IN THE COURT OF APPEALS OF IOWA

No. 3-504 / 12-1021
Filed August 7, 2013

LARRY CARSON, Executor of the ELMER JOSEPH CARSON ESTATE,
Plaintiff-Appellant,

vs.

BONNIE L. ROTHFOLK, a/k/a BONNIE L. CARSON and JAY CARSON,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

An executor appeals the district court's decision rejecting his attempts to set aside a conveyance of land and collect the profits from a growing crop. **AFFIRMED IN PART AND REVERSED IN PART.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellant.

Paul D. Burns and Jessica A. Doro of Bradley & Riley PC, Cedar Rapids, for appellees.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Larry Carson, as executor of his father's estate, appeals the district court's ruling (1) refusing to grant his request to set aside a conveyance of land the decedent executed in favor of one of his other children or, alternatively, to impose a constructive trust; (2) failing to award the estate the proceeds of the crop planted before the decedent's death but harvested after his death; and (3) assessing a portion of the deposition costs incurred during the litigation against the estate. We affirm the district court's refusal to set aside the conveyance. However, we find the estate is entitled to the profits from the crop planted during the decedent's life tenancy but harvested after his death. We therefore reverse the district court's decision on that issue. Finally, we find the district court did abuse its discretion in assessing a portion of the deposition costs to the estate.[1]

I. BACKGROUND FACTS AND PROCEEDINGS.

Elmer Joseph Carson (Joe) died on August 7, 2008. Pursuant to a will executed in December 2006, Joe's son, Larry, was appointed as executor. Joe was estranged from most of his five children at various points in his life. He had the longest consistent relationship with his daughter Bonnie Rothfolk a/k/a Bonnie Carson. Following Joe's divorce from his first wife, the mother of his five children, Joe signed a contract in 1978 in which he sold sixty acres of land to Bonnie, while reserving to himself a life estate. Bonnie testified her father called to tell her he was sending her a contract to sign, notarize, and send back. After

[1] Our original decision was filed in this case on July 10, 2013. The estate filed a petition for rehearing, which was granted. The original decision was withdrawn, and this opinion is now substituted.

Bonnie received the contract she was concerned that it called for her to purchase the land with a $3000 down payment and make annual payments of $3000 until the sum of $30,000 was paid. When Bonnie explained to her father that she did not have the money to purchase the land, Joe informed her that he was gifting the payment to her. Bonnie signed the contract and returned it to Joe, who recorded the contract and never demanded payment from her on that contract. It was known among at least some of the children that Joe transferred the property to Bonnie to try to avoid paying alimony to his first wife. However, Bonnie asserts she did not become aware of this motivation until her father became ill in 2006.

Joe was diagnosed with dementia after becoming ill in the fall of 2006. Bonnie and her brother, Jay, initiated a conservatorship proceeding in December 2006. Over Christmas, Larry took Joe out of the veteran's home where Joe was living and took Joe to Joe's attorney's office where Joe executed a new will removing Bonnie as a residual beneficiary. Joe also added a provision regarding the land conveyed in 1978, which stated, "I do not believe all payments have been made on that contract, and request my executor require an accounting from Bonnie Carson."[2] After executing the will, Larry then took Joe to another attorney that same day, to discuss the pending conservatorship proceeding. That attorney ultimately advised Joe to file a voluntary petition for the appointment of a guardian, which was accomplished in February 2007. Joe requested Larry be

[2] Joe had recently become angry with Bonnie when she had attempted to pay a bill from Joe's account which he disputed, and Joe believed Bonnie wanted to keep him in the veteran's home when Joe wanted to move back to the farm.

appointed his guardian. The district court heard both petitions together and appointed Jay as Joe's guardian and conservator.

Jay acted as the guardian and conservator for approximately a year, during which time he planted corn on the sixty acres in dispute. Jay was removed as conservator and guardian in June 2008, and attorney Judith Jennings Hoover was appointed in his place. Jay presented invoices to Judith for work he performed and expenses he incurred in planting the crop. However, Jay received payment for these services not from Joe's account but from an account Bonnie set up for the farm expenses. Joe died in August. Jay testified at the hearing in this matter that at the time of Joe's death, the crop was not yet mature. Larry and another of Joe's children, Ed, disputed Jay's contention, asserting the crop could have been harvested at that time for silage.

