[Cite as *Stewart v. Boland*, 2015-Ohio-1712.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BETTY STEWART, Administrator of the Estate of Elizabeth G. Probst,	:	APPEAL NOS. C-140376 C-140395 TRIAL NO. 2013-000293
Plaintiff-Appellee/ Cross-Appellant,	:	*O P I N I O N.*
vs.	:	
RONALD BOLAND,	:	
Defendant-Appellant/ Cross-Appellee.	:	

Appeals From: Hamilton County Court of Common Pleas, Probate Divsion

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Affirmed as Modified

Date of Judgment Entry on Appeal: May 6, 2015

Millikin & Fitton Law Firm and *Steven A. Tooman*, for Plaintiff-Appellee/Cross-Appellant,

The Goode Firm and *Joshua L. Goode*, for Defendant-Appellant/Cross-Appellee.

Please note: this case has been removed from the accelerated calendar.

SYLVIA SIEVE HENDON, Presiding Judge.

{¶1} Ronald Boland appeals the judgment of the Hamilton County Probate Court in an action brought under R.C. 2109.50 by Betty Stewart, the administrator of Elizabeth G. Probst's estate, for concealment of estate assets. Stewart has filed a cross-appeal, challenging the trial court's denial of her request for attorney fees.

Background

{¶2} Probst died on January 16, 2011, at the age of 92. Boland, her nephew, had served as her attorney-in-fact under a power of attorney from June 2004 until her death.

{¶3} Following a trial, a magistrate of the probate court issued a decision finding Boland guilty of misappropriating estate assets, and finding that a judgment against him in the amount of $436,717.07, plus a ten percent penalty, and court costs, was warranted. Both parties filed objections to the magistrate's decision.

{¶4} The trial court overruled the objections and adopted the magistrate's decision. Both parties appealed.

{¶5} We address Boland's two assignments of error out of order. In his second assignment of error, Boland challenges the trial court's judgment that he was not entitled to $52,583.81 remaining in a joint-and-survivorship account upon Probst's death, and that he had improperly received $77,300 as compensation for his services as Probst's attorney-in-fact.

Joint-and-Survivorship Account

{¶6} Probst created a joint-and-survivorship account with Boland on January 20, 2009, when she executed a signature card that made Boland an

additional owner on her PNC Bank checking account. The trial court, however, determined that Probst had lacked the capacity to create a joint-and-survivorship account.

{¶7} The court based its finding on the following facts presented at trial. Probst had entered an assisted-living facility called Atria in October 2005, with a dementia diagnosis. She lived there until August 2009, when she moved to another facility called Burlington House.

{¶8} During his direct examination in Stewart's case-in-chief, Boland's brother Robert testified to the following:

> [Attorney]: How often would you visit your Aunt Betty when she was in a nursing home?
>
> ROBERT BOLAND: Oh we went out quite a bit and -- me and my wife went out quite a bit. We took some drinks out and put them at her window. Not at the nursing home. The -- the retirement center where she was staying.
>
> [Attorney]: Was that Atria or Burlington?
>
> [Audience Member]: It was Atria.
>
> ROBERT BOLAND: Atria.
>
> [Attorney]: Were you able to observe her mental --
>
> ROBERT BOLAND: Yes. And it was really bad.
>
> [Attorney]: And when was it really bad?
>
> ROBERT BOLAND: For about two years I guess. She was -- she didn't even know me.
>
> [Attorney]: Two years before she died?
>
> ROBERT BOLAND: Two years before she died.
>
> [Attorney]: And when you say really bad, what do you mean?

ROBERT BOLAND: Well, she just was really bad. Just -- she didn't know me and she just -- she was carrying a little animal around with her, a stuffed animal. And she'd sleep with it. When she sat in the chair she'd have it sitting on her lap.

[Attorney]: What kind of stuffed animal was it?

ROBERT BOLAND: A -- a big cat was it?

[Attorney]: Oh you've got to testify. Sorry. You can't ask for help from them.

ROBERT BOLAND: It -- it might have been a big cat.

[Attorney]: A big cat. What was she confused as to -- you said she didn't know you. Was she confused as to places and times and those types of things?

ROBERT BOLAND: Yeah she was just -- she didn't even know us.

[Attorney]: And that was for about two years before she passed away?

