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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE SUPERVISED ESTATE OF HARRY McKOWEN	)	
NELLIE LIKENS McCOWEN,	)	
Appellant-Petitioner,	)	
vs.	)	No. 48A05-0701-CV-27
ESTATE OF HARRY McKOWEN, Deceased	)	
TINKA BACH, PERSONAL REPRESENTATIVE	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable George G. Pancol, Master Commissioner
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0503-ES-8

October 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner, Nellie Likens McKowen ("Nellie"), appeals the trial court's denial of her Petition to Recover Joint Assets following the death of her husband, Harry McKowen ("Harry"), and the trial court's award of such assets to Appellee-Respondent, The Supervised Estate of Harry McKowen ("the Estate"). Upon appeal, Nellie claims the trial court erred in denying her petition for the following reasons: (1) Harry's removal of Nellie as joint account owner while he was a protected person under a guardianship was void as a matter of law; (2) Harry's transfers from the joint accounts without notice to her did not divest her of her joint ownership, regardless of whether Harry was under a guardianship; and (3) the court's order in the guardianship proceedings, which Nellie did not appeal, was improperly construed by the court as *res judicata* in the instant case. We affirm.

FACTS

Harry and Nellie were married May 8, 2001, when Harry was approximately eighty-nine years old, and Nellie was sixty-five. After their marriage, Harry and Nellie did not occupy the same house on a full-time basis.

Harry owned several Certificates of Deposit ("CDs"), with those at issue totaling over $300,000. At some point he added Nellie's name to the CDs, making them joint accounts.[1] Nellie never withdrew any money from these accounts.

On July 28, 2004, Harry executed a Durable Power of Attorney, naming his caretaker George Sparks as his attorney-in-fact.[2] Also on that date, Sparks petitioned the trial court to appoint him as Harry's temporary guardian. In appointing Sparks as Harry's temporary guardian, the court incorporated the allegations in Sparks's petition into its order and set the matter for hearing on August 26, 2004. On August 7, 2004, apparently before a hearing was held, the court appointed Sparks permanent guardian "over [Harry's] person." Appellant's App. at 12.[3]

On August 12, 2004, Harry executed a will giving Nellie $200,000 in cash. The will left Harry's farm, farm equipment and tools, and cattle, as well as the residue of his estate, to Sparks.

Following the August 7, 2004 order establishing Sparks as the permanent guardian over Harry's person, on August 26, 2004, the court held the hearing it had set in its July

[1] The record is unclear as to when Harry added Nellie's name to the accounts or specifically which accounts these were. Nellie does not dispute that the accounts were initially Harry's and were funded only with Harry's money. At the hearing on Nellie's Petition to Recover Joint Assets, the parties stipulated to Exhibit A, a chart of the claimed joint accounts at issue.

[2] On May 30, 2001, Harry had executed a Durable Power of Attorney appointing Nellie as his attorney-in-fact. Harry's later document naming Sparks revoked his earlier document naming Nellie.

[3] On September 10, 2004, Nellie filed a motion to correct error on the basis that the court had appointed Sparks permanent guardian over Harry's person prior to the scheduled hearing. The court denied this motion. It does not appear that a hearing was held prior to Sparks being named permanent guardian over Harry's person on August 7, 2004. On October 5, 2004, Nellie objected to Sparks's appointment on the basis that he was a convicted felon and included with her objection an abstract of judgment showing one George R. Sparks was convicted in 1994 in Madison Superior Court of Class C felony dealing in marijuana and Class D felony maintaining a common nuisance, for which he received an aggregate four-year sentence.

28 order for purposes of considering whether Sparks should become Harry's permanent guardian. On October 5, 2004, Nellie filed a motion to remove Sparks and requested the court to appoint her or Fairmount State Bank as guardian. On October 12, 2004, the trial court issued an order appointing Fairmount State Bank and trust officer Tinka Bach temporary guardian over Harry. The appointment was based upon the allegations in Sparks's original petition. Following a second hearing on December 14, 2004, the trial court determined that Harry, who had consented to guardianship by Fairmount State Bank, was physically incapacitated but mentally competent. The court appointed Fairmount State Bank as Harry's permanent guardian.

