2016 IL App (2d) 150997-U
No. 2-15-0997
Order filed October 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF JOSEF FRANK, Deceased	)	Appeal from the Circuit Court of Kane County.
	)	No. 13-P-587
(Shirley DeHuelbes, as Executor of the Estate of Josef Frank, Deceased, Petitioner-Appellee, v. William J. Frank, Respondent-Appellant).	)	Honorable David R. Akemann, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment

ORDER

¶ 1 *Held*: The trial court erred in awarding a certain sum to the estate, as the evidence established that the sum was a gift to respondent during the decedent's lifetime.

¶ 2 Following an evidentiary hearing on a citation issued pursuant to section 16-1 of the Probate Act of 1975 (Act) (755 ILCS 5/16-1 (West 2014)), the circuit court of Kane County entered a judgment for $140,000 in favor of the Estate of Josef Frank, deceased (Josef), and against respondent, William J. Frank. Respondent is one of Josef's three children. The other two are Thomas Frank (Tom) and petitioner, Shirley DeHuelbes. Their mother, Katharina Frank (Katharina), died on February 10, 2012, leaving her estate to Josef, who died 12 days later. Documentary evidence admitted at the hearing includes a completed form dated August 20,

2010, adding Katharina and respondent as joint owners of the funds in an account that Josef maintained at Alliant Credit Union (Alliant). Respondent subsequently withdrew $140,000 from the Alliant account and used the funds as part of the purchase price of a home located in Lakewood. The trial court concluded that the funds did not belong to respondent. We disagree, and therefore we reverse the judgment below.

¶ 3 Josef executed a will in 2004, naming Katharina as executor. In the event that Katharina predeceased Josef, the will named petitioner as executor. Josef's will provided that, should Katharina predecease him, all of his real and personal property would be divided equally among their three children. Respondent testified, however, that in April or May of 2011, his parents indicated that they wanted to give him $140,000 as a gift. At the time, respondent owned a home in Crystal Lake, but he wanted to move into a ranch-style home. Respondent suffered from arthritis and he thought a ranch-style home would be better for him and his parents, who were elderly at that point. Respondent testified that his parents wanted to help pay for the new home. In addition, Josef and Katharina had lent money to respondent's siblings and those loans had not been repaid.

¶ 4 Respondent's Realtor, Philip Peterson, testified that it was his understanding that respondent and his parents were going to buy a home together. They looked at houses together, and Peterson was present when respondent and his parents discussed the houses. Peterson testified, "[t]he reasoning, the conversations had were that they were purchasing it together so that [respondent] would be able to help take care of [Josef and Katharina] and take them to the store and to the doctor's office or whatever they need." Peterson identified the contract for the sale of the Lakewood property. Respondent's signature is dated October 7, 2011. The sale closed on December 15, 2011.

¶ 5 Scott Jacobsen testified that he was employed by Wells Fargo as a loan officer. In September or October of 2011, respondent contacted Jacobsen in order to obtain a home loan. Respondent told Jacobsen that he planned to purchase a home that he could share with his elderly parents so that he could care for them. Respondent also advised Jacobsen that Josef and Katharina were making a gift of $140,000, to be applied to the purchase price of the home. Jacobsen prepared a fill-in-the-blank form entitled "gift letter," stating that Josef and Katharina "will give (or ha[d] given) a gift of $140,000.00 to [respondent] in time to close the mortgage transaction on the purchase of the [Lakewood] property." The form indicated that the funds were on deposit in the Alliant account, which was identified as the "donor's account," rather than the borrower's. Under the heading "Donor/Recipient Certification," the form states, "This is a bona-fide gift, and there is no obligation, expressed or implied either in the form of cash or future services, to repay this sum at this time." On November 4, 2011, Josef and Katharina signed the gift letter as donors. Respondent signed as recipient.

¶ 6 Richard Toth, an attorney, testified that he represented respondent in connection with the purchase of the Lakewood property. Toth did not represent Josef or Katharina. However, he spoke with Katharina before she signed the gift letter. Toth testified that he explained that the $140,000 discussed in the gift letter was an unconditional gift and that Katharina could not "later on come back and say I want to get repaid."

¶ 7 On November 14, 2011, respondent withdrew $140,000 from the Alliant account. Respondent testified that Katharina was present with him at the credit union when he withdrew the funds, but her back and knee were hurting and she could not make the withdrawal herself. She allowed respondent to make the withdrawal, but was within earshot of the teller while he did so.

