IN THE COURT OF APPEALS OF IOWA

No. 1999-580 (9-841) / 99-0403
Filed February 9, 2000

FILED
FEB 0 9 2000
CLERK SUPREME COURT

VINSON R. PERKINS,
Plaintiff-Appellant,

vs.

PATRICIA E. FAIRCHILD,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Plaintiff appeals the denial of his replevin action which sought the recovery of a bond and certain items of jewelry from his daughter. **AFFIRMED.**

Dennis E. Martin and Kevin J. McCoy of Martin & Martin, P.C., Omaha, Nebraska, and Rick D. Crowl of Stuart, Tinley, Peters, Thorn & Hughes, Council Bluffs, for appellant.

Robert J. Becker of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., Omaha, Nebraska, and Peter J. Peters of the Peters Law Firm, Council Bluffs, for appellee.

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

MAHAN, J.

Vinson Perkins appeals the denial of his replevin action, in which he sought the recovery of a bond and certain items of jewelry from his daughter. He contends the court erred in applying an incorrect burden of proof and in admitting hearsay under the residual exception to the hearsay rule. We affirm.

Patricia Fairchild is the only child of Vinson and Eloise Perkins. Vinson and Eloise had a very good relationship with Patricia and her son, Paceon Vetaly. Vinson and Eloise were successful in acquiring considerable assets and were generous in their dealings with Patricia.

Eloise died in June of 1996. Vinson remarried on September 19, 1997, without informing Patricia of his plans. Patricia learned of the marriage after the fact, and the communication between father and daughter on personal and financial matters dissolved quickly.

Vinson alleged Patricia took a $60,000 school bond and various jewelry from his duplex in October of 1997. Patricia adamantly denied taking these items. She contends the jewelry was a gift from her mother made in March 1996, and the bond was a gift from her father in March of 1997, and delivered in June 1997.

Vinson filed a petition for replevin to recover the school bond and jewelry. The petition was later amended. Patricia filed a general denial which did not include any affirmative defenses.

The matter was tried to the court. Testimony was received from the parties, Patricia's son, Paceon, and Patricia's cousin, Mary Jane Fogerty. Fogerty testified to certain statements allegedly made by Eloise to Patricia regarding the gifting of the jewelry. The district court ruled Vinson failed to prove by a preponderance of the

evidence he was entitled to possession of the property. The amended petition was dismissed, and ownership and possession of the property was "vested and confirmed" in Patricia. Vinson appeals.

I. Burden and Standard of Proof. Vinson contends the district court applied an incorrect burden and standard of proof. We disagree.

A replevin action is an enforcement of a plaintiff's right to immediate possession of property wrongfully taken or detained. *Iowa Truck Center, Inc. v. Davis*, 204 N.W.2d 630, 631 (Iowa 1973). Replevin is an action at law and the findings of fact made by the trial court are binding on us if supported by substantial evidence. Iowa Code § 643.2; *Flickinger v. Mark IV Apartment, Ass'n*, 315 N.W.2d 794, 797 (Iowa 1982).

Vinson had the burden to prove by a preponderance of the evidence he was entitled to possession of the bond and jewelry at the time he filed his petition for replevin. *See Marx Truck Line, Inc. v. Fredricksen*, 260 Iowa 540, 546, 150 N.W.2d 102, 105 (1967).

The issue in dispute was the immediate right of possession and the burden remained on Vinson throughout the proceedings. *Wilson v. Findley*, 223 Iowa 1281, 1299, 275 N.W. 47, 56 (1937). Patricia filed a general denial. As such, any evidence tending to negate Vinson's claim was competent and, therefore, her evidence of gift under the general denial was proper. *Id.* However, the burden still remained with Vinson. If Patricia had pled an affirmative defense of gift, she would have assumed the burden. *Id.* Our supreme court has stated:

> Counsel for appellee made a strenuous effort to force the defendant into a position which would cast the burden upon her, but defendant's counsel refused to be drawn into the net, and nowhere in

> their pleadings did they set up an affirmative defense, and appellee's contention that there was a voluntary paper issue is not sound. There can be no affirmative paper issue of gift if evidence of gift is admissible under the general denial. The effort of appellee to force the appellant into a position where she would be compelled to take the affirmative, or where the burden of final persuasion would be upon her, was to bring the case within the rule of *Roberts v. Morse,* 190 Iowa 1344, 181 N.W. 678, but that case is distinguishable. In that case there was an affirmative defense of gift, and the defendant did assume the burden. This was also true in the case of *Adamson v. Harper,* 162 Iowa 56, 143 N.W. 844 (1913).