ROBERT BOLAND: (Inaudible) before she died.

{¶9} In addition, Stewart presented the testimony of Katie Bennett who began working at Burlington House on December 28, 2010. In the 20 days preceding Probst's death on January 16, 2011, Bennett saw Probst "about four days a week." Bennett testified that she had observed Probst's mental condition, and stated, "As far as I knew she -- she had dementia. [S]he didn't even know who she was let alone anyone else."

{¶10} Probst went to the hospital several times in 2009. In April 2009, she was treated for a head laceration, and was noted at the time to suffer from dementia. In August 2009, she was admitted to the hospital after she had lost consciousness while sitting in a chair. As indicated by hospital staff notes, Ronald Boland "noted a decline over the last six to nine months in [Probst's] dementia and is concerned in

that she is able to remain safe in the current environment." The record from that admission further indicated that Probst was diagnosed with severe dementia.

{¶11} In its judgment entry, the trial court stated:

> An employee of Burlington House, Katie Bennett, testified that in 2010 and 2011 she saw decedent 4 times per week. Ms. Bennett testified that decedent was demented and confused. * * * Defendant's brother, Robert Boland, testified that decedent did not recognize him for two years before she died [*from January 2009 until January 2011*]. * * * *Ms. Bennett's testimony relates to events in 2010 and 2011. Given the time frame of Ms. Bennett's testimony*, it is relevant to the extent that it corroborates Robert Boland's testimony and Defendant's statement against interest.

(Emphasis added.)

{¶12} Given that Bennett had begun working at Burlington House just three weeks before Probst died, any overlap with Robert's observations of Probst was not corroborative. And Bennett's first encounter with Probst occurred two years after Probst created the joint-and-survivorship account. Moreover, notwithstanding the trial court's finding, the record demonstrates that Robert's testimony about Probst's capacity was generally confined to the period after the creation of the account. So neither Bennett's nor Robert's testimony was particularly relevant to Probst's capacity in January 2009 to create the account.

{¶13} In the absence of fraud, duress, undue influence or lack of mental capacity on the part of the depositor, the opening of a joint-and-survivorship account is conclusive evidence that the depositor intended to transfer to the survivor the balance remaining in the account at the depositor's death. *Wright v. Bloom*, 69 Ohio St.3d 596, 607, 635 N.E.2d 31 (1994). In other words, there is a conclusive

presumption that, by opening a joint-and-survivorship account, a depositor intended to transfer a survivorship interest. *Id.*

{¶14} A court need not go beyond the joint-and-survivorship account contract to ascertain the depositor's intent. *Id.* at 605. Instead, the dispositive question is simply whether the signature card or account documents specified that the joint account holders have survivorship rights. *Leblanc v. Wells Fargo Advisors, L.L.C.*, 134 Ohio St.3d 250, 2012-Ohio-5458, 981 N.E.2d 839, ¶ 30. The *Wright* presumption is rebuttable by clear and convincing evidence of fraud, duress, undue influence or lack of mental capacity on the part of the depositor. *Wright* at 603; *see Gotthardt v. Candle*, 131 Ohio App.3d 831, 835, 723 N.E.2d 1144 (7th Dist.1999).

{¶15} Cases involving will contests are instructive in the case at bar, because the party challenging the validity of a will admitted to probate must overcome the presumption that the testator possessed the capacity to execute the will. *See Neumeyer v. Penick*, 180 Ohio App.3d 654, 2009-Ohio-321, 906 N.E.2d 1186, ¶ 47 (5th Dist.). Courts have held that it is not enough to show that a testator had dementia at the time a will was executed, because the challenger must show that the dementia actually affected the testator's capacity to make the will. *See, e.g., In re Estate of Goehring*, 7th Dist. Columbiana Nos. 05 CO 27 and 05 CO 35, 2007-Ohio-1133, ¶ 54; *Martin v. Dew*, 10th Dist. Franklin No. 03AP-734, 2004-Ohio-2520; *In re Estate of Marsh*, 2d Dist. Greene No. 2010 CA 78, 2011-Ohio-5554.

