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2012 IL App (3d) 110039-U

Order filed April 6, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

<i>In re</i> ESTATE OF FRANCIS LOUISE	)	Appeal from the Circuit Court
LAWYER,	)	of the 21st Judicial Circuit,
	)	Iroquois County, Illinois,
Deceased	)	
	)	
(John H. Lawyer,	)	
	)	Appeal No. 3-11-0039
Plaintiff-Appellant,	)	Circuit No. 10-P-47
	)	
v.	)	
	)	
Kathy J. Ebert,	)	Honorable
	)	Gordon L. Lustfeldt,
Defendant-Appellee).	)	Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justice Lytton concurred in the judgment.  
Presiding Justice Schmidt dissented.

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**ORDER**

- ¶ 1 *Held:* Fiduciary to the decedent proved by clear and convincing evidence that adding herself to the decedent's checking account as a joint tenant with right of survivorship was not fraudulent.
- ¶ 2 The plaintiff, John H. Lawyer (John), as executor of the decedent's estate, filed suit

against the defendant, Kathy J. Ebert (Kathy). John sought to recover the proceeds from the decedent's checking account which were retained by Kathy as a surviving joint tenant. He appeals from an order that dismissed his motion for an accounting and awarded the remaining funds in the bank account to Kathy. We affirm.

¶ 3

### FACTS

¶ 4 Francis Louise Lawyer died intestate on May 25, 2010. The approximate value of her estate was \$20,000, with an estimated \$10,000 in funeral expenses. The decedent had four heirs: Kathy, John, Elmer C. Lawyer (Elmer), and Lyndon E. Lawyer (Lyndon).

¶ 5 On June 15, 2010, John was appointed independent administrator of the estate of the decedent. On October 25, 2010, John filed a "Motion for Hearing on Accounting by Agent under Durable Power of Attorney for Property." In that motion, John alleged that Kathy abused her power of attorney by improperly using the funds in decedent's bank account after her death. Kathy responded by stating that the account in question contained a right of survivorship, and that the balance of funds in the account after her mother's death were rightfully hers. She further denied any allegations of wrongdoing while entrusted as the decedent's power of attorney.

¶ 6 The hearing on the motion for an accounting was held on December 6, 2010. Kathy testified that on April 28, 2010, she became an agent under a durable power of attorney for the decedent. Two days later, Kathy went to Buckley State Bank in Buckley, Illinois, to inform the bank that she had power of attorney for the decedent. According to Kathy, the bank placed a document in front of her creating a joint tenancy with right of survivorship in the decedent's bank account. Kathy testified that she did not ask the bank to do this; rather, the bank told her that the account had to be changed because Elmer could continue to write checks if the account was not

changed. She further stated that she did not know that she would be the survivor on the account when her mother died, and that her only understanding with regard to the power of attorney was that she was to pay her mother's bills. Kathy further testified that after she had the power of attorney, she continued to have the statements sent to her mother's address.

¶ 7 Kathy also testified about several checks she had written from the account after being told by the bank that the money in the account was hers. Kathy explained that she wrote the following checks: (1) \$250 to Heartland Healthcare, the decedent's nursing home, because Kathy believed the home had treated the decedent exceptionally well; (2) \$500 to Price's Tree Service to remove a tree the decedent planted on her son's property with the understanding that the tree would be removed upon her death; (3) \$115 to Sheila's Sunny Boomers; (4) \$18 to Heartland Healthcare for haircuts for the decedent before her hair fell out due to radiation treatments; and (5) \$64.19 for items for a rose garden at the decedent's grave.

¶ 8 After Kathy's testimony, counsel moved for a directed verdict which the trial court granted. The trial court recognized there was "presumptive fraud" when someone with a power of attorney becomes the joint tenant on a bank account. The court notes there was no evidence that Kathy used her power of attorney improperly to become the joint tenant on the account. Instead, the evidence demonstrated the bank provided the forms for Kathy to sign. The court emphasized that the evidence did not establish the reason the bank chose these forms or eliminate the possibility that decedent directed the bank to do so. The court continued, "to me if you don't have any proof that [Kathy] caused [the joint tenancy to be created] then I don't see how the estate can succeed." The court was also convinced that Kathy was not engaged in fraud because the checks were not written to her and the statements were sent to the decedent.

¶ 9 John then questioned whether the court was making a ruling that the money in the account belonged to Kathy. Upon considering the issue, the court ruled that "the money belongs to [Kathy] because there's been no proof of anything else." John appealed.

¶ 10 ANALYSIS

¶ 11 The issue before the court is whether the trial court erred by awarding the money in the joint account to Kathy. We affirm.

¶ 12 Once the power of attorney was executed, Kathy was responsible as a fiduciary to the decedent. *In re Estate of Rybolt*, 258 Ill. App. 3d 886 (1994). Since Kathy became a beneficiary on the account while she was a fiduciary to the decedent, two conflicting presumptions arise. *In re Estate of Harms*, 236 Ill. App. 3d 630 (1992). First, there is a presumption of fraud or undue influence where, as here, "the fiduciary has benefitted by virtue of [her] fiduciary status." *In Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997). In order to rebut the presumption, the fiduciary must prove by clear and convincing evidence she "has exercised good faith and has not betrayed the confidence reposed in [her]." *Id.* Factors the court may consider include the fiduciary's frank disclosure of information, the payment of adequate consideration, and that the principal had competent and independent advice regarding the transaction. *Id.*

¶ 13 In contrast, the establishment of a joint tenancy with right of survivorship raises a presumption that the decedent intended to bestow a gift. *Harms*, 236 Ill. App. 3d 630. A party can rebut this presumption only by presenting clear and convincing evidence that a gift was not intended. *Id.* When the joint tenancy is created after the fiduciary relationship is established, the controlling presumption is one of fraud. *In re Estate of Miller*, 334 Ill. App. 3d 692 (2002).

