IN THE COURT OF APPEALS OF IOWA

No. 1-090 / 10-1028
Filed July 27, 2011

CITIZENS STATE BANK,
Plaintiff-Appellee,

vs.

TIMOTHY J. RUEBEL, PEGGY R. RUEBEL, and ELSIE M. SWANSON,
Defendants-Appellants,

and

BANK OF AMERICA, N.A., UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY OF NORTH CAROLINA, STAR ENERGY, An Iowa Corporation, and NORTH STAR CAPITAL ACQUISITION, L.L.C.,
Defendants.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Elsie Swanson appeals from a ruling on summary judgment granting an in rem judgment against real estate in her name in foreclosing mortgages securing debts of Peggy and Timothy Swanson. **REVERSED AND REMANDED.**

Jerrold Wanek of Garten & Wanek and Robert Gainer, Des Moines, for appellants.

Neven J. Mulholland and James L. Kramer, Fort Dodge, for appellee.

Considered by Sackett, C.J., and Vogel and Potterfield, JJ.

SACKETT, C.J.

Elsie M. Swanson appeals from an in rem judgment and decree of foreclosure finding mortgages that secured borrowing by Elsie's daughter Peggy R. Reubel and Peggy's husband Timothy J. Ruebel were first and paramount liens on a 120-acre farmland titled in her name.[1] She contends the district court erred (1) in ruling on summary judgment she was competent when she executed and delivered to Citizens State Bank a written hypothecation agreement and mortgage creating a lien in favor of Citizens in the property, (2) in denying her homestead interest in the property, and (3) in finding that subsequent liens established on the property by Peggy as Elsie's power of attorney to secure loans in favor of herself and Timothy were not gifts to Peggy. We remand for an evidentiary hearing on the issue of Elsie's competency when the initial mortgage was given. We find Elsie has long-term homestead rights to a home on the 120 acres of farmland, and because she did not sign an Iowa Code section 561.22 waiver, her homestead, including forty acres, should be set aside free of Citizens's encumbrance. We also find the district court erred when it found Peggy did not make a gift to herself in mortgaging Elsie's real estate to secure notes on which she and Timothy were jointly and severally liable. We reverse and remand with direction to the district court.

BACKGROUND. Peggy is Elsie's only child. In September of 2001, Elsie gave Peggy a general power of attorney allowing Peggy to operate on her behalf,

[1] Elsie's daughter Peggy R. Ruebel and Peggy's husband Timothy J. Ruebel had also appealed. They dismissed their appeal on June 14, 2010.

but specifically providing that Peggy could not use the power of attorney to make gifts to herself.

Elsie was the record titleholder of real estate locally known as 2772 Hayes Avenue, Callender, Webster County, Iowa, and legally described as:

> The South 120 acres of the Southwest Quarter (SW1/4) of Section Thirty-Two (32), Township Eighty-Eight (88) North, Range Twenty-Nine (29) West of the 5th P.M., Webster County, Iowa and also described as:
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> The South one-half (S1/2) of the Southwest one-fourth (SW1/4) and the South one-half (S1/2) of the North one-half (N1/2) of the Southwest one-fourth (SW1/4) of Section Thirty-two (32) Township Eighty-eight North (88N) range twenty-nine (29), West of the 5th P.M., Webster County, Iowa except for public highways.

The 120 acres includes a homestead that had been owned by Elsie and her late husband for nearly fifty years. On December 14, 2004, in order for Citizens to "make, renew, or extend a loan, or other financial accommodation to Timothy J. Ruebel and Peggy R. Ruebel" and to guarantee payment thereof, Elsie personally made, executed, and delivered to Citizens a written hypothecation agreement and a mortgage granting Citizens a first lien on the property described above. The mortgage secured a note in the amount of $170,000 signed by Peggy and Timothy on which they were jointly and severally liable. The hypothecation agreement secured all present or future obligations and liabilities of Timothy and Peggy to Citizens. The mortgage was recorded on December 16, 2004.

On October 19, 2005 and June 27, 2006, Peggy operating under a power of attorney given to her by Elsie in September of 2001,[2] created additional liens

[2] In September of 2001, Elsie gave Peggy the power of attorney authorizing Peggy to conduct her business, but specifically providing that Peggy "may not make gifts of my

on Elsie's property to secure notes on which she and Timothy were also jointly and severally liable.

