2011 IL App (3d) 100264–U
Consolidated with 2011 IL App (3d) 100476-U

Order filed September 22, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re ESTATE OF WILLIAM SCHUBERT,	)	Appeal from the Circuit Court
Deceased (Geraldine Schrock, Nancy Lucas, and Citizens First National Bank, as Administrator of the Estate of Robert Schubert, deceased)	)	of the 13th Judicial Circuit, Bureau County, Illinois,
Petitioner-Appellants,	)	
	)	Appeal No. 3-10-0264
	)	consolidated with 3-10-0476
v.	)	Circuit Court No. 06-P-72
Stephen C. Donini, Individually and as Executor of the Estate of William Schubert, deceased,	)	Honorable Cornelius J. Hollerich,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Schmidt concur in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly entered judgment on the jury verdict in favor of the decedent's estate in a will contest and judgment following a bench trial on a claim that certain bank accounts payable upon death were not estate assets and should be turned over to the beneficiary listed on those accounts.

¶ 2 This matter consolidates two appeals from the same probate case. In the first appeal, the petitioners in a will contest appeal from an order of the circuit court of Bureau County entering judgment on a jury verdict. In the second appeal, the same petitioners appeal from an order of the court finding that two bank accounts held by the decedent were payable upon death (POD) accounts that had been erroneously transferred to the decedent's estate due to a mistake by the executor, the executor's attorney, and the banker. The court ordered the funds transferred from the estate to the beneficiary of the accounts. We affirm both rulings by the trial court.

¶ 3 BACKGROUND

¶ 4 Because of the length and complexity of the testimony, and as the parties are familiar with the facts of this case, we need not recite the evidence and findings of the trial court in detail. Rather, we will recite only those facts necessary to an understanding of our ruling. The parties may, however, be assured this court thoroughly reviewed the record in considering the propriety of those findings.

¶ 5 The record established that William Schubert died on September 3, 2006, at the age of 58 years. In September of 2005, Schubert was diagnosed with pancreatic cancer and underwent an aggressive regimen of chemotherapy. On July 28, 2006, shortly after beginning his cancer treatment, Schubert executed a will naming his friend, Stephen C. Donini, as his executor, and distributing the bulk of his multi-million dollar estate to Donini. Schubert's heirs at law, his mother, Geraldine Schrock, his sister, Nancy Lucas, and his disabled brother, Robert Schubert, received nothing under the will.

¶ 6 After the will was admitted to probate, Schrock, Lucas, and Robert Schubert[1] (the appellants) filed a three count will contest alleging undue influence, lack of testamentary capacity, and intentional interference with an expectancy of inheritance. Following a jury trial, the circuit court entered judgment on the jury verdict that the will as filed was valid. The appellants filed a motion for a new trial, which was denied. This appeal followed.

¶ 7 In case number 3-10-0264, the appellants raise five issues on appeal: (1) whether the jury was improperly influenced by Donini's testimony that the decedent had left a $50,000 life insurance policy to Geraldine Schrock, despite the fact that the judge sustained an objection to the testimony and issued a curative instruction to the jury to disregard the testimony; (2) whether the trial court erred in allowing a former employee of Citizens First National Bank to testify to facts surrounding a transaction involving the POD account at the bank approximately a year prior to the decedent's death; (3) whether the trial court erred in not responding to a request from the jury during its deliberations; (4) whether the trial court erred in allowing testimony from several witnesses over hearsay objections; and (5) whether the jury's verdict was against the manifest weight of the evidence. In case number 3-10-0476, the appellants raise several arguments challenging the trial court's decision to order the estate to turn over $587,935.87, which had previously been transferred to the estate.

[1] Robert Schubert died during the pendency of this cause of action and Citizens First National Bank as administrator of his estate was permitted to substitute as a party to this proceeding.

