COURT OF APPEALS DECISION DATED AND FILED

October 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP690

Cir. Ct. No. 2001CV381

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

GREGORY W. SCHAEFER AND TERRY SCHAEFER,

PLAINTIFFS-RESPONDENTS,

V.

BARBARA CONWAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Barbara Conway appeals from an order dismissing her counterclaim alleging that her brother, Gregory Schaefer, breached his fiduciary duty to her regarding the division of their mother's estate. She argues that under applicable Illinois law Gregory owed her a fiduciary duty by virtue of

his appointment with her as co-executor of their mother's will and by virtue of their close familial relationship. We agree with the circuit court's conclusion that no fiduciary duty existed and affirm the order of dismissal. We deny Gregory's motion to declare the appeal frivolous.

¶2 As a matter of estate planning and to avoid probate, Barbara's and Gregory's mother, Mildred Schaefer, titled property she owned in Twin Lakes, Kenosha county, Wisconsin, in all three of their names as joint tenants with rights of survivorship.[1] All three joint tenants resided in Illinois. Mildred also opened three bank accounts designating Barbara as a joint owner with rights of survivorship. Mildred died in 1997. Her will designated Barbara and Gregory as co-executors and directed that all her property be equally divided between them. No probate proceeding was filed because all of Mildred's property was held in joint tenancy. Barbara paid Gregory $36,693.64, one-half the value of the joint accounts after the payment of estate debts.

¶3 Gregory and Barbara could not agree on what to do about the Twin Lakes property and their relationship deteriorated. Gregory commenced this action for partition or sale of the property with equal division of the proceeds. Barbara filed a counterclaim asserting that because Gregory was the personal representative of Mildred's estate, he owed her a fiduciary duty and breached that duty by persuading her to pay him the one-half value of the joint bank accounts when she was not required to do so. She also alleged that she paid taxes, utilities,

[1] Barbara's appellate brief does not include citations to the record to corroborate the facts set out in the brief. An appellant's failure to provide record citations in his or her brief whereby the facts set forth in the brief can be corroborated improperly burdens the appellate court and precludes any challenge on reconsideration to the facts stated in the opinion. *See* ***State v. Haynes***, 2001 WI App 266, ¶1 n.2, 248 Wis. 2d 724, 638 N.W.2d 82.

and maintenance expenses on the Twin Lakes property. She sought an offset from the property's sale proceeds for the $36,693.64 she paid to Gregory and all sums she expended to maintain the property after Mildred's death.

¶4 An order for partition was entered and Barbara purchased the property. One-half the appraised value was escrowed pursuant to the partition order. A trial to the court was conducted on Barbara's counterclaim.

¶5 At trial, Barbara testified that she had not been advised that she was entitled to keep the money in the joint bank accounts and that had she known she was not required to give Gregory one-half of the accounts, she would not have. She indicated that Gregory had suggested using the services of Attorney John Zavislak to distribute Mildred's estate but that Gregory had not disclosed that Zavislak shared office space with Gregory's brother-in-law. She explained that if she had known of the connection between Gregory and Zavislak, she would not have trusted Zavislak's advisements that Mildred's estate should be divided equally and informally. She argued that Gregory breached his fiduciary duty by persuading her to use Zavislak's services when Zavislak was more loyal to Gregory's interests because of the business relationship with Gregory's brother-in-law.

¶6 The circuit court found that after Mildred's death, $19,083.02 was expended in maintaining and improving the Twin Lakes property. It required Gregory to pay one-half that sum by an offset to his one-half share of the sale proceeds. The court concluded that Gregory did not owe Barbara a fiduciary duty because he was not legally or equitably designated a personal representative of Mildred's estate. It found that Mildred, Barbara and Gregory shared the goal of dividing Mildred's estate equally without a court probate proceeding.

¶7 Barbara argues that Gregory's fiduciary duty stems from two sources under Illinois law: first, acting as co-executor under Mildred's will; and second, as a matter of fact because Gregory and Barbara are brother and sister, vacationed together, and had a close relationship leading Barbara to trust Gregory.[2] Whether a fiduciary duty exists involves the application of law to the facts of the case and, therefore, presents a question of law that we review de novo. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 393, 588 N.W.2d 67 (Ct. App. 1998). The circuit court's findings of fact will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).[3] We accept the circuit court's determination as to the weight and credibility of the witnesses. ***Jacobson***, 222 Wis. 2d at 390.

