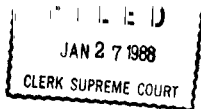


IN THE COURT OF APPEALS OF IOWA



ETHEL DAVIS,)

Plaintiff-Appellee,)

Filed January 27, 1988

vs)

7-341
86-1613

41

SHEILA K YERKEY,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County (No. CL62-36540),
Joel D Novak, Judge.

The defendant appeals the judgment in plaintiff's favor in an action for wrongful conversion of funds and the district court's order permitting the plaintiff to garnish funds held by the defendant's dissolution attorney. **AFFIRMED.**

Jeffrey G. Flagg of Des Moines for defendant-appellant.

David Shinkle of Rogers, Miller, Reavely, Schuster & Shinkle, Des Moines,
for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J.**42**

In this consolidated appeal the defendant, Sheila Yerkey, appeals the judgment against her for the wrongful conversion of funds and the district court's order allowing the plaintiff, Ethel Davis, to garnish the proceeds of the sale of her homestead. She asserts: (1) the trial court erroneously found that \$10,000 given to her by the plaintiff was not a gift; and (2) the homestead exemption protects the proceeds of the judicially-ordered sale of her homestead. We affirm.

Ethel Davis is the eighty-seven-year-old mother of Sheila Yerkey. In 1972 Ethel's husband died and the relationship between her and Sheila strengthened. In 1980 Sheila began assisting Ethel with her financial matters. She was named on Ethel's bank accounts and was her stand-by conservator.

In July of 1980, Ethel gave Sheila \$10,000. Ethel, as Sheila concedes, considered the money to be her burial fund. Ethel wanted Sheila to hold these funds for her. Sheila took the money and placed it into a new account in her name only. In 1983, Ethel gave Sheila an additional \$16,000 to manage for her.

When Ethel asked Sheila to return the \$16,000, Sheila was only able to return \$10,250 because she spent a portion of the money. This prompted Ethel to ask for the return of the \$10,000 burial fund. Sheila refused to return this claiming it was a gift.

Prior to the wrongful conversion action trial, Sheila's marriage was dissolved. The decretal court ordered the marital residence be sold and the proceeds be divided between the parties. The homestead was sold and Sheila's proceeds were delivered to her attorney. Ethel then asked the district court to condemn these funds to satisfy the judgment.

The conversion action was tried to the court, and our scope of review is for the correction of errors at law. Iowa R. App. P. 4. The trial court's findings have the force of a special verdict and are binding upon us if supported by sub-

stantial evidence. Id. Iowa R. App. P. 14(f)(1). We view the evidence in the light most consistent with the judgment. Menzel v. Morse, 362 N.W.2d 465, 470 (Iowa 1985).

Sheila contends the trial court erred by not finding the \$10,000 was a gift. She claims Ethel intended it as a gift and she is not required to repay it.

Under Iowa law a "gift" is established by an intention to make a gift, with a present intent to part with the title and to transfer all right to and dominion over the subject matter of the gift to the donee without the power of revocation, followed by delivery of the subject matter of the gift. Taylor v. Grimes, 223 Iowa 821, 826, 273 N.W. 898, 901 (1937). At law, proof of the donor's intent to make a gift must be established by a preponderance of the evidence. Jensen v. Schreck, 279 N.W.2d 374, 382 (Iowa 1979).

Since Ethel has not shown a confidential relationship exists between herself and Sheila, she has the burden of proof to show there was not a gift. See Frederick v. Shorman, 259 Iowa 1050, 1056, 147 N.W.2d 478, 482 (1966) (party asserting delivery made on a condition or trust has burden of establishing such condition or trust) and Matter of Estate of Clark, 357 N.W.2d 34, 37, (Iowa App. 1984) (burden of proof shifts if confidential relationship shown).

The trial court found that Ethel had shown there was not a gift by clear and convincing evidence. We agree.

The record indicates, as Sheila concedes, the \$10,000 was meant to be Ethel's burial fund. Sheila's ex-husband testified that Sheila told him she was holding \$16,000 in one account and \$10,000 in another for her mother. He also testified Sheila never told him the \$10,000 was a gift, and that Sheila told him all the money would be returned to Ethel. Sheila's brother, Al, testified that Ethel told him she had saved \$10,000 for funeral expenses so she would not

be a burden on the family. Viewing this evidence in the light most favorable to the judgment, we conclude it was substantial and supports the trial court's finding. We therefore hold the trial court did not err in finding the \$10,000 was not a gift.

Sheila's second contention is that the homestead exemption is a defense to the garnishment action brought by Ethel. Sheila argues the homestead laws protect the proceeds from the sale of her home.

It is well-established in Iowa that Iowa Code section 598.21 constitutes a "special declaration of statute" which renders the homestead laws ineffective to bar a judicial sale of the homestead in adjusting the property rights of the parties. In re Marriage of Tierney, 263 N.W.2d 533, 534 (Iowa 1978); see also Kobriger v. Winter, 263 N.W.2d 892, 894 (Iowa 1978); Daniels v. Morris, 54 Iowa 369, 371 6 N.W. 532, 533 (1880). The homestead laws, therefore, are not applicable when a judicial sale is ordered. Tierney, 263 N.W.2d at 535. The proceeds are subject to the claims of creditors in the hands of the parties. Id; but see Brown v. Vonnahme, 343 N.W.2d 445, 451 (Iowa 1984) ("absent judicial sale, the homestead is shielded from the creditors of both parties when the dissolution decree awards such property to one of the parties") (emphasis added).

It is clear from Tierney that Iowa Code section 598.21 overrides the homestead laws and makes the proceeds from the sale of the homestead subject to the parties' creditors. The Yerkey's homestead was ordered sold and the proceeds divided among the parties. This case, therefore, does not fall within the holding in Brown, and no homestead exemption remains in the proceeds of the sale. The proceeds are then available to satisfy Ethel's judgment and subject to garnishment. We hold the trial court did not err in denying Sheila's Motion to Quash.

AFFIRMED.