SCOPE OF REVIEW. Review of an equitable claim to foreclose a mortgage is de novo. *Beal Bank v. Siems*, 670 N.W.2d 119, 123 (Iowa 2003). "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them." Iowa R. App. P. 6.14(6)(*g*).

PROCEEDINGS. On May 13, 2009, Citizens filed a petition in equity seeking foreclosure contending the notes given by Peggy and Timothy were in default and seeking an in rem judgment against several tracts of real estate owned by Peggy and Timothy[3] and the 120 acres titled in the name of Elsie M. Swanson for $171,008.90 plus accrued interest and costs.[4] Peggy and Timothy answered and affirmatively alleged that the hypothecation agreement did not secure future borrowing. Elsie filed a similar answer. At this time the Ruebels and Elsie were represented by the same law firm.

On December 18, 2009, Citizens filed a motion for summary judgment, a statement of undisputed material facts, and an affidavit noting that Peggy and Timothy were in bankruptcy and requested an in rem judgment against the properties included in the petition for foreclosure. Peggy and Timothy filed a resistance to the motion for summary judgment contending material facts were at

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property to herself." The power of attorney was not placed on record until October 19, 2005. While there could be an issue of whether the giving of the power of attorney placed Peggy in a confidential relationship with Elsie, it does not appear that Citizens was aware of the power of attorney until Peggy used it to accumulate further debt.

[3] After the suit was filed, Peggy and Timothy filed bankruptcy.

[4] Citizens also sought judgment against the Ruebels and two additional parcels of real estate owned by them.

issue including the fact that "the mortgage documents did not include a homestead exemption waiver on what was clearly agricultural land" and did not include a notice of homestead exemption waiver as required by Iowa Code section 561.22, consequently the mortgages they signed were void.[5] Timothy signed an affidavit saying that he read the statement of facts in support of the motion for summary judgment and found each fact true and correct.

Elsie, through the same law firm, also filed a resistance to the motion for summary judgment contending that significant issues of material facts existed that relate to the extent and validity of the mortgages against her property and the matter was not ripe for adjudication. She asked the court to deny the motion for summary judgment. Elsie filed a memorandum in support of her resistance contending she did not have the capacity to contract, the instruments executed by Peggy as power of attorney were void, and there was no homestead exemption waiver on what was agricultural land. Elsie attached a radiology report that showed as of November 1, 2001, she had memory loss and vertigo.

Elsie also filed an unverified statement of facts contending that prior to December 14, 2004, she did not have the capacity to enter into a contract and that she was of unsound mind, without the ability to perceive documents or enter into negotiations. She further stated the power of attorney given to Peggy profited Peggy who used it to make gifts to herself, and despite Citizens having a copy of the power of attorney, it allowed Peggy to make gifts to herself of Elsie's property. Elsie attached the power of attorney to Peggy that provided "[m]y Attorney-in-Fact may not make gifts to my property to himself or herself."

[5] Peggy and Timothy have dismissed their appeal; therefore, this issue is not before us.

On March 1, 2010, a hearing was held on Citizens's motion for summary judgment. The district court subsequently filed an order. The court found the claim of the lack of a homestead exemption waiver under section 561.22 needed further factual investigation and therefore set another hearing on that issue. The court further found defendants had failed to provide proof Elsie was incompetent to contract prior to or on December 14, 2004, finding the radiology report offered no proof to support the claim. The court found that Peggy, in signing mortgages as Elsie's attorney-in-fact on October 6, 2005, and June 27, 2006, to secure notes signed by Peggy and Timothy, did not make gifts to herself. The court opined that to make a gift there must be a present intent to make the gift and one must divest herself of all control. The court then dismissed the defendants' claims that Elsie was not competent in December of 2004, and that Peggy misused the power of attorney.

The hearing on the homestead issue was held on April 30, 2010. Peggy and Timothy both testified. The crux of their testimony was that Elsie had Alzheimer's and/or dementia, had lived for more than fifty years in a home on the 120 acres of agricultural land, and Elsie's belongings remained in the home where her grandson, who had lived with her earlier, continued to reside. It was acknowledged Elsie probably would never return to her home because of the state of her health, and she had stayed on a full-time basis with Peggy and Timothy since 2007.

The district court entered an order finding Elsie had abandoned her homestead, and the burden was on her to show she intended to return, because the removal from a homestead with no intention to return to it as a home is the

equivalent to a surrender of all claims of homestead and constitutes abandonment. The court found Elsie left the property by at least 2007 to move in with her daughter because of her frail health, and she had no intention to return. Therefore, Elsie had abandoned the homestead.

