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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEAN LOFING, CONSERVATOR of the Property of George Marash,

Appellant,

vs.

MIKE YANKEY,

Appellee.

Filed April 14, 1977

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No. 2-57502

Appeal from Cerro Gordo District Court -- B. C. Sullivan, Judge

Plaintiff appeals to recover funds handled by a person in a confidential relationship after an adverse holding in the trial court.

REVERSED AND REMANDED

Warren L. De Vries, of Mason City, counsel for appellant.

Pappas, McGuire & Folkers, of Mason City, William Pappas, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

The appellant is the conservator of George Marash, an 84-year-old bachelor who cannot read nor write and speaks English with difficulty. Marash came to America from his native country of Serbia, now a part of Yugoslavia, and resided in Mason City, Iowa, while employed as a laborer in a brick and tile yard in that city.

He relied upon Marica Yankovich, a close friend, to pay his bills and assist him in certain business practices. He was godfather to the Yankovich children. In 1967, when in poor health, he entered the Iowa State Hospital at Oakdale for approximately two years. During this time, Marica Yankovich turned over the handling of his funds to her son, Mike Yankey, the defendant in this action (Yankovich changed to Yankey). The eventual responsibilities of these funds amounted to approximately $4200 which was in large measure disbursed, in addition, Marash had $3500 worth of H Series Savings Bonds. These bonds were issued in the name of George Marash or Mike Yankey, enabling either to cash the bonds. The bonds were cashed by the defendant according to him at the direction of Marash, who denied that he gave permission. The proceeds were allegedly given to the defendant's mother, Marica Yankovich, allegedly at Marash's direction which Marash denies. No trace of the money was ever found nor was it accounted for.

It is note worthy that Marash allegedly gave considerable gifts to his godchildren, the defendant's children, after the defendant started handling his financial affairs, but the record reflects that he did not make gifts to these children prior to the handling of the funds by the appellee.

The trial court held in its conclusions of law that the

plaintiff had failed to meet her burden of proof regarding the gift disbursements and the items of unauthorized expenditures. Further, the plaintiff had failed to satisfy her burden of proof that the defendant had converted the four bonds in the amount of $3500 to his own use. The trial court erred in determining who has the burden of proof.

We reverse.

In reviewing this matter de novo as an equity appeal, we find that the case of Jahn v. Harmes, 249 N.W.2d 638 (Iowa 1977) is dispositive. We are bound to apply the reasoning of *"confidential relationship"* as expressed by the court in that case. We hold that in this case, the confidential relationship was established and when a person stands in such a relationship, they then have the burden of sustaining transfer to him by the other. First National Bank in Sioux City v. Curran, 206 N.W.2d 317, 322, 323 (Iowa 1973) sets forth both the responsibilities under a confidential relationship and the burden the defendant carries to rebut the presumption of overreaching by the person in a position of confidential relationship.

> "When a confidential relationship is shown, the person in whom the trust is reposed is not merely required to go forward with the evidence; he has the burden of persuasion to uphold the transfers. In re Estate of Lundvall, 242 Iowa 430, 46 N.W.2d 535. His burden is heavy. He must produce 'clear, satisfactory and convincing evidence.' Moorhead v. Miller, 171 N.W.2d 295 (Iowa). He is required to prove 'entire good faith on his part and free, voluntary, and intelligent action on the part of the grantor'. Curtis v. Armagast, 158 Iowa 507, 519, 138 N.W. 873, 878. The court stated in Merritt v. Easterly, 226 Iowa 514, 530, 284 N.W. 397, 405:
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> > Since that [confidential] relationship existed between the

> deceased and the appellant, the burden was upon the appellant to rebut the presumption of over-reaching on his part, and to affirmatively establish that in his acquisition of property, in the transactions in controversy, he took no advantage of the deceased by reason of their relationship but that she acted voluntarily with freedom, intelligence and a full knowledge of all of the facts. ...
>
> The courts must scrutinize with jealous vigilance transactions between persons sustaining relations of trust and confidence, to the end that the dominating member shall conduct himself with uberrima fide--the utmost good faith."

In reviewing this matter de novo, we see no necessity for retrial. The defendant has not sustained the burden required of him as set forth in Jahn v. Harmes, 249 N.W.2d 638 (Iowa 1977) and First National Bank in Sioux City v. Curran, 206 N.W.2d 317 (Iowa 1973).

The matter is then reversed and remanded to the district court with directions to enter an order of judgment against the defendant for $3500 in H Series Bonds plus interest and for the payments made to or for the Yankovich family during and after Marash was confined to the Oakdale Hospital in 1967.

The balance of the amount in dispute is returned to the trial court for his determination on the amount due the plaintiff-appellant based upon the record already made. This involves resolving the conflicts in the testimony concerning payments allegedly made to the ward in cash. The trial court is in a better position to pass upon the credibility of the witnesses and other evidence than are we, taking into consideration the proper burden of proof.

REVERSED AND REMANDED - all judges concur.