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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1822

Robert L. Larson, Personal Representative of the Estate of Marion Levine,
Respondent,

vs.

Rebecca Caron, et al.,
Appellants.

Filed May 28, 2013
Reversed and remanded
Hooten, Judge
Cleary, Judge, concurring specially

Hennepin County District Court
File No. 27-CV-12-1241

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Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant challenges the district court's grant of summary judgment to respondent, arguing that the district court erred by concluding that forgiveness of debt must be in writing to be enforceable as a gift, and rejecting other evidence that the

decedent forgave the debt. Respondent cross-appealed, arguing that the district court erred by barring the recovery of the interest accrued on the debt on the basis of the doctrine of laches. We reverse and remand.

FACTS

Appellants Bradley and Rebecca Caron are a married couple and Rebecca Caron is the step-granddaughter of the decedent, Marion Levine, who died on January 22, 2009. Respondent Robert Larson is the personal representative of Marion Levine's estate. On October 5, 2000, appellants borrowed $100,000 from decedent and Levine Investments, an investment company owned and controlled by Marion Levine as sole proprietor.[1] In exchange for the loan, appellants signed a "due on demand" promissory note which provided that interest would accrue at a rate of 6.5% per annum payable annually.

Between 2000 and 2005, appellants made a total of six payments of principal and interest. Appellants made four annual interest-only payments for the years 2001 through 2004, paying $6,500 on September 19, 2001, $4,015.75 on September 18, 2002, $3,025 on December 16, 2003, and $3,025 on September 23, 2004. Additionally, appellants' made principal payments of $45,000 on October 5, 2001 and $27,500 on April 20, 2005. According to appellants, as of the last payment, they had paid a total of $89,065.75 on the note and owed only $27,500.00 in principal. But, according to respondent, appellants

[1] Respondent also serves as trustee for Levine Investments, which is currently owned by the Marion Levine Revocable Trust.

owed $30,087.67 in outstanding principal and $15,815.98 in interest through December 31, 2011, for a total of $45,903.65.[2]

Appellants claim that they called decedent on May 1, 2005, to tell her to expect a check in the mail for final payment on the note. Appellants averred that, during this conversation, decedent forgave the remaining principal balance on the note. Appellants further stated that they sent a letter thanking decedent for the forgiveness of the debt. Appellants made no principal or interest payments on the promissory note after the conversation, and decedent made no demands, requests, or inquiries on the promissory note for nearly four years between the conversation and her death in January 2009. However, decedent's gift tax returns from 2005 to 2007 did not reflect a forgiveness of appellants' debt, though she recorded numerous cash gifts to other friends and relatives. Additionally, Levine Investments balance sheets after the conversation reflected the promissory note to appellants as a loan receivable.

In 2009, respondent, acting as the personal representative of decedent's estate, telephoned appellants and asked for information regarding the promissory note. During this conversation, appellants informed respondent that the decedent had forgiven the balance due on the promissory note. At that time, respondent did not dispute appellants' claims that the balance of the note had been forgiven, and acknowledged that while appellants had made sizable payments, those payments stopped in 2005.

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[2] At the time in question, decedent had personal bank accounts, separate from the bank accounts held in the name of Levine Investments. Some of appellants' payments were deposited in decedent's personal accounts, while others were deposited in business accounts for Levine Investments. The parties do not argue that the interests of Levine Investments and decedent diverge, so we presume that their interests are identical.

Between May 1, 2005 and November 1, 2011, neither decedent nor anyone acting on her behalf made any formal request for payments from appellants on the promissory note. It was not until November 1, 2011—over two years after the 2009 inquiry—that respondent demanded appellants pay the balance due on the note. In a letter dated November 29, 2011, appellants responded to the demand for payment, stating that decedent "forgave the remaining balance due on the note shortly after the April 20th, 2005 principal payment." In January 2012, respondent filed suit against appellants for $45,903.65, including $30,087.67 in principal and $15,815.98 in interest.

