

IN THE COURT OF APPEALS OF IOWA

No. 9-819 / 09-0596
Filed December 30, 2009

**BRIAN D. MILLER, Executor of The
Estate of Edward J. Humburg,**
Plaintiff-Appellant,

vs.

**DUANE EISENTRAGER and
SUSAN K. EISENTRAGER,**
Defendants-Appellees.

Appeal from the Iowa District Court for Franklin County, Colleen D.
Weiland, Judge.

Executor appeals the district court's dismissal of his petition alleging
undue influence stemming from a confidential relationship, breach of fiduciary
duty, and asserting a constructive trust. **AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED WITH DIRECTIONS.**

Joseph LaPointe, Mason City, for appellant.

Dani Eisentrager, Eagle Grove, for appellees.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

The executor of the Edward J. Humburg estate, Brian D. Miller, appeals the district court's dismissal of the petition alleging constructive fraud due to a confidential relationship, breach of fiduciary duty, and constructive trust.¹ The executor asserts the district court erred in (1) finding Susan Eisentrager sustained her burden of proof to rebut the presumption of undue influence; (2) failing to find Susan breached her fiduciary duty by abusing her authority as attorney-in-fact, and (3) failing to find a confidential relationship existed between Susan and Beulah Humburg, and between Susan's husband, Duane Eisentrager, and Edward Humburg. We agree with the district court a confidential relationship existed between Susan and Edward. However, we do not find substantial evidence that Susan rebutted the presumption of undue influence. We also find she abused her authority as attorney-in-fact and remand with instructions. However, we do not find a confidential relationship existed between Susan and Beulah, or Duane and Edward, and affirm as to those issues.

I. Background Facts and Proceedings

Edward and Beulah Humburg had two children, Roger and Susan. Roger predeceased the couple, survived by his son, Anthony. During their marriage, both Edward and Beulah were involved in managing their finances, but Beulah handled most of the check-writing. As her parents got older, Susan increasingly helped them with errands, and began paying bills and writing checks for them in May 2001. In July 2001, Beulah transferred \$40,000 to Susan and her husband,

¹ We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c).

Duane, for Susan to pay Edward and Beulah's expenses. Beulah passed away in September 2001. Following Beulah's death, Susan gave additional support to Edward by regularly bringing him to her house, often to spend the night, and providing for his day-to-day needs. She paid nearly every bill for Edward, writing checks on his checking accounts. On September 18, 2001, Edward executed a power of attorney, naming Susan as his attorney-in-fact.

In January 2002, Edward moved in with the Eisentrager family. Edward utilized home health care services, but depended on Susan for his daily needs and transportation. During the summer of 2002, Edward deeded his homestead to Susan and Duane, retaining a life estate. Although Edward was failing physically, he remained mentally alert. Edward passed away May 15, 2004. Following his death, Susan and Duane sold Edward's home for \$59,010.73 and deposited the proceeds into their own account.

On September 18, 2001, the same day he signed the power of attorney, Edward executed his last will. The will provided for an equal distribution between Susan and Anthony of Edward's residuary estate. Anthony had what the district court called a "pleasant relationship" with Edward, and visited Edward approximately once a month. Anthony, then age sixteen, received no notice when Edward's estate was being administered by the original executor, Susan. Eventually Anthony's mother, Sara, inquired as to the status of the estate, and learned the estate had been fully administered and closed, but Anthony had

received nothing from the estate.² A petition to reopen the estate was granted and the current litigation was brought by the newly appointed executor, Miller. After a trial, the district court dismissed the executor's petition. The executor appeals.

II. Standard of Review

Actions to set aside or contest wills are triable in probate as law actions. Iowa Code § 633.33 (2007). This petition was both filed and tried at law, therefore we review for corrections of error at law. *Id.* We are bound by the trial court's findings of fact provided they are supported by substantial evidence. *In re Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996).