¶ 8 ANALYSIS

¶ 9 1. Testimony Regarding a $50,000 Life Insurance Policy

¶ 10 Donini testified that Geraldine Schrock was going to receive $50,000 as the beneficiary of a life insurance policy on the decedent's life. Schrock's attorney objected to the testimony concerning the life insurance policy, arguing that the policy was not part of the estate and had no relevance to the issues raised in the will contest. The trial court sustained the objection and admonished the jury to disregard the testimony. Subsequent to the jury verdict, the appellants filed a motion for a new trial, stating that Schrock had, in fact, received only an annuity of $5,352. The appellants alleged that Donini's testimony about the $50,000 policy was an intentional false statement and that the existence of the $5,352 annuity constituted newly-discovered evidence which necessitated a new trial. In denying the motion for a new trial, the court noted that the testimony regarding the purported life insurance policy had been stricken as irrelevant and the jury had been instructed to disregard it. The court further noted that the testimony regarding the policy was a very small portion of the evidence and did not have any bearing on the outcome of the case.

¶ 11 A determination whether newly-discovered evidence warrants a new trial is a matter within the sound discretion of the trial court, and any newly-discovered evidence must be of such a conclusive or decisive nature and be sufficiently important as to make it probable that a different verdict would have been rendered had the evidence been presented to the jury. *Prudential Property & Casualty Insurance Co. v. Dickerson*, 202 Ill. App. 3d 180, 185-86 (1990). The trial court's determination will be overturned on appeal only if the court abused its discretion, which occurs when no reasonable person would take the view adopted by the trial

court, or when the court's ruling is arbitrary, fanciful, or unreasonable. *Spencer v. Wandolowski*, 264 Ill. App. 3d 611, 621 (1994).

¶ 12 Here, it cannot be said that the trial court abused its discretion in denying the appellants' motion for a new trial. When the testimony concerning Schrock's possible receipt of insurance proceeds was brought up, the court sustained an objection to the relevance of the testimony. The jury was instructed to disregard the testimony. There is a strong presumption that an instruction to the jury to disregard irrelevant testimony is sufficient to cure any evidentiary defects. *Dugan v. Weber*, 175 Ill. App. 3d 1088, 1099 (1988). Since the jury was instructed to disregard the testimony that Schrock was to receive $50,000 from a life insurance policy, the fact that the statement ultimately turned out to be incorrect would not change the presumption that the jury properly disregarded the testimony. Likewise, even if the jury had been advised that Schrock may have actually received an annuity worth $5,352, the trial court's finding that this evidence probably would not have resulted in a different verdict is not unreasonable. The issue before the jury was whether Schubert lacked testamentary capacity and whether Donini exerted undue influence over Schubert. The trial court found that the presence and amount of life insurance the decedent provided to Schrock was not relevant in the will contest. This finding was not unreasonable. We find, therefore, that the trial court did not abuse its discretion in denying appellants' motion for a new trial.

¶ 13 2. Testimony Regarding POD Accounts

¶ 14 Kim Frey, a former employee of Citizens First National Bank, testified that she was a personal banking representative and assisted Schubert in September 2005 in changing the beneficiary on the POD accounts from his church to Donini. The accounts held in excess of

$500,000. The plaintiff objected to the testimony on the basis of relevance, hearsay, and as a violation of the Dead-Man's Act (735 ILCS 5/8-201 (West 2008)). The trial court overruled the objections, finding no statutory violation and also finding that the evidence was relevant to Schubert's donative intent and testamentary capacity when he executed his will a few months later. We affirm the trial court's evidentiary rulings.

¶ 15 A trial court has broad discretion in determining the relevance of proffered evidence and that decision will only be overturned on appeal if the trial court abused its discretion. *Carlyle v. Jaskiweicz*, 124 Ill. App. 3d 487, 496 (1984). Evidence is relevant if it has "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." *People v. Bolden*, 197 Ill. 2d 166, 184 (2001). Here, Frey's testimony concerning Schubert's changing the beneficiary of the POD accounts to Donini, which were executed prior to Schubert beginning chemotherapy, was offered to establish that Schubert's desire to give the bulk of personal wealth to Donini was not the result of his lack of understanding of his financial affairs due to the debilitating effects of chemotherapy. As such, Frey's testimony, if otherwise credible, would have a tendency to make it more probable that Schubert possessed the proper capacity and intent at the time the will was executed. See *Manning v. Mock*, 119 Ill. App. 3d 788, 805 (1983) (citing *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 176 (1953)) (proof of mental capacity and donative intent of the testator during a reasonable time before or after the execution of a will is sufficient to establish same at the time of the execution of the will). We cannot say that the trial court abused its discretion in finding this evidence relevant to the determination of the will contest.

