

IN THE COURT OF APPEALS OF IOWA

No. 6-771 / 95-2031

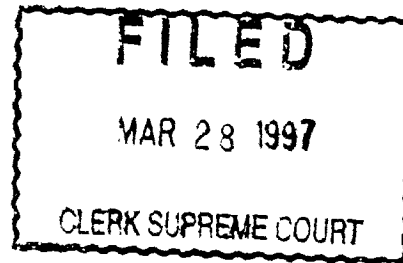
**CONSERVATORSHIP OF CARL O. OLSON  
BY FIRSTAR BANK OF COUNCIL BLUFFS,**  
Conservator,

Appellee,

vs.

**MARILYN AXTELL,**

Appellant.



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Appeal from the Iowa District Court for Pottawattamie County, Timothy J. O'Grady, Judge.

Marilyn Axtell appeals from a district court's ruling that a \$30,000 transfer from Carl Olson's account was fraudulent. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, and Gary L. Altwegg of Altwegg & Anderson, Logan, for appellant.

Dean T. Jennings of McGinn, McGinn & Jennings, Council Bluffs, for appellee.

Considered by Habhab, C.J., Huitink, and Vogel, JJ.

**PER CURIAM**

This is an appeal by Marilyn Axtell claiming the district court erred in finding a confidential relationship existed between Carl Olson and her and that she did not own the funds in the bank account on which her name was placed. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

We review de novo this action tried in equity. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, particularly concerning the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Carl Olson, born in 1906, is the ward of a conservatorship. The conservator filed this action against Marilyn Axtell seeking the return of \$30,000 Marilyn withdrew from Carl's bank account. Marilyn cross-claimed seeking the restoration of the joint account with right of survivorship. A trial was held, judgment was entered for the conservator, and Marilyn now appeals.

I. The district court found that Carl did not gift the funds in the joint bank account to Marilyn. We find no reason to disturb this finding on appeal. The bank account at issue was opened by Carl in 1986. He routinely kept more than \$30,000 in the checking account. Carl placed Marilyn's name on the account in 1991. However, Marilyn has never deposited funds in the account, did not received monthly bank statements, and did not have checks for the account. The only withdrawal made by Marilyn is the one in question in 1994. We concur with the trial court's finding that Carl did not gift the account to Marilyn in 1991.

**II.** The district court concluded that because the account was not a gift to Marilyn, the validity of the 1994 transfer had to be determined based on the 1994 events. Marilyn argues that she was a joint tenant of the account, however, and therefore had the right to withdraw any and all funds at any time.

The right of a joint tenant is generally described as “an undivided interest in the entire estate to which is attached the right of survivorship.” The precise extent or share of the undivided interest attributable to an individual joint tenant may be determined, however. The rights of the individual joint tenants must be determined from their agreement. Generally, the respective rights of the parties to a joint bank account are determined by the rules of contract law, and the intent of the parties with respect to the joint savings account is controlling. Each joint tenant is presumed to own an equal share in the joint bank account; however, this presumption is rebuttable.

*Anderson v. Iowa Dep’t of Human Servs.*, 368 N.W.2d 104, 109 (Iowa 1985) (citations omitted). Extrinsic evidence may be used to establish the rights of joint tenants during their lifetime. *See id.*; *Petersen v. Cartensen*, 249 N.W.2d 622, 625 (1977).

It is clear the parties did not intend Marilyn to have free access to the funds in the joint account. Marilyn’s own testimony indicates she did not believe she had a right to withdraw money from the account without Carl’s authorization.

**III.** Because Marilyn did not have free access to the checking account funds, the validity of the \$30,000 transfer must be determined as of May 1994. We turn therefore to the nature of Carl and Marilyn’s relationship.

Marilyn and Carl became acquainted in 1984. Over the next ten years Marilyn assisted Carl with many of his household, financial, and business activities. Carl had limited schooling—Marilyn assisted Carl in writing letters and filling out checks. After Carl could not get his driver's license renewed in 1991, Marilyn drove him to his various appointments. There was evidence that Carl could not have lived on his own without Marilyn's assistance. On May 19, 1994, the rescue squad was called to Carl's apartment where he was found lying, unresponsive, on the floor. Marilyn was the person contacted when Carl was taken to the local emergency room. Marilyn signed the transfer form as the responsible party after Carl's condition was stabilized. Marilyn transported Carl between the two hospitals.

"A confidential relationship arises 'when one person has gained the confidence of another and purports to act or advise with the other's interest in mind.'" *Coffman v. Adkins*, 338 N.W.2d 540, 543-44 (Iowa App. 1983) (quoting *Oehler v. Hoffman*, 253 Iowa 631, 635, 113 N.W.2d 254, 256 (1962)). The district court found that by May 19, 1994, Carl and Marilyn had a confidential relationship. We do not disturb this finding on appeal.

Because a confidential relationship was established, Marilyn had the burden to establish by clear and convincing evidence that the \$30,000 transfer was voluntary. *See Coffman*, 338 N.W.2d at 543. Marilyn asserts that while she was driving Carl to the second hospital, Carl told her she "better get her money out of the bank." Marilyn testified Carl was lucid during this time. They went to the drive-through portion of

the bank, but Carl did not have his checkbook. Marilyn delivered Carl to the second hospital. She then found Carl's checkbook and wrote a check payable to herself in the amount of \$30,000. She immediately purchased a certificate of deposit for \$30,000 in her name alone. Medical personnel described Carl as confused during his hospitalization. On May 24, 1994, Carl was discharged to a nursing home.

We agree with the trial court that Marilyn failed to show by clear and convincing evidence the transfer was due to free, voluntary, and intelligent action on Carl's part.

**IV.** The court ordered Marilyn to return the money, including interest, to the conservator. The court concluded, however, that it was Carl's intent in 1991 to give Marilyn the right of survivorship in the joint account. The court ordered the conservator to place the \$30,000 into an account bearing both Carl and Marilyn's names. Marilyn would have the right to any funds remaining in the account at the time of Carl's death. However, she was not to have the right to draw on the account.

The conservator was authorized to use the funds in the account for Carl's maintenance. There is no dispute before us concerning this portion of the court's order. We affirm the ruling in its entirety.

**AFFIRMED.**