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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) 1 CA-CV 10-0645
)
KENNETH HARLAN OLSON,) DEPARTMENT C
)
Deceased.) **MEMORANDUM DECISION**
) (Not for Publication
_____)) - Rule 28, Arizona
LINDA STOGNER,) Rules of Civil
) Appellate Procedure)
Plaintiff/Counterdefendant/)
Appellant/Cross-Appellee,)
)
v.)
)
SUSAN MIDDAUGH, individually, and as)
Personal Representative of the Estate)
of KENNETH HARLAN OLSON,)
)
Defendant/Counterclaimant/)
Appellee/Cross-Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2005-002635

The Honorable David O. Cunanan, Commissioner
The Honorable Lindsay Ellis, Judge Pro Tem (Retired)

AFFIRMED IN PART; REVERSED IN PART

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N O R R I S, Judge

¶1 On appeal, Linda Stogner argues the probate court should have removed her sister, Susan Middaugh, as personal representative of the Estate of Kenneth Harlan Olson, their father ("decedent"), and should have invalidated the transfers made by decedent to Middaugh because she breached her fiduciary duty to decedent and exercised undue influence over him. Because the superior court's decision refusing to do either was supported by substantial evidence, we disagree.

¶2 On cross-appeal, Middaugh argues the probate court should have found the proceeds from the sale of a mining claim belonged to her as the surviving joint tenant with right of survivorship. We agree, and thus reverse this portion of the probate court's judgment.

FACTS AND PROCEDURAL BACKGROUND

¶3 In August 2006, Stogner and two of her siblings (collectively, "Siblings") petitioned the court to remove Middaugh as personal representative of the Estate, alleging she had breached her fiduciary duty and had exercised undue

influence over decedent. Middaugh denied the allegations in Siblings' petition and argued decedent transferred property to her to avoid probate, emphasizing the transfers were "subject to an express parol trust" for Siblings -- \$5,000 for Stogner and \$25,000 each for the other two siblings. The parties also disputed the effect of a promissory note, secured by a deed of trust, pertaining to a mining claim sold by decedent and Middaugh to a third party in May 2005 ("mining claim proceeds"). The deed of trust designated decedent and Middaugh as joint tenants with right of survivorship, but the promissory note simply listed Middaugh and decedent as holders of the note without additional designation.

¶4 After a trial at which Middaugh, Siblings, and others testified, and relying on the vulnerable adult statute that was not pled by the parties, the probate court entered judgment removing Middaugh as personal representative, appointing Stogner as the successor personal representative, and setting aside several asset transfers to Middaugh, including the mining claim proceeds ("the first judgment"). Middaugh appealed. We reversed the first judgment because the probate court based its decision on grounds not raised in the parties' pleadings. Accordingly, we remanded for the probate court to "rule on the issues framed by the parties' pleadings."

¶15 On remand, the probate court reconsidered the evidence and arguments of the parties, specifically the "court docket, minute entries, exhibits, pleadings, partial transcripts and audiotapes of the proceedings" as well as "Plaintiff's Written Closing Statement; the Defendant's Memorandum of Law Regarding Issues of Breach of Fiduciary Duties, Undue Influence and Constructive Trust; Appendix Re: Defendant's Memorandum, and other relevant post-judgment pleadings." The court found no evidence existed to "clearly and convincingly establish that [decedent] was subject to undue influence by Middaugh in the transfer of property interests" or that Middaugh had violated a fiduciary duty owed to decedent. Accordingly, the court denied Siblings' petition to remove Middaugh as personal representative. The court also found the mining claim's promissory note did not include joint tenancy language and thus the Estate and Middaugh were each entitled to 50% of the mining claim proceeds, subject to decedent's gifts to Siblings. With the exception of the mining claim, the court affirmed the transfers to Middaugh.

¶16 Siblings timely appealed the probate court's judgment on remand ("second judgment"),¹ and Middaugh cross-appealed. We

¹Although the notice of appeal identifies all three siblings, Linda Stogner is the sole appellant and cross-appellee in this appeal.

have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(J) (2003).