On June 2, 2010, the district court entered a judgment and decree of foreclosure in rem ordering foreclosure for $773,190.59 of principal, accrued interest of $185,324.60 and accruing interest at twenty-one percent per annum, late fees and charges of $105, expenses relating to the property of $1058, attorney fees of $23,632.48, additional amounts for future attorney fees, costs and expenses, and court costs of $210. The court further ordered that a special execution may issue and the real estate may be sold to satisfy or partially satisfy the in rem judgment. On June 22nd, Elsie, Peggy, and Timothy, through the same law firm, appealed the June 2nd ruling and all other adverse rulings and orders therein. Only Elsie's appeal remains before us.

Competency of Elsie to execute initial documents. Elsie raised as a defense in the foreclosure action that she was not competent to execute the December 14, 2004 mortgage and hypothecation agreement. Citizens filed a motion for summary judgment contending Elsie was competent and there was no evidence to show otherwise. Elsie resisted the motion, but the district court granted it. Elsie contends this was error.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.907; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and

affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). In reviewing the grant or denial of a motion for summary judgment, we examine the evidence in a light most favorable to the nonmoving party. *Mewes v. State Farm Auto. Ins. Co.*, 530 N.W.2d 718, 721 (Iowa 1995).

The Iowa court said in *Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404, 408 (Iowa 1997), that the business community in the absence of bad faith is free to rely on the legal capacity of adult persons who have not been adjudged incompetent.[6] *Putenson* was decided in the context of a motion to set aside a nonjudicial foreclosure in which the court ruled the appointment of a guardian ad litem is not required in order to commence a nonjudicial foreclosure proceeding when "the mortgagor has not been adjudged incompetent and is not confined to a hospital for the mentally ill." *Id.* The issue did not arise in the context of execution of a mortgage.

Elsie was born in 1922, and at the time she signed the documents she was nearly eighty-two years old. A medical report attached to her resistance to the motion for summary judgment indicated she suffered memory loss. She contracted away property rights and she agreed to pledge her entire farm to guarantee an unknown amount and then the same day signed a mortgage securing $170,000 of Peggy and Timothy's debt. Peggy filed a verified statement of facts contending, "Elsie Swanson is of unsound mind, without the ability to

[6] The issue in this case concerned the plaintiff's own debt and did not address a person that guaranteed the debt of another. *Putensen* has not been subsequently cited in support of the proposition referenced here.

reasonably perceive documents or events, or enter into negotiations, and has been so prior to December 14, 2004." Testimony developed during the hearing on the homestead issue, which was taken after the district court ruled against Elsie on the competency issue, indicated Elsie suffered from Alzheimer's and dementia.

Citizens presented no evidence that would support a finding Elsie was competent at the time the papers were signed or that would show what transpired at the time they were signed. Generally, an agreement in writing speaks for itself and absent fraud or mistake, ignorance of the contents will not serve to negate or avoid its contents. *See Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995); *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993); *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 323 (Iowa 1977); *Advance Elevator Co. v. Four State Supply Co.*, 572 N.W.2d 186, 188 (Iowa Ct. App. 1997). We agree with Citizens that our supreme court has said that banks are not required to assess the mental condition of their customers. See *Putensen*, 564 N.W.2d at 408. We do note, however, that Putensen[7] concerned a party's own debt and did not address a financial institution's obligation to look to the competency of an aged citizen who guaranteed a debt for another. It is difficult to look at this transaction and conclude that Citizens operated in good faith. Elsie was a vulnerable older Iowan whose only child was

[7] There was testimony in *Putensen* that a bank officer described her as appearing normal and mentally stable. 564 N.W. 2d at 406

in the process of taking financial advantage of her.[8] There is no evidence Elsie gained any financial advantage from the transaction.

In *Putensen*, 564 N.W.2d at 408, in arriving at its holding, that in the absence of bad faith financial institutions are free to rely on the legal capacity of adult persons, the court discussed the fact that financial institutions are not equipped to assess mental conditions of their customers and the line between the idiosyncratic person and a mildly or even moderately mentally disturbed person can easily become blurred. The court further noted that "an idiosyncratic person is surely entitled to free access to a bank's services, and this freedom would be compromised to any extent such persons could escape responsibility for their commercial transactions." *Id*. The court stated, "[u]tter chaos would attend a rule that would require a bank to conduct its customer relations on the basis of its lay assessment of the customer's mental condition." *Id*.