III. Confidential Relationship

The district court found a confidential relationship began between Edward and Susan, when Edward moved into the Eisentragers' home in January 2002.³ The executor asserts Susan failed to rebut the presumption of undue influence in her management of Edward's finances. "The gist of the doctrine of confidential relationship is the presence of a dominant influence under which the act is presumed to have been done. The purpose of the doctrine is to defeat and correct betrayals of trust and abuses of confidence." *In re Estate of Clark*, 357 N.W.2d 34, 37 (Iowa Ct. App. 1984).

² Although Edward's probate file was not made part of the record, the executor asserts the receipt and waiver form required before closing the estate was signed by Susan on behalf of, but without the knowledge of, Anthony.

³ Nothing in this opinion should be read to diminish Susan's devotion to her parents and the quality of care she provided them as their health failed.

A. Burden of Proof to Rebut Undue Influence

Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefited party to prove by clear, satisfactory, and convincing evidence “that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily.” *Jackson v. Schrader*, 676 N.W.2d 599, 604 (Iowa 2003).

Since that [confidential] relationship existed between [Edward] and [Susan], the burden was upon [Susan] to rebut the presumption of overreaching on [her] part, and to affirmatively establish that in [her] acquisition of property, in the transaction in controversy, [s]he took no advantage of [Edward] by reason of their relationship, but that he acted voluntarily with freedom, intelligence and a full knowledge of all of the facts.

Id. (quoting *Merritt v. Easterly*, 226 Iowa 514, 530, 284 N.W. 397, 405 (1939)).

When a confidential relationship is shown, the person in whom the trust is reposed is not merely required to go forward with the evidence; she has the burden of persuasion to uphold the transfers. *Jackson*, 676 N.W.2d at 605. It is a heavy burden. *Id.*

The executor asserts Susan failed to carry her burden of proof to show she acted in good faith in the managing of Edward’s accounts and that Edward was fully knowledgeable and gave his consent to Susan’s many transactions that benefited her or her family. The executor identifies approximately \$112,993, which Susan used to her advantage after becoming attorney-in-fact. Together with the proceeds from the sale of Edward’s home, \$59,010.73, Susan depleted Edward’s assets to the point that his probate inventory listed only \$4355 in total gross assets. After the payment of funeral expenses and attorney fees, there

was no net estate remaining for distribution. After Anthony's mother questioned Susan as to the estate, Susan wrote Anthony a check for \$7000.

In May 2001, Susan began writing the majority of checks for Edward. With the power of attorney in place on September 18, 2001, Susan began paying his bills and writing all of his checks. She paid for all of his medical bills, his house payment, insurance, and took care of all of his life necessities. However, she also wrote a substantial number of checks from his accounts that not only covered Edward's needs, such as groceries, but also paid for her and her family's daily expenses. At trial Susan was able to identify a few checks written strictly for Edward's benefit, and many checks she admitted were written strictly for her or her family's benefit. She was unable to discern the purpose for a host of other checks and admitted she comingled her personal expenses with Edward's, and paid both from Edward's accounts. The result was that between her family and Edward, Susan could identify only a small number of checks written strictly for the benefit of Edward.

The record includes plaintiffs' exhibits twenty-nine, the Goldenaire account; thirty, the United Bank and Trust account; and thirty-one, the IRMA account, which are compilations of checks Susan wrote from Edward's three accounts to pay for her or her family's expenses. Such items include her insurance, cell phone, satellite services, credit cards, utilities, numerous magazines—including Country Woman, Taste of Home, Quick Cooking, Field and Stream, Sports Illustrated (including the swimsuit edition for Susan's son, Mike), Lane Bryant women's clothing, catalog purchases from Blair, Eddie Bauer,

Walter Drake, Harriet Carter, Carroll Wright Gifts, and a variety of local purchases, including J.C. Penney, Sears, Target, and Pamida.