Respondent moved for summary judgment, arguing that there was no documentation of the forgiveness in any of the decedent's business or personal records and no indication that she paid gift taxes relative to the debt forgiveness. Appellants argued that the debt had been forgiven by the decedent and that no attempts were made by decedent or her estate to collect the debt for more than six years after their last payment, even though they were close to decedent and frequently socialized with her between the forgiveness of the debt and her death.

The district court concluded that decedent's oral forgiveness of the promissory note did not constitute a credit agreement under Minn. Stat. § 513.33, subd. 1 (2012), and that appellants failed to present sufficient evidence to create a genuine issue of material fact. In granting summary judgment in favor of respondent, the district court ordered appellants to pay respondent $30,087.67, which was deemed to be the unpaid principal on

the note.[3] However, the district court denied respondent's request for summary judgment relative to the unpaid interest of $15,815.98, finding that the delay in attempting to collect the debt, constituted a waiver of the right to collect such payments under the equitable doctrine of laches.

Respondent requested permission to file a motion for reconsideration, asking the district court to reconsider its order denying the accrued interest and stating, for the first time, that decedent was diagnosed with dementia in 2003, as an explanation for her failure to pursue repayment of the note prior to her death. Appellants responded with their own request for leave to submit a motion for reconsideration on the basis that the documentary evidence relied on by respondent and the district court to indicate that the note had not been forgiven was questionable, in light of decedent's weakened mental state. The district court denied both motions for reconsideration. Appellants appealed from the summary judgment and respondent cross-appealed relative to the order denying judgment for the unpaid accrued interest.

D E C I S I O N

Appellants argue that the district court erred by granting summary judgment because forgiveness of debt does not need to be reflected in writing and genuine issues of material fact remain regarding whether decedent forgave the promissory note. Because

[3] On appeal, appellants argue that the $45,000 payment from October 2001 and the $27,500 payment from April 2005 were to be applied to the principal of the loan, leaving an unpaid principal of $27,500. However, the district court, without explanation, entered judgment against appellants for $30,087.67, the principal balance as alleged in respondent's complaint.

there are genuine issues of material fact under the unique circumstances of this case, we reverse the district court's order granting summary judgment and denying respondent's claim for accrued interest.

A district court shall grant summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court asks whether "there are genuine issues of material fact" and whether "the district court erred in its application of the law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). In doing so, we "view the evidence in the light most favorable to the party against whom [summary] judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). We review the district court's summary judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). This court will also "review the [district] court's application of the law de novo." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).

To withstand summary judgment, a "party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. A party may not rely on "mere speculation" and must present "substantial evidence" to survive summary judgment. *Osborne*, 749 N.W.2d at 371 (quotations and alteration omitted). However, the district court should not "decide issues of fact but . . . determine whether there is an issue of fact to be tried." *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981) (quotation omitted).

Ultimately, "summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Appellants argue that the district court erred in determining that forgiveness of debt must be expressed in writing to be legally effective. The district court, citing *Lamprey v. Lamprey*, 29 Minn. 151, 12 N.W. 514 (Minn. 1882) and *Stewart v. Hidden*, 13 Minn. 43, 13 Gil. 29 (1868), stated that "[t]he law's general preference for written contracts is consistent with the law of gifts, wherein the forgiveness of a debt may constitute a gift only when delivery is demonstrated by a writing or receipt."

While Minnesota courts have generally preferred that forgiveness of debt be set forth in writing, neither of these cases state that there must be a written document in order for forgiveness of debt to be effective. In *Lamprey*, the parties disputed the validity of a written stipulation modifying a loan agreement. 29 Minn. at 154–55, 12 N.W. at 514–15. In the stipulation, the creditor acknowledged that the entire debt was paid notwithstanding the fact that the debtor paid only part of the debt. *Id.* at 154, 12 N.W. at 514. In affirming the district court's grant of a new trial and its decision that the stipulation could be considered by the trial court, the supreme court noted, in dictum, that the stipulation and acknowledgment of the receipt of partial payment of an existing debt written by the creditor, if determined to be genuine, may be regarded as evidence of a gift. *Id.* at 155–56, 12 N.W. at 515. In *Stewart*, a creditor sued for payment on a promissory note and the debtor claimed that the creditor forgave the debt as evidenced by the creditor's delivery of the promissory note to him upon partial payment of the debt. 13

