IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MARTIN J. BLANCHARD, A/K/A MARTIN J. BENTON, A/K/A, MICHAEL G. SCARLATA, DECEASED.

THOMAS BLANCHARD,
Appellant/Cross-Respondent,
vs.
GEORGE C. MONTGOMERY, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARTIN J. BLANCHARD, A/K/A MARTIN J. BENTON, A/K/A, MICHAEL G. SCARLATA,
Respondent/Cross-Appellant.

No. 67099

FILED

JUN 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order granting a petition for return of assets and awarding damages in a probate matter. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

The issues in this appeal and cross-appeal arise out of a will contest between Janet Blanchard's and Martin Blanchard's respective estates. Appellant Thomas Blanchard is Janet Blanchard's son and special administrator of her estate. George Montgomery is the special administrator for Martin Blanchard's estate. The parties' dispute arises over a residence located at 8066 Egypt Meadows Avenue in Las Vegas, Nevada ("Egypt Meadows") and four bank accounts held with Bank of America.

16-900700

We address three issues in this appeal and cross-appeal: (1) whether substantial evidence supports the probate commissioner's special finding that Martin lacked the intent to make gifts of his separate property; (2) whether substantial evidence supports the probate commissioner's recommendation that Martin lacked the testamentary capacity to execute his last will; and (3) whether the district court erred by awarding treble damages against Thomas for conversion of Martin's estate assets.[1] We do not recount the facts of the case except as necessary to our disposition.

Martin lacked intent to make gifts of his separate property

Thomas argues that substantial evidence does not support the probate commissioner's special finding that Janet transmuted Martin's property before Martin's death. Thomas further claims that no tracing supports the conclusion that Martin used his separate property to purchase Egypt Meadows and to fund the four bank accounts. Egypt Meadows was held by "Martin J. Blanchard and Janet H. Blanchard husband and wife as joint tenants." Three of the four bank accounts were titled in both Martin's and Janet's names; the fourth was titled in Janet's name alone.

"A district court's findings [of fact] will not be disturbed unless they are clearly erroneous and are not based on substantial evidence." *Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998) (alteration in original) (quoting *Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d

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[1]The district court filed an order on November 11, 2014, denying Thomas's objection to the probate commissioner's report and recommendations, adopting the same report and recommendations, and entering judgment accordingly.

540, 542 (1994)). "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *Schmanski v. Schmanski*, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999). We first address whether substantial evidence supports the probate commissioner's finding that Martin's separate property funded the purchase of Egypt Meadows and the bank accounts. Concluding that substantial evidence supports this finding, we next determine whether Martin intended to make a gift of his separate property to the community estate.

Martin's separate property

Before the probate commissioner, Martin's appointed guardian ad litem, Daniel V. Goodsell, Esq., testified that Janet transmuted Martin's separate property to joint or community property between 2005 and 2008. Specifically, Goodsell testified that his investigation revealed the funding for Egypt Meadows, purchased September 26, 2006, and the four Bank of America accounts, opened in February of 2008, originated from Martin's separate property. Specifically, as to Egypt Meadows, Goodsell testified that he identified three payments originating from Martin's separate property accounts that equaled the purchase price of Egypt Meadows. Goodsell concluded that, in total, Janet transmuted approximately $545,000.00 from Martin's separate assets through the purchase of the Egypt Meadows residence, the funding of three jointly held Bank of America accounts, and the funding of one account in Janet's name only. Goodsell created an interim report and spreadsheets detailing his research and conclusions. These were admitted as exhibits during the hearing.

Montgomery also testified to having personally traced the funds back to Martin's separate property. Montgomery testified that before Martin transferred money from the Bank of America accounts in February 2008, the accounts were titled in Martin's name only.[2] Further, Thomas testified that when Janet learned that Martin transferred money from those accounts, she went into Bank of America and transferred the money to the checking accounts held jointly or solely in her name. Therefore, three witnesses established a connection between Martin's separate property and the amount used to purchase the residence and fund the four identified bank accounts.

Janet and Martin lived together for 28 years, yet the two never put property in Janet's name until the last 2 years of the relationship when Janet's doctor deemed Martin incapacitated and unable to make sound financial decisions. Thomas did not present any evidence to show that Janet and Martin held the accounts jointly before Martin transferred the funds. In contrast, the parties' forensic accountant, Joseph L. Leauanae's, testimony was inconclusive. Therefore we conclude substantial evidence supports the finding that Martin used separate property to purchase Egypt Meadows and fund the four identified bank accounts between 2006 and 2008.