In addition, the exhibits detail numerous checks written by Susan for cash for herself. For example, after Edward sold some real estate on February 25, 2002, and the money, \$63,442.47, was deposited in his Goldenaire account, Susan turned around and wrote two checks from that account: \$11,490.02 went to pay off a note for Susan; and \$51,952.45, Susan deposited into her own account and later used to purchase a Jeep for herself for approximately \$11,500; the rest was used for home repairs. She claimed the entire amount was a “gift” from Edward. However, the only evidence she was able to offer to support her claim was by her own testimony that her father was aware of what she was doing. As the executor asserts, such self-serving testimony only attempts to justify Susan’s conduct, but is not sufficient to prove Edward “acted voluntarily with freedom, intelligence and a full knowledge of all of the facts.”

Susan’s burden was to rebut the presumption of undue influence by clear, satisfactory, and convincing evidence that she acted in good faith throughout her transactions with Edward. *Jackson*, 676 N.W.2d at 604. The district court found that “Ed had constant access to his account and asset information, and he and Sue conducted his bill-paying together.” Our review of the record fails to show that, apart from Susan’s assertions, Edward approved and was fully knowledgeable of Susan’s transactions, which eventually depleted virtually all of his assets to the detriment of his grandson, who was to share equally with Susan in the net assets of Edward’s estate.

During Susan's testimony, she was asked to explain her use of Edward's funds for her own benefit. She repeatedly answered "I don't know," and "my father wanted me to have the money." While she claims the \$63,442.47 from the February 2002 cash withdrawals was a gift from her father, there was nothing to corroborate such a gift; the only evidence of Edward's wishes was Susan's own testimony. Further, she failed to report this "gift" on her father's probate inventory as a transfer within three years of death. Iowa Code § 450.3(2). At the same time that she was claiming the \$63,442.47 to be a "gift," she also took the position that the money was "income" or payment for her services for caring for her father. This "income" was not reported on her 2002 federal or state income tax returns. She testified at trial that her tax preparer was in the process of amending her 2002 tax returns to report the money as earned income. In the next breath, she reversed her position and reasserted that the money was a gift.

We find that Susan's own vague and vacillating testimony was insufficient to rebut the presumption of undue influence. Considering the evidence of the hundreds of checks written for her or her family's benefit from Edward's accounts, and the fact that Edward named Anthony as an equal beneficiary under his will, which was executed the same day as he made Susan his attorney-in-fact, we conclude Susan did not demonstrate by clear, satisfactory, and

convincing evidence that Edward was free from undue influence, or that she acted in good faith throughout her transactions with Edward.⁴

IV. Breach of Duty Under Power of Attorney

The executor also asserts the checks written by Susan for her own benefit were a breach of her fiduciary duties under the power of attorney. “The established rule is that a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified.” *Crabtree*, 550 N.W.2d at 170. Edward’s power of attorney form stated, “my Attorney-in-Fact may not make gifts of my property to himself or herself.” We agree Susan abused her authority as attorney-in-fact. Therefore, all monies shown on the checks set forth in exhibits twenty-nine, thirty, and thirty-one, must be returned to Edward’s estate.

V. Constructive Trust: Homestead

The executor next challenges Susan’s retaining Edward’s home after his death, then selling it and keeping the proceeds, rather than preserving this asset for the benefit of the estate. In July 2002, Edward deeded his homestead to Susan and Duane and retained a life estate for himself. A gift is made when the donor has a present intention to make a gift and divests himself “of all control and dominion over the subject of the gift.” *Crabtree*, 550 N.W.2d at 170. Michael Cross, the attorney who drafted the deed, and was Susan’s attorney during the

⁴ The executor also challenged Edward’s mental ability the months preceding his death, asserting he did not have the ability to act freely, intelligently and voluntarily. While a doctor’s note from September 20, 2002, stated that Edward suffered from mild dementia, there were no other indications his mental clarity was in issue. As the district court found, “although physically limited, Ed remained independent, clear-minded and opinionated.” Although Edward had the mental clarity to make decisions, insufficient evidence remains to prove he was knowledgeable about the way Susan was depleting his assets to the benefit of herself and her family.

administration of Edward's estate, testified that Edward transferred the homestead to Susan and her husband, Duane, because they had done a great deal for Edward, "and to avoid that home being taken by the state for Title XIX reimbursement if he had to go to a nursing home." Cross confirmed that he discussed the transfer only with Edward. Susan was not present, nor did Cross ever speak to her. At trial, Cross was asked,

Q: Did it appear that anyone was influencing him to make this transfer? A: No, not Ed.

