2013 IL App (3d) 120271-U

Order filed January 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re Estate of MILAN BOKAN, Deceased	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
(Karen L. Ivlow,	)	
Petitioner-Appellee,	)	Appeal No. 3-12-0271 Circuit No. 11-P-516
v.	)	
Sandra Bokan,	)	Honorable J. Jeffrey Allen,
Intervenor-Appellant).	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: Where the evidence established that the decedent was capable of managing his own affairs when he created a "payable on death" (POD) account naming his daughter as the beneficiary, the daughter was entitled to all funds held in the POD account upon decedent's death.

¶ 2 Executor of the estate of Milan Bokan, Karen L. Ivlow, brought a citation petition

seeking to recover funds she deposited into a payable on death (POD) account naming the decedent's daughter, Sandra Bokan, as the beneficiary. Sandra intervened and moved for a directed verdict. The trial court denied the motion and ordered the funds turned over to pay the estate's debts. We reverse and remand for further proceedings.

¶ 3 In January of 2000, Milan Bokan granted his niece, Karen, power of attorney to handle his personal property. Around the same time, he established multiple financial accounts at First Midwest Bank, including a checking account that was "payable on death" to his daughter, Sandra. The remaining accounts were certificates of deposit and were also designated as POD accounts. One of the certificates named Milan's other daughter, Milane, as the beneficiary.

¶ 4 In March of 2011, Milan was no longer able to care for himself at home and moved to a nursing home. Karen wrote checks from Milan's account to pay for his health care costs as his agent in fact under the power of attorney. During that time, Milan expressed concern to Karen that he would not be able to pay his medical bills.

¶ 5 On June 21, 2011, Karen liquidated the five certificates of deposit and deposited their cash value of $46,603.89 into Milan's checking account to help pay his expenses. Prior to the deposit, the checking account had a balance of $16, 606.21. Milan died seven days later, and the funds in the checking account became payable to Sandra.

¶ 6 At the time of his death, Milan had also executed a will. In it, he named Karen as the executor of the estate and provided that his property was to be divided in eight shares among twelve individuals, including Sandra.

¶ 7 On behalf of the estate, Karen filed a citation petition to recover the assets transferred

to the POD checking account. In the petition, she alleged that the transfer should be voided because, as the power of attorney, she mistakenly moved the funds from the certificates of deposit into the POD checking account.

¶ 8 Following a hearing, Sandra moved for a directed verdict. The trial court denied the motion. The court held that the POD account was, in part, an asset of the estate. The court found that it was Milan's desire to be able to meet his obligations and, to that extent, granted the petition for recovery of assets. The court determined that after the debts of the estate were paid, an amount of $16,606.21 (the checking account balance prior to liquidation) should be distributed to Sandra to honor the POD designation and an amount of $9,070.512 should be distributed to Milane as the POD designee of one of the certificates of deposit.

¶ 9 STANDARD OF REVIEW

¶ 10 A motion for judgment *n.o.v.* or a directed verdict should be granted only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 137 Ill. 2d 494, 510 (1967). Although motions for judgments *n.o.v.* and motions for directed verdicts are made at different times, they raise the same questions and are governed by the same rules of law. *Maple v. Gustafson*, 151 Ill. 2d 445 (1992). Our standard of review is *de novo*. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill.2d 147 (2006).

¶ 11 ANALYSIS

¶ 12 Sandra claims that the trial court erred in denying her motion for a directed verdict because the record demonstrates that Milan intended to create a POD checking account in

her favor. In response, the estate argues that the trial court properly concluded that the June 21 transaction was a mistake and that the transferred funds reverted back to the estate.

¶ 13 A written instrument creating a payable on death account raises the presumption of donative intent, which may be overcome only by the presentation of clear and convincing evidence by the opposing party that a gift was not intended. *In re Estate of Weiland*, 338 Ill. App. 3d 585 (2003). 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. *Bazydlo v. Volant*, 164 Ill. 2d 207 (1995).