Minn. at 43, 13 Gil. at 29–30. The creditor argued that there was no consideration for the discharge of the note upon partial payment. *Id.* at 43, 13 Gil. at 37. The supreme court reversed the judgment entered in favor of the creditor and remanded, noting that delivery of the promissory note to the debtor was evidence that the forgiveness of the remaining amounts due on the note was a gift. *Id.* at 43, 13 Gil. at 38–39. Unlike the current matter, in both of these cases the parties disputed whether the written documents evidencing full satisfaction of loans could constitute valid gifts.

"To constitute a valid gift inter vivos, the donor must deliver the property to the donee, or to someone for him, with intent to vest title in the donee, and without reserving any right to reclaim the property." *Oehler v. Falstrom*, 273 Minn. 453, 456, 142 N.W.2d 581, 585 (1966); *see also Weber v. Hvass*, 626 N.W.2d 426, 431 (Minn. App. 2001) (citing *Oehler*), *review denied* (Minn. June 27, 2001). Generally, the "required elements of a gift are '(1) delivery; (2) intention to make a gift; and (3) absolute disposition by the donor of the thing which the donor intends as a gift.'" *Angell v. Angell*, 777 N.W.2d 32, 37 (Minn. App. 2009) (quoting *Weber*, 626 N.W.2d at 431), *aff'd*, 791 N.W.2d 530 (Minn. 2010).

However, in a factually analogous case, this court did not strictly require delivery of a specific writing in addressing whether the forgiveness of debt needed to be in writing. *Kiecker v. Estate of Kiecker*, 404 N.W.2d 881, 883–84 (Minn. App. 1987) (citing *Oehler*, 273 Minn. at 456–57, 142 N.W.2d at 585); *see also Quarfot v. Sec. Nat. Bank & Trust Co.*, 189 Minn. 451, 455, 249 N.W. 668, 669 (1933) (noting that "[m]uch depends upon the intent of the donor" and that "[a]ny substantial act" by the donor that

effects the gift and passes control to the donee "will ordinarily support a gift"). Although the supreme court affirmed the district court's determination that the debtor failed to present clear and convincing evidence, the intent of the donor, not the presence or absence of a specific writing, was the supreme court's central focus. 404 N.W.2d at 883–84.

Further, it is well settled that a written contract "may be modified by a subsequent oral agreement," or, "[i]n the absence of an express verbal agreement, [by] subsequent acts and conduct of the parties to the contract." *Reliable Metal, Inc. v. Shakopee Valley Printing, Inc.*, 407 N.W.2d 684, 687 (Minn. App. 1987) (citing *Mitchell v. Rende*, 225 Minn. 145, 148, 150, 30 N.W.2d 27, 30–31 (1947)); *see also Pollard v. Southdale Gardens of Edina Condominium Ass'n., Inc.*, 698 N.W.2d 449, 453 (Minn. App. 2005) ("It is well settled that a written contract may be modified by subsequent acts and conduct of the parties to the contract."). Utilizing these same contract principles, we have upheld the validity of an oral agreement to modify the subsequent performance of a debtor relative to a promissory note. *See In re Estate of Giguere*, 366 N.W.2d 345, 346–47 (Minn. App. 1985). Even without a specific writing, if there is other sufficient evidence of an agreement for forgiveness of debt, such agreement is binding upon the parties. *See Sparta Sportsfabrikk v. NorTur, Inc.*, 407 N.W.2d 128, 131 (Minn. App. 1987) (accepting minutes from board of directors meetings, business records, and letters as sufficient evidence to support forgiveness of a debt).

