IN THE COURT OF APPEALS OF IOWA

No. 9-741 / 08-1814
Filed December 30, 2009

IN THE MATTER OF THE ESTATE OF JAMES V. GRANT, Deceased

REBECCA A. GRANT,
Plaintiff-Appellant,

vs.

AISHA R. GRANT-DALEY, FLOR-MARIA GRANT, SUZETTE GRANT-MCTAGGERT, KAREEM SEGLER, JAMIE-LEE GRANT and GREGORY J. FENDER, Executor of the Estate of James V. Grant,
Defendant-Appellees.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

Plaintiff appeals from a jury's determination that she had no authority to change the beneficiary of decedent's life insurance policy and that decedent was not unduly influenced in executing a will. **AFFIRMED.**

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

Dennis J. Mitchell of Meardon, Sueppel & Downer, P.L.C., Iowa City, for appellees Aisha R. Grant-Daley, Flor-Maria Grant, Suzette Grant-McTaggert, Jamie-Lee Grant, and Kareem Segler.

Steven E. Ballard of Leff Law Firm, L.L.P., Iowa City, for appellee Gregory J. Fender.

Joseph T. Moreland of Hayek, Brown, Moreland & Hayek, L.L.P., Iowa City, for appellee Gregory J. Fender.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

Rebecca A. Grant, the wife of decedent James V. Grant, appeals, challenging a jury verdict finding she was without authority to submit forms changing the recipient of James's life insurance policy and retirement accounts to herself and that James was competent and not unduly influenced when he executed a will prior to his death. The other parties to the action, the executor of James's estate and his five children, disagree. We affirm.

I. BACKGROUND AND PROCEEDINGS. James Grant died on July 23, 2007, leaving his surviving spouse, Rebecca, and five children, Aisha Grant-Daley, Flor-Maria Grant, Suzette Grant-McTaggert, Kareem Segler, and Jamie-Lee Grant. He had married Rebecca on January 1, 2006. The children were all the products of other relationships. James, a long-term employee of the University of Iowa, was diagnosed with cancer in 2005, and in March of 2007, was advised that the cancer was terminal.

On June 10, 2007, James allegedly signed a document that, while professing love for his five children, disinherited them and basically left everything to Rebecca. James was hospitalized on July 5, 2007. On July 11, 2007, James advised Rebecca in the presence of others from his hospital bed that he intended to divorce her.[1] On July 12, 2007, Rebecca filed a petition contending she was abused by James[2] and a no-contact order was issued

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[1] A dissolution petition was prepared by his attorney but never filed.

[2] She alleged that on July 5 he pushed her, threw water at her and her shoes, pulled her eight-year-old daughter, who was not James's biological child, outside and would not let her go until their pastor pulled up to the house. She also alleged he always threw water on her or pushed her.

prohibiting any communication or contact by James, who remained hospitalized.[3] On July 13, 2007, James executed a will leaving all his property to his five children. On July 18, 2007, he executed a General Power of Attorney directing that his former wife, Janet Richardson, be his attorney-in-fact.

On July 19, 2007, Rebecca delivered change of beneficiary forms to the benefits office of the University of Iowa designating her as the sole beneficiary of James's life insurance and TIAA-CREF accounts. The forms purportedly were signed by James on or about May 1, 2007.

James died on July 23, 2007. On August 1, 2007, Greg Fender, the executor nominated in James's July 13, 2007 will, filed a petition for probate of that will and a request that he be appointed executor. An order admitting the will and appointing him executor was entered that day.

Fender, as executor, on August 29, 2007, filed a petition for declaratory judgment[4] asking that the court find that the change of beneficiary forms Rebecca delivered on July 19, 2007, did not manifest decedent's intention and were not authentic. Fender also asked for a temporary injunction enjoining Rebecca from transferring or expending funds from the life insurance policies and retirement accounts.

On September 12, 2007, Rebecca filed a petition seeking probate of the June 10, 2007 will. On September 13, 2007, she filed a petition for declaratory judgment asking that the court declare the June 10, 2007 will to be decedent's

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[3] On July 18, 2007, she asked that the order be cancelled, and the district court cancelled it.

[4] James's five biological children subsequently joined in the action.

valid will and that the July 13, 2007 will was a nullity. She further asked that Fender be removed as executor and his attorney be removed.

The declaratory judgment actions were joined and a jury trial was held in September of 2008. After hearing the evidence, the jury responded to a series of interrogatories.[5] The district court then filed an order determining that the jury found James had the mental ability to make the July 13, 2007 will and it was not the result of undue influence. The court further granted the petition of the executor and James's five children for declaratory judgment and declared that the change of beneficiary forms Rebecca delivered to the University of Iowa had no effect as the jury found they were delivered without authority.