After Bonnie had Larry and Ed served with no trespassing notices prohibiting them from entering onto the farm, Jay harvested the crop in late October and early November grossing $34,501.31. Jay sent an invoice for his service in harvesting the crop to Bonnie. The profits from the sale of the grain were deposited in Bonnie's account.

Larry, as the executor of the estate, filed a petition for declaratory relief against Bonnie and Jay asserting (1) the contract signed by Joe conveying the property to Bonnie was a sham as it was done to shield the real estate from claims from Joe's ex-wife (the mother of Larry, Bonnie, Jay, Ed, and Julie) and (2) the estate is entitled to the growing crop under the doctrine of emblements. The estate requested the contract conveying the land to be declared null and

void and the crop be declared the property of the estate. Bonnie and Jay counterclaimed asking the court to declare the contract enforceable and to require the estate to prepare and execute a deed in satisfaction of the contract.

The case proceeded to trial in February 2012. The court issued its ruling finding that while the sale of the sixty acres to Bonnie was suspect, the estate failed to convince the court by clear and convincing evidence the transaction was fraudulent so as to justify setting aside the transfer. The court also rejected the estate's attempt to impose a constructive trust. The court found that because the crop was not mature at the time of Joe's death, the estate is not entitled to the proceeds from the harvested crop. Both parties filed posttrial motions under Iowa Rule of Civil Procedure 1.904(2), and the court amended its ruling, (1) ordering Bonnie to reimburse the estate for the amount the conservatorship contributed to the inputs for the crop, (2) declaring the land conveyance valid and enforceable and directing the clerk of court to issue a certificate of change of title to reflect Bonnie as the owner, and (3) taxing the estate with court costs and $540 for the deposition of Larry Carson.

The estate appeals.

II. SCOPE AND STANDARD OF REVIEW.

As this declaratory judgment action was brought by the estate in equity, our review is de novo. *In re Estate of Woodroffe*, 742 N.W.2d 94, 102 (Iowa 2007); *see also* Iowa Code § 633.33 (2011) ("[A]ll other matters triable in probate shall be tried by the probate court as a proceeding in equity."). We give weight to

the district court's findings of fact, especially its determinations of credibility, but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

However, we review the district court's decision to assess the deposition costs against the estate for abuse of discretion. *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa 1994).

III. 1978 CONVEYANCE.

For its first claim on appeal, the estate asserts the district court erred in failing to set aside the 1978 real estate transfer between Joe and Bonnie or to impose a constructive trust.[3] The estate agrees with the district court's determination that the Uniform Fraudulent Transfers Act, Iowa Code chapter 684, does not apply to this conveyance as it was sold prior to the effective date of that statute. *See* 1994 Iowa Acts ch. 1121, § 18 ("This act takes effect on January 1, 1995, and applies to all causes of action arising on or after that date."). So we must look to Iowa common law for the legal requirements of establishing a fraudulent conveyance.

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[3] Although not raised or argued by any party to this case, we note at the outset that the principles of *Shaw v. Addison*, 28 N.W.2d 377, 397-99 (Iowa 1947) (a real estate transfer to hinder or defraud creditors will not be set aside in an action by the transferor or his successor) and *Stephens v. Harrow,* 26 Iowa 458, 460-62 (1868) (heirs of a party to a fraudulent conveyance may not impeach the conveyance) might be implicated but for the fact that the estate was ostensibly pursuing this action for the benefit of creditors, specifically one creditor, Joe's ex-wife and the mother of the executor and other children. *See Level v. Church of Christ*, 251 N.W. 709, 710 (Iowa 1933) (finding even though an administrator of an estate representing heirs may not have been permitted to challenge decedent's fraudulent conveyance, the administrator has a duty to collect assets for benefit of creditors). If the estate were successful in proving a fraudulent conveyance, there would remain issues concerning laches in the ex-wife's pursuit of collecting on amounts she claimed were due, and whether Joe's heirs could receive any portion of the proceeds remaining after the settlement of claims, as those proceeds would have resulted from setting aside the allegedly fraudulent conveyance that Joe had initiated.

A fraudulent conveyance under common law is "any 'transaction by means of which the owner of real or personal property has sought to place the land or goods beyond the reach of his creditors, or which operates to the prejudice of their legal or equitable rights.'" *Prod. Credit Ass'n v. Shirley*, 485 N.W.2d 469, 472 (Iowa 1992) (citation omitted). To determine if a conveyance is fraudulent, the courts look for "certain badges or indicia of fraud" including: "inadequacy of consideration, insolvency of the transferor, and pendency or threat of third-party creditor litigation." *Textron Fin. Corp. v. Kruger*, 545 N.W.2d 880, 883 (Iowa 1996). The transaction is also examined for "secrecy or concealment, departure from the usual method of business, any reservation of benefit to the transferor, and the retention by the debtor of possession of the property." *Id*.