¶ 14 On appeal, John argues Kathy exceeded her power of attorney by replacing the previous

joint tenant on the decedent's bank account. In support of his argument, John relies on the statute that interprets the statutory short form of power of attorney for property, which is codified in the Illinois Power of Attorney Act. 755 ILCS 45/3-4 (West 2010). However, there is no indication in this record the trial court received or reviewed the actual power of attorney document. Moreover, the actual power of attorney document signed by the decedent signed is not a part of the record. Consequently, based on this record, we are unable to determine with certainty the specific powers Kathy was granted. Therefore, all doubts regarding the scope of Kathy's authority must be resolved in her favor. *Walters v. Rodriguez*, 2011 Ill. App. (1st) 103488 (burden is on the appellant to produce a sufficient record, and any doubts that result from the incompleteness of the record will be resolved against the appellant).

¶ 15 We now consider whether the trial court properly awarded the funds in the account to Kathy. In the instant case, the court focused on the lack of evidence demonstrating the decedent's intent. The court noted the only evidence presented indicated the bank staff provided the form creating a joint account for Kathy's signature. According to the court, there was no evidence that the bank was not acting at the direction of the decedent herself when selecting the forms for Kathy to sign. Kathy clearly testified she did not request the creation of a joint account. Therefore, the court concluded presumption of fraud did not apply to the actions of the bank.

¶ 16 We note as an initial matter that the burden is on the fiduciary, not the estate, to prove by clear and convincing evidence that she did not act in a fraudulent manner. *DeJarnette*, 286 Ill. App. 3d 1082. It appears the trial court misapplied the burden of proof by stating the estate did not prove that Kathy caused the joint tenancy to be created. Nonetheless, upon reviewing the record we are convinced that Kathy demonstrated by clear and convincing evidence that she was

acting in good faith and without fraudulent intentions.

¶ 17 Kathy's testimony established that after she held power of attorney for the decedent, she went to the bank to inform them of this fact. Kathy understood that her power of attorney was for the purpose of paying the decedent's bills. At that point, it was the bank, not Kathy, that suggested she should become a joint tenant on the bank account so that a previous *joint tenant* could no longer write checks on the account. Kathy continued to have the statements for the joint account sent to the decedent's address, and she did not even realize the money in the account was hers until after the decedent's death. Even after Kathy was notified by the bank that the money was hers, she did not use the money for her personal benefit, but instead she donated money to the institution that cared for the decedent, paid for the decedent's haircuts, and paid for materials to place on the decedent's grave and carry out her wishes. We believe these facts demonstrate Kathy did not use her power of attorney to confer a personal benefit upon herself, thus alleviating any concerns of fraud or undue influence.

¶ 18 These same facts also show the account at issue was created originally as a joint account before the decedent received the power of attorney. We agree that the court correctly determined the funds in the joint account belonged to Kathy, rather than the estate.

¶ 19 **CONCLUSION**

¶ 20 For the foregoing reasons, the judgment of the circuit court of Iroquois County is affirmed.

¶ 21 Affirmed.

¶ 22 **PRESIDING JUSTICE SCHMIDT, dissenting:**

¶ 23 The trial court's grant of a directed verdict was improper; its decision should be reversed and this case remanded for further proceedings.

¶ 24 A trial court should only direct a verdict “when all the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence ever could stand.” *Williams v. City of Chicago*, 371 Ill. App. 3d 105, 106 (2007). A “directed verdict should be granted where there is no evidence demonstrating a substantial factual dispute or where the assessment of the credibility of witnesses or the determination of conflicting evidence is not decisive to the outcome.” *Robinson v. Chicago Park District*, 325 Ill. App. 3d 493, 497 (2001). Our review of a directed verdict is *de novo*. *Williams*, 371 Ill. App. 3d at 106.

¶ 25 A person with power of attorney is an agent of the grantor of the power. *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 777 (2002). “The agency relationship differs from other fiduciary relationships in that it is the duty of the agent to respond to the desires of the principal.” *Milwaukee Mutual Insurance Co. v. Wessels*, 114 Ill. App. 3d 746, 749 (1983). When an agent “deals with the subject matter of the relationship and thereby gains an advantage to himself he will be deemed guilty of fraud, either actual or constructive, depending upon his intent and purpose.” *Doner v. Phoenix Joint Stock Land Bank of Kansas City*, 381 Ill. 106, 114 (1942). Such an agent “has the burden of rebutting the presumption of fraud by clear and convincing proof that he has not betrayed the confidence reposed in him.” *Id.*

¶ 26 Respondent’s burden was to show by clear and convincing evidence that changing the beneficiary was not fraudulent. *Id.*; *Matter of Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997). Such a showing required her to provide evidence that the decedent wanted respondent to be the beneficiary. Respondent did not present evidence that the decedent wanted her to change the beneficiary. She argued that it was just a happy coincidence that she became the beneficiary:

she just signed what the bank gave her. It is irrelevant that she did not know what she was doing. Respondent has cited to no case which holds that only actual fraud would prevent her from being the proper beneficiary. The fact that respondent had no evil intent is irrelevant to the facts before us. No evidence was presented that decedent intended that the money at issue go to respondent, rather than the estate, upon decedent's death.

¶ 27 In order to overcome the presumption of fraud, respondent had to show that she acted in accordance with the decedent's wishes. No such evidence was presented. A directed verdict is only proper where no other result could possibly stand. Respondent did not make such a showing in this case. She presented no evidence that she changed the beneficiary at the decedent's request. The evidence was not such that no contrary verdict could ever stand. In fact, the record contains no evidence whatsoever to rebut the presumption of fraud. I would reverse and remand.