Wilson, 223 Iowa at 1299, 275 N.W. at 56.

We agree with the district court Vinson did not prove by a preponderance of the evidence he was entitled to possession of the bond and jewelry. Even assuming for purposes of argument Patricia assumed the burden in this case, our result would be the same. This action is at law and proof of the intent of a donor to make a gift must be by a preponderance of the evidence as compared to an equity case where the burden is by clear, convincing, and satisfactory evidence. *Jensen v. Schreck,* 275 N.W.2d 374, 382 (Iowa 1979); *In re Marriage of Humphrey,* 448 N.W.2d 709, 710 (Iowa App. 1989). The district court was correct in concluding the evidence presented at trial supports Patricia's contention the school bond and jewelry were gifts. Indeed, the district court observed there was "no evidence to support Plaintiff's assertion that Defendant removed said bond or jewelry" from his duplex in October of 1997.

We have carefully reviewed this case and conclude the district court properly applied the burden of proof. We therefore affirm on this issue.

II. Hearsay Testimony. We review rulings on hearsay objections for correction of errors of law. *City of Dubuque v. Fancher,* 590 N.W.2d 493, 495 (Iowa 1999). Admission of hearsay evidence over a proper objection is presumed to be

prejudicial error unless the contrary is affirmatively established. *Frunzar v. Allied Property & Cas. Ins. Co.*, 548 N.W.2d 880, 887 (Iowa 1996).

Vinson contends the district court erred in admitting Fogerty's testimony under the residual exception to the hearsay rule, Iowa Rule of Evidence 803(24). Patricia argues the testimony was properly admitted under Iowa Rules of Evidence 801(d)(2)(B) and 804(b)(3).

Vinson's attorney specifically objected to Fogerty's testimony being admitted under rule 803(24). The discussion regarding the objection was held off the record. After that discussion and back on the record, the district court stated, "That's fine. I'll overrule the objection. I'll allow you rebuttal." We agree the district court did not make specific findings on the record as required to admit hearsay under rule 803(24). *State v. Weaver,* 554 N.W.2d 240, 247 (Iowa 1996); *State v. Rojas,* 524 N.W.2d 659, 662-63 (Iowa 1994); *State v. Kone,* 557 N.W.2d 97, 100-01 (Iowa App. 1996). In addition, the exceptions to the hearsay rule now cited by Patricia as the basis for admission of the testimony do not appear in the record and we cannot consider them; hearsay exceptions raised in the appellate brief but not at trial are deemed waived. *Frunzar*, 548 N.W.2d at 887.

In *Kone*, a remand was necessary to cure the 803(24) defect and allow for proper appellate review. *See Kone,* 557 N.W.2d at 101. A remand of this case would certainly be necessary to cure the 803(24) defect. However, we conclude a remand is unnecessary in the instant case. Even assuming the district court erred in admitting Fogerty's testimony, said error was not prejudicial. The district court carefully lists the evidence presented by Patricia on the issue of the possession of the jewelry. In addition, the district court found Vinson failed to present any

evidence to support his contention Patricia removed said jewelry from his duplex. While the district court makes a brief reference to Fogerty's testimony in its decision, there is nothing to suggest the district court's ruling would have been different without the use of said testimony. We affirm on this issue.

III. Stock Certificates Subject to Nebraska Court Ruling. In his reply brief, Vinson asks us to order Patricia to deliver stock certificates, the delivery of which the parties stipulated to delay until after a Nebraska district court ruled in a case involving these same parties. An issue raised for the first time in a reply brief is not properly presented to this court. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996). We will not consider this issue.

AFFIRMED.