DISCUSSION

I. Stogner's Appeal

¶17 As noted above, Stogner argues the probate court should have removed Middaugh as personal representative of the Estate and invalidated the transfers made by decedent to Middaugh. As she sees it, to comply with our instructions on remand, the second probate court was required to accept or reinstate the findings made in the first judgment. We disagree and hold the probate court was entitled to reconsider the evidence on remand pursuant to our mandate.

¶18 When the mandate of an appellate decision provides specific instructions, a trial court must "strictly follow" them. *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 334, ¶ 30, 212 P.3d 17, 26 (App. 2009) (quoting *In re Marriage of Molloy*, 181 Ariz. 146, 149, 888 P.2d 1333, 1336 (App. 1994)); see also *Johnson v. Mofford*, 193 Ariz. 540, 546, ¶ 31, 975 P.2d 130, 136 (App. 1998). We review de novo whether a trial court - - in this case, the probate court -- violated a mandate. *Bogard*, 221 Ariz. at 334, ¶ 30, 212 P.3d at 26.

¶19 Here, this court instructed the probate court on remand to "rule on the issues framed by the parties' pleadings"

because the probate court could award a judgment only "within the issues formed by the pleadings" and could not "award greater or different relief than that sought." We explained:

[T]he parties did not have the opportunity to address the possible application of the financial exploitation statute, and thus we are reluctant to consider its application to these facts. We similarly do not have the benefit of the probate court's findings either on the issue of undue influence or the terms of the constructive trust if a trust should be imposed given Middaugh's alleged violation of her fiduciary relationship.

To comply with our mandate, the probate court was required to reconsider the evidence in light of the issues framed in the pleadings because the first judgment did not -- as we explained -- contain any findings on undue influence or on the potential terms of a constructive trust. Accordingly, in "strictly follow[ing]" the mandate, the probate court on remand properly reviewed the parties' pleadings and accompanying evidence.

¶10 Furthermore, contrary to Stogner's argument, we reversed the first judgment in its entirety and did not merely overturn it insofar as it relied on the vulnerable adult statute. Thus, based on our mandate, the probate court on remand was required to rule on all of the issues in the parties' pleadings, which, as framed by Siblings' petition and Middaugh's answer, were: (1) whether Middaugh had breached her fiduciary

and confidential relationship with the other heirs by placing decedent's assets in her own name or by intending to defraud Siblings by taking the assets without any intent to hold them for Siblings' benefit; (2) whether Middaugh had exercised undue influence on the decedent by, *inter alia*, inducing him to sign a joint tenancy deed to his house after he was hospitalized and days before his death; (3) whether decedent and Middaugh held the promissory note securing the deed of trust for the mining claim proceeds as joint tenants with right of survivorship; and (4) whether the court should remove Middaugh as personal representative, enjoin Middaugh from disposing of the assets, or impose a constructive trust on the assets.

¶11 Stogner next argues the findings in the second judgment are inconsistent with the findings in the first judgment.² We agree, but this inconsistency does not require reversal because, as noted above, the probate court was entitled to reconsider the evidence and make its own findings. That

²In reviewing the probate court's findings of fact, we examine the record "only to determine whether substantial evidence" -- that is, "evidence which would permit a reasonable person to reach" the court's result -- exists to support the probate court's action, *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999), and we accept the probate court's findings unless they are clearly erroneous. *In re Estate of Newman*, 219 Ariz. 260, 265, ¶ 13, 196 P.3d 863, 868 (App. 2008). We also consider the facts in the light most favorable to sustaining the probate court's judgment. *Id.* at 263, ¶ 3, 196 P.3d at 866.

brings us to the heart of the appeal, which is whether the findings in the second judgment are supported by the evidence. As we explain below, the findings in the second judgment address the issues framed by the parties' pleadings and are supported by the evidence.

