael paid the property taxes on the west field for several years, and we agree he is entitled to an offset. This offset would be in the sum of \$2798. We reverse the trial court's denial of a judgment for reimbursement for the rent received by Michael and determine that the estate is entitled to a judgment against Michael in the sum of \$3201.

²⁶ However, we note that rents were identified in the prayer of relief to Count X of the Amended Counterclaim.

E. Counterclaims for Damages for Conversion of Personal Property.

1. The Estate.

The Estate seeks a judgment against Michael for damages resulting from his alleged conversion of various items of personal property that remained in Catherine's homestead after her death.

"Conversion is 'the wrongful control or dominion over another's property contrary to that person's possessory right to the property. The wrongful control must amount to a serious interference with the other person's right to control the property.'" *Lewis v. Jaeger*, 818 N.W.2d 165, 188 (Iowa 2012). No conversion may be found where the exercise of control was not wrongful, as, for example, where the property was rightfully in the possession of the defendant, e.g., *Williams v. Redinger*, 161 N.W. 701, 702 (1917), or where the plaintiff abandoned the property. See 18 Am. Jur. 2d *Conversion* § 102 (2013).

Michael alleged Gordon and Catherine made a gift of their personal property to him in November 2005. Tammy Jo Williamson, wife of Michael, corroborated that testimony.²⁷

Michael admitted negotiating with the bank for purchase of the contents of the Battle Creek residence in 2007, but claimed he did so in an effort to bring the controversy to an end—not in acknowledgment that he was not already entitled to the possessions. Moreover, Michael testified that the majority of the

²⁷ The United Bank of Iowa reported the value of the property during the conservatorship proceedings as \$7500.

possessions in the home had to be destroyed due to mold damage.²⁸ Tammy also corroborated that allegation.²⁹

Catherine Williamson testified at the Special Master's hearing that Michael had taken some of her things from her house, which she wanted returned. However, throughout the course of the underlying proceedings, both parties made allegations of undue influence over Catherine at the end of her life.

The district court found George failed to establish his conversion claim because the items had been given to Michael by Gordon and Catherine. Since the exercise of control was not wrongful, there was no conversion. Furthermore, there was evidence that most of the personal property was damaged by mold and had to be destroyed. Although we undertake de novo review, when considering the credibility of the witnesses and the weight to accord their testimony, we may give weight to the findings of facts of the district court. Here, we give deference to the district court's findings and reach the same conclusion. We affirm on this issue.

2. George's individual claim.

George personally sought damages for Michael's alleged conversion of a box of his personal items and a pool table. The trial court found George established his claim with respect to the box of personal items, but failed to establish the claim regarding any other items of personal property, including the

²⁸ Michael attributes the damage to United Bank's failure to maintain the heat in the home. Frozen pipes resulted in a flooded basement. The record is unclear as to the date of such damage.

²⁹ She further testified that estimates indicated the cost to repair the mold damage to the structure itself would exceed the value of the house.

pool table. All of the aforementioned items were in the residence when it was conveyed to Michael.³⁰

“Since, in order to maintain an action for conversion, the plaintiff must have an interest in the thing converted, carrying with it a right of possession at the time of the conversion, the burden rests on the plaintiff to establish his or her interest, and right of possession at the time of the conversion.” *Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 191 (Iowa 2010) (quoting 18 Am. Jur. 2d *Conversion* § 94, at 218 (2004)).

George offered into evidence a receipt for his purchase of the pool table in 2006. However, he had the table installed in the Battle Creek residence. He failed to establish that he retained a right to possession of the pool table at the time of Catherine’s death. Moreover, Michael alleges the pool table was damaged along with the other items of personal property in the Battle Creek residence. Thus, even if Michael disposed of the pool table when George had a superior possessory right to the table, George suffered no damage as a result of Michael’s interference.

We agree with the trial court that George’s conversion claim was properly denied.³¹

IV. Conclusion.

We affirm the grant of specific performance to Michael for the east field only, conditioned upon the terms and payoff sum fixed by the district court. To

³⁰ Catherine and Gordon reserved a life estate in the house.

³¹ We have addressed the merits of the claim with some reluctance as George has never joined these proceedings and appears to lack standing.

be entitled to specific performance, the sum must be paid within sixty of days of the issuance of procedendo, less any deductions for any payments made by Michael subsequent to the trial, if any. We also affirm the district court on all issues raised in the cross-appeal, except we reverse on the claim for rent, and order the entry of a judgment in favor of the estate and against Michael in the sum of \$3201. Costs are assessed to Michael.

AFFIRMED IN PART AND REVERSED IN PART.