2012 IL App (1st) 113226-U

FIFTH DIVISION
June 29, 2012

No. 1-11-3226

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF AL D. ELLISON, a disabled person.	)	Appeal from the Circuit Court
	)	of Cook County
(Teena Christmas,	)	
	)	
Petitioner-Appellee,	)	
	)	10 P 1343
v.	)	
	)	
Donna Ellison,	)	Honorable
	)	John J. Fleming,
Respondent-Appellant.)	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 HELD: Trial court's finding that respondent owed the Estate $9,982.75, was not against the manifest weight of the evidence.

¶ 2 Following a bench trial on a citation to recover assets, the trial court entered judgment against respondent Donna Ellison, finding that respondent owed the Estate of Al D. Ellison (Estate) $9,982.75, for an alleged gift made after the appointment of petitioner Teena Christmas as guardian for Ellison. Respondent appeals, arguing that the trial court erred (1) in finding that

the respondent owed the Estate the amount left in a bank account, (2) the money was a valid gift, (3) respondent's power of attorney for property enabled the gift, and (4) the trial court lacked subject matter jurisdiction over the gift.

¶ 3 On March 4, 2010, petitioner filed a petition for appointment of guardian for a disabled person. The petition alleged that petitioner was Ellison's daughter and Ellison was disabled due to dementia. Ellison responded to the petition and denied that he was disabled and that he suffered from dementia. He requested that the petition for appointment of guardian be denied. On April 5, 2010, the parties appeared for the first status hearing. Ellison requested time for a second medical opinion, which the court allowed.

¶ 4 On May 5, 2010, the parties appeared for a status hearing. Respondent appeared without counsel. Both petitioner and respondent are Ellison's daughters. When asked by the trial court if any cross-petitions had been filed, Ellison's attorney answered that he had not filed a cross-petition because they did not believe "guardianship [was] necessary because we have a power of attorney." Ellison's attorney stated that the power of attorney was signed prior to the first hearing and he did not think it would be an issue that needed to be brought before the court. Petitioner noted that the first doctor's report from December 2009 found Ellison to be incapable. The court pointed out that Ellison was "signing a pretty important legal document *** well after that time." Respondent informed the court that she had powers of attorney for Ellison for property and healthcare. Respondent stated that Ellison had been diagnosed with mild dementia and prostate cancer. The trial judge asked respondent if she wanted "to serve as [Ellison's] power of attorney under this power of attorney," and respondent answered that she did. The judge advised

respondent to get an attorney and assert what she wanted to do. The judge also told respondent to keep track of the expenditures from Ellison's funds as an accounting would be done.

¶ 5 We note that no written power of attorney appears in the record on appeal. The discussion in the report of proceedings is the only indication that such a document exists.

¶ 6 At the June 1, 2010, status hearing, the trial court noted that respondent did not file a cross-petition and respondent agreed that she did not file anything with the court. After speaking the parties, the court asked if Ellison had any objection to his daughter being appointed as guardian. Petitioner agreed to move into Ellison's home to care for him. The court asked respondent if she understood, and she replied that she did.

¶ 7 On that date, the trial court entered an order appointing petitioner as plenary guardian for the estate and person of Ellison. The order stated that the factual basis for the findings was based on "the CCP-211 medical report of Dr. Nahid Alavi and the agreement of Mr. Ellison in court." The CCP-211 report from Dr. Alavi was based on an examination of Ellison on December 23, 2009. The report stated that Ellison had Alzheimer's and dementia. Dr. Alavi found that Ellison was "totally incapable of making personal and financial decision[s] due to Alzheimer, dementia which moderate to progressive [*sic*] and not reversible."

¶ 8 In July 2010, petitioner filed a petition for issuance of a citation to discover assets. In her petition, petitioner alleged that respondent transferred money from Ellison's account in her personal account. Specifically, petitioner asserted that respondent transferred $10,400, in January 2010, $2,000, in March 2010, and $400 in June 2010. Petitioner also alleged that respondent removed various items of personal property from Ellison's residence. The trial court

granted the petition and issued a citation against respondent.

¶ 9 In August 2010, the trial court conducted a hearing on the citation to discover assets. At the hearing, it was unclear what petitioner's care plan was for Ellison and where Ellison was residing. The court asked petitioner to file an updated care plan.