¶ 16 Likewise, the trial court was correct in rejecting the appellants' objections to Frey's testimony based upon the Dead-Man's Act. An objection to the admission of testimony based upon the Dead-Man's Act is properly brought by the representative of the estate, not an adverse party. *Balma v. Henry*, 404 Ill. App. 3d 233, 239 (2010). Only the representative of an estate can either assert or waive the privilege of invoking the Dead-Man's Act. *Ruback v. Doss*, 347 Ill. App. 3d 808, 814 (2004). Here, the privilege to invoke the Dead-Man's Act does not belong to the appellants, and, therefore, they cannot assert that the Dead-Man's Act bars Frey's testimony. In other words, the appellants had no standing to raise the Dead-Man's Act. *Balma*, 404 Ill. App. 3d at 239; *In re Estate of Sewart*, 274 Ill. App. 3d 298, 308 (1995) ("It is the representative [of the estate] who is entitled to raise the objection that an adverse party or interested person is incompetent to testify [citation] and it is the representative who waives the Dead-Man's Act protection by calling a person to testify to a conversation with the decedent or to an event which took place in the decedent's presence [citation].")

¶ 17 Moreover, even if the appellants had standing to raise the Dead-Man's Act, it would not preclude Frey's testimony. The Dead-Man's Act prohibits a party or person directly interested in the outcome of a civil action from testifying on his or her own behalf as to any conversation with the decedent when that party's interest is adverse to the executor of the decedent's estate. 735 ILCS 5/8-201 (West 2008); *In re Estate of Hill*, 88 Ill. App. 3d 1038, 1041 (1980). A person is directly interested in the outcome of a case, within the meaning of the Dead-Man's Act, only if he or she will directly experience a monetary gain or loss as an immediate result of the judgment in the case. *People v. $5,608 U.S. Currency*, 359 Ill. App. 3d 891, 895 (2005). Even if the witness is an employee or agent of an interested party, the witness is not disqualified under the

Dead-Man's Act. *Id.* An employee or agent of an interested party does not have a *direct* interest in the outcome of the litigation, and the employment status affects only the credibility of the witness, not his or her competency to testify under the Dead-Man's Act. *Bernardi v. Chicago Steel Container Corp.*, 187 Ill. App. 3d 1010, 1018 (1989). Since Frey had no direct interest in the outcome of the litigation, the Dead-Man's Act had no applicability to her testimony.

¶ 18 Likewise, the trial court correctly rejected the hearsay objection to Frey's testimony. Hearsay evidence, a statement made outside of court offered to prove the truth of the matter asserted in the statement, is inadmissible. *Horace Mann Insurance Co. v. Brown*, 236 Ill. App. 3d 456, 461 (1992). However, where the mere making of the out-of-court statement is the significant fact, not the truth of the matter asserted in the statement, hearsay is not involved. *People v. Kliner*, 185 Ill. 2d 81, 150 (1998). Here, the significant fact to which Frey testified was the fact that the decedent changed the beneficiary on his POD account, not the truthfulness of his statements to Frey. Additionally, to the extent that the decedent's statements to Frey were particularly relevant, those statements were offered to establish his state of mind at the time and not to prove the truth of the underlying statement. *Horace Mann Insurance Co.*, 236 Ill. App. 3d at 461-62 (out-of-court statement of declarant is admissible when the statement tends to show the declarant's state of mind at the time of the utterance).

¶ 19 3. Question From the Jury

¶ 20 During jury deliberations, the bailiff delivered to the trial judge a request from the jury seeking to examine the will during deliberations. Before the judge could contact each counsel to make them aware of the jury's request, the jury informed the court that it had reached a verdict. The trial judge then stated on the record that, in view of the jury having reached a verdict

without viewing the will, the request was no longer at issue. The appellants maintain that it was reversible error for the trial judge not to respond to the jury's request prior to the verdict being announced.

