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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-284 / 93-1178

CLYDE E. MILNE, As Executor of the Estate of Cliford A. Milne, Deceased,

Appellee/Cross-Appellant,

vs.

MARJORIE L. BAUER,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James L. Beeghly, Judge.

Marjorie Bauer appeals and Clyde Milne cross-appeals a judgment of the district court ruling Marjorie obtained assets from the decedent, Clifford Milne, through undue influence. **AFFIRMED.**

Mark W. Fransdal and Mark S. Rolinger of Redfern, Mason, Dieter, Larsen & Moore, Cedar Falls, for appellant.

Beth E. Hansen and Kevin R. Rogers of Swisher & Cohrt, Waterloo, for appellee.

Heard by Donielson, C.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the second judicial district serving on this court by order of the Iowa Supreme Court.

HUITINK, J.

Marjorie Bauer appeals and Clyde Milne cross-appeals a judgment of the district court ruling Marjorie obtained assets from the decedent, Clifford Milne, through undue influence. We affirm.

Clifford Milne moved to La Porte City in 1985 with the help of his niece, Marjorie Bauer. At that time Clifford was in his late eighties and suffered numerous medical problems, including transient ischemic attacks (TIAs) which left him confused and disoriented.

Upon his arrival, Marjorie assumed responsibility for Clifford's care and assistance. She prepared meals, cleaned his home, did his laundry and home maintenance. Clifford entrusted Marjorie with his financial affairs and she was familiar with all of his assets. Marjorie assisted him in liquidating some assets and investing and she became joint owner of his checking account.

In January 1986 Clifford executed his will which left all of his residual estate to Marjorie and Clyde Milne, Marjorie's brother, and named them coexecutors of the estate. In June 1987 Clifford executed a power of attorney designating Marjorie as his attorney in fact.

Clifford suffered several serious bouts of TIAs which resulted in hospitalization in September 1987. He stayed briefly in a nursing home after his release but was then released to Marjorie's care. He required assistance with his personal hygiene, bladder problems, dressing, sitting, standing and walking.

In January 1988 Clifford deeded his home in La Porte City to Marjorie, reserving a life estate to himself. Clifford returned to the nursing home in April 1988 and died in September 1988. In December Clyde filed a petition for probate seeking his appointment as executor along with Marjorie.

In April 1991 Clyde filed a petition seeking removal of Marjorie as coexecutor, claiming a confidential relationship existed between Clifford and Marjorie, and she received property as a result of undue influence. Marjorie was reluctant to disclose assets to Clyde or the attorney for the estate and she refused to account for those assets which came into her ownership or under her control prior to Clifford's death.

The district court determined a confidential relationship existed and Marjorie had not sustained her burden of proving several transactions were voluntary and intelligently made by Clifford. It established a constructive trust upon all property which could be identified as originating from Clifford's estate then in Marjorie's possession as well as the following: (1) $2000 proceeds from the Waterloo Savings Bank C.D. deposited in Marjorie's account in January 1988; (2) $201.90 in interest earned on the National Bank of Waterloo C.D.; (3) $3000 representing the principal amount of IDS Bond Fund; (4) $3000 representing the principal amount of the Cornerstone Mortgage investment group; (5) $3000 in proceeds from the

First Wisconsin C.D. account; (6) $2199.34 from the American Federal Savings Bank account; (7) $30,232.65 which was transferred into sole ownership of Marjorie in 1987; and (8) $10,000 in proceeds from another C.D. The court removed Marjorie as executor, ordered her to restore the listed property to the estate, and reserved jurisdiction for entry of judgment against her for any deficiency. The district court also ordered Marjorie to pay Clyde $2500 toward attorney fees.

Our review in this equity action is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). This also applies to our review of a finding that a confidential relationship existed. Pence v. Rawlings, 453 N.W.2d 249, 251 (Iowa App. 1990).

Marjorie contends Clyde failed to prove a confidential relationship existed between Marjorie and Clifford. We disagree.

A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another. In re Estate of Herm, 284 N.W.2d 191, 199 (Iowa 1979). In its broadest sense, a confidential relationship encompasses all the positions in life wherein one comes to rely on and trust another in his or her important affairs. Id.

There is clear and convincing evidence in the record showing a confidential relationship developed between Marjorie and Clifford. Upon his arrival, Clifford relied on Marjorie to assist him in his daily living. She cleaned his home, prepared meals and choose his physicians. Clifford confided in Marjorie alone as to his finances. During the last three years of his life Marjorie handled all of his financial affairs and transactions.

Where a confidential relationship exists, a transaction by which the one having the advantage profits at the expense of the other is considered presumptively fraudulent and voidable. Pence, 453 N.W.2d at 252 (citation omitted). The burden then shifts to the party seeking to uphold the transaction to prove entire good faith on its part and free, voluntary and intelligent action by the other party to the transaction. First National Bank in Sioux City v. Curran, 206 N.W.2d 317, 322 (Iowa 1973).

