IN THE COURT OF APPEALS OF IOWA

No. 6-765 / 95-1856

IN THE MATTER OF THE ESTATE OF RALPH W. MARTIN, Deceased.

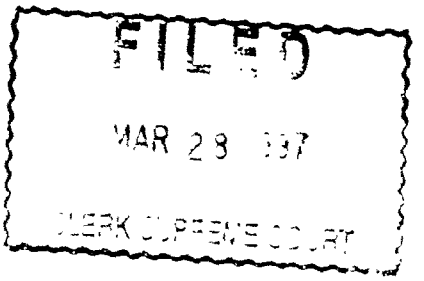
LUTHERAN HOMES SOCIETY,

Petitioner-Appellee,

vs.

MERRILL MARTIN,

Respondent-Appellant.



Appeal from the Iowa District Court for Muscatine County, J. Hobart Darbyshire, Judge.

Merrill Martin appeals a district court ruling in a probate action that the decedent had not intended to make a gift to him of approximately $250,000. **AFFIRMED.**

J. W. Conway and Thomas G. Reidel of Conway & Reidel, Muscatine, for appellant.

David J. Meloy of Stanley, Lande & Hunter, Muscatine, for appellee.

Heard by Cady, P.J., and Huitink, J., and McCartney, S.J.*

* Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The appellant, Merrill Martin (Merrill), appeals from a ruling of the district court that determined the decedent, Ralph W. Martin, did not intend to make an inter vivos gift to Merrill of certain mutual funds. The consequence of the district court ruling was that the said funds would pass under the terms of the last will and testament of the decedent which has been admitted to probate.

The appellee, Lutheran Homes Society, is the residual beneficiary under said last will and testament of the decedent.

This matter came before the district court on the application of the attorney for the estate, Merrill being named the executor of said estate. The substance of the application was that the attorney for the estate sought the instructions of the district court as to whether or not Merrill should continue to serve as the executor of the decedent's estate and a decision as to whether or not the mutual fund shares, having an approximate value of $250,000, had been gifted to Merrill by the decedent prior to the latter's death.

The trial before the district court was conducted as if this were an equitable action. Section 633.33 of the Probate Code indicates that it is. Probate actions to determine the ownership of property are equitable actions. *In the Matter of the Estate of Bates*, 492 N.W.2d 704, 705-06 (Iowa App. 1992).

The evidence adduced by Merrill supporting his claim there was such an inter vivos gift of the shares consisted of the testimony of Merrill that the decedent, on the

day before his death and on the day of his death, told Merrill the shares were to be his. The trial court received the testimony subject to the objections made by the appellee. In its decision, the trial court refused to consider the testimony of Merrill as to what the decedent had said to him and therefore found there was no evidence to support the contention of Merrill that there was a valid gift of the shares to him.

Merrill asserts it was error for the trial court to make a finding there was no such valid gift on the sole ground that Merrill's statements as to what the decedent said to Merrill were inadmissible hearsay.

Our review is de novo. *Bates*, 492 N.W.2d at 705.

Merrill was the nephew of the decedent, Ralph W. Martin. Merrill attended to most of the decedent's business. Decedent was eighty-eight years old when he died on June 19, 1994. It is clear from the record the decedent imposed great trust in Merrill. Merrill wrote checks on the decedent's bank accounts and paid his bills; he purchased certificates of deposit for the decedent; he assisted the decedent in selling the decedent's farm by negotiating the sale on the decedent's behalf; he helped prepare income tax returns for the calendar year 1993; and, in fact, in May 1994 he received a power of attorney from the decedent. This power of attorney was very broad, giving Merrill the authority to collect assets, purchase and sell investments, and to execute income tax returns on the decedent's behalf. The final act of trust was to name Merrill as executor of his estate.

A confidential relationship is found wherever confidence is reposed by one person in another person who gains resulting superiority and influence over the other. *First Nat'l Bank v. Curran*, 206 N.W.2d 317, 321 (Iowa 1973); *Curtis v. Armagist*, 158 Iowa 507, 138 N.W. 873 (1912). No one factor creates such a relationship; we look to the "multiform positions in life." *First Nat'l Bank*, 206 N.W.2d at 321-22 (quoting *Dibel v. Meredith*, 233 Iowa 545, 549, 10 N.W.2d 28, 30 (1943)).

The clear evidence in this cause convinces us that such a relationship existed between the decedent and Merrill.

The existence of this relationship, in turn, creates certain presumptions. The principal presumption arising out of a transfer or purported gift is that the gift was obtained by undue influence, and the donee has the burden of showing that the gift was obtained without undue influence and was not occasioned by any advantage taken over the donor by the donee and in view of the confidential relationship in which the donor has reposed trust and confidence in the donee. The courts must, with vigilance, scrutinize transactions wherein the dominating member receives a gift. *Merritt v. Easterly*, 226 Iowa 514, 530, 284 N.W. 397, 405 (1939).

There is no evidence here, other than Merrill's testimony as to what his uncle told him the day before his uncle passed away and the day of his death, which conversation occurred approximately one hour before his uncle passed away. We do not find this is clear and convincing evidence that a gift was intended. There is no corroboration of Merrill's testimony.

In *Johnson v. Johnson*, 196 Iowa 343, 191 N.W. 353 (1923), the supreme court said, "It is a rare case where the dominant individual in a fiduciary relation can sustain a gift to himself by the one who is dependent upon him." *Id.*, 191 N.W. at 355.

We do not find this to be that rare case.

By reason of the foregoing, it is not necessary for us to address the issue as to whether or not the testimony of Merrill as to his uncle's comments to him were admissible hearsay under the exemptions defined in Iowa Rules of Evidence 803(1), 803(3), and 804(b)(3). Clearly if it is inadmissible hearsay, there is no basis upon which to sustain the gift since there is no evidence of a gift. We choose to consider the testimony, however, and find that Merrill has failed to sustain his burden.

Based upon the foregoing, the order of the trial court is affirmed.

AFFIRMED.