We do not agree with Citizens that *Putensen* exonerates a financial institution from any responsibility to assure that any aging Iowan who guarantees a substantial debt for another is competent to understand the nature and the breath of the transaction. Additionally, the concern voiced in *Putensen* that an idiosyncratic person's access to a bank's services would be compromised should such person be able to escape responsibility for their commercial transactions, is entirely different from the concern that to put a heightened responsibility on a financial institution to assure an aging Iowan is competent to understand the obligations of a guarantee would make it difficult for an aged person to guarantee another's financial obligation.

[8] This has been termed elder financial abuse.

Citizens presented no evidence Elsie was competent. We believe there are sufficient material facts, including Peggy's affidavit relating to her observations of her mother, to put at issue Elsie's competency at the time she signed the hypothecation agreement guaranteeing Peggy and Timothy's debt. We remand for a hearing on this issue.

We also believe there are more than sufficient facts to show Elsie was not competent when the action for foreclosure was filed, and evidence introduced during the proceedings indicated she was not competent during the foreclosure action and is not competent now.[9] A guardian at litem should be appointed to represent her interests.

WAIVER OF HOMESTEAD RIGHTS. Elsie contends no mortgage can be foreclosed against her homestead because Citizens failed to have her sign the required waiver of homestead rights as provided in Iowa Code section 561.16. "Homestead rights are jealously guarded by the law." *Merchants Mut. Bonding v. Underberg*, 291 N.W.2d 19, 21 (Iowa 1980). One way in which the legislature has protected homesteads is to make them exempt from execution. *See* Iowa Code § 561.16. Iowa Code section 561.22 requires a lender in certain situations to give a borrower notice of his or her homestead exemption and receive from the borrower a written waiver.[10] The legislature hoped this additional procedural

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[9] Not only is Elsie not competent, but it appears she may need protection. Peggy has exercised little financial restraint, and while possibly well-meaning, the evidence shows she has operated to the detriment of Elsie's financial interests. Peggy apparently continues to operate under the power-of-attorney Elsie gave her.

[10] Iowa Code section 561.22 provides:

> 1. a. Except as otherwise provided in subsection 2, if a homestead exemption waiver is contained in a written contract affecting agricultural land as defined in section 9H.1, or dwellings, buildings, or other appurtenances located on the land, the contract must contain a statement

step in the waiver of homestead rights on agricultural land would "encourage second thoughts about executing the waiver." *West Des Moines State Bank v. Mills*, 482 N.W.2d 432, 435 (Iowa 1992).

It is clear that the 120 acres is agricultural land[11] of more than forty acres and that it was Elsie's homestead when the first mortgage was given. Citizens does not claim a homestead waiver was signed in any of the transactions, nor do we find that it was. We also find the home on the property was Elsie's home for close to half a century. The district court denied Elsie's claim solely on the finding it had ceased being her homestead. No one strongly argues that it was not Elsie's homestead for some fifty years. Citizens contends it was not her homestead after 2007, when Elsie, because of poor health, sought to stay with Peggy and Timothy, and it appeared she would not be able to stay in her home in the future.

First, on our de novo review, we disagree with the district court's finding that Elsie had abandoned her homestead or shown the intent to abandon it. There is no evidence Elsie intended to abandon her home. She had to leave

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> in substantially the following form, in boldface type of a minimum size of ten points, and be signed and dated by the person waiving the exemption at the time of the execution of the contract: "**I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale; and that by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract."**
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> . . . .
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> 2. This section shall not apply to a written contract affecting agricultural land of less than forty acres.

[11] The term "agricultural land" is defined in section 9H.1 as "land suitable for use in farming." Iowa Code § 9H.1(2). Chapter 9H also defines the word "farming" as "the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock." Iowa Code § 9H.1(14).

because her poor health required that she have assistance. She did not establish another homestead, and most of her possessions remained in the home on the 120 acres. While we need not address it, we would be hesitant to hold that an aging Iowan loses homestead rights because he or she needs care not available in his or her home, particularly where, as here, she leaves her possessions in the home.

