2014 IL App (1st) 13-2125-U

FOURTH DIVISION
March 13, 2014

Nos. 13-2125 and 13-2192, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JUDITH GRAMER, Executor of the Estate of Otto Gramer,	)	Appeal from the Circuit Court of Cook County.
Petitioner-Appellant,	)	
v.	)	No. 11 P 1671
COLLEEN MAFFIA,	)	Honorable Susan Coleman,
Respondent-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

Held: The trial court's order granting respondent's motion *in limine* to exclude any evidence that decedent on prior occasions had created convenience only joint bank accounts with others was not an abuse of its discretion and is affirmed as such evidence was not proper habit evidence and was not relevant to the accounts at issue here. The trial court's finding that petitioner failed to rebut by clear and convincing evidence the presumption that when the decedent opened joint

accounts he intended the accounts as a gift to respondent was not against the manifest weight of the evidence and is also affirmed.

¶ 1 Following Otto Gramer's death on January 31, 2011, a probate estate was opened. The Executor of the Estate, Judith Gramer, the decedent's ex-wife, filed a Petition for Citation to Discover Assets requesting that respondent, Colleen Maffia, disclose information regarding two accounts upon which the decedent had named her as a joint tenant. Prior to trial, respondent filed a motion *in limine* seeking to bar any and all evidence of convenience only accounts that the decedent had established prior to the accounts at issue here. The trial court granted respondent's motion *in limine* finding that the creation of prior convenience accounts was not proper habit evidence and was not relevant to whether the accounts at issue here were convenience accounts.

¶ 2 Following the petitioner's case-in-chief at a bench trial, respondent moved for a directed finding. The trial court granted respondent's motion because it found that petitioner had failed to present clear and convincing evidence sufficient to overcome the presumption that the accounts were gifted to respondent. Petitioner now appeals the trial court's rulings on respondent's motion *in limine* and motion for a directed verdict.

¶ 3 BACKGROUND

¶ 4 Following the decedent's death, petitioner filed a Petition for Citation to Discover Assets directed to respondent seeking information about two accounts created by the decedent that named respondent as a joint tenant. Prior to trial, respondent filed a motion *in limine* seeking to preclude the introduction of any evidence regarding other accounts created by the decedent that were not the two accounts at issue in this appeal, arguing that such evidence was irrelevant. Petitioner responded by arguing that such evidence was relevant and was evidence of the decedent's habit of setting up his bank accounts as convenience accounts. The trial court granted

respondent's motion *in limine* finding that such evidence was not proper habit evidence and was not relevant to the decedent's intent at the time he created the accounts at issue here, namely the CD account and the money market account in respondent's name. The case then proceeded to trial and the following evidence was presented during petitioner's case-in-chief.

¶ 5 Respondent was called as an adverse witness. Respondent testified that the decedent had been a friend of the family growing up, and that after respondent's parents divorced, her mother, Patricia Cuchetto, dated the decedent for about eight years before they broke up in 2007. After the break up, respondent continued her relationship with the decedent.

¶ 6 On November 3, 2009, respondent went to the bank with the decedent and opened a five-year CD account in the amount of $30,000. The $30,000 came from a check signed by the decedent. At the direction of the decedent, respondent wrote "not a loan" on the memo line of the check prior to placing the money into the CD account.

¶ 7 Respondent also established a money market account with the decedent on December 3, 2009 in the amount of $20,000. Prior to setting up this account, the decedent wrote a cashier's check to respondent in the amount of $19,808.46 as well as a check made payable to respondent in the amount of $191.54. Their intent was to add these amounts to the CD account. However, when they arrived at the bank, they learned that they could not deposit the money into an already established account. As a result, they decided to create the money market account instead so they could have an account that they could dip into whenever needed. The only conversation the decedent and respondent had about the money market account was that respondent could use the money in the account if she needed it.

¶ 8 In December 2010, respondent had a conversation with the decedent about her daughter's upcoming baptism, which she was planning to have in March 2011. The decedent told

respondent to use the money from the money market account for the reception. The decedent passed away on January 31, 2011 before the baptism took place. While the decedent was alive, respondent made two withdrawals from the money market account—one for $1,931.36 to pay the decedent's real estate taxes and one in January 2010 for $500, which she recalled after reviewing the withdrawal slip with her name on it.

¶ 9 Respondent did not make any withdrawals from the CD account during the decedent's lifetime because it was her understanding that there would be a penalty for doing so. Respondent did not report the interest made on the CD account or the money market account on her 2009 or 2010 tax returns, and she did not disclose any gifts from the decedent in her tax returns because she did not know she had to.