¶ 21 As a general rule, when a trial judge receives a question from the jury during deliberations, the trial judge may, in the exercise of discretion, draft an answer to the query or simply abstain from responding. *Baraniak v. Kurby*, 371 Ill. App. 3d 310, 314 (2007); *Hojek v. Harkness*, 314 Ill. App. 3d 831, 834 (2000). We review the decision by a trial judge to abstain from responding to a jury query under an abuse of discretion standard of review. *Van Winkle v. Owens-Corning Fiberglass Corp.*, 291 Ill. App. 3d 165, 173 (1997). Additionally, a trial judge has considerable discretion in determining whether an exhibit may be taken into the jury room. *Kohutko v. Four Columns, Ltd.*, 148 Ill. App. 3d 181, 190 (1986).

¶ 22 Here, the trial judge was in the process of advising counsel of the jury's request to view the will when the bailiff brought word that the jury had reached a verdict. The record shows that only approximately 20 minutes had passed since the jury made the request. The trial judge stated on the record that it did not appear that the jury had been prejudiced by a lack of response to its request or the lack of actually viewing the will. Based upon the record, we cannot say that the court abused its discretion. The record established that the jury had the opportunity to view the will when it was placed on an overhead projector for the jury's viewing. Moreover, it is not unreasonable to presume from the fact that the jury did not wait more than 20 minutes for a response before reaching its verdict that the jury was not prejudiced when it did not receive an answer to its request. Given the record in this matter, we cannot say that the trial judge abused his discretion in not responding to the jury's request to view the will during its deliberations.

¶ 23 4. Hearsay Objections

¶ 24 The appellants next maintain that the trial court erred in allowing Charles Reed to testify concerning a conversation he had with the decedent regarding the decedent's mother and her lack of concern about the decedent's health. The appellants maintain on appeal that the trial court improperly admitted the testimony over a hearsay objection. Our review of the record concerning this testimony shows that no hearsay objection to this testimony was raised at trial. Evidentiary objections not raised at trial, even if raised in a post-trial motion, are waived. *Fornoff v. Parke Davis & Co.*, 105 Ill. App. 3d 681, 691 (1982).

¶ 25 The appellants also allege that the trial court erred in allowing the testimony of Rick Michael, Darren Peterson, Dale Kimberly, Dean Sweeny, Victor Miskowiec, and James Siebert over hearsay and foundational objections. We have reviewed the record and found no instance where the trial court overruled any specific objection on hearsay or foundational basis as to any of these witnesses. As these objections were not raised at trial, they are waived on appeal. *Fornoff*, 105 Ill. App. 3d at 691.

¶ 26 5. Jury Verdict

¶ 27 The jury returned a general verdict finding that the will admitted to probate was the valid last will and testament of the decedent. The appellants filed a posttrial motion for a judgment JNOV or, in the alternative, a new trial. The trial court denied the motion. We affirm the trial court's ruling.

¶ 28 A jury's finding that a testator possessed testamentary capacity and was not subjected to undue influence in executing a will must be upheld unless the findings are against the manifest weight of the evidence. *In re Estate of Kline*, 245 Ill. App. 3d 413, 422 (1993). Undue influence

occurs where the will of the testator is overpowered and he is induced to do or forebear an act which he would not do or would do if left to act freely. *Kline*, 245 Ill. App. 3d at 422. In order to set a will aside, "the undue influence must be of such a nature as to destroy the testator's freedom concerning the disposition of his estate and render his will that of another." *Bruault v. Feigenholtz*, 54 Ill. 2d 173, 181 (1973). Similarly, testamentary capacity requires that the person making a will have sufficient mind and memory to know the natural objects of his bounty, the character and extent of his property, and be able to make dispositions of his property according to a plan formed in his own mind. *In re Estate of Sutera*, 199 Ill. App. 3d 531, 536 (1990).