Q: Did he appear to be coached? A: No

Q: Describe Ed, specifically referencing the home transfer.

A: I think he would be someone who had his own mind and he would make decisions based on his own mind. . . . I had no indication of anything otherwise.

Q: So is there doubt in your mind that he made that transfer willingly? A: None whatsoever.

After Edward's death, Susan sold the property for \$59,010.73. With the money, she purchased a vehicle for \$26,000 for her son, Mike, paid off a loan to the bank for \$8900 for Duane, gave \$10,000 to Mike for his wedding, gave \$7000 to Tony, and used the rest for home improvements. Susan reported the prior transfer of real estate on Edward's probate inventory in order to clear title to the real estate. Because there is sufficient evidence, primarily from attorney Cross, that Edward deeded this land of his own "freedom, intelligence and a full knowledge of all of the facts," we find Susan rebutted the presumption the transfer was a product of undue influence and affirm the district court. *Jackson*, 676 N.W.2d at 604.

VI. Confidential Relationship—Duane, Beulah

The executor also asserts that Susan had a confidential relationship with Beulah, as she gave Beulah a substantial amount of assistance, and Beulah in

turn gave Susan \$40,000 for her to pay for Beulah's and Edward's expenses. The executor asserts Susan should have returned all of the funds to Edward and Beulah's account after Beulah died in September 2001. Susan testified that Beulah informed her that the money was "not a gift and if they needed it would be [Beulah and Edward's] to use." While there is evidence \$10,000 was transferred back to Edward and Beulah's account, \$30,000 remained unaccounted for. As executor of Beulah's estate, Susan failed to report this \$30,000 as either a gift within three years of her death or as an asset of Beulah's estate. While we question Susan's handling of this money, we are not inclined to order the return of these funds to Edward's estate.⁵ We also agree with the district court that there was insufficient evidence to find a confidential relationship existed between Susan and Beulah. Likewise, we agree with the district court, no confidential relationship existed between Duane and Edward. We agree with the district court that the "evidence shows that Duane occasionally assisted Ed, that Ed and Duane were friendly and that Ed resided in Duane's home; it does not show that Ed relied on and trusted Duane to the extent contemplated in a confidential relationship."

VII. Conclusion.

We affirm the district court's finding of no confidential relationship between Susan and Beulah or between Duane and Edward. We affirm the finding of a confidential relationship between Susan and Edward, but find the confidential relationship began on September 18, 2001, when Edward executed the power of attorney, naming Susan as his attorney-in-fact. We reverse the district court on

⁵ There is no claim stemming from Beulah's estate for the return of the funds.

its conclusion Susan rebutted the presumption of undue influence, and also conclude Susan breached her fiduciary duty by self-dealing, as Edward's attorney-in-fact. She failed to meet the heavy burden of showing the amounts the estate asserts she removed from Edward's accounts: \$76,578.51 from the Goldenaire account, \$20,787.58 from the United Bank and Trust account, and \$15,627.47 from the IRMA account, were used for the sole benefit of Edward or were not a product of undue influence. *Jackson*, 676 N.W.2d at 605. We therefore remand to the district court for entry of judgment, against Susan for \$112,993.56 in favor of the executor, to restore those funds to Edward's estate.⁶

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

⁶ Anthony may retain the \$7000 Susan gave to him, as Susan testified it came from the proceeds of the sale of Edward's house after he died. As the house was "gifted" to Susan, the \$7000 came from Susan's assets and does not therefore go back to the estate for purposes of this remand.