Rebecca filed a motion for new trial arguing, among other things, that the jury was improperly instructed and that she was prejudiced by the grant of a motion in limine limiting the admission of evidence about Jamie-Lee Grant, one of James's children and a party to this action. The motion was denied and this appeal follows.

II. INSTRUCTIONS ON PRINCIPAL-AGENT RELATIONSHIP. The review of a challenge to jury instructions is for correction of errors at law. *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000).

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[5] The jury was instructed to answer whether the beneficiary designation on the life insurance policy and on the TIAA-CREF accounts contained the authorized signatures of James Grant. The jury answered "yes" to this question. The jury was also asked to answer whether Rebecca had authority to file the change of beneficiary forms on July 19, 2007. To this question the jury answered "no." The jury was further instructed to answer whether James had the mental ability to make the July 13, 2007 will. To this question the jury answered "yes." The jury was also instructed to answer whether that will resulted from undue influence. To this question the jury answered "no."

Rebecca contends the district court erred in instructing the jury she must prove the requirements of a principal-agent relationship in connection with her delivery of beneficiary designations to the University. She argues the jury should not have been instructed that she had to prove she had authority as an agent for her husband as principal to file the change of beneficiary forms.

The estate and James's children contend the instructions given are supported by law. They argue that the burden of proving an agency relationship is on the party asserting its existence, namely Rebecca. They assert she had the burden of proving she had the manifest consent of James, as principal, and she acted on his behalf and subject to his control and consent. In order to bind him, they contend, she must have had previous authorization from James with his express or implied knowledge that ratified the filing of the change of beneficiary. The estate contends that error on this issue was not preserved.

Rebecca states she objected to the agency instructions. When asked to make a record her attorney stated:

> First of all, with respect to the general submissibility of the instruction on agency, the suggestions and comments made when we were discussing these informally, I would object because I do not believe that normal agents and principals ought to apply in the context of the delivery of beneficiary designations between husband and wife.

One of the instructions that Rebecca appears to argue should not have been given is that instruction that was designated as Instruction 20 which provides in relevant part:

> Rebecca A. Grant has the burden of proving that she had been authorized and directed by Mr. Grant, as his agent, to file the change of beneficiary forms for the life insurance policies and the TIAA-CREF accounts by proving the following:

> 1. That James Grant had manifested his consent for Rebecca A. Grant to file each change of beneficiary form and that consent continued through July 19, 2007; and
> 2. That Rebecca A. Grant was acting subject to James Grant's consent and control when she filed each change of beneficiary form on July 19, 2007; and
> 3. That any authority for Rebecca Grant to act on behalf of James Grant on July 19, 2007, had not been revoked or terminated.

After Rebecca's attorney had made the objection above when addressing what instructions should be given as to agency, Rebecca's attorney stated:

> With respect to the language of the instructions on agency, I will state that we had substantial discussion of those outside – substantial discussion before we made the record, and I would state that Exhibit (sic) 20 reflects a substantial effort by all parties to craft the best language possible given the legal determination made by the Court, and *I do not have any objections to the language used in Instruction 20 or any of the other instructions other than with respect to Instruction Number 23, because I believe that instruction should have language that indicates Rebecca Grant should have known the permanent loss of capacity at the time she filed the beneficiary designations*.

(Emphasis supplied). We agree that the burden of proving an agency relationship is upon the party asserting its existence. *Benson v. Webster*, 593 N.W.2d 126, 130 (Iowa 1999); *Kanzmeier v. McCoppin*, 398 N.W.2d 826, 830 (Iowa 1987). An agency relationship exists where there is "(1) a manifestation of consent by one person that another shall act on the former's behalf and subject to the former's control and (2) the consent of the latter to so act . . . ." *Mermigis v. Servicemaster Indus., Inc.*, 437 N.W.2d 242, 246 (Iowa 1989). The primary consideration in determining whether an agency relationship exists is the principal's right of control. *See id.* Furthermore, there is no presumption that a

spouse acts as an agent for his or her spouse based only on the marriage relationship.

41 C.J.S. *Husband and Wife* § 87, at 464-65 (2006), provides:

> An agency relationship between a husband and wife is not presumed based solely upon their marital relationship and neither spouse is empowered to act as agent for the other simply because they are married. Rather, the existence of an agency between a husband and wife is a question of fact, resting upon the same considerations or rules applying to any other agency. Marriage is a factor to be considered in determining if an agency relationship exists and the effect of the marriage relationship has been said to make it more likely that other circumstances will be found to raise an inference of agency.

Additionally, Rebecca, having raised no objection to the language of Instruction 20 as given, cannot challenge it being given at this time. It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998).

We therefore move to her challenge to instruction number 23 which provided:

> An individual principal's loss of capacity to do an act terminates the agent's actual authority to do the act. *The termination is effective only when the agent has notice that the principal's loss of capacity is permanent.*
>
> If you find that on July 19, 2007, James Grant had permanently lost the mental capacity to change the beneficiaries on his life insurance and retirement accounts and on July 19, 2007, Rebecca Grant knew of his permanent loss of capacity, then you must find that Rebecca A. Grant did not have authority to file the change of beneficiary forms on July 19, 2007.