A. *Undue Influence*

¶12 Substantial evidence supports the probate court's finding "no evidence exist[ed] that would clearly and convincingly establish that [decedent] was subject to undue influence by Middaugh in the transfer of property interests." See *Evans v. Liston*, 116 Ariz. 218, 220, 568 P.2d 1116, 1118 (App. 1977) (burden on party contesting the validity of deed "to prove by clear and convincing evidence" it was procured by undue influence). A person exercises undue influence when he or she overcomes the free will of another person, making that person's desires conform to his or her own. *Id.* (standard for undue influence same for executing a will or deed). In determining whether a person has exercised undue influence over a decedent, courts examine, *inter alia*, whether the person made fraudulent representations to the decedent; whether the person benefited was active in procuring the transfers; whether the transfer was consistent with decedent's prior declarations; whether the transfer was reasonable in light of decedent's attitudes and

family; whether the decedent is susceptible to undue influence; and whether the decedent and the influencer had a confidential relationship. *Mullin v. Brown*, 210 Ariz. 545, 550, ¶ 18, 115 P.3d 139, 144 (App. 2005) (quoting *In re Estate of McCauley*, 101 Ariz. 8, 10-11, 415 P.2d 431, 433-434 (1966)).

¶13 A legal document preparer, a title agent, and decedent's attorney testified decedent was strong-willed and not easily subjected to the influence of others. The legal document preparer, Middaugh, and a friend of decedent testified that although decedent was physically ill and in the hospital, he was of sound and "sharp" mind when he executed the deed adding Middaugh as a joint tenant on his home. Decedent's attorney, the legal document preparer, the title agent, and Middaugh testified that because decedent was displeased with Siblings and to further his long-held desire to avoid probate, decedent added Middaugh's name on his bank accounts and as a joint tenant for his house and the mining claim proceeds. Based on the testimony and the exhibits presented to the probate court, substantial evidence supports the probate court's finding Siblings had failed to demonstrate by clear and convincing evidence Middaugh exercised undue influence over decedent.

B. Constructive Trust

¶14 Substantial evidence also supports the court's finding Siblings had failed to present "clear and convincing evidence that Middaugh violated a fiduciary duty owed to [decedent] in order to overturn the transfers [to Middaugh] or establish a constructive trust." See *Turley v. Ethington*, 213 Ariz. 640, 643 n.2, ¶ 9, 146 P.3d 1282, 1285 n.2 (App. 2006) (requirements for imposing a constructive trust must be established by clear and convincing evidence). "A constructive trust arises by operation of law, and is generally imposed when property is acquired under inequitable circumstances, resulting in unjust enrichment of one at the expense of another." *Stoltz v. Maloney*, 129 Ariz. 264, 267, 630 P.2d 560, 563 (App. 1981). In Arizona, "a constructive trust arises where there has been fraud, either actual or constructive, or where there is a confidential or fiduciary relationship plus an implied promise to reconvey." *Id.* (citations omitted).

¶15 Siblings failed to present clear and convincing evidence Middaugh had defrauded or intended to defraud decedent or Siblings. Decedent's attorney, the legal document preparer, and the title agent testified decedent had wanted Middaugh as a joint tenant on his properties and accounts, and he -- not Middaugh -- initiated procedures to achieve this. Further,

Middaugh testified she always had intended to abide by decedent's wishes to distribute decedent's monetary gifts to Siblings if decedent's assets were subject to probate. Although one of Siblings testified Middaugh had forgiven one of decedent's loans, Middaugh explained she had "compromised" that loan to satisfy a claim against the Estate. Thus, Siblings presented no evidence Middaugh had acted contrary to decedent's wishes, improperly disposed of the Estate's assets, or in any way defrauded or intended to defraud decedent or Siblings.

