IN THE COURT OF APPEALS OF IOWA

No. 7-067 / 06-0428
Filed July 12, 2007

LEONARD GOODRICH, LELAND GOODRICH, SHIRLEY EVANS, CHERYL WILSON, DIANE CARLTON, DONNA HANSEN, NONA DAHL, NYLA GEORGE, KAREN FINNEGAN, MARILYN BERTELL, and DUANE WASSON,
Plaintiffs-Appellants,

vs.

PHYLLIS THOMPSON and BERNARD THOMPSON,
Defendants-Appellees.

Appeal from the Iowa District Court for Dallas County, Gary G. Kimes, Judge.

Plaintiffs appeal the district court's ruling denying their petition. **AFFIRMED.**

Louis R. Hockenberg, Jennifer Jaskolka-Brown, and Jill Mataya Corry, West Des Moines, for appellants.

Frank Murray Smith and Tyler Murray Smith of Frank Smith Law Office, Des Moines, for appellees.

Heard by Sackett, C.J., and Mahan and Miller, JJ.

MAHAN, J.

Plaintiffs appeal the district court's ruling denying their petition. They argue the district court (1) failed to evaluate asset transfers made after the decedent executed a power of attorney in 1996 under the proper standard; (2) erred in requiring plaintiffs to show fraud in connection with their claim of rescission based on mental incapacity; (3) found the decedent was not mentally incompetent against the weight of the evidence; (4) erred in finding Phyllis Thompson did not breach her fiduciary duty, convert assets, and commit fraud while acting as attorney in fact; and (5) erred when it refused to permit a witness to testify concerning handwriting. We affirm.

I. Background Facts and Proceedings

Lucille Goodrich died on December 3, 2003, at age eighty-six. By all accounts, she was a kind-hearted person who loved her family and kept her financial affairs to herself. She spent her life living with her brother on the farm on which they were born. When her brother died in 1991, his will named Lucille executor and left most of his estate to her. Plaintiffs, all of whom are Lucille's nieces and nephews, allege Lucille's mental health began to decline after her brother died. The point of contention, however, is exactly when and how much Lucille declined. Plaintiffs argue her decline came as soon as the month after her brother's death in 1991. They claim the will she executed in 1992 divided her assets equally among them. They argue certain transactions made after Lucille

gave Phyllis power of attorney after 1996, however, were the product of an unsound mind and/or improper maneuvering by Phyllis and Bernard Thompson.[1]

Trial on the issues lasted for eight days. The district court gave heavy weight to the witnesses who are not relatives to any of the parties in the case. These witnesses included Lucille's friends from church, her doctors, and her attorneys. It found the plaintiffs' time line allegedly marking Lucille's mental decline too vague. Ultimately, the district court concluded plaintiffs failed to support their claims by clear, convincing, and satisfactory evidence. Four of the original eleven plaintiffs appeal.

II. Standard of Review

We review de novo matters tried in equity. Iowa R. App. P. 6.4. We are not bound by the district court's findings of fact or conclusions of law. *In re Estate of Warrington*, 686 N.W.2d 198, 202 (Iowa 2004). We do, however, give weight to the factual findings when they involve matters of witness credibility. *Id.*

III. Merits

A. Transfers Made After 1996

Plaintiffs argue the district court failed to evaluate under the correct standard transfers made after Lucille appointed Phyllis her attorney in fact in December 1996. The two transfers in question occurred on January 23, 1997, and gave Phyllis joint tenancy with Lucille in two certificates of deposit. Plaintiffs further argue Phyllis and Lucille were in a confidential and fiduciary relationship

[1] Phyllis was also named executor of Lucille's estate. Plaintiffs, however, filed a petition to remove her as executor. The district court determined she should be removed, but left all other issues to be decided in this case.

at the time the transfers were made. As a result, plaintiffs claim both of these transfers are presumptively fraudulent and the result of undue influence.

The district court determined there was no clear and convincing evidence that a confidential relationship existed immediately after the December 1996 power of attorney. It determined Lucille continued to write her own checks and pay her own bills with Phyllis's oversight. It found the transfers were witnessed by bank personnel. Finally, it determined there was no showing that Phyllis advised or influenced Lucille to make the transfers.

The parties, however, do not dispute Phyllis was in a fiduciary relationship with Lucille as a result of her power of attorney when the transfers were made. "A transfer to a grantee standing in a confidential or a fiduciary relationship to the grantor is presumptively fraudulent and therefore presumptively the product of undue influence." *Mendenhall v. Judy*, 671 N.W.2d 452, 454-55 (Iowa 2003). When a fiduciary relationship exists between the grantor and the grantee, the burden shifts to the grantee to negate the presumption with clear and convincing evidence. *Id.* at 456. The grantee must "affirmatively establish that in his acquisition of the property he took no advantage of the [grantor] by reason of their relationship, but that the [grantor] acted voluntarily with freedom, intelligence, and a full knowledge of all the facts." *Marron v. Bowen*, 235 Iowa 108, 112, 16 N.W.2d 14, 16-17 (1944).