¶ 8 Asked by petitioner's attorney who owned the funds in the Alliant account as of November 14, 2011, respondent testified, "It was a joint account where we were all three signers, me, my mother, and my father. It was not my money if that's what you're asking." Respondent insisted, however, that he was personally entitled to withdraw funds from the account, in order to "complete the gift" from his parents. Respondent acknowledged that, when asked at his discovery deposition why he was made a joint owner of the Alliant account, he answered, " 'In the event that something happened *** the money would be accessible by a family member rather than go through probate.' "

¶ 9 At issue in this appeal is whether the $140,000 that respondent withdrew from the Alliant account was a gift. A reviewing court will not substitute its judgment for the trial court's unless the trial court's decision is against the manifest weight of the evidence. *In re Estate of Berger*, 166 Ill. App. 3d 1045, 1057 (1987).

¶ 10 Ordinarily, one claiming to own property as a gift "is required to prove, by clear and convincing evidence, donative intent, the donor's parting with exclusive dominion and control over the subject of the gift, and delivery to the donee." *Koerner v. Nielsen*, 2014 IL App (1st) 122980, ¶ 18. " 'In a citation proceeding, the sole testimony of a donee as to what was done or said to him by a deceased donor is of questionable credibility and should be carefully scrutinized, as direct disproof of such declarations and conduct of the deceased donor is rarely possible. Such testimony should be considered, but sufficient corroborative evidence is required so as to make the proof of a gift clear and convincing.' " *In re Skinner's Estate*, 111 Ill. App. 2d 267, 276 (1969) (quoting *In re Estate of Hackenbroch*, 35 Ill. App. 2d 155, 162 (1962)).

¶ 11 Different rules apply, however, to funds deposited in a joint account. "The basic form of interest in a joint account is a statutorily created form of joint tenancy." *In re Estate of Shea*, 364

Ill. App. 3d 963, 969 (2006). When the owner of an account adds an apparent joint tenant, the law presumes that a gift is intended. *Id.* at 968-69. A party challenging the presumption must present clear and convincing evidence to overcome it. *Id.* at 969. There is no dispute that, in August 2010, respondent was added to the Alliant account as a joint owner along with his parents. The trial court concluded, however, that petitioner overcame the presumption that a gift was intended when respondent's name was added to the Alliant account in August 2010. Noting that respondent's testimony was the only evidence of what transpired when the funds were withdrawn from the Alliant account, the trial court then found that there was insufficient evidence to establish that the $140,000 withdrawn from the Alliant account on November 14, 2011, met the requirement for a gift at that time.

¶ 12 It has been stated that, "[i]n order for a party to rebut the presumption of a valid *inter vivos* gift attendant to the creation of a joint account, she must introduce clear and convincing evidence that the account was established as a convenience account." *Vitacco v. Eckberg*, 271 Ill. App. 3d 408, 412 (1995). "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." *Shea*, 364 Ill. App. 3d at 969. The record contains clear and convincing evidence that no *inter vivos* gift was intended when respondent's name was placed on the Alliant account. Respondent himself testified that the funds on deposit in the Alliant account did not belong to him on the date that he withdrew them. By his own admission, his name had been placed on the account so that the funds would be "accessible by a family member" and would not "go through probate."

¶ 13 However, the funds at issue were not on deposit in the Alliant account upon Josef's death; they were withdrawn during his lifetime. Contrary to the trial court's ruling, respondent

presented clear and convincing evidence that the withdrawn funds were a gift to him. Petitioner does not dispute that both Katharina and Josef owned the account as joint tenants. Thus either had the authority to dispose of funds in the account without the consent of the other. *In re Estate of Vogel*, 291 Ill. App. 3d 1044, 1048 (1997) ("although a joint tenant in real property may not convey the interest of another joint tenant without the other tenant's consent [citation], a party to a joint bank account may withdraw and dispense with all of the funds from that account, and neither he nor his estate is liable to the other joint depositors for the withdrawn funds [citations]"). Katharina and Josef both executed a gift letter unequivocally expressing the intent to make a gift of funds from the account to respondent. Even if, as petitioner argues, Josef might not have understood what he signed, there is no reason to doubt that Katharina did. She specifically authorized respondent to withdraw funds from the account, as contemplated in the gift letter, and was present when he did so. Furthermore, the gift letter definitively refutes petitioner's argument that any gift to respondent was conditioned upon Katharina and Josef taking occupancy of the home purchased with the funds from the account. We therefore conclude that the trial court's decision is against the manifest weight of the evidence.

¶ 14 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed.

¶ 15 Reversed.