"The existence of a 'blood relationship' is not a per se indication of fraud, but its existence strengthens the inference of a fraudulent conveyance and we will apply close scrutiny to such a transaction." *Benson v. Richardson*, 537 N.W.2d 748, 756 (Iowa 1995). We look for strict proof of the existence of consideration and the fairness of the transaction. *Id*. It is presumed a transfer of property without consideration is fraudulent, but the presumption can be rebutted if the transferee proves the transferor remained solvent after the transfer. *Id*. A transferor is insolvent if the sum of his debts is greater than all of his assets at fair valuation. *Id*. at 757.

"The convergence of several badges or indices may support an inference of fraud, which grows in strength as the badges increase in number." *Textron*,

545 N.W.2d at 883. But a party must prove the fraud by clear and convincing evidence. *Benson*, 537 N.W.2d at 756.

Here, Joe retained possession of the land under a life estate, though there was no concealment of the transfer. Joe recorded the transfer in 1978, and all of Joe's children and Joe's ex-wife knew of the transfer to Bonnie. However, we have a blood relationship between Joe and Bonnie, and we have no consideration as Bonnie testified Joe stated he would gift to her the money for the down payment and the annual payments. Under common law this transfer is presumed fraudulent. *Id*. However, Bonnie can rebut this presumption by showing Joe remained solvent after the 1978 transfer. *See id*.

The estate asks us to look at the time frame of Joe's death to determine whether Joe was solvent, which was when possession of the land actually transferred from Joe to Bonnie. If we focus on Joe's solvency at death, the estate claims the assets are not capable of paying the creditors, specifically the unpaid alimony obligation to Joe's ex-wife. Thus, because Joe was insolvent at that point in time, the estate claims the conveyance to Bonnie was fraudulent and must be set aside.

Bonnie and Jay assert we must look to the time when the title to the land was transferred, not when possession transferred. We agree. Joe conveyed the title to the land to Bonnie in 1978, reserving to himself a life estate. The conveyance of the land was effective from the date the instrument was made and delivered even though Joe reserved to himself a life estate, which delayed Bonnie's possession of the land until Joe's death. *See Prindle v. Iowa Soldiers'*

Orphans' Home, 133 N.W. 106, 107 (Iowa 1911) (finding a conveyance made during the life of the decedent to a grantee, but which retained a life estate to the decedent, was effective from the date of the making and delivery of the instrument and not from the death of the decedent even though the right to possession was postponed until the decedent's death); *see also Craven v. Winter*, 38 Iowa 471, 476 (1874) (holding a conveyance of land which reserved a life estate to the decedent was effective upon delivery and was not in the nature of a devise which could be revocable at the will of the maker). We will thus focus on Joe's solvency at the time he executed and delivered the real estate contract to Bonnie—1978.

Four years after Joe conveyed the property to Bonnie, he initiated a modification proceeding seeking to reduce his alimony obligation to his ex-wife by claiming in part that his net worth had substantially decreased to the point he could no longer make the alimony payments without undue hardship. The district court denied the modification request finding Joe voluntarily decreased his net worth by selling the sixty acres of land to his daughter at considerably less than market value while retaining a life estate. In addition, Joe was still earning his living by being the president of a thriving grain business, and he still was the major stockholder in the business despite his gift of stock to two of his sons. As the district court found, the modification court's assessment of Joe's net worth is not binding on us, but it does provide a unique window into Joe's financial status in the four years following the conveyance of the land to Bonnie.

We agree with the district court's determination that Joe was not insolvent at the time of the conveyance in 1978, and thus, Bonnie has rebutted the presumption the conveyance was fraudulent. *See Benson*, 537 N.W.2d at 756 (finding a conveyance without consideration is presumed fraudulent but the presumption can be rebutted by proving the transferor was solvent after the transfer); *see also Level*, 251 N.W. at 710 (permitting an administratrix to bring an action to set aside, as fraudulent, a conveyance made by the decedent where the property of the estate was insufficient to pay debt which was incurred by the decedent *prior* to the conveyance of the property). The debt incurred by Joe prior to his death appears to have accrued after the 1978 conveyance. The conveyance in 1978 did not result in Joe's insolvency, and the conveyance does not have any other badges or indicia which converge to support an inference of fraud. *See Textron*, 545 N.W.2d at 883.