Thus, we agree that the intent of the donor is the primary consideration, such that "an effective donative transfer can be made without a document of transfer by a delivery

in combination with a manifestation of intent to make a gift." Restatement (Second) of Property: Donative Transfers § 31.1 cmt. k (1992). Courts have recognized that physical delivery is not always possible because of the nature of certain property, and in those cases, constructive or symbolic delivery may suffice, though there are obvious evidentiary issues in proving such delivery with clear and convincing evidence. Restatement (Third) of Property: Wills & Other Donative Transfers § 6.2 cmt. c, f, g, h (2003). Furthermore, "[t]he acts, conduct, or statements of the creditor subsequent to the transaction relied upon as constituting a gift of the debt may have a material bearing on the question of donative intent," and "the fact that the parties have, by their conduct, treated the debt as forgiven has been given consideration as indicative of a donative intent, and has been held to permit or require that it be so treated in equity." C.R. McCorkle, *Gift of Debt to Debtor*, 63 A.L.R.2d 259 § 12[a] (1959) (footnotes omitted). As such, "a gift of personal property can be perfected on the basis of donative intent alone if the donor's intent to make a gift is established by clear and convincing evidence." Restatement (Third) of Property: Wills & Other Donative Transfers § 6.2 cmt. yy (2003). The intent of the donor is the primary consideration in determining the existence of a gift in other contexts. *See Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997) ("The most important factor in determining whether a gift is marital or nonmarital is the donor's intent."); *see also C.I.R. v. Duberstein*, 363 U.S. 278, 285–86, 80 S. Ct. 1190, 1197 (1960) (stating that, for purposes of gifts and federal tax law, "the most critical consideration . . . is the transferor's intention." (quotation omitted)).[4]

[4] Indeed, for tax purposes, intrafamily transfers are presumptively considered gifts unless

In Minnesota, "[q]uestions of intent are questions of fact." *Oehler*, 273 Minn. at 457, 142 N.W.2d at 585. In the context of gifts, it is well-settled that the existence of a gift is a question of fact that must be shown by clear and convincing evidence. *Oehler*, 273 Minn. at 457, 142 N.W.2d at 585. This higher standard of proof also applies to any oral modification of a promissory note. *Giguere*, 366 N.W.2d at 347. "Clear and convincing proof will be shown where the truth of the facts asserted is highly probable." *In re Estate of Lobe*, 348 N.W.2d 413, 414 (Minn. App. 1984) (quotation omitted). This standard places an elevated burden on the putative donee to show that a transaction is properly characterized as a gift through the donor's intent.

The district court granted summary judgment because appellants did not present "sufficient credible evidence to support their defense so as to create a genuine issue for trial." But the district court focused on appellants' affidavit and "claim that Ms. Levine forgave the balance of the note during a phone call on May 1st, 2005," and concluded that "[u]nder the standard at summary judgment, [appellants'] assertion, standing alone, is insufficient to create a genuine fact issue for trial."

But, appellants also presented evidence that: (1) they sent a thank you letter to decedent for forgiving the debt; (2) they had paid most of the principal of the debt; (3) decedent did not attempt to collect interest or the remaining principal for the four years between 2005 and 2009, even though they consistently paid interest each year

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the party challenging that status makes "an affirmative showing" of "a real expectation of repayment and a real intent to enforce the collection of the asserted debt." *Klaphake v. Comm'r of Rev.*, 2012 WL 3642278, at *7 (Minn. Tax Ct. Aug. 20, 2012) (quotation omitted) (citing federal tax memorandums).

between 2001 and 2004; (4) they had a close family relationship and had frequent contact with decedent until her death; and (5) some of their payments on the note were deposited into decedent's personal accounts, rather than in business accounts for Levine Investments, which may show that decedent viewed their loan differently than her other business investments. Appellants, at least, created a genuine issue of material fact as to whether the subsequent acts and conduct of decedent were consistent with their claim that the debt was partially forgiven.

