IN THE COURT OF APPEALS OF IOWA

No. 0-697 / 99-1026
Filed January 24, 2001

MARVA LOU McSORLEY,
Plaintiff-Appellant,

vs.

MILLICENT L. GARCIA and LAURA A. TATTEN,
Defendants-Appellees,

and

FIDELITY and DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,
Defendant-Appellee.

FILED
JAN 24 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

The plaintiff appeals the district court's denial of her motion for directed verdict, claiming co-conservators were required to seek court approval before transferring funds and changing the beneficiary of ward's retirement account. **AFFIRMED.**

Patrick M. Flood, Omaha, Nebraska, for appellant.

Curtis J. Heithoff, Council Bluffs, for appellees Garcia and Tatten.

John Mullen, of Gaines, Mullen, Pansing & Hogan, Omaha, Nebraska, for appellee Fidelity and Deposit Co.

Heard by Mahan, P.J., and Zimmer and Miller, JJ.

MAHAN, J.

The plaintiff appeals the district court's denial of her motion for directed verdict, claiming co-conservators were required to seek court approval before transferring funds and changing the beneficiary of ward's retirement account. Plaintiff contends the district court erred: (1) in denying plaintiff's motion for directed verdict, and (2) in failing to submit a proposed jury instruction. We affirm.

Background Facts and Proceedings. John Pogge executed a will in September 1994, designating his five children as residuary beneficiaries of his estate. From May to June 1995, Pogge was hospitalized with a serious illness. While in the hospital, Marva McSorley, a close friend and associate of Pogge's in the real estate business for many years, volunteered to move into Pogge's home to care for him and manage his financial affairs after his discharge. Pogge required considerable in-home care following his release from the hospital, and did not exhibit full control of his mental faculties. McSorley and Millicent Garcia, Pogge's daughter, provided for Pogge's daily care, and McSorley managed his financial affairs.

On or about June 19, 1995, Pogge changed the beneficiary of his Keogh plan with Dain Bosworth from the Estate of John Pogge to McSorley. His attorney witnessed Pogge's signature on the change of beneficiary designation. Three days later, a neurologist examined Pogge, noting Pogge could not remember what he had for breakfast that day and he continued to have problems with short-term memory.

In August 1995, Pogge was hospitalized. He purportedly signed a durable power of attorney for health care decisions, naming McSorley as attorney-in-fact, and a voluntary petition for appointment of guardian and conservator, naming McSorley as his guardian and conservator. After a hearing, the district court determined Pogge did not have the capacity to comprehend and understand what he had signed. The court appointed Garcia and her sister, Laura Tatten, as conservators. Subsequently, Garcia and Tatten transferred the Keogh funds to a new account with Kirkpatrick Pettis, restoring the account's beneficiary to the Estate of John Pogge. None of the investments in the account were changed.

Pogge died in September 1996. McSorley filed this action against Garcia, Tatten, and Fidelity and Deposit Company of Maryland, the company that posted surety bond in the guardian and conservatorship proceeding, for conversion, breach of fiduciary duty, and indemnification. McSorley alleged the conservators' actions were void since they failed to seek approval from the probate court. Garcia and Tatten filed a counterclaim, alleging McSorley exercised undue influence over Pogge.[1]

The jury found in favor of defendants, concluding McSorley was in a confidential relationship with Pogge and she exercised undue influence over him. The district court entered judgment for defendants. McSorley appeals.

Standard of Review. We review McSorley's appeal for errors at law. Iowa R. App. P. 4. Errors not stated or argued on appeal are waived. *Zeman v. Canton State Bank*, 211 N.W.2d 346, 350 (Iowa 1973).

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[1] Garcia and Tatten also alleged intentional infliction of emotional distress. The court granted plaintiff's motion for summary judgment on this claim.

Merits. McSorley contends the district court erred in denying her motion for directed verdict. Specifically, she argues Garcia and Tatten, as Pogge's co-conservators, were required to seek court approval before transferring Pogge's Keogh funds and changing the beneficiary of the funds to the Estate of John Pogge. By failing to seek court approval, McSorley argues, Garcia's and Tatten's actions are void and cannot be ratified, and the assets must be delivered over to McSorley. McSorley also argues the district court erred in failing to instruct the jury a conservator's actions, if not done pursuant to court order and approval, are void and cannot be ratified later.

Garcia and Tatten contend McSorley has no standing to pursue her appeal because the jury's conclusion she exercised undue influence over Pogge—a decision McSorley has not appealed—voided any legally cognizable claim to the Keogh fund. Given the facts and circumstances of this case, we agree with Garcia and Tatten. We find McSorley's contentions without merit.

The court instructed the jury: "Where a confidential relationship is found to exist, any transaction by which the person in whom the trust is placed profits at the expense of the other is assumed to be undue influence and will be held presumptively fraudulent and voidable." McSorley did not object to the submission of this instruction to the jury. It therefore became the law of the case. *Poulsen v. Russell*, 300 N.W.2d 289, 294 (Iowa 1981) ("Unless objected to by a party, an instruction to the jury, right or wrong, is the law of the case."). The jury found the defendants had proven by clear and convincing evidence Marva Lou

McSorley on June 19, 1995 was in a confidential relationship with John Pogge. McSorley does not challenge this finding by the jury on appeal.

McSorley's undue influence of Pogge preceded the actions of Garcia and Tatten. The jury's finding of undue influence rendered McSorley's designation as beneficiary of Pogge's retirement account presumptively fraudulent and voidable. The undue influence of McSorley terminated any right or interest she had in Pogge's retirement account. Once the undue influence of McSorley is established, she has no further right to challenge anything that happened in the administration of the conservatorship. McSorley lacks standing to complain of any subsequent actions of Garcia and Tatten, as co-conservators, concerning the account.

In addition, an action is moot if it no longer presents a justiciable controversy because the issues involved have become academic or nonexistent. *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 540 (Iowa 1997). "Our test of mootness is whether an opinion would be of force or effect in the underlying controversy." *Id.* (quoting *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991)). The court's resolution of issues raised by McSorley would be of no effect, given the jury's finding of undue influence and her failure to appeal that finding.

Conclusion. We conclude McSorley lacks standing to raise the issues addressed in her appeal. Our resolution of the issues raised by McSorley would be of no effect, and are therefore moot.

AFFIRMED.