The district court stated, "Again, there is no showing that Phyllis advised or influenced Lucille to make these transfers." What case law requires, however, is an *affirmative showing* Phyllis did not advise or influence Lucille to make the

transfers. We have reviewed the record de novo under the correct standard, and conclude Phyllis has met her burden of proof. Plaintiffs' claim must fail.

B. CD Transfers into Bank Account

Plaintiffs also argue Phyllis breached her fiduciary duty by cashing certain certificates of deposit into the joint account held by Lucille and Phyllis. A similar fact situation was present in *In re Estate of Crabtree*, 550 N.W.2d 168 (Iowa 1996). As the district court in the instant case stated:

> In *Crabtree*, an attorney-in-fact cashed the principal's mature certificate of deposit which was payable on death to another. The purpose of the transaction was to provide sufficient funds for the principal's future medical expenses and burial expenses. The principal died nine months later, with the ultimate effect of the transaction increasing the principal's estate and the residual bequest to the attorney-in-fact. The pay-on-death beneficiary of the CD brought an action against the attorney-in-fact alleging that the transaction was an improper gift by the attorney-in-fact to herself. In upholding the validity of the transaction, the Court stated:
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> > The trial court found the $20,000 certificate was the only mature certificate and it was cashed to provide needed support to [the principal] Crabtree. There is substantial evidence to support these findings. Thus, any benefit to [attorney-in-fact] Sherry was unintentional and merely fortuitous. There was no reason to believe at the time of the transaction that Sherry would profit from it in the future. Had Crabtree lived longer, eventually all of his certificates would have been used to pay his expenses. Moreover, Crabtree was competent to make changes to his will, so there was no certainty that Sherry would eventually benefit from this transaction as a beneficiary of the estate. Thus, we conclude Sherry did not make a gift to herself by cashing the $20,000 certificate of deposit.
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> [*Crabtree*, 550 N.W.2d] at 170-71.
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> The instant case is analogous to *Crabtree* in several important respects. First, Phyllis cashed CDs only as they came due in order to avoid early withdrawal penalties. This was in Lucille's best interest. Also, as discussed further below, the funds cashed by Phyllis and deposited into the joint checking account were used solely for Lucille's care. Lucille had substantial nursing

> home expenses which were increasing on an annual basis. There was no reason to believe at the time of the transaction that Phyllis would profit from it in the future. Nor was there any certainty that Phyllis would eventually benefit from this transaction as joint owner of the checking account. In fact, the record shows that on several occasions Phyllis allowed the checking account balance to dip below the $21,915.07 balance that was in the account the date Phyllis was added as joint owner of the account. This fact weighs against Plaintiff's suggestion that Phyllis maintained an unnecessarily high balance in the joint checking account expecting to benefit upon Lucille's death. Any benefit to Phyllis resulting from the transaction was unintentional and merely fortuitous.

We agree with the conclusion reached by the district court. Phyllis benefitted in no way from these transactions at the time they occurred. *See Crabtree*, 550 N.W.2d at 170. Again, as our supreme court stated in *Crabtree* "[t]here was no reason to believe at the time of the transaction that [the attorney-in-fact] would profit from it in the future. Had [the principal] lived longer, eventually all his certificates would have been used to pay his expenses." *Id.* We therefore conclude Phyllis did not breach her fiduciary duty to Lucille.

C. Lay Witness

Plaintiffs argue the district court erred in refusing to allow testimony from a lay witness concerning Lucille's handwriting. We review the district court's ruling on evidence for abuse of discretion. We conclude the district court did not err. Plaintiff's counsel was allowed to do an offer of proof and the witness's testimony is present in the record for us to review. The witness was not an expert, there were no other witnesses testifying to the same conclusion, there was no indication of how she knew Phyllis's handwriting other than the two had "previously corresponded," and her testimony is potentially self-serving as her father is a plaintiff. *See* Iowa R. Evid. 5.901(*b*)(2); *United States v. Binzel*, 907

F.2d 746, 749-50 (7th Cir. 1990) (refusing to allow testimony concerning handwriting where testimony was self-serving and only witness was unable to identify relationship that would familiarize him with handwriting); *In re Estate of Early*, 234 Iowa 570, 575-76, 13 N.W.2d 328, 331 (1944) (allowing testimony where two witnesses testified as to handwriting); *State v. Wickett*, 230 Iowa 1182, 1190-91, 300 N.W. 268, 270-72 (1941) (allowing testimony where three witnesses testified as to handwriting). The district court's ruling excluding her testimony is affirmed.

D. Other Issues

We have reviewed the district court's detailed and well-reasoned opinion in conjunction with the other issues raised in this appeal. We conclude the issues were correctly decided by the district court and we cannot significantly add further to a discussion of those issues. We affirm the decision of the district court.

AFFIRMED.

Miller, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I concur with the majority in all respects except that I would modify the district court decision to provide that the balance remaining in the checking account held by decedent and Phyllis as joint tenants should be an asset of the estate. Phyllis transferred a number of decedent's CD's into the account to pay decedent's bills, but a balance remained in the account at decedent's death. Phyllis as an attorney in fact has benefitted by the transfers she made insomuch as she took the balance of the account as a joint tenant.