Even if, at the time of the hearing on the foreclosure, Elsie had abandoned her home, the bank cannot succeed on this issue. The question is not whether it was her homestead when the mortgage was foreclosed, but whether it was her homestead when the mortgage was signed. In *Beal Bank*, the bank argued that because neither party at time of trial resided in property claimed to be a homestead, neither party had the right to claim the homestead exemption as a defense to Beal Bank's foreclosure petition. 670 N.W.2d at 125. The court in *Beal Bank* found this argument had no merit, because the validity of the encumbrance was determined at the time it was executed. *Id*.; *see also Belden v. Younger*, 76 Iowa 567, 570, 41 N.W. 317, 318 (1889) (holding abandonment of homestead after conveyance by wife alone "did not validate her transfer of the property without the concurrence of the husband"); *Lunt v. Neeley*, 67 Iowa 97, 101, 24 N.W. 739, 740 (Iowa 1885) (holding that invalid assignment "was not validated by the subsequent abandonment of the property" by the owner).

The bank did not comply with the statute, and therefore, the bank did not obtain an effective waiver of the defendant's homestead rights. *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 106 (Iowa 2004). A waiver of homestead rights in agricultural land is only effective if the contract contains a written

disclosure in compliance with section 561.22. *Id.* (citing *Red River State Bank v. Reierson*, 533 N.W.2d 683, 688 (N.D. 1995), which held a bank's failure to comply with statutory requirements for homestead exemption waiver rendered bank's mortgage unenforceable); *see also Beal Bank*, 670 N.W.2d at 124 (holding mortgage not signed by spouse as required by statute protecting spouse's homestead rights is void and mortgage cannot be foreclosed).

Courts of equity are bound by statutes and follow the law in the absence of fraud or mistake. *Mensch v. Netty*, 408 N.W.2d 383, 386 (Iowa 1987); *accord Johnson Cnty. Sav. Bank v. City of Creston*, 212 Iowa 929, 940, 231 N.W. 705, 710 (1930) (noting "in the absence of fraud, accident, or mistake" a court of equity cannot disregard statutory requirements); *Brunsdon v. Brunsdon*, 199 Iowa 1099, 1113, 200 N.W. 823, 829 (1924).

We reverse the district court's finding Elsie cannot claim homestead rights to her home and forty included acres.

THE POWER OF ATTORNEY. Beginning in 2005, Peggy, operating under the power of attorney, gave substantial mortgages to secure notes signed by herself and Timothy on which she and Timothy were jointly and severally liable. Responding to the Bank's petition to foreclose these mortgages, defendants contended that in executing the mortgages Peggy made a gift to herself in violation of the power of attorney. The district court, using a narrow definition of gifts, found that Peggy giving Elsie's land as security for her and Timothy's borrowing were not gifts to Peggy; thereby Peggy did not violate the power of attorney. We disagree.

The district court has defined gifts too narrowly relying only on part of *In re Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996), where the court citing *Taylor v. Grimes*, 223 Iowa 821, 826, 273 N.W. 898, 901 (1937), noted that "[w]e have held in other contexts a gift is made when the donor has a present intention to make a gift and divests himself 'of all control and dominion over the subject of the gift.'" However, in *Crabtree* the court also cited *Fender v. Fender*, 329 S.E.2d 430, 431 (S.C. 1985), where the court noted an attorney in fact may not use his position for his personal benefit in a substantially gratuitous transaction. In reaching the conclusion the benefits bestowed on Peggy were gifts, we look also to Black's Law Dictionary, which broadly defines "gift" as: "1. The voluntary transfer of property to another without compensation. 2. A thing so transferred." Black's Law Dictionary 709 (8th ed. 2004).

Peggy, in executing mortgages on Elsie's behalf to secure a loan on which she was jointly and severally liable with Timothy, engaged in a gratuitous transaction in violation of her power of attorney. She received a benefit from the transaction. She obtained a loan she probably would not have gotten without Elsie's land for security. The bank relied on the power of attorney in accepting Peggy's mortgages of Elsie's property, and in doing so, was or should have been aware of the limitation of Peggy's power. "A power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified." *Crabtree*, 550 N.W.2d at 170. The power of attorney was clear that while Peggy was given the right to mortgage Elsie's property, she was not given the right to mortgage it to make gifts that benefited her. Citizens relied on the power of attorney in making the loans. It should not now be able to claim

ignorance of it. We find the mortgages given by Peggy as power of attorney to secure notes to Peggy and Timothy whereon Peggy is jointly and severally liable are null and void. We reverse on this issue.