¶ 10 Respondent testified that she removed some items from the home because Ellison had moved into her home and the items belonged to him. When asked if she became power of attorney for Ellison on March 18, 2010, respondent answered, "I'm not sure about the date, but somewhere around that time." Petitioner's attorney then asked if it was in March 2010 and respondent answered, "yes." Respondent also testified that several years ago she was power of attorney for health care for Ellison. Respondent stated that she moved money from Ellison's account to an account she had to pay his bills. Petitioner's attorney asked if she transferred $10,400, from Ellison's account in January 2010 and respondent answered that she was "not sure about the date," she "probably did," and she did not remember. She responded that she "was transferring a lot of money out of his account to put in a separate account with her name on it to pay his bills.

¶ 11 Respondent testified that Ellison gave her a gift of the money left in the account. Respondent stated that this occurred when petitioner began her guardianship, but before petitioner had physical custody of Ellison. Respondent said Ellison told her that he did not want petitioner "to get her hands on none of [his] money. So you keep the money." Respondent declined the money, but Ellison told her keep it. Respondent did not know how much money was remaining, she estimated "probably about $8,000." Respondent testified that she gave the

money away. Respondent affirmed that this occurred around June 1, 2010, when petitioner was appointed guardian.

¶ 12 An updated care plan was filed and approved in October 2010. The care plan stated that Ellison would live at his home and be supervised by petitioner. Two nights a week Ellison would stay the night at petitioner's house. The care plan listed petitioner's significant other, a friend and a grandson to supervise Ellison when petitioner was unable to do so.

¶ 13 In December 2010, petitioner filed a petition to issue a citation to recover assets. Petitioner repeated her allegations that respondent withdrew $10,400, $2,000, and $400, from Ellison's bank accounts and that respondent removed various items of personal property from Ellison's home. The petition alleged three counts against respondent: conversion (count I) for wrongfully converting control and ownership over Ellison's funds and possessions; breach of fiduciary duty (count II) that respondent, as power of attorney, acted contrary to the best interests of Ellison by breaching her fiduciary duties owed to Ellison not to financially exploit him; and damage to property (count III) that respondent locked Ellison out of his home and petitioner incurred costs to gain entry. The trial judge issued the citation to recover assets against respondent. We note that a new trial judge presided over this case beginning in December 2010.

¶ 14 In May 2011, respondent filed her answer to the petition. Respondent admitted that she transferred $10,400, and $2,000, from Ellison's account to an account in her name, but asserted that the transfer was made at Ellison's request. She denied transferring the $400. She claimed that she held a power of attorney for Ellison from March 18, 2010, to June 1, 2010. She denied that she had any funds or items in her control beyond items left in her possession by Ellison.

Respondent also denied that she breached her fiduciary duty, acted contrary to Ellison's best interests or financially exploited him. She also denied locking Ellison out of his home.

¶ 15 On August 11, 2011, the trial court conducted a bench trial on the citation to recover assets. Petitioner testified that in January 2010, she noticed that Ellison was not remembering things well, such, as finances and cooking. Ellison was able bathe himself. She stated that money disappeared from Ellison's account and went into an account belonging to respondent.

¶ 16 Respondent testified at the hearing as an adverse witness for petitioner. Petitioner's attorney asked respondent if she executed a power of attorney on March 18, 2010, and respondent answered, "yeah." She admitted that she changed accounts into her name with Ellison's permission. Respondent stated that she did not know "exactly how much [money] it was." When asked if she transferred $10,400, from Ellison's account, respondent said no. Respondent also said she did not remember the transfer of $2,000. Respondent was impeached with her testimony from the August 2010 hearing and admitted that she gave answers about transferring money. Respondent described the account that received the transfers as a "secondary account" for Ellison, but respondent's name was on the account while Ellison's name was not. Respondent testified that she did not remember her prior testimony about the gift of the remaining money.

¶ 17 On cross-examination, respondent explained that she opened the second account with her father present when Ellison could not account for money missing from his account. Respondent said she did not write any checks on the account, but used it for online banking and to pay Ellison's bills. She paid his utilities and taxes. Respondent stated that she took food, clothing

and other items from the house when she moved Ellison into her home.

¶ 18 Respondent was unsure when she closed the account holding Ellison's money, but Ellison was with her. Respondent testified that Ellison asked her why they had been going to court. She told him that it was because petitioner wanted guardianship over him. Ellison said he did not want to be with petitioner and asked what did petitioner want, his money. Respondent told him, "You know that's what it's about." Ellison then told her to take his money, but respondent said she did not want the money. Ellison said to take the money and give it to the kids because "if [he] ain't got none, maybe [petitioner will] leave [him] alone." Respondent closed the account and gave the remaining money to her four children. Respondent admitted that this was after the guardianship proceedings had been initiated. Respondent testified that Ellison still had a $10,000 certificate of deposit (CD) and a second CD could not be located. She denied soliciting money from Ellison. She estimated there was around $9,000, left in the account when it was closed.