Alternatively, the estate claims the district court erred in failing to establish a constructive trust. The estate points to statements made by Bonnie after her father became ill that appear to indicate she believed she was holding the farm for the benefit of her other siblings. In November of 2006, Bonnie wrote to Larry regarding her concerns Joe might not qualify for federal health benefits. Bonnie stated in the email, "There is no guarantee that they will agree to leaving the farm for all of us in my name." Later that same month, Bonnie wrote to Larry again, stating:

> Transfer of farm to me in 1978. Hopefully that will not be considered one of his assets. And don't think it's just mine. I have only been the holder of this farm to protect it from Joe's creditors and ex-wives. If it's needed for his care . . . it will go for his care.

She also wrote in a separate email to Larry and her son:

> As I have always believed, I have just been a caretaker, holder of the farm for Joe. In his will, he wants this land to be a "century farm". . . . I assume that means kept in the same family for 100 years. If not, please correct me. He also states in the attachment that he does not want Jay or his family to rent [or] purchase the land. AND he clearly wants Larry and I to share everything, and to me that means the farm as well.

At trial Bonnie explained that it was not until her father's illness that others told her they believed Joe transferred the farm to her in order to avoid creditors. Until then she simply assumed Joe wanted to keep the farm in the family and to let her son eventually own the land.

> A constructive trust is an equitable remedy courts apply to provide restitution and prevent unjust enrichment. A constructive trust is a remedial device under which the holder of legal title to property is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest. Three types of constructive trusts exist: (1) those arising from actual fraud; (2) those arising from constructive fraud; and (3) those based on equitable principles other than fraud.

Berger v. Cas' Feed Store, Inc., 577 N.W.2d 631, 632 (Iowa 1998) (quoting *Benson*, 537 N.W.2d at 760) (internal citations omitted). As stated above, we do not find the conveyance fraudulent. To justify a constructive trust on grounds other than fraud, a party must prove: "bad faith, duress, coercion, undue influence, abuse of confidence, or any form of unconscionable conduct or questionable means by which one obtains the legal right to property which they should not in equity and good conscience hold." *Id*. (quoting *In re Estate of Welch*, 534 N.W.2d 109, 111 (Iowa Ct. App. 1995). The estate has to prove its claim by clear, convincing, and satisfactory evidence. *See id*.

Here, the estate has failed to prove Bonnie acted in bad faith, or forced Joe to convey the property through duress, coercion, undue influence, or abuse of confidence. There is no evidence in the record of any conduct by Bonnie that makes it equitable to divest her of property her father gifted to her long before his death. Her statements in November of 2006 do not change this conclusion. The statements simply indicate her willingness to use the farm if necessary for the care of her father following his illness and her understanding of his intent to keep the farm in the family.

We agree with the district court's decision to not set aside the conveyance of the property to Bonnie.

IV. PROFITS FROM THE CROP.

Next, the estate asserts the district court erred when it failed to award it the profits from the 2008 crop. The estate asserts under the doctrine of emblements, Joe's estate was entitled to the profits as the crop was planted when he was under the conservatorship but was not yet mature at the time of his death.

The district court found the crop was not yet mature at the time of Joe's death, and we agree. However, the court found this immaturity of the crop precluded the estate from profiting from the crop. The estate asserts this finding is in contravention to the doctrine of emblements, which states:

> It is a broad and almost universal principle that the tenant who sows a crop shall reap it, if the term of his tenancy be uncertain. In order to entitle a tenant or his executor or administrator to emblements, his tenancy must be uncertain in its duration. In the next place the tenancy must be determined by the

> act of God, as by the death of the tenant, or by the act of the lessor or owner in expelling the tenant or terminating his tenancy.
>
> One of the important rights of a tenant for life is this right to emblements, or profits of the crop which the law gives him, or to his executors, if he be dead, to compensate for the labor and expense of tilling and sowing the land. The same principles apply also to tenancies at will.
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> A tenant having the right to the emblements, has the corresponding right also to enter upon the premises to harvest the crops growing at the termination of his tenancy.