¶ 29 Here, the jury found that Donini did not unduly influence the decedent into drafting the will at issue and that the decedent possessed the requisite testamentary capacity when he executed the will. We cannot say that the jury's determination was against the manifest weight of the evidence. The evidence was conflicting. While there was extensive medical opinion testimony that the decedent's chemotherapy could have impacted his ability to think for himself, there was other medical opinion testimony to the contrary. Also, it is significant to note that the decedent made Donini the beneficiary of the POD account prior to beginning the chemotherapy treatment. The record also contained the testimony of several witnesses who testified that the decedent appeared to them to be lucid and coherent during conversation occurring during the same time frame as when the will was executed, while other witnesses testified that the decedent appeared to be wearied and debilitated during this time period.

¶ 30 The law is well settled that, when a jury is presented with questions of testamentary capacity and undue influence in a will contest and there is sufficient evidence to sustain a verdict for either side, the jury is in a better position to resolve these factual issues than a reviewing

court, and a judgment upholding the will's validity should not be reversed unless the verdict is clearly against the manifest weight of the evidence. *Kline*, 245 Ill. App. 3d at 426 (citing *Sterling v. Dublin*, 6 Ill. 2d 64, 74 (1955)). Here, reviewing the record as a whole, we cannot say that the trial court erred in entering a judgment upholding the jury's finding that the will was valid.

¶ 31 6. Order Turning Over the POD Account Proceeds

¶ 32 On September 8, 2006, Donini, in his capacity as executor of the estate, and his attorney went to the Citizens First National Bank and transferred ownership of all accounts registered to the decedent to accounts registered to the Estate of William V. Schubert, deceased. Included in the transfers were the two POD accounts totaling approximately $500,000. These two accounts were then used as estate accounts for approximately two years, during which time other estate funds were comingled with the original account proceeds.

¶ 33 On February 20, 2008, Donini, in his individual capacity, filed a request to turn over to him the original proceeds of the POD accounts. A special administrator for the estate was appointed to represent the estate on Donini's individual claim. The special administrator, after an investigation, reported to the court that the funds had been "temporarily mischaracterized" and were not estate assets. A contested hearing was held at which the appellants maintained that Donini was judicially estopped from maintaining that the accounts were not estate assets. Following the hearing, the trial court ordered the estate to turn over to Donini the proceeds of the POD accounts, totaling $587,935.87.

¶ 34 On appeal, the appellants posit that the trial court made several evidentiary errors and errors of law which require reversal of the turnover order. The appellants first maintain that

Donini failed to establish by clear and convincing evidence that the decedent intended the proceeds of the POD accounts to be turned over to Donini upon the decedent's death. We disagree. Accounts designated as "payable on death" or "POD" are presumed to be in the nature of accounts held in joint tenancy with right of survivorship which vest immediately to the named beneficiary upon the death of the account holder, and it is up to the party challenging the beneficiary's right to overcome that presumption by clear and convincing evidence. See *In re Estate of Weiland*, 338 Ill. App. 3d 585, 597 (2003). Here, the record established that the decedent designated Donini as the beneficiary of the accounts, and there is little in the record to overcome the presumption that the decedent intended Donini to take the proceeds of the accounts immediately upon his death. We cannot say that the trial court's findings of fact are contrary to law or against the manifest weight of the evidence.

¶ 35 The appellants next maintain that the trial court erred in finding, by clear and convincing evidence, that the transfer of the POD accounts to the estate did not constitute a gift to the estate. A gift is a voluntary gratuitous transfer of property from donor to donee where the donor manifests an intent to make such a gift and absolutely and irrevocably delivers the property to the donee. *In re Estate of Poliquin*, 247 Ill. App. 3d 112, 115 (1993). Proof that a transfer is a gift is shown by donative intent, delivery and acceptance. *In re Estate of Stahl*, 13 Ill. App. 3d 680 (1973). Absent a presumption that a transfer is a gift, such as when a donor places an asset in joint tenancy, the burden of proving the existence of a gift is upon the donee, *i.e.*, the party asserting the transfer was a gift, and the proof must be by clear and convincing evidence. *Poliquin*, 247 Ill. App. 3d at 116. The trial court's finding as to whether a transfer constituted a gift, requiring an evaluation of the unique facts and circumstances of the case, will not be

overturned on appeal unless it is against the manifest weight of the evidence. *Poliquin*, 247 Ill. App. 3d at 116; *In re Estate of Kaplan*, 219 Ill. App. 3d 448, 460 (1991).