CONCLUSION. We reverse the summary judgment entered by the district court. We direct the district court to hold an evidentiary hearing on the issue of whether Elsie was competent when she signed the December 14, 2004 mortgage and, based on its finding, to make a determination whether or not the mortgage and agreement she signed are valid and enforceable. The district court shall find null and void any mortgages signed by Peggy as power of attorney for Elsie. If after doing the above the district court finds that Citizens still has a valid lien against some or all of Elsie's property, then Elsie may claim forty acres with her home as an unencumbered homestead.

REVERSED AND REMANDED.

Potterfield, J., concurs; Vogel, J., dissent.

Vogel, J. (dissenting)

As I agree with the district court's well-reasoned determination of mental capacity to contract, the construction of the power of attorney, and the abandonment of the homestead, I would affirm.

Elsie's Mental Capacity to Contract

On Elsie's mental capacity, I agree with the district court that:

> Defendants have failed to provide proof of any substance that Elsie M. Swanson was incompetent to contract prior to or on the date of December 14, 2004. The radiology report attached to Defendants' pleadings offers no proof whatsoever to support Defendants' claim.

A party alleging lack of mental capacity has the burden of proving by clear, convincing, and satisfactory evidence that the person did not have sufficient mental capacity to understand the contract he or she executed. *Daughton v. Parson*, 423 N.W.2d 894, 896 (Iowa Ct. App. 1988).

The majority states that "Citizens presented no evidence that would support a finding Elsie was competent . . . ." However, the burden is not on Citizens to prove the party it contracted with was of sound mind, but rather the burden is on the party alleging incapacity. Therefore, the district court employed the correct approach by examining the record to determine whether Elsie brought forth any evidence to create a genuine issue of material fact. The record contained the November 2001 radiology report that was introduced without any explanation other than Elsie had "clinical indications" of "memory loss and vertigo." Elsie offered no affidavit from a medical expert to explain the significance of the report or to describe Elsie's condition as of December 2004. Elsie argues an affidavit from Peggy asserts that Elsie "is of unsound mind,

without the ability to reasonably perceive documents or events, or enter into negotiation, and has been prior to December 14, 2004." But these are ultimate conclusions made by Peggy who stands to substantially benefit—by ultimately escaping her own indebtedness—by now claiming her mother was incompetent. Moreover, her "facts" do not set forth "specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5); *see also Liska v. First Nat'l Bank in Sioux City*, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981) ("In order to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact.").

On this record, I would agree with the district court that Elsie failed to establish a genuine issue of material fact concerning her own lack of contractual capacity to enter into the 2004 hypothecation and mortgage.[12]

Abandonment of the Homestead

The district court also found Elsie had abandoned her homestead, clearing the way for Citizens to foreclose the mortgage and set the property for eventual sheriff's sale. I disagree with the majority that reverses this finding, as it is in direct contradiction to the very purpose of homestead protection, which is:

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[12] For us to hold otherwise puts a bank in the position of having to make a determination as to a person's mental capacity for every transaction. Other than for the most obvious of human frailties, this would be an untenable task for any financial institution to be able to conduct normal business affairs. *Putensen*, 564 N.W.2d at 408 ("Financial institutions are not equipped to assess mental conditions of their customers and should not be expected to do so. . . . Utter chaos would attend a rule that would require a bank to conduct its customer relations on the basis of its lay assessment of the customer's mental condition."). Moreover, the majority's assertion that there is a "heightened responsibility on a financial institution to assure an aging Iowan is competent to understand the obligations of a guarantee," could subject a financial institution to an age discrimination suit, should it refuse to accept an "aging person's" financial transaction request.

> [T]o promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen, and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune.

In re Estate of Tolson, 690 N.W.2d 680, 682 (citing 40 Am.Jur.2d Homestead § 4, at 253 (1999)). However, homestead rights are forfeited when there is no intent to return to the property. *In re McClain's Estate*, 220 Iowa 638, 262 N.W. 666, 668, (Iowa 1935) ("Removal from the homestead property with no intention to return to it operates as an abandonment of the homestead.").

At the evidentiary hearing as to whether the Callender property was still Elsie's homestead, Peggy acknowledged that several years ago Elsie had moved out of the Callender property and in with her and Timothy for caretaking purposes. As Peggy testified,

> Q. When did she live with you on a full-time basis? A. 2007.
> Q. She's lived with you since 2007 until now on a continuous basis? A. Yes.

Peggy also admitted there was no intent for Elsie ever to move back to the Callender property as Elsie suffers from Alzheimer's disease, in its advanced stage, and is totally incapable of caring for herself.