¶ 10 On or about November 27, 2009, after the creation of the CD account but before the creation of the money market account, respondent needed money to pay off credit card bills. She wanted to take the money from the CD account, but the decedent said he would rather it be taken from his account and he loaned respondent $2,700. Respondent paid the decedent back for this $2,700. Following the decedent's death, respondent withdrew the money from the CD account before the five years was up and did not incur a penalty fee.

¶ 11 Respondent testified that her name was placed on the CD account and money market account in 2009 because she was about to start a family and the decedent told her he wanted to make sure that she was taken care of in the event that something happened to him, such as his death. She added at trial that the money was "for both now and later." Respondent testified that she did not attend the decedent's funeral. However, she did obtain a copy of his death certificate on February 11, 2011 and brought it to Citibank in order to transfer the money from the money market account she had with the decedent into her own account. Respondent also closed out the

decedent's CD account, which contained $30,034.08, and opened her own CD account. In April 2011, respondent closed both accounts that she had created in her name and placed the money into an account that she opened with her husband. This new account totaled $47,740.

¶ 12 Next, petitioner called Pablo Robledo to testify. Robledo testified that he was the neighbor of the decedent for approximately ten years. Robledo testified that during the last three years of the decedent's life, the decedent mentioned that "a lady was helping him pay the bills." He assumed this lady was respondent and assumed that this meant he was placing respondent's name on bank accounts.

¶ 13 Petitioner then called Deborah Gramer-Amp to testify. Amp testified that she was the daughter of the decedent. Amp had been added to the decedent's money market savings account before 2008. At the time the decedent placed approximately $50,000 into a CD account and money market account for respondent, Amp was unaware of any other liquid assets that the decedent owned. Besides the $50,000 in liquid assets, the decedent had a home, a boat, a trailer and a golf cart.

¶ 14 Petitioner called Laurie Gramer to testify. Laurie testified that she is married to the decedent's son, Christopher Gramer, and has been for 20 years. An offer of proof was made during Laurie's testimony wherein she testified that the decedent placed her name on a checking account about ten years ago as a matter of convenience in the event that anything happened to the decedent. While she was named on the checking account, she would write checks for the decedent (and he would sign the checks). She did this for approximately three months immediately after the decedent had been released from the hospital. On cross examination, Laurie testified that she was still named on the checking account at the time of the decedent's death.

¶ 14 Petitioner then called Judith Gramer to testify. Judith testified that she was married to the decedent from 1961 until 1991. She testified that the decedent's will, which was drafted and signed in 1969, was the only will to her knowledge. The will left the decedent's assets to Judith, or if Judith had passed away, their children. Judith testified that she never discussed finances with the decedent after they divorced in 1991.

¶ 16 Petitioner rested, and respondent moved for a directed verdict. Respondent argued that petitioner had not rebutted by clear and convincing evidence the presumption that the joint accounts were gifts. Petitioner argued that she had presented clear and convincing evidence sufficient to overcome the presumption of a gift by showing that the decedent intended to create a convenience account and *cited In re Estate of Shea* in support of her argument. The trial court summarized the testimony that had been presented over the two-day case-in-chief and granted respondent's motion for a directed verdict. The trial court found that petitioner had failed to overcome the presumption of a gift and noted that there was no evidence that the decedent ever intended the accounts, a CD account and money market account, to be used for convenience purposes, and there was no evidence that the accounts were ever in fact used for convenience purposes. The Estate filed a motion for new trial, which was denied. The Estate now appeals the trial court's rulings granting respondent's motion *in limine*, granting respondent's directed verdict and denying petitioner's motion for a new trial. For the reasons that follow, we affirm the trial court's rulings.

¶ 17 ANALYSIS

¶ 18 Motion *in Limine*

¶ 19 At the outset, we note that petitioner's notice of appeal does not specify the trial court's ruling on respondent's motion *in limine* as a basis for this appeal. The notice of appeal only

references the trial court's March 22, 2013 order granting respondent's motion for a directed verdict and June 25, 2013 order denying petitioner's motion for a new trial.[1] Illinois Supreme Court Rule 303 provides that the notice of appeal "shall specify the judgment or part thereof appealed from and the relief sought from the reviewing court." Ill. Sup. Ct. R. 303 (eff. Jan. 12, 1967). However, it is well settled that a notice of appeal is to be liberally construed and should be considered as a whole (*Honkomp v. Dixon*, 97 Ill. App. 3d 476, 479 (1981)), and an appeal from an unspecified judgment is not waived (1) where the deficiency is one of form rather than substance or (2) where the unspecified judgment is "a step in the procedural progression leading to the judgment specified in the notice of appeal." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979). Here, because we recognize that the ruling on the motion *in limine* was "but one step in the procedural process" leading up to the trial and directed verdict, we find that the issue on appeal has not been waived. See *Jewel Companies, Inc. v. Serfecz*, 220 Ill. App. 3d 543, 548 (1991).