We note our concern with preventing abuse where individual debtors take advantage of intrafamily fiscal dealings, especially in dealings with elderly or sick family members.[5] While this type of relationship includes the possibility of financial exploitation,[6] in light of the procedural posture presented here, we view the closeness of the relationship between decedent and appellants in the light most favorable to appellants. However, the higher evidentiary burden requiring clear and convincing evidence of donative intent is consistent with these policy concerns. This burden should ward off debtors seeking to extinguish a debt obligation by merely stating that the loan had been forgiven by the donor. We note that appellants must present sufficient evidence to

[5] Respondent raised the possibility that decedent lacked the capacity to forgive the appellant's debt, but this evidence was only brought forth in respondent's motion for reconsideration and was not received by the district court. Thus, it is neither part of the record nor considered on appeal. Minn. R. Civ. App. P. 110.01. Further, neither party appeals the district court's decision to deny their respective motions for reconsideration. In light of our resolution of the summary-judgment issue, we decline to discuss whether that decision was appropriate. However, we note that the district court, on remand, has discretion to consider the evidence submitted relative to those motions, including evidence pertaining to decedent's capacity.

[6] We note that intrafamily fiscal dealings also include situations where elderly or sick family members borrow money from relatives, who may forgive all or part of the debt.

withstand this heightened evidentiary standard. *See DLH*, 566 N.W.2d at 70 (holding that, in order to survive summary judgment, the nonmoving party must establish that there is a genuine issue of material fact through legally sufficient evidence). Thus, a writing commemorating the forgiveness of debt as a gift is preferred, but the ultimate issue is whether appellants can present clear and convincing evidence of the decedent's donative intent.

Based upon the law, as well as the evidence presented by appellants in support of their claim that their debt was forgiven, we conclude that district court erred in granting summary judgment relative to respondent's claim for repayment of the principal owed on the promissory note. When viewed in the light most favorable to appellants, there was sufficient evidence that decedent forgave the balance of the promissory note to at least create a genuine issue of material fact. Because resolution of these factual issues at trial may also affect the district court's denial of respondent's claims against appellants for the accrued interest, we reverse both the summary judgment and the denial of respondent's claims for accrued interest and remand.

Reversed and remanded.

CLEARY, Judge (concurring specially)

I concur with the majority's decision to reverse and remand both the summary judgment and the denial of respondent's claim for accrued interest, but I write separately to express my concern over the continuing need to protect the elderly and the vulnerable from financial exploitation.

The majority notes, correctly, that while "Minnesota courts have generally preferred that forgiveness of debt be set forth in writing," it is not an absolute requirement. But perhaps it should be when the alleged donor is elderly or otherwise vulnerable. The majority mentions in passing "our concern with preventing abuse where individual debtors take advantage of intrafamily financial dealings, especially in dealings with elderly or sick family members." And while the issue of a lack of mental capacity of the donor was not raised in this case until the motion for reconsideration, alleging that decedent suffered from dementia since 2003, two years before the alleged debt-forgiving phone call, the mental capacity of many elderly citizens is severely diminished as the years go by.[7]

Senior citizens, many of them in failing health, are often dependent on others for companionship and for the necessities of life. In that capacity, they are often victims of financial exploitation by those closest to them. Here, as the majority notes, we must "view the closeness of the relationship between decedent and appellants in the light most favorable to appellants" and, when viewed in the light most favorable to appellants, there

[7] The motion also informed the court that the donor's death in 2009 "was caused by Alzheimer's disease."

is a genuine issue of material fact as to whether decedent forgave the balance of the promissory note, even without written documentation.

The majority is comfortable that the burden of clear and convincing evidence of donative intent will suffice to prevent a fraudulent attempt to extinguish a debt obligation without a writing confirming the transfer. In many cases, I would agree. Yet, in dealing with the elderly or the otherwise vulnerable, I believe the law should require a properly authenticated written document memorializing the extinguishing of the debt or, for that matter, memorializing the transfer of any monetary gift inter vivos. While this would not end all litigation on such matters, this requirement would protect those who need protection the most, and help avoid the many legal disputes that arise among heirs and other beneficiaries upon the passing of an elderly person with means.

Dated: _____ _____
Judge Edward J. Cleary