Reilly v. Ringland, 39 Iowa 106, 108 (1874) (internal citations omitted). The estate asserts under the doctrine of emblements, it is entitled to the profit of the crop that was planted and growing at the time of his death. *See Carman v. Mosier*, 75 N.W. 323, 324 (Iowa 1898) (defining the right to emblements as "the profits which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested, when his estate terminates").

It is undisputed Jay prepared the land for planting on his father's behalf when he was serving as guardian and conservator.[4] It is also undisputed Jay paid the expenses for preparing the land for planting from Joe's account. *See id.* ("If the estate is terminated before the seed is actually sown, there will be no right to emblements. Nor can the cost of preparing the ground for the reception of the seed be recovered.") Jay went on to plant the corn crop during Joe's conservatorship, and the crop was growing but not yet mature at the time of Joe's death.

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[4] Jay performed this work as a custom operator on behalf of the conservatorship and not as a tenant farmer.

Bonnie and Jay claim that because the crop was growing and not yet mature, it passed to Bonnie upon Joe's death. They cite in support of their position *In re Estate of Rahfeldt*, 112 N.W. 858, 861 (Iowa 1962), which provides: "A growing corn crop is a part of the real estate and passes with the land as between vendor and purchaser, mortgagor and mortgagee, and by a will to a devisee." While this is a true statement of law, it does not apply in this situation. Bonnie did not obtain the right to possession of the land through a mortgage or through Joe's will. Neither did she purchase the land from Joe when the 2008 crop was yet growing. Instead, her right to possession of the land came to pass as a result of Joe's death as the life tenant. As stated in *Rahfeldt*, "The doctrine of emblements . . . is not applicable to a transfer from a fee simple title holder to a life tenant. . . . The doctrine is applicable only to a tenant holding for a period subject to termination at a time which he cannot ascertain beforehand." 112 N.W. at 861. The latter situation is precisely the fact pattern we have here. Joe's life tenancy terminated at a time he could not control or ascertain beforehand, and as such the doctrine of emblements applies and entitles his estate to the profits from the crop growing at the time of his death.

We reverse the district court's decision holding the estate is not entitled to the profits from the crop, and we reverse the district court's related ruling that ordered Bonnie had to repay the estate for the money Jay spent from Joe's account during the conservatorship in order to pay for the cost of preparing the land for planting.

The gross profit from the sale of the corn was $34,501.31. Bonnie is entitled to no proceeds from the crops and is obligated for no expenses for growing the crops. However, because she previously paid some expenses to Jay for seed, planting, and harvesting, she is entitled to reimbursement for those expenses in the amount of $11,359.62. The remaining proceeds in the amount of $23,141.69 shall be paid by Bonnie to the estate.

V. DEPOSITION COSTS.

Finally, the estate asserts the district court abused its discretion in ordering it to pay $540.00 of Larry's deposition cost. Iowa Rule of Civil Procedure 1.716 provides,

> Cost of taking and proceeding to procure a deposition shall be paid by the party taking it who cannot use it in evidence until such costs are paid. The judgment shall award against the losing party only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial.

The district court's decision to award cost is twofold. *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty Solid Waste Agency*, 641 N.W.2d 776, 786 (Iowa 2002).

> The trial court must initially make a factual finding that the prerequisite for allowance of the deposition expense is met, i.e., that the deposition was "introduced into evidence in whole or in part at trial." The court then must exercise its discretion in deciding whether all or some portion of the cost was "necessarily incurred."

Id. (internal citations omitted).

Larry's deposition was used in cross-examination of Larry and defense counsel read about seven lines from the transcript to the court after all witnesses had testified. The court reporting bill for the deposition of Larry, Dottie—Larry's wife—and Bonnie totaled $999.95. There is no indication the precise amount

attributable only to Larry's deposition, but the district court stated it was awarding "a proportionate share of the court reporter's bill for his deposition," "where his admissions about the condition of the crops was read into evidence." The estate maintains the district court abused its discretion by failing to show how it calculated the figure awarded. In addition, it asserts the limited use of the deposition was used does not warrant the amount ordered.

Based on our review, we find first that the use of a deposition during cross-examination of a witness is not "introduced into evidence" as contemplated by the rule and is therefore not a cost subject to being assessed. Next, we find that the de minimis use of a deposition, reading seven lines of a deposition of a party witness who had already testified live at the trial, should not generate a $540.00 deposition cost assessment. On this issue we find the district court abused its discretion and reverse.

AFFIRMED IN PART AND REVERSED IN PART.