¶ 19 Ellison testified that respondent "sometimes" helped him pay his bills. He did not remember respondent opening an account to transfer money. Ellison did remember the $9,000. He stated that he did not know where it went and he did not care where it went. He said he was "through with it." He also said that he would "like to spend it [himself,] but [he] didn't have a chance to spend it."

¶ 20 Jerry Stokes testified that he was respondent's brother-in-law and he was present in the car when Ellison gave the money in the account to respondent. Stokes said that respondent was reluctant to take the money, but agreed to take it when the money was intended for her children. Stokes stated that Ellison asked why petitioner was taking them to court and respondent told

Ellison it was about money. Ellison said he would get rid of the money so petitioner would leave him alone.

¶ 21 The parties stipulated that the amount of money received by respondent was $9,982.75. Respondent admitted that this money was taken from the account on June 3, 2010. During arguments, respondent's attorney stated that respondent "no longer [had] a power of attorney after June 1st because *** someone else was awarded guardianship, and the power of attorney was apparently cancelled."

¶ 22 The trial court entered judgment against respondent in the amount of $9,982.75. The court held that there was not sufficient proof regarding the items from the house. The court made the following findings on the record.

> "So at that point, there had been a judicial finding that Mr. Ellison was incapable of making his personal or financial decisions. So any gifting they would have to come to court to ask for the gift, and then we would have to have a finding at that point, because he had been adjudicated disabled.
>
> Whether or not, in fact, he had donative intent, this isn't even a situation where before adjudication that the gifts were made. This is definitely a situation that happened after he was adjudicated disabled and incapable of making personal financial decisions.
>
> ***

> So the point of having a guardian at that point of person and state [*sic*] is to secure his assets. If he wished to make a gift, then what you do is come into court and say he wants to make a gift, and the court has a hearing to determine whether or not he has the ability to form the intent to make that gift.
>
> That didn't happen. That money was – should have been part of the estate as of the day he was adjudicated. And he did not have the power on his own at that point to make that gift without coming into court. And his testimony here today was he wanted to spend it himself, and probably wasn't that he was giving the gift to his daughter out of the kindness of his heart. It was kind of like, well, if I can't have it, I don't care what happens to it; which is basically what his testimony is today, which I don't see basically as someone forming a donative intent."

¶ 23 In August 2011, respondent filed a motion to vacate the judgment or a new trial, which the trial court denied in September 2011.

¶ 24 This appeal followed.

¶ 25 On appeal, respondent argues that the trial court erred in finding that the $9,982.75 judgment award was part of the estate and owed by respondent. Respondent contends that the trial court's order did not find that she committed any of the legal claims alleged in the citation to recover assets. Specifically, she asserts that there was no finding by the trial court that she

converted the money or a breach of fiduciary duty. Respondent also argues that the money was a valid gift by Ellison, that the power of attorney enabled the gift, and the trial court lacked subject matter jurisdiction over the gift because at the time of the appointment of the guardian, no findings were made as to the power of attorney.

¶ 26 Although petitioner has not filed a brief in response, we may consider the appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 27 Under section 16-1 of the Probate Act of 1975, a party may file a citation to discover and recover assets belonging to an estate. 755 ILCS 5/16-1 (West 2010); see also *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 250 (2006). In a citation proceeding, the trial court "may examine the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may determine all questions of title, claims of adverse title and the right of property and may enter such orders and judgment as the case requires." 755 ILCS 5/16-1(d) (West 2010). "The objectives of a citation proceeding under the Probate Act are to obtain the return of personal property belonging to the estate but in the possession of, or being concealed by, others or to obtain information to recover estate property." *In re Estate of Elias*, 408 Ill. App. 3d 301, 315 (2011). To recover property in a citation proceeding, the petitioner must initially establish a *prima facie* case that the property at issue belongs to the estate, then the burden shifts to the respondent to prove his or her right to possession by clear and convincing evidence. *Elias*, 408 Ill. App. 3d at 315. "The alleged donee of a gift carries the burden of proving the existence of donative intent in the donor, and proof

must be clear and convincing in order to establish the gift." *Hofferkamp v. Brehm*, 273 Ill. App. 3d 263, 274 (1995). A trial court's finding that certain property belongs to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Elias*, 408 Ill. App. 3d at 316.

¶ 28 It is uncontested that respondent took $9,982.75, from Ellison's bank account after the trial court had appointed petitioner as guardian. Respondent argues that the money was a gift from Ellison and he did not lack donative intent. The trial court held that the money from bank account belonged to the Estate and no gift could have been after a guardian had been appointed without court approval because Ellison was incapable of making financial decisions. Respondent contends that the judgment was against the manifest weight of the evidence because the trial court did not find either conversion or a breach of a fiduciary duty as alleged in petitioner's citation petition.