The parties stipulated that while under the above guardianships Harry made multiple transfers of money from CDs held jointly with Nellie into CDs in his name only. The transfers occurred on August 20 and October 9, 2004, while Sparks was Harry's guardian; on October 13 and October 15, 2004; November 9, 2004; and December 9, 2004, while Bach as representative of Fairmount State Bank was his temporary guardian; and again on January 11, 2005, while Bach and Fairmount State Bank were his permanent guardian.

Harry died on March 1, 2005. On March 3, 2005, Sparks and Bach, as co-personal representatives, filed a petition for probate of Harry's August 12, 2004 will.[4] Bach's final report and petition to terminate guardianship revealed that Harry's estate totaled over $2.5 million. On July 19, 2005, the trial court approved the report, terminated the

[4] Sparks was subsequently removed as personal representative following Nellie's objection on the basis of his felony conviction. (Red app. 136-37; 143)

guardianship, and ordered that Harry's assets be distributed to his estate. No appeal regarding the guardianship of Harry was ever filed.

On July 5, 2005, Nellie filed a petition to recover joint assets. On March 9, 2006, Nellie filed an amended petition to recover joint assets. The matter was heard on October 24, 2006, after which the trial court entered a December 14, 2006 order denying Nellie's petition. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

Where the trial court enters specific findings of fact and conclusions thereon, we apply the following two-tiered standard of review: whether the evidence supports the findings, and whether the findings support the judgment. *Learman v. Auto Owners Ins. Co*., 769 N.E.2d 1171, 1174 (Ind. Ct. App. 2002), *trans. denied*. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Clark v. Crowe*, 778 N.E.2d 835, 839-40 (Ind. Ct. App. 2002).

As Nellie is challenging the trial court's denial of her petition, she is appealing a negative judgment and will prevail only upon establishing that the judgment of the trial court was contrary to law. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). A judgment is contrary to law when the evidence is without conflict and all reasonable

inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. *Id*.

II. Whether CD transfers were voided by Harry's guardianship

As a preliminary matter, we observe that the trial court based part of its December 14, 2006 ruling denying Nellie's petition on the doctrines of *res judicata* and collateral estoppel. In doing so, the court found that Nellie's challenge to Harry's transfers of some of his and her joint accounts into accounts bearing only his name was properly a challenge to the guardianship proceedings, which Nellie never pursued. In appealing this order, therefore, Nellie devotes part of her brief to arguing why her challenge was not more properly raised as a challenge to the guardianship proceedings. Rather than address whether Nellie's instant challenge was waived by her failure to appeal the guardianship order, we prefer to address her claims on their merits.

Nellie first argues that the trial court's order denying her claim to the formerly jointly-held CDs was in error on the basis that Harry's transfers of the CDs out of joint ownership were void as a matter of law due to the fact that Harry made the transfers while he was under a guardianship. In support of this argument, Nellie claims that while under the guardianship Harry was by definition "incapacitated" and would therefore have been incapable of transacting his own business.

Indiana Code section 29-3-1-6 (2004) defines "guardian" as a person "responsible as the court may direct for the person or the property of an incapacitated person." An "incapacitated person" is someone who is unable to manage either his property, himself, or both due to "insanity, mental illness, mental deficiency, physical illness, infirmity,

habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity…." *See* Ind. Code § 29-3-1-7.5 (2004). Additionally, Indiana Code sections 29-3-7-5 and –6 (2004) provide that a guardian shall take possession of the guardianship property, that the protected person under the guardianship may not transfer such interest, and that upon the production of guardianship letters, a protected person has no rights to possess and dispose of the guardianship property.

It is Nellie's position that Harry's person and estate fell under a guardianship and were therefore subject to the above statutory provisions. A review of the trial court's orders and the facts, however, demonstrates that Harry's guardianship was a limited one. Pursuant to Indiana Code sections 29-3-1-6 and 29-3-8-8 (2004), a trial court may limit the responsibilities and powers of the guardian and create a limited guardianship. The trial court, in the July 28 and October 12, 2004 orders of temporary guardianship, sought to address the emergency of the allegations in Sparks's July 28, 2004 petition, which were largely concerned with Nellie's past removal of Harry's property without his permission and her threatened damage to his real property. Pursuant to Indiana Code section 29-3-3-4 (2004), a temporary guardian has only the powers necessary to prevent immediate and substantial injury or loss to the protected person or his property. Indeed, as the trial court stated in its order denying Nellie's petition, these temporary orders did not place responsibility or power with the guardian over Harry's assets. Further, both of the permanent guardianship orders expressly limited the guardianship, the August 7 order by granting it only over Harry's person, and the December 14 order by finding Harry

mentally competent and ordering that the guardian's responsibility was for "the hiring and compensation of the necessary caretakers for the care and welfare of Harry McKowen." Appellant's App. at 14.