{¶16} In this case, even were we to accept that Probst had dementia at the time she created the joint-and-survivorship account, we could not conclude that Stewart demonstrated by clear and convincing evidence that the dementia had actually impacted Probst's capacity to create the account. Consequently, we hold that the trial court's determination that Probst lacked the capacity to create a joint-and-survivorship account in January 2009 was against the weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *Eastley v.*

Volkman, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Accordingly, the funds remaining in Probst's PNC Bank joint-and-survivorship checking account in the amount of $52,583.81 were nonprobate assets not subject to the probate court's jurisdiction. *See Wright,* 69 Ohio St.3d 596, 635 N.E.2d 31.

Compensation for Services as Attorney-in-Fact

{¶17} Boland also challenges the trial court's determination that he was liable for the repayment of money he had earned by serving as Probst's attorney-in-fact under a power of attorney. Boland claimed at trial that Probst's husband, before his death, had told Boland to take $250 per week as a fee for his services. The trial court noted that there was no documentary evidence to support the claim. Even if Boland's testimony on this point was, as he argues, "uncontroverted," we defer to the trial court's credibility assessments. Here, the trial court simply disbelieved Boland. We will not disturb its finding that he was not entitled to $77,300 for his claimed services. *See Thompkins, supra; Eastley, supra.*

{¶18} Consequently, we overrule Boland's second assignment of error to the extent that it challenges the trial court's finding with respect to the $77,300 for Boland's services as attorney-in-fact. We sustain the second assignment of error to the extent that the trial court found $52,583.81 remaining in the joint-and-survivorship account to be a probate asset.

{¶19} Because we have concluded that the trial court's determination that Probst had lacked the capacity to create the joint-and-survivorship account was against the weight of the evidence, we need not address Boland's first assignment of error, in which he challenges the lack of expert testimony on the issue.

Stewart's Cross-Appeal

{¶20} In her sole assignment of error, Stewart argues that the trial court erred by denying her request for attorney fees. She contends that the court's finding of guilt under R.C. 2109.52 was tantamount to a finding that Boland had acted in bad faith, and that, therefore, attorney fees were required. We review a trial court's decision to deny attorney fees for an abuse of discretion. *See In re Rider*, 68 Ohio App.3d 709, 712, 589 N.E.2d 465 (6th Dist.1990).

{¶21} In the absence of statutory authorization or a finding of conduct that amounts to bad faith, a prevailing party may not recover attorney fees. *See Pegan v. Crawmer*, 79 Ohio St.3d 155, 156, 679 N.E.2d 1129 (1997). Under R.C. 2109.52, if a probate court finds a person guilty of concealing estate assets, the court must render judgment in favor of the fiduciary for the amount of money or the value of property concealed, with a ten percent penalty "and all costs of the proceedings or complaint." Although the statute does not specifically authorize an award of attorney fees, some courts have held that a probate court's guilty finding in an asset-concealment action is "tantamount to a finding that [the concealer] acted in bad faith and/or for oppressive reasons in concealing the assets." *In re Estate of Toth*, 5th Dist. Stark No. CA-9312, 1993 Ohio App. LEXIS 5790, *3 (Nov. 29, 1993); *see In re Estate of Brate*, 12th Dist. Warren No. CA2007-08-103, 2008-Ohio-3517; *Apergis v. Boccia*, 11th Dist. Trumbull No. 2009-T-0079, 2010-Ohio-2954. In those cases, the appellate courts upheld awards of attorney fees, finding no abuse of discretion by the trial courts.

{¶22} In this case, however, even if we agreed that a guilty finding was equivalent to a finding of bad faith, there was no error in the refusal to award attorney fees. In ruling upon Stewart's objection to the magistrate's failure to award attorney fees, the trial court found that its magistrate had properly exercised

discretion in not making the award, and stated that Stewart had not "provided any evidence of what fees were incurred, in any event." Under these circumstances, we cannot say that the trial court erred by refusing to award attorney fees. We overrule Stewart's sole assignment of error.

Conclusion

{¶23} In conclusion, we reverse the trial court's judgment to the extent that it found the $52,583.81 remaining in the joint-and-survivorship account upon Probst's death, to be an asset of the estate. The trial court's judgment is modified to the extent that judgment is entered against Boland in the amount of $ 384,133.26, plus a ten percent penalty, and court costs, and the judgment is affirmed as modified.

Judgment accordingly.

CUNNINGHAM and **FISCHER, JJ.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.