¶8 Illinois recognizes that

> [a] fiduciary or confidential relationship may be found in one of two ways. A fiduciary relationship may be found to exist as a matter of law from the relationship of the parties, such as an attorney-client relationship, or may be found to exist by the facts of a particular situation, such as a relationship where trust is reposed on one side and results in superiority and influence on the other side. Where a fiduciary relationship is alleged simply on the basis of evidence showing trust and confidence have been reposed by one person in another, the existence of the relationship must be proved by clear and convincing evidence.

Estate of Long, 726 N.E.2d 187, 190-91 (Ill. App. Ct. 2000) (citation omitted).

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[2] There is no dispute that Illinois law applies.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶9 Barbara argues that the circuit court failed to consider under ***Estate of Lightner***, 225 N.E.2d 417 (Ill. App. Ct. 1967), that despite the fact that Mildred's will was never admitted to probate and no personal representative letters were issued, the will's nomination of Gregory as co-executor effectively created a fiduciary relationship. In ***Lightner***, the named executor of Esther Lightner's will approached Esther's elderly widower and persuaded him to sign an agreement waiving his right to renounce the will. ***Id.*** at 420-21. The agreement was signed without full disclosure of the contents of the will and before executory letters were issued. ***Id.*** at 422. The court held that even though the letters had not been issued, a fiduciary relationship existed between the named executor and Esther's widower such that full disclosure was required. ***Id.***

¶10 This is not a ***Lightner*** case. In ***Lightner***, the acts of the named executor "clearly arose out of the anticipated administration of the estate." ***Id.*** The named executor ultimately was appointed executor. The named executor committed fraud to procure the elderly widower's waiver of spousal rights. Here, despite having executed the will in 1977, Mildred, with the knowledge and assistance of both Barbara and Gregory, organized her affairs so as to avoid probate. Thereafter, the nomination of co-executors in the 1977 will never came into play. Gregory does not stand in any fiduciary position by virtue of the ineffective nomination.

¶11 Barbara also advances her close relationship with Gregory as creating a fiduciary duty. ***Long*** explains that the factors to be considered in determining whether a fiduciary relationship exists from the facts of the situation include "the degree of kinship, disparity of age, health and mental condition, and the extent to which the allegedly servient party entrusted the handling of his [or

her] business and financial affairs to and reposed faith and confidence in the dominant party." ***Long***, 726 N.E.2d at 191.

¶12 Other than the brother-sister relationship, there is no evidence in the record that any of the other factors created a fiduciary relationship.[4] The circuit court found that Mildred, Gregory and Barbara worked toward the goal of equally dividing her estate and avoiding probate, a goal identified before Mildred's death. That finding is not clearly erroneous. The court also found credible Attorney Zavislak's testimony that he advised Barbara she was not legally obligated to share the bank accounts with Gregory but that Gregory might have a legal claim that Barbara was named on the accounts only as a matter of convenience. Zavislak testified that Barbara spearheaded Mildred's financial arrangements, including having Mildred's savings bonds titled to joint ownership. Barbara was not an unsophisticated party who relied on Gregory for handling Mildred's affairs. Further, there was no showing that Gregory gained superiority over Barbara. At all times Barbara had access to all monies in the joint bank accounts.

¶13 Although it would be wonderful if parents, brothers, sisters, friends, and relatives were required to treat each other with the utmost respect and care, and were worthy of the trust attendant to such relationships, that it not case. The brother-sister relationship is not enough to establish a fiduciary duty. *See* ***McCreight v. McCreight***, 473 N.E.2d 577, 580 (Ill. App. Ct. 1985). Because no fiduciary relationship existed, we need not address Barbara's argument that the fiduciary duty was breached by nondisclosure.

[4] Barbara makes an unsubstantiated claim in her appellant's brief that she and Gregory vacationed together.

¶14 Gregory contends that the appeal is frivolous.[5] *See* WIS. STAT. RULE 809.25(3). Whether an appeal is frivolous is a question of law. ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 841, 520 N.W.2d 93 (Ct. App. 1994). Barbara's argument that a fiduciary relationship exists by virtue of the sibling relationship is frivolous. However, we cannot award attorney fees under RULE 809.25(3) unless "the entire appeal is frivolous." *See* ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶16, 238 Wis. 2d 535, 618 N.W.2d 218. Barbara's claim under ***Lightner***, although rejected, had arguable merit. The motion for attorney fees for a frivolous appeal is denied.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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[5] Gregory's assertion that he is entitled to double damages if the appeal is found frivolous misplaces reliance on WIS. STAT. RULE 809.83(1). RULE 809.83(1)(a)1. only authorizes double costs if this court finds that an appeal was taken for the purpose of delay. By an order of November 17, 2004, we denied Gregory's motion to dismiss the appeal on the ground that Barbara missed various deadlines relating to the preparation of transcripts.