2015 IL App (5th) 140221-U

NO. 5-14-0221

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re ESTATE OF EMIL KITTEL, Deceased	)	Appeal from the
	)	Circuit Court of
(Jack Kittel, Executor,	)	Madison County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-P-675
	)	
Jeanne Kay Landers,	)	Honorable
	)	Thomas W. Chapman,
Defendant-Appellant).	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in finding that stepdaughter fraudulently benefitted from fiduciary relationship with the deceased.

¶ 2 Jack Kittel, son of Emil Kittel, the deceased, and independent executor of the estate of Emil Kittel, filed a complaint in the name of the estate of Emil Kittel against defendant, Jeanne Kay Landers, the deceased's stepdaughter. The complaint alleged that Landers had a fiduciary relationship with the deceased, and fraudulently derived significant financial benefit from that fiduciary relationship. After determining that a fiduciary relationship did exist, the circuit court of Madison County found that Landers

fraudulently benefitted from that relationship. Landers appeals contending that the court's decision was against the manifest weight of the evidence. We agree, and therefore reverse.

¶ 3 The record reveals that the deceased, Emil Kittel (Kittel), was married to Bernadine Kittel, his second wife, for almost 30 years. At the time of their marriage, the deceased and Bernadine executed antenuptial agreements referencing each party's holdings in order to protect their assets for each party's respective families. Each party also executed a last will and testament leaving their respective possessions to their biological children. These documents were not altered during the remaining lifetimes of the parties.

¶ 4 Landers was one of Bernadine Kittel's daughters, and therefore, Kittel's stepdaughter. Landers was close to both her mother and stepfather and helped them throughout their marriage. Jack Kittel, the deceased's son, lived out of town, but did keep in touch with his father. Landers also kept in touch with Jack, regularly giving him updates about his father and stepmother. Kittel was not particularly close to his other children, many of whom predeceased him.

¶ 5 In July of 2010, Bernadine Kittel, passed away. Soon after Bernadine's death, Kittel entered the hospital for certain medical problems and depression. In September of 2010, he later moved to an assisted living facility. He subsequently reentered the hospital for another two weeks, and then returned to the assisted living facility until December 11, 2010, the date of his death. Kittel was 88 at the time of his death. He had not been mentally incapacitated during any of the time he was hospitalized, nor was he bedridden.

In fact, when he resided at the assisted living facility, he still drove a car and came and went as he pleased.

¶ 6 After Bernadine's death, Landers continued to help her stepfather. She regularly checked on the house that he and Bernadine had lived in, picked up his mail, and visited with him a couple times a week. She also started helping him pay his monthly bills by writing certain checks from his account. The balance in the account when she started to help write checks for him was approximately $15,000. In early August, Kittel instructed Landers to pick up an envelope for him at the bank where he had his checking accounts and bring it to the hospital. Landers did as Kittel asked, not knowing, at that time, that the documents had been prepared to put her name on one of Kittel's checking accounts. Kittel opened the sealed envelope, signed the signature card, and then had Landers sign the card after him. Per his instructions, Landers returned the documents to the bank. The now retired bank employee who prepared the documents testified at trial that she could have only prepared the signature cards to change the names on the account on the instructions of Kittel. The signature cards made Landers a joint owner of the account, with the right of survivorship.

¶ 7 On August 24, 2010, Kittel went to the bank to liquidate a $100,000 certificate of deposit. He was alone and signed all the necessary paperwork to liquidate the certificate, and then transferred the monies into the checking account bearing both his and Landers' names. The bank employee who assisted him with the transactions testified Kittel knew what he was doing, even though he also appeared devastated over the loss of his wife. The certificate of deposit that Kittel liquidated had been in the names of Kittel and

Bernadine as joint tenants with right of survivorship. Kittel later informed Landers that he had cashed in the certificate of deposit and deposited the monies into the joint bank account. According to Landers, he also stated that he wanted her to have whatever was left when the time came.

¶ 8 Landers continued to help Kittel pay his bills from the joint checking account for the remainder of his life. After his passing, Landers paid for his funeral out of the joint checking account. She later filed a claim with the estate for a refund, however, since she had not signed for the funeral bill.