¶16 Siblings also failed to establish by clear and convincing evidence that Middaugh had a confidential or fiduciary relationship with decedent. As the probate court recognized, the "fact that [Middaugh and decedent] were parent and child does not automatically establish a confidential relationship." Further, when a court has imposed a constructive trust on this basis, the record generally has demonstrated "in addition to the family relationship such factors as age and infirmity . . . , actual dominance on the part of one of the parties, an established course of management of the grantor's affairs by the grantee, or other similar facts making it inequitable to allow the grantee to prevail." *Id.* As discussed, several individuals testified that although decedent was elderly and in poor health, he was strong-willed, wanted the

bulk of his assets to go to Middaugh, and sought Middaugh's assistance with his financial affairs to avoid probate. Moreover, Siblings presented no evidence Middaugh dominated decedent or forced him to transfer his assets to her. Accordingly, the record supports the probate court's finding the evidence was insufficient to impose a constructive trust or to overturn decedent's transfer of assets to Middaugh.

II. Cross-Appeal

¶17 In her cross-appeal, Middaugh argues the probate court should have found the mining claim proceeds belonged to her as the surviving joint tenant with right of survivorship. We agree.³ "We review questions of law and mixed questions of law and fact de novo." *In re Estate of Ward*, 200 Ariz. 113, 115, ¶ 9, 23 P.3d 108, 111 (App. 2001) (emphasis omitted).

¶18 When two substantially contemporaneous documents contain inconsistencies, they "are to be read together in determining the nature of the transaction." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 198, 805 P.2d 1012, 1019 (App.

³It is debatable whether Stogner responded to Middaugh's cross-appeal. See *Pima Cnty. Juv. Severance Action No. S-113432*, 178 Ariz. 288, 293 n.1, 872 P.2d 1240, 1245 n.1 (App. 1993) (failure to file a brief in response to a cross-appeal "constitutes a confession of error" if there are debatable issues). She argues in her reply brief, however, that "the mine was never properly distributed to [Middaugh] and must be divided among all heirs." We have elected to consider this brief statement as a response to the cross-appeal.

1990). Here, the title agent testified that on May 22, 2005, she prepared the promissory note for the mining claim proceeds, the deed of trust securing payment of the promissory note, and an "Acceptance of Joint Tenants with Right of Survivorship Deed of Trust" executed by both decedent and Middaugh. The title agent also testified decedent and Middaugh signed the promissory note and the Acceptance on June 23, 2005. In the Acceptance, decedent and Middaugh affirmed their "intention to accept said interest as such Joint Tenants with full right of Survivorship and to acquire any interest [they] may have in said premises under the terms of said Deed of Trust as Joint Tenants with right of survivorship." Although the promissory note does not contain joint tenancy language, it reflects it "is secured by a Deed of Trust, of even date herewith." Reading these contemporaneous documents together, it is clear decedent and Middaugh intended to take the mining claim proceeds as joint tenants with right of survivorship.

¶19 The title agent's uncontroverted trial testimony and decedent's attorney's deposition testimony buttress this conclusion. The title agent testified that when decedent signed the mining claim deed, he told her he wanted to take the mining claim proceeds as a joint tenant with Middaugh. She also testified she had prepared the documents according to decedent's

instructions and had prepared the promissory note "in the customary fashion" for joint tenancies. At trial, consistent with the statement in her affidavit, the title agent confirmed she had "failed to do an assignment of the Promissory Note to [decedent] and Susan Middaugh as Joint Tenants with Rights of Survivorship" despite decedent's desire to hold the mining claim proceeds in joint tenancy. Decedent's attorney also testified and confirmed decedent told him he had intended Middaugh to be a joint tenant with him on the mining claim proceeds and the title agent told him she had intended both the promissory note and deed to be in joint tenancy.

¶20 Accordingly, substantial evidence demonstrates decedent had intended to take the mining claim proceeds as joint tenants with right of survivorship with Middaugh and any lack of joint tenancy language in the promissory note was an oversight. Therefore, we reverse the probate court's ruling Middaugh and the Estate are each entitled to 50% of the mining claim proceeds and hold Middaugh is entitled to all of the mining claim proceeds as the surviving joint tenant.

CONCLUSION

¶21 For the foregoing reasons, we affirm in part and reverse in part the probate court's second judgment. We deny Middaugh's request for sanctions under Arizona Rule of Civil