¶ 14 Generally, a POD account is not considered an estate asset unless evidence demonstrates that it was obtained by undue influence or self-dealing. See *In re Estate of Denler*, 80 Ill. App. 3d 1080 (1980); *In re Estate of Nicholls*, 2011 IL App 4th 100871. On the death of the holder of a POD account, the Illinois Trust and Payable on Death Accounts Act (Act) (205 ILCS 625/1 *et seq.* (West 2010)) states that the beneficiary of the POD account shall be the sole owner of the account. 205 ILCS 625/4(c) (West 2010). The Act further provides that, upon the death of the holder, the institution that maintains the POD account shall distribute the proceeds to the beneficiary or beneficiaries designated in the agreement controlling the account without further liability. 205 ILCS 625/10 (West 2010).

¶ 15 As in any written contract, a POD account may be voided based on duress, fraud or mistake of fact. See generally *Gonzalez v. Second Federal Savings & Loan Ass'n*, 2011 IL App (1st) 102297, and *Dana Point Condominium Ass'n, Inc. v. Keystone Service Co.*, 141 Ill. App. 3d 916 (1986). A mistake of fact occurs when both parties reach an agreement, but the agreement is not expressed in the written instrument. *In re Marriage of Agustsson*, 223

Ill. App. 3d 510 (1992). The mistake must be mutual and common to all parties. *Beynon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill. App. 3d 754 (1983). A unilateral mistake of one party may not be relied upon to relieve that party from its obligation where the party's own negligence or lack of prudence resulted in the mistake. *Cummings v. Dusenbury*, 129 Ill. App. 3d 338 (1984).

¶ 16 Here, it is undisputed that Milan was healthy and capable of managing his own affairs at the time the POD checking account was created. It is also undisputed that Milan intended to create a POD account naming Sandra as the beneficiary. Thus, under the Act, the funds in the account are not an asset of the estate; they became Sandra's asset upon Milan's death.

¶ 17 The estate claims that the POD account is voidable because Karen's actions were based on a mistake and contravened Milan's will. The estate relies on *In re Estate of Nicholls*, 2011 IL App 4th 100871, to support its position.

¶ 18 In *Nicholls*, the decedent's nephew, who was a co-executor of the estate, acted as the decedent's agent in fact using a power of attorney and changed the POD designation on several certificates of deposit to himself. The appellate court held that the power of attorney did not authorize him to change the beneficiaries on the POD accounts. The issue before the appellate court was the nephew's banking powers as stated in the language of the power of attorney. In *dicta*, the court noted that the nephew's actions of self-dealing upset the decedent's estate plan and contradicted the terms of the will. *Id*. at ¶ 31.

¶ 19 Contrary to the estate's argument, *Nicholls* does not stand for the proposition that evidence of an estate plan can be used as clear and convincing evidence to overcome the

presumption of donative intent in a POD account absent evidence of fraud. In *Nicholls*, the nephew took affirmative self-dealing actions and the court noted that his actions deliberately upset the estate plan. Here, neither party alleges fraud and Karen did not engage in self-dealing.

¶ 20 This case is based solely on the theory of unilateral mistake. Illinois case law suggests that an allegation of unilateral mistake may support rescission of a contract where the mistake did not arise out of negligence or lack of prudence by the contracting party seeking relief. See *Cummings*, 129 Ill. App. 3d at 344-45. In this case, however, Karen's mistake was the result of her failure to inquire into the legal implications of the transfer, part of her fiduciary duty as financial power of attorney. See 755 ILCS 45/2-7 (West 2010). As such, it may not be relied upon to relieve the estate of the consequences of her actions.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County denying Sandra's motion for a directed verdict and ordering the turn-over assets is reversed, and the cause is remanded for further proceedings.

¶ 23 Reversed and remanded.

¶ 24 JUSTICE SCHMIDT, specially concurring.

¶ 25 I concur in the judgment, but write separately to point out my belief that Karen's actions in transferring the money to the POD account are only considered a "mistake" in light of what occurred *after* the transfers. Had Milan lived another year, had all the money transferred been spent on his care, and had the account balance been reduced to zero, no one would have suggested Karen made a mistake or breached any fiduciary duty. Therefore, I disagree with any suggestion that Karen breached any fiduciary duty by making the transfers. *Supra*, ¶ 20.