Additionally, a review of the facts supports the conclusion that Harry's was a limited guardianship. At the August 26, 2004 hearing, the witnesses testified to Harry's general soundness of mind and overall self-sufficiency in financial matters, and his stated wish for a guardian only in the event that he was unable to communicate. It is noteworthy that just prior to this hearing, Harry was of sufficiently sound mind and had sufficient ability to communicate to execute a will.

Further, at the December 14, 2004 hearing in which Harry testified, there is no indication that he lacked mental capacity, either at the time of the hearing or in the prior months while under a guardianship. Not only did Harry testify to various facts including his birthday, his age, and the current President of the United States, he testified to taking "every cent out of that Huntington Bank," suggested counsel should be able to understand his doing so, and further indicated that he had changed his will when his marriage to Nellie was "on the rocks" but that he had still left her "quite a good bit." Oct. 14, 2004 Tr. at 46, 55-56. Harry further testified, however, that he suffered from various physical ailments, that Sparks helped him get out of his bed, and that Sparks took care of him and promised that he would not have to go to a nursing home. We note that Indiana Code section 29-3-1-7.5 (2004) provides for a guardianship based upon the specific incapacity of such physical illness.

We must pay deference to the trial court's special position allowing it to observe the demeanor and attitude of Harry and all persons involved in this case. *See In re Wurm*, 172 Ind.App. 170, 176, 360 N.E.2d 12, 16 (1977), *trans. denied*. Given the trial court's conclusion that Harry was mentally competent, the facts in the record supporting this finding, and the dearth of facts suggesting otherwise, we are not persuaded by Nellie's reasoning that the court's imposition of a guardianship over Harry automatically established his mental incompetence and consequently voided all of his transactions. Accordingly, we find no clear error in the trial court's determination that Harry, who was mentally competent, was under a limited guardianship which did not infringe upon his ability to make binding financial decisions and transactions such as the CD transfers at issue.

III. Whether Harry's CD transfers without notice were valid

Nellie next claims that even if Harry were able to make transfers as a protected person under a guardianship, the transfers at issue are void because Harry failed to notify her that he was divesting her of her joint interests. In support of this argument, Nellie refers to *Voss v. Lynd*, 583 N.E.2d 1239, 1242 (Ind. Ct. App. 1992), wherein this court observed that "one joint tenant of money in a joint bank account cannot divest the other of his joint ownership by withdrawing the money without the other's knowledge and consent." In *Voss*, however, the joint accounts at issue were those in which the origin of the money funding the accounts, as between husband and wife, could not be determined. 583 N.E.2d at 1241. Indeed, the one joint account which had been solely funded by the husband was determined to belong to his estate and was not at issue. *Id*.

Here it is undisputed that Harry funded all of the CDs, and that Nellie contributed nothing to them. Indiana Code section 32-17-11-17(a) (2004) provides that, barring clear and convincing evidence of a different intent, during the lifetime of all parties, a joint account belongs to the parties in proportion to the net contributions by each party to the sums on deposit. While Nellie was a named joint tenant, because she had made no contributions to the account and Harry had made all of them, her proportionate share of the account would have been zero. As Nellie had no effective share in the account, Harry was entitled to transfer the money—to which his proportionate share was 100 percent—without notice to Nellie or her consent because Harry's transfer would not have divested her of any actual or measurable joint ownership interest in the account.

Having found no clear error in the trial court's determination that Harry's CD transfers while under a limited guardianship were not void and, further, that such transfers were not invalidated by Nellie's lack of notice or consent, we decline Nellie's challenges to the denial of her petition to recover joint assets.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.