Of the transactions that were questioned by Clyde Milne, the trial court found Marjorie had met her burden of proof with respect to all transfers except the following:

> (a) The July 13, 1987 deposit of $12,000 in a certificate of deposit at Waterloo Savings Bank with Clifford and Marjorie listed as joint tenants. Ownership of the account was transferred to Marjorie and her daughter Joanne Frantz on October 13, 1987. On January 13, 1988 Marjorie redeemed the certificate.
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> (b) The November 10, 1986 investment of $3000 of Clifford's funds in IDS Bond Fund on which Marjorie signed Clifford's signature and she was named beneficiary.

(c) On April 16, 1988 Marjorie wrote a $3000 check, using Clifford's funds, to Edward D. Jones & Company to purchase securities of Cornerstone Mortgage Investment Group. The account was established in Clifford's and Marjorie's names.

(d) A $3000 C.D. in First-Wisconsin-Grantsburg was redeemed by cashier's check on October 13, 1987, redeemed by Marjorie and deposited in her account on October 20, 1987.

(e) On March 2, 1986 a savings account was opened at American Federal Savings Bank with a check signed by Clifford. Marjorie closed the account on September 30, 1987 and deposit the balance of $2199.34 in her personal account.

(f) On January 2, 1986 Clifford deposited28,000 with First Federal Savings in a six month C.D. using funds originating from his checking account and securities of a Wisconsin utility. The account was a joint tenancy account. It t was closed on January 8, 1987 and a check payable to either Clifford or Marjorie. Both signed an application to invest the $30,232.65 in a Lutheran Brotherhood account, creating a joint tenancy. On September 30, 1987 the ownership was changed to Marjorie alone.

(g) On March 24, 1987 Clifford's funds were used to purchase a C.D. with National Bank of Waterloo. On September 24, 1987 Marjorie withdrew the deposit, endorsed the $10,000 redemption check as Clifford's power of attorney and deposited the funds in her personal account five days later.

We, based on our de novo review, reach the same result as the trial court regarding the transfers. Although the court found the transfers described in paragraphs (e) and (g) were made voluntarily by Clifford, this is not dispositive as to their validity. Marjorie's burden "is not met simply by showing that, at the time of the execution, he said that it was all right, or that he was glad of it." Johnson v. Johnson, 196 Iowa 343, 349, 191

N.W. 353, 355 (1923). The same influence which led to the other transactions induced the transactions in paragraph (g). See id. We therefore affirm the trial court's disposition of these transfers.

Marjorie also claims the trial court erred in denying her claim for services submitted to the estate for payment. We disagree.

There is a strong presumption that rendering services to a family member is gratuitous. In re Hunt's Estate, 256 Iowa 1076, 1088, 129 N.W.2d 618, 625 (1964). In order to overcome this presumption, the claimant must show there was an express agreement for payment or the services were in excess of what one family member might be expected to render to another. Id.

The trial court found Marjorie failed to present credible evidence showing an express or implied agreement that she would be compensated for her services to Clifford. The court found it likely Clifford deeded Marjorie his real estate in La Porte City and named her a beneficiary in his will as an "expression of gratitude for her dedicated service." The trial court reached these conclusions after carefully considering all the evidence and the credibility of the witnesses called to testify on this issue. We agree with these conclusions and affirm on this issue.

In his cross-appeal Clyde Milne contends the district court erred in failing to award sufficient attorney fees, expenses and punitive damages.

The allowance of attorney fees in estate actions is left to the considerable discretion of the trial court. In re Estate of Olson, 479 N.W.2d 610, 614 (Iowa App. 1991) (citing In re Estate of Law, 253 Iowa 599, 605, 113 N.W.2d 233, 236 (1962)). The burden is on the personal representative to show the action for fees is motivated by good faith and just cause, rather than simply personal advantage. Id. (citation omitted).

Our review of the record indicates the trial court made an effort to determine which attorney fees were attributable to protecting the interests of the estate and which were to protect Clyde's personal interests as a beneficiary. The trial court did not abuse its considerable discretion in awarding attorney fees in the amount of $2500.

Punitive damages may be awarded if a party's conduct is malicious. Malice may be actual, such as personal spite, or it may be established by the defendant's willful or reckless disregard of the rights of another. Claude v. Weaver Construction Co., 261 Iowa 1225, 1231, 158 N.W.2d 139, 144 (1968); Robinson v. Home Fire & Marine Ins. Co., 244 Iowa 1084, 1093, 59 N.W.2d 776, 782 (1953). Proof of fraudulent conduct provides sufficient justification for an award of punitive damages. Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871, 880 (Iowa App. 1983).

The imposition of a constructive trust in this case results from our finding of constructive fraud as opposed

to actual fraud involving elements of deceit or disregard of another's rights. Moreover, the record does not support a finding that Marjorie acted out of spite or ill feelings toward anyone. We therefore affirm the district court's decision denying Clyde's claim for punitive damages.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. The decision of the district court is affirmed in its entirety. Costs of this appeal are assessed two-thirds to Marjorie Bauer and one-third to Clyde Milne.

AFFIRMED.