¶ 9 On December 30, 2010, the estate of Emil Kittel was opened and Jack Kittel was appointed independent executor. The will, which was admitted to probate, directed that $1,000 be given to Kittel's daughter and the residue of his estate be given to Jack. On February 18, 2011, Kittel's estate filed a petition against Landers to discover and recover information and assets, alleging concealment or embezzlement of personal property from the estate. On December 4, 2012, the estate filed a separate, two-count complaint in the probate division against Landers. The first count alleged that Landers had a fiduciary relationship when she was added as joint owner of one of Kittel's accounts, and that all transactions made to her benefit were fraudulent. The second count pertained to another certificate of deposit which was distributed to the intended beneficiaries, Kittel's grandchildren. This second count was dismissed on the grounds of *res judicata* and collateral estoppel, having already been ruled upon in a previous claim against the estate of Bernadine Kittel. The only issue, therefore, that remained for trial concerned the

$100,000 certificate of deposit that Kittel liquidated and placed in the joint checking account with Landers.

¶ 10 The trial court entered its judgment on April 22, 2014, against Landers, finding that a fiduciary relationship existed between Kittel and Landers which preexisted the creation of the joint-account relationship. The court further determined that the joint account was a convenience account. Once the court determined that the joint account was a convenience account, the court further concluded that the presumption of gift created by Kittel's placing the certificate of deposit monies into the joint account was negated. And, because Landers had not been able to rebut the presumption of fraud or undue influence associated with the fiduciary relationship by clear and convincing proof that she had exercised good faith and not in contravention of the confidence reposed in her, the trial court found in favor of the estate. Landers argues on appeal, however, that the court erred in finding that a fiduciary relationship existed, erred in finding the joint account to be a convenience account, and erred in finding that she had not overcome the presumption of fraud.

¶ 11 When there is no fiduciary relationship as a matter of law, a party must show by clear and convincing evidence the existence of such a relationship. *In re Estate of Feinberg*, 2014 IL App (1st) 112219, ¶ 32, 6 N.E.3d 310. Here, there was no fiduciary relationship as a matter of law. Therefore, the evidence had to establish, leaving no reasonable doubt in the trier of fact's mind, that a fiduciary relationship was created by the circumstances. See *In re Estate of Larimore*, 64 Ill. App. 3d 470, 470-71, 381 N.E.2d 76, 77 (1978). Appropriate factors to consider included the degree of kinship between

the parties, and their disparity in age, health, mental conditions and emotional states, as well as the business experience of the parties. *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 78, 785 N.E.2d 126, 132 (2003). The key to the finding of the existence of a fiduciary relationship, above all else, is dominance and influence. *Lagen v. Balcor Co*., 274 Ill. App. 3d 11 (1995). And, once a fiduciary relationship is shown to exist, the presumption is that a transaction between the dominant and servient parties which profits the dominant party is fraudulent. *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 757, 525 N.E.2d 203, 206 (1988). The dominant party then has the burden of proving by clear and convincing evidence that the transaction was fair and equitable, and did not result from his or her undue influence over the servient party. *Lemp*, 170 Ill. App. 3d at 757, 525 N.E.2d at 206.

¶ 12 Here, the court determined that a fiduciary relationship existed because there was a relationship of trust. The court, however, did not identify any facts pertaining to influence or dominance in reaching its conclusion that a fiduciary relationship existed. We agree with Landers that the court did not do so because there was no evidence that she dominated or influenced Kittel, or that he was even capable of being influenced. In fact, most of the evidence points to the contrary. The evidence clearly showed that Kittel knew what he was doing, despite his sorrow over the loss of his wife of almost 30 years, and that he was in complete control of his faculties and his affairs. He discussed his bills with Landers, and he knew what they were for and gave her instructions on what to do with them. Kittel went to the bank alone, and knew he had the certificate of deposit. He also knew that he wanted to deposit the monies in the joint account. While he had

physical problems necessitating hospitalization at times, his final 2½ months were spent at an assisted living facility, where he had the ability to come and go as he pleased. Moreover, Kittel was described by witnesses as someone who could not be influenced. Even if we were to agree that a fiduciary relationship existed, there was no clear and convincing evidence presented to support the finding of fraud or undue influence under the circumstances presented. Providing assistance to an elderly person alone does not establish a fiduciary relationship. The key, again, is whether that person has gained influence and superiority over the other. *Freiders v. Dayton*, 61 Ill. App. 3d 873, 881, 378 N.E.2d 1191, 1197 (1978).