¶ 20 Respondent's motion *in limine* number one requests that the trial court preclude any evidence regarding conversations about accounts that were created by the decedent before the two accounts at issue here. Respondent argues that evidence of other accounts is irrelevant. Petitioner in turn argues that the accounts are relevant and admissible as habit evidence to show the decedent's habit of creating convenience accounts. The trial court granted respondent's motion *in limine* finding that such evidence was not relevant and not proper habit evidence.

¶ 21 Evidence is relevant if it has any tendency to make the existence of any fact of

[1] Further, we note that nowhere does petitioner specify which motion *in limine* she is challenging on appeal as respondent filed 11 motions *in limine*. While we can gather from the arguments and the overall record that she is appealing the ruling on respondent's motion *in limine* number one, nowhere is this specified and the citations to the record are either too vague to tell or inaccurate.

consequence to the case more or less probable than it would be without such evidence. *People v. Boughton*, 268 Ill. App. 3d 170, 172 (1994); Ill. R. Evid. 401 (eff. Jan. 1, 2011) ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.).

¶ 22 Illinois Rule of Evidence 406 states: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Ill. R. Evid. 406 (eff. Jan. 1, 2011). A habit may be defined as a settled way of doing a particular thing. *Grewe v. West Washington County Unit District No. 10*, 303 Ill. App. 3d 299, 306 (1999). "Habit evidence is a description of a person's regular response to a repeated specific situation so that doing the habitual act becomes semiautomatic." *Id.* (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 406.1 (6th ed.1994)). The party seeking admission of the habit evidence must first establish a proper foundation to show conduct that becomes semiautomatic, invariably regular and not merely a tendency to act in a given manner. See *Knecht v. Radiac Abrasives, Inc.*, 219 Ill. App. 3d 979, 986 (1991).

¶ 23 A trial judge has discretion in granting a motion *in limine* and a reviewing court will not reverse a trial court's order allowing or excluding evidence unless that discretion was clearly abused. *Swick v. Liautaud*, 169 Ill. 2d 504, 521 (1996). A trial court abuses its discretion when no reasonable person would take the position adopted by the trial court. *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 564 (2008). In this case, we disagree with petitioner's argument that the decedent's decisions regarding unrelated accounts with persons other than respondent can be

evidence of what the decedent's intent was at the time he created a CD account and a money market account in respondent's name. We agree with the trial court's reasoning that prior instances of creating banking accounts for convenience purposes is not evidence of a "semiautomatic" habit to show that the decedent "invariably" created convenience accounts. As such, we affirm the trial court's ruling granting respondent's motion *in limine* as we cannot say that no other reasonable person would have come to the trial court's conclusion. See *Fronabarger*, 385 Ill. App. 3d at 564.

¶ 24 Directed Verdict

¶ 25 The trial court granted respondent's motion for a directed finding pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2012)) because it found that petitioner failed to present clear and convincing evidence to overcome the presumption that the decedent's two banking accounts were given to respondent as a gift. A party challenging the presumption of a gift can overcome it only by clear and convincing evidence. *In re Estate of Shea*, 364 Ill. App. 3d 963, 969 (2006); *Murgic v. Granite City Trust & Savings Bank*, 31 Ill. 2d 587, 591 (1964). For the reasons below, we affirm the trial court's ruling.

¶ 26 "[W]hen a 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 at 968–69; *Matter of Guzak's Estate*, 69 Ill. App. 3d 552, 554 (1979); *Murgic*, 31 Ill. 2d at 590. The presumption is not conclusive but the burden is upon the one who challenges the gift to present clear and convincing evidence that the intent of the party was not to make a gift. *Murgic*, 31 Ill. 2d at 590; *Matter of Guzak's Estate*, 69 Ill. App. 3d at 554. Clear and convincing evidence has been defined as that quantum of proof that leaves no reasonable doubt in the mind of the fact finder about the truth of the proposition in question. *In re John R.*, 339 Ill. App. 3d 778, 781

(2003). Although stated in terms of reasonable doubt, courts consider clear and convincing evidence to be more than a preponderance, while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *Id*. When a party must prove a point by clear and convincing evidence, this court should reverse only if it is manifestly evident that the evidence presented on the point was not clear and convincing. *In re Estate of Shea*, 364 Ill. App. 3d at 971.