(Emphasis supplied).

Rebecca is arguing here that the instruction should have required that Rebecca had notice of James's lack of capacity. We need not and do not decide whether the instruction should have required that Rebecca have notice of James' lack of capacity as the language of the instruction given instructs as Rebecca requested. We find no reason to reverse on this issue.

The estate and James's children also argue that there is no credible evidence to show any agency. Rebecca suggests there is evidence. Whether an agency exists ordinarily is a fact question and there must be substantial evidence on the question to generate a jury question; a scintilla is not enough. *Martin v. Jaekel*, 188 N.W.2d 331, 333-34 (Iowa 1971). There was no error made in instructing the jury. We affirm on this issue.

Rebecca also argues for the first time on appeal that these instructions are in error, for Iowa does not require strict adherence to agency law in connection with delivery of beneficiary designations. She cites two cases in support of this argument: *Isgrig v. Prudential Ins. Co. of Am.*, 242 Iowa 312, 316 45 N.W.2d 425, 427 (1951), and *Jacobs v. Abraham Lincoln Life Ins.*, 223 Iowa 1157, 1160-61, 274 N.W. 879, 881 (1937).

Without addressing the issue of error preservation, we find that neither case supports Rebecca's argument. *Isgrig* dealt with the failure of the insurance company to note on a life insurance policy a change of beneficiary made by the insured at an office of the insurer under the supervision of its agents and delivered to an agent of the insurer, but not delivered to the home office. 242 Iowa at 316, 454 N.W.2d at 427. The court addressed the issue of the ministerial

duty of the company and did not address the issue of the authority of a person delivering a change of beneficiary form. *See id.* *Jacobs* addressed compliance with change of beneficiary designations and again did not deal with the authority of the person delivering a change of beneficiary form, the issue here. *See Jacobs*, 223 Iowa at 1160-61, 274 N.W. at 881.

III. EXCLUSION OF EVIDENCE. Rebecca contends the district court should not have excluded evidence that Jamie-Lee Grant, a son of James, was being investigated for allegedly assaulting a minor. She contends she should be granted a new trial because of this exclusion.

We review a district court's decision on the admissibility of evidence for an abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). An offer of proof is generally necessary to preserve error. *State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995). We will not presume prejudice when the answer to the question is not obvious and the proponent made no offer of proof. *Id.*

Rebecca contends an offer of proof was made in connection with the event. The estate and James's children deny that such an offer was made. Rebecca's brief does not advise us where in the record the offer of proof was made, consequently we accept the representation of the estate and James's children it was not made. The question then is whether it is obvious from the record.

In support of her argument Rebecca's brief tells us, without making a reference to where in the record the evidence appears, that before James went to the hospital he told Rebecca he was concerned his son was being investigated

for assaulting children who participated in a tennis program Jamie-Lee taught.[6] Rebecca argues, without citing any authority that evidence she sought to admit was probative on the issue of undue influence as showing there was an investigation ongoing.[7] She contends, again without any reference to where this evidence appears in the record, that after his father's death Jamie was charged in Johnson County with assault causing injury and he filed a motion in limine to keep this information out at the time of the present trial. According to Rebecca's brief, no formal ruling was made on the motion. However, after the estate and James's children objected to a question posed by Rebecca's counsel to Jamie-Lee on the ground that the question violated the motion in limine, a recess was called. The discussion with the judge during that recess indicates the parties knew the motion was granted. Nonetheless, the extent of the ruling may not have been as clear. The court ruled, "there being no request of the Court based on this violation of the court's limine motion we will go ahead and proceed." It is not obvious what evidence Rebecca was prevented from introducing, she cites no authority for her position that any answer elicited by the question was

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[6] We do find in the appendix that on cross examination Jamie testified that he told his father in July it was his belief that Rebecca was trying to get him in trouble about his disciplinary action at the tennis facility where he was a coach and that a young child had made a complaint. However, the fact we were able to find the information does not relieve Rebecca from abiding by Iowa Rule of Appellate Procedure 6.14(7). This rule provides in relevant part that, "[r]eferences in the final briefs to portions of the record shall be to the pages of the appendix at which those parts appear." Iowa R. App. P. 6.14(7).

[7] Iowa Rule of Appellate Procedure 6.14(1)(*c*) provides in relevant part, "[f]ailure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."

admissible, and she makes no attempt to show she was prejudiced by the omission of the alleged evidence. We affirm on this issue.

IV. MOTION FOR NEW TRIAL. Rebecca also contends she should have a new trial because of the rulings on both of these issues. We disagree.

AFFIRMED.