¶ 13 We also agree with Landers that the court incorrectly applied a presumption of fraud despite the fact that the evidence showed no circumstances justifying that presumption. When the sole owner of a bank account adds an apparent joint tenant to the account, the law presumes that the original owner intends a gift. *In re Estate of Shea*, 364 Ill. App. 3d 963, 968-69, 848 N.E.2d 185, 190 (2006). A party challenging the presumption must overcome that presumption by clear and convincing evidence that the party did not intend to make a gift. *In re Estate of Shea*, 364 Ill. App. 3d at 969, 848 N.E.2d at 190. A convenience account, for instance, is an account, held in some form of joint tenancy, where the creator did not intend the other "tenant" to have any interest in the account, present or future, but had some other intent in creating the account. *In re Estate of Shea*, 364 Ill. App. 3d at 969, 848 N.E.2d at 191. The relevant inquiry focuses on the intent of the creator at the time the account was created, although the finder of fact, in determining the creator's intent, may properly consider events occurring after the

creation of the account. *In re Estate of Dawson*, 103 Ill. App. 2d 362, 367, 243 N.E.2d 1, 3 (1968). Here, Kittel placed $100,000 in the joint account after the account had originally been created. It is illogical that an individual would place all of his or her substantial assets in a joint account just to relieve themselves of the day-to-day burden of writing checks. *In re Estate of Harms*, 236 Ill. App. 3d 630, 635, 603 N.E.2d 37, 41 (1992). The writing of checks alone was not clear and convincing evidence that the account was a convenience account. In finding that the account was a convenience account, the court ignored the compelling evidence of Kittel's desire to let Landers have whatever was left in the account upon his passing. The establishment of these kinds of joint accounts is not uncommon. These joint accounts are often used as a form of testamentary disposition, or a will substitute, where the creator does not intend the other tenant to have any present interest, but does intend that the other tenant will have the account on the creator's death. This kind of joint account is a true joint tenancy account, with the right of survivorship, whether or not the other tenant claimed any interest in the account during the creator's life. A joint account created as an alternate form of testamentary disposition is not a convenience account. *In re Estate of Harms*, 236 Ill. App. 3d at 635, 603 N.E.2d at 41. The court erred in finding that Kittel's account was a convenience account.

¶ 14 Returning to the relationship of the parties, even if a fiduciary relationship existed, that, alone, is not enough to rebut the presumption of the intent by the creator to make a gift. There must also be some abuse or breach of the relationship. See *In re Estate of Wilkening*, 109 Ill. App. 3d 934, 939-40, 441 N.E.2d 158, 162 (1982); *In re*

Estate of Foster, 104 Ill. App. 2d 447, 453-54, 244 N.E.2d 620, 623-24 (1969). And there was no showing that Landers abused her relationship with Kittel or betrayed his confidence. While she benefitted from the deposit of the monies from the certificate of deposit into the joint account, it was Kittel who directed her to obtain the signature cards so that he could put her name on the account, and it was Kittel, alone, who went to the bank, cashed in the certificate of deposit, and then placed the monies into the joint account. There is absolutely no evidence in the record that Landers did anything to influence Kittel in these matters. Moreover, there were no transactions that benefitted Landers that she initiated without the knowledge Kittel. *Cf. In re Estate of Miller*, 334 Ill. App. 3d 692, 778 N.E.2d 262 (2002); *In re Estate of Rybolt*, 258 Ill. App. 3d 886, 631 N.E.2d 792 (1994). Given that there was no abuse of any trust or confidence that Kittel had placed in Landers, there is no presumption of fraud, leaving only the presumption of Kittel's intent to gift the joint account to Landers. See *In re Estate of Copp*, 132 Ill. App. 2d 974, 980, 271 N.E.2d 1, 5 (1971).

¶ 15 In conclusion, we find that there was no fiduciary relationship between Kittel and Landers under the circumstances presented, and, therefore, no evidence of fraud or abuse of any possible fiduciary relationship. Further, we agree with Landers that classifying the joint account as a convenience account was against the manifest weight of the evidence. Therefore, we reverse the decision of the circuit court and enter judgment in favor of Landers.

¶ 16 Reversed.