The homestead "must embrace the house *used as a home* by the owner." Iowa Code § 561.1(1) (2009) (emphasis added). "Occupancy of the dwelling house, except when the owner is temporarily absent with a fixed purpose to return, is essential to claim the right." *Berner v. Dellinger*, 206 Iowa 1382, 1383, 222 N.W. 370, 371 (1928). "[A]ctual use, not a mere intent to occupy the property, must exist . . . ." *Beal Bank*, 670 N.W.2d at 124. Here, the record is undisputed that Elsie ceased to occupy the Callender home no later than 2007,

and had no intent to return there. Indeed, the property has been leased to the Ruebels' son since 2007. As stated by the district court,

> Here, Elsie left the property in question by at least 2007 to move in with her daughter, Peggy. Due to Elsie's frail health there is no intention on Elsie's part to return to her former home. As such, this court concludes that there has been an abandonment of Elsie's homestead claim in the property that is the subject of this litigation.

I would therefore uphold the district court's ruling that the Callender property was no longer Elsie's homestead.

Mortgages Given Under Power of Attorney.

On October 6, 2005, to secure an additional $138,156.39 of credit extended by Citizens to the Ruebels, Peggy executed a second mortgage as Elsie's attorney in fact. On June 27, 2006, to secure a further $178,123.92 in credit, Peggy executed a third mortgage on the Callender property utilizing the power of attorney granted to her by Elsie.

Elsie argues that the 2005 and 2006 mortgages of the Callender property should be set aside because they exceeded the scope of the power of attorney. She now claims that when her land was used as security for the Ruebels' loans, she was in effect making a "gift" to the Ruebels—a violation of the terms of the power of attorney.

Again, I would agree with the district court's analysis. "The established rule is that a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified." *Crabtree*, 550 N.W.2d at 170. This power of attorney instrument specifically allowed Peggy to mortgage Elsie's property, among other things. The only thing Peggy could not do was

"make gifts of [Elsie's] property to . . . herself." While the transaction in question was a mortgage that benefited Peggy, it was not a gift from Elsie to Peggy. A gift is made when the donor "divests himself of all control and dominion over the subject of the gift." *Id*. The mortgages did not divest Elsie of control or dominion of the Callender property; they encumbered it.

By allowing her property to stand as security for the Ruebels' promissory notes, Elsie was making a form of *loan*, not a gift, to the Ruebels. Had the Ruebels paid their promissory notes in full, the mortgages would have been satisfied, returning Elsie's property to its former unencumbered state. On the other hand, if Citizens were to foreclose the mortgages on Elsie's property, Elsie as the secondary obligor would have recourse against the Ruebels as the principal obligors, e.g., a right to seek reimbursement from them. Restatement (Third) of Suretyship and Guaranty §§ 18, 22 (1996); *see Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 772 (Iowa 2009) (adopting the Restatement's position on reimbursement); *see also In re Estate of Hoffman*, 548 P.2d 1101, 1104 (Wash. Ct. App. 1976) (finding that a mother's execution of a mortgage on her property as additional security for the son's borrowings did not constitute a gift of that property to the son).

This resolution also makes good sense as a matter of policy. Handed a general power of attorney that expressly authorized Peggy to mortgage Elsie's property, Citizens allowed her to do so. To hold that it was a gift, would raise questions as to whether Elsie was receiving an appropriate benefit from the transaction and whether there was "donative intent." But if that were the legal standard, powers of attorney would become less useful because third parties

could no longer safely rely upon the terms so clearly set forth in the instrument. This is another area where the law works best when its application is predictable. *See Crabtree*, 550 N.W.2d at 170 (explaining that a power of attorney grants the powers that are specified); *cf. Putensen*, 564 N.W.2d at 408 (concluding "the business community is free, in the absence of bad faith, to rely on the legal capacity of adult persons who have not been adjudicated incompetent").[13]

For the foregoing reasons, I would affirm the sound judgment of the district court.

[13] Since Peggy was Elsie's only child, one could draw the inference that she was encumbering her own anticipated inheritance by executing the 2005 and 2006 mortgages, which she now seeks to avoid. Of course, there is a separate question, beyond the scope of this dissent, as to whether Peggy's actions, even if authorized by the power of attorney, breached her fiduciary duty to Elsie. But that is a matter between them, not a concern of Citizens, which relied in good faith on the instrument that was presented to it.