¶ 36 Here, it cannot be said that the trial court's finding by clear and convincing evidence that Donini did not intend the transfer of the POD accounts to the estate to be a gift was against the manifest weight of the evidence. The trial court found to be credible Donini's testimony that, at the time the account was transferred, he did not know that the accounts were POD accounts payable to him in his individual capacity. Consistent with Donini's testimony, Frey testified that she merely assumed that Donini knew that the accounts were payable to him upon the decedent's death, and there was no discussion that the accounts were POD accounts when Donini and his attorney visited the bank to transfer the accounts. Given the evidence that Donini was not aware that he had been named the beneficiary of the accounts, the trial court's conclusion that he had mistakenly transferred the proceeds to the estate was not against the manifest weight of the evidence.

¶ 37 The appellants next maintain that the trial court erred in denying their oral motion *in limine* prior to trial in which they sought to bar the testimony of several of Donini's witnesses. A motion *in limine* is addressed to the trial court's inherent power to admit or exclude evidence, and a reviewing court will not disturb the trial court's ruling on a motion *in limine* absent a clear abuse of discretion. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (2001). Our review of the record reveals no clear abuse of discretion by the trial court in denying the motion *in limine.*

¶ 38 The appellants next maintain that the trial court erred in rejecting their claim that Donini's execution of the account documents and signature cards establishing the estate account constituted a judicial or evidentiary admission that the funds deposited into the account

(including the proceeds of the POD accounts) belonged to the estate. Judicial admissions are statements made during a judicial proceeding or contained in a document filed with a court which are deliberate, clear, and unequivocal statements by a party about a concrete fact within the party's knowledge. *In re Estate of Rennick,* 181 Ill. 2d 395, 406 (1998). Judicial admissions conclusively bind a party to the statements contained in the admission. *Rennick*, 181 Ill. 2d at 406-07. Evidentiary admissions, or non-judicial admissions, unlike judicial admissions, do not conclusively bind a party and may be contradicted or explained. *McCormack v. Haan*, 20 Ill. 2d 75, 78 (1960). Whether evidence constitutes an admission by a party is a question of law that is reviewed *de novo*. *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 480 (1987).

¶ 39 Here, the bank documents and signature cards executed at the time the estate account was established did not constitute a judicial admission as to whether the proceeds of the POD accounts were properly included as estate assets. We hold that the trial court was correct in finding that those documents were not deliberate, clear and unequivocal statements by Donini as to the ownership of the POD account proceeds. The record is clear that Donini did not, at the time the estate account was established, have personal knowledge as to the decedent's intent regarding the POD accounts. Thus, the trial court correctly determined that Donini had made no judicial admission as to the ownership of those funds. Moreover, to the extent that the account documents at issue constituted non-judicial admissions, the statements contained in those documents as to the ownership of the funds derived from the POD accounts was adequately contradicted and explained. *Rennick,* 181 Ill. 2d at 407.

¶ 40 Finally, the appellants maintain that the trial court erred in allowing Donini and Frey to testify concerning the circumstances surrounding the execution of the estate account documents

over their objections based upon the Dead-Man's Act and the parol evidence rule. For the reasons articulated above, we have found that the Dead-Man's Act did not preclude testimony by Frey regarding the POD accounts. Those same reasons apply to the instant matter. As to whether the trial court properly determined that the parol evidence rule did not prevent testimony regarding the establishment of the estate account, we noted that the parol evidence rule bars extrinsic or parol evidence only where a written instrument is clear and unambiguous. *Rakowski v. Lucente*, 104 Ill. 2d 317 (1984). Here, the question at issue was whether the funds coming from the POD accounts were mistakenly deposited in the estate account. Extrinsic evidence is permissible to establish a mistake of fact. *Beynon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill. App. 3d 754 (1983). We find no error in the trial court's use of extrinsic evidence to establish whether the proceeds of the POD accounts were mistakenly placed in the estate account.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the judgments of the circuit court of Bureau County, declaring the will to be valid and ordering the proceeds of the POD accounts to be turned over the beneficiary of the accounts, are affirmed.

¶ 43 Affirmed.