¶ 27 When determining whether the donor actually intended to transfer his interest in the account at his death to the surviving joint tenant, it is proper to take into consideration the facts surrounding the creation of the joint account and all circumstances and events occurring after the creation of the joint account. *Matter of Guzak's Estate*, 69 Ill. App. 3d at 554. A party can present evidence that establishes that a joint account was used as a convenience account to overcome the presumption of a gift. See *In re Estate of Shea*, 364 Ill. App 3d at 969. "A convenience account is an account that is nominally a joint account, but is intended to allow the nominal joint tenant to make transactions only as specified by, and on behalf of, the account's creator." *Id*. "The typical purpose of such an account is to allow the nominal joint tenant to pay the true owner's bills while the true owner is unable to do so." *Id*. The rationale is that one can reasonably assume that a person does not intend to give away funds in the very account he or she relies on to pay bills. *Id*.

¶ 28 Here, we find that the trial court's ruling, that petitioner failed to rebut the presumption of a gift and "prove by clear and convincing evidence that an agreement beyond or different from the basic joint account agreement governed the ownership of the accounts" (*In re Estate of Shea*, 364 Ill. App. 3d at 971), was not against the manifest weight of the evidence. First, except for one payment of the decedent's real estate taxes, the accounts were never used to pay the

decedent's bills.[2] *In re Estate of Shea*, 364 Ill. App. 3d at 972 ("courts will consider how accounts were actually used to decide how the original owners intended them to be used."). Second, the decedent initially created a CD account for respondent and money could not be withdrawn from the CD account for five years without incurring a penalty. Thus, the $2,700 loan that respondent took from the decedent subsequent to the creation of the CD account is insignificant as she could not take money from the CD account without incurring a penalty. Further, when the decedent attempted to put additional money into the CD account for respondent and learned that he could not, he created a money market savings account that named her as a joint tenant. According to respondent, this account was created so that respondent could use it both now and in the future, and she and the decedent discussed the fact that she could use the funds in the account. See *In re Estate of Divine*, 263 Ill. App. 3d 799, 811 (1994) (A decedent's statements of his or her intentions regarding an account are, naturally, relevant to deciding what his or her intentions were.). The decedent had specifically told respondent to use money from the account for her daughter's baby shower, which was scheduled for after the decedent passed way. Respondent testified at trial that there were two withdrawals from the money market account during decedent's life—one to pay the decedent's property taxes and one $500 withdrawal in her name. Based on this evidence, the trial court found that petitioner failed to present clear and convincing evidence to overcome the presumption of a gift, and we cannot find that the trial court's ruling was against the manifest weight of the evidence. As such, we affirm the trial court's order granting respondent's motion for a directed finding.

¶ 29 Petitioner argues that we should reverse the trial court's ruling in light of the court's holding in *In re Estate of Shea*. We disagree. In *In re Estate of Shea*, where the court affirmed

[2] And, considering the decedent wrote checks to fund the accounts at issue here, it would appear that his bills were being paid from an entirely separate account.

the trial court's finding that the executor of the decedent's estate had overcome the presumption of a gift by clear and convincing evidence, the trial court made a specific finding that "[the surviving joint tenant on the account] could not provide any evidence that decedent intended the funds as a gift." *In re Estate of Shea*, 364 Ill. App. 3d at 967. Here, in contrast to the trial court's finding of no evidence of a gift in *In re Estate of Shea*, as discussed above, respondent testified that the decedent wanted her to have the money for expenses now as well as later when he might no longer be around. Respondent testified that, before passing away, the decedent told her he wanted her to use the money for her daughter's baptism. Respondent further testified that her and the decedent had talked about respondent using the money from the accounts before he passed away.

¶ 30 Further, in *In re Estate of Shea*, not only was there evidence of the accounts being used for writing checks on behalf of the decedent, but the respondent in that case also presented evidence that prior to creating the joint tenancy on the accounts, the decedent had two conversations with two different people about putting someone else's name on his accounts for the purpose of writing checks when he was no longer able to do so. Thus, when the decedent added someone else's name to his accounts, the evidence regarding the decedent's prior conversations painted "a believable picture of a person preparing for his possible disability by enabling his neighbor to pay his bills for him." *In re Estate of Shea*, 364 Ill. App. 3d at 972. Here, there is only one instance when respondent wrote a check on behalf of the decedent (to pay his property taxes) and there is no evidence of a preexisting intent to create a convenience account with respect to the particular accounts at issue here—the CD account and the money market account. As such, *In re the Estate of She*a is distinguishable from the present case.

¶ 31 CONCLUSION

¶ 32 For the above reasons, the trial court's rulings granting respondent's motion *in limine* and granting respondent's motion for a directed finding are affirmed.

¶ 33 Affirmed.