¶ 29 "To prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property." *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114-15 (1998). The trial court found on the record that the $9,982.75, belonged to the Estate and that respondent took the money after Ellison had been found incompetent by the court.

¶ 30 "The test of a donor's mental capacity to make a gift is whether at the time of the transaction the donor had the ability to comprehend the nature and effect of his act." *In re Estate of Clements*, 152 Ill. App. 3d 890, 894 (1987). "Illness and impairment of the mind incident to

old age do not necessarily indicate so great a deterioration of capacity that an individual is unable to understand the nature and effect of the transaction or to protect his own interests." *Clements*, 152 Ill. App. 3d at 894. "If the donor is incompetent at the time of the alleged gift, however, the presumption of donative intent is completely overcome." *Clements*, 152 Ill. App. 3d at 894.

¶ 31 We find that there was ample evidence to support the trial court's finding that the money was part of the Estate and owed by respondent. The trial court's findings implicitly concluded that respondent converted Ellison's money because the money belonged to the Estate, Ellison was incapable of having a donative intent, and respondent took the money from Ellison.

¶ 32 The court previously had ruled that Ellison was incapable of making financial decisions. A report from Ellison's physician, based on a December 2009 examination, stated a diagnosis of Alzheimer's and dementia. The doctor concluded that Ellison was "totally incapable of making personal and financial decisions." This report was filed with the trial court at the time petitioner was appointed guardian. Respondent was present in court when the trial judge appointed petitioner as guardian on June 1, 2010. The order appointing petitioner as guardian stated that Ellison was a disabled person and was "totally unable to manage his/her estate or financial affairs." The court's finding that Ellison was incompetent negates any donative intent after that date. Ellison could not have formed a donative intent on June 3, 2010, to give the balance of his money to respondent. As the trial court stated, any gift after the appointment of the guardian had to be approved by the court. Respondent did not seek this approval and took the money without authorization.

¶ 33 Further, respondent did not provide any evidence to establish a donative intent. Her

testimony disclosed that she informed Ellison that petitioner was seeking guardianship to get Ellison's money. In response, she said that Ellison told her to take the money so petitioner would leave him alone. This conversation was not sufficient proof of donative intent by Ellison. Moreover, Ellison testified that he did not know where the money went and that he would have liked to spend the money himself.

¶ 34 The trial court's conclusion that respondent, without authorization, took $9,982.75, belonging to Ellison after the court had found him to be a disabled person and incapable of managing his financial affairs, was not against the manifest weight of the evidence. Respondent converted Ellison's money, as alleged in the citation, and the court's findings sufficiently established the count for conversion.

¶ 35 Respondent supports her position with inconsistent contentions. First, she argues that she could not have breached her fiduciary duty because "[n]o evidence was introduced concerning the power of attorney, which was not introduced or included in the record. The document was created in March 2010 but no evidence was offered as to the effective date." Later in her brief, respondent abandons this argument and contends that the power of attorney was valid and remained in effect after the guardian was appointed, making the gift valid.

¶ 36 After a thorough search, we can conclusively state that the record on appeal does not contain the power of attorney for either property or for health care naming respondent. We also note that the limited testimony concerning the purported power of attorney is vague, conclusory and uncertain. At the hearing on the citation to discover assets, respondent could not testify as to the date the power of attorney was executed. Nor did she ever refer to any exhibit as the

document or instrument purporting to be the power of attorney.

¶ 37 Respondent, as the appellant, bears the burden of providing a sufficiently complete record to support her claim or claims of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant,* 99 Ill. 2d 389, 391-92 (1984). Any doubt arising from the incompleteness of the record will be resolved against the appellant. *Foutch,* 99 Ill. 2d at 392.

¶ 38 A "power of attorney" is defined as "an instrument granting someone authority to act as agent or attorney-in-fact for grantor." Black's Law Dictionary 1191 (7th ed. 1999). An "instrument" is "a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate." Black's Law Dictionary 801 (7th ed. 1999). Under the Illinois Power of Power Act, the General Assembly has found that "the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent to act for them in dealing with their property and financial affairs." 755 ILCS 45/3-1 (West 2010). As pointed out above, no such form or a substantially similar written document appears anywhere in the record.

¶ 39 Since no validly executed power of attorney appears in the record, we conclude that respondent forfeited any argument involving a power of attorney.

¶ 40 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 41 Affirmed.