Martin's gift of separate property

When one spouse uses separate property "to acquire property in the names of the husband and wife as joint tenants, it is presumed that a gift of one-half of the value of the joint tenancy property was intended." *Gorden v. Gorden*, 93 Nev. 494, 497, 569 P.2d 397, 398 (1977). "The

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[2]The record does not indicate where Martin transferred the money.

presumption is overcome only by clear and convincing evidence." *Id.* If the purchasing spouse, however, "lacks such mental vigor as to enable him to protect himself against imposition, the burden of proof shifts to the [non-purchasing spouse] to prove by clear and satisfactory evidence that the gift was freely and voluntarily made by the donor." *Ross v. Giacomo*, 97 Nev. 550, 557, 635 P.2d 298, 302 (1981) *abrogated on different grounds by Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006); *see also Peardon v. Peardon*, 65 Nev. 717, 766, 201 P.2d 309, 333 (1948) (concluding that where a wife conveys property to her husband without consideration and "it is not shown that he is not the dominant, superior personality in influence and power, the burden of proof shifts . . . [and] is placed upon the husband to prove the voluntary character of the wife's act in parting with her property.").

"[A] presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction." *In re Estate of Bethurem*, 129 Nev. ___, ___, 313 P.3d 237, 241 (quoting *In re Jane Tiffany Living Trust 2001*, 124 Nev. 74, 78, 177 P.3d 1060, 1062 (2008)). "A fiduciary relationship [ ] arises from the existence of the marriage itself, thus precipitating a duty to disclose pertinent assets and factors relating to those assets." *Williams v. Waldman*, 108 Nev. 466, 472, 836 P.2d 614, 618 (1992). A beneficiary may rebut the presumption of undue influence by clear and convincing evidence. *In re Estate of Bethurem*, 129 Nev. at ___, 313 P.3d at 241.

After the one-day trial, the probate commissioner based his findings that Martin lacked the capacity to form the requisite intent on Martin's advanced age (92 years old at the time of these transactions), and the parties' Antenuptial Agreement, signed July 6, 2005, just one year

before the disputed transaction in 2006. During the trial, Thomas produced a letter from Dr. Charles B. Johnston regarding Martin's cognitive impairment. The letter indicated that Martin had been under Dr. Johnston's care since October 10, 2006, and had been suffering from cognitive impairment since that time. In the letter, dated March 4, 2008, Dr. Johnston concluded that Martin was incapable of conducting his own financial affairs and was not capable of making good financial decisions.

Thomas also testified to visiting Janet in the hospital around October 2006, and that Martin stayed with her the entire time refusing to leave even to shower or get a change of clothes. Thomas also stated that Martin concerned him and the nurses because Janet's condition prevented her release and Martin could not care for himself. Thomas testified to a separate instance where Martin displayed paranoia in 2007.

Based on this evidence, the probate commissioner concluded that even though Martin and Janet held Egypt Meadows in joint tenancy, Martin lacked the requisite intent to gift the property to the community due to his cognitive impairment. Further, the probate commissioner concluded that Martin was susceptible to Janet's influence because of his cognitive impairment and Janet's position to exercise control over Martin's assets.[3]

Together, the findings show a susceptibility to undue influence due to a lack of "mental vigor" and a presumption of undue influence

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[3]The probate commissioner's report stated that Martin "was susceptible to the influence that Janet was in a position to exercise over the transmutation events . . ." and that "Martin was susceptible to Janet's influence . . ." but did not expressly state that Janet exerted "undue influence" over Martin.

because of Janet's fiduciary relationship to Martin arising from their marriage, and because she would benefit from titling Egypt Meadows and the bank accounts jointly rather than as Martin's separate property. *See Id.* Thus, we conclude that substantial evidence supports the probate commissioner's finding that Martin lacked the capacity to protect his assets. Accordingly, the burden shifted to Thomas to prove by clear and satisfactory evidence that Martin freely and voluntarily made the gifts to the community property. *See Ross*, 97 Nev. at 557, 635 P.2d at 302.

Thomas did not provide any evidence that Martin freely and voluntarily gifted the Egypt Meadows property or the funds in the Bank of America accounts to the community. Importantly, Thomas did not provide any evidence of an agreement between Martin and Janet to hold the Egypt Meadows property or the funds in the Bank of America accounts as joint tenants in contravention of the parties' Antenuptial Agreement and earlier Property Settlement Agreement. Thus, Thomas failed to meet his burden of proving by clear and convincing evidence that Martin freely and voluntarily made gifts to the community estate. *See Ross*, 97 Nev. at 557, 635 P.2d at 302. Therefore, substantial evidence supports the probate commissioner's finding that Martin lacked the requisite intent to gift the Egypt Meadows property and the funds in the Bank of America accounts to the community when the assets were placed in joint tenancy.

Martin's capacity to execute his last will

On cross-appeal, George agrees that Martin lacked the requisite capacity to make gifts of Egypt Meadows and the four bank accounts, yet he argues the district court erred by adopting the probate commissioner's report and recommendation that Martin lacked the mental capacity to execute testamentary documents after July 2006. George

argues that the district court erred because he presented substantial evidence that Martin had testamentary capacity when he executed his March 3, 2008, will. Specifically, George argues that his testimony shows that Martin had the requisite capacity to execute the 2008 will. By finding the 2008 will invalid, the probate commissioner impliedly determined that the 2004 trust and subsequent amendments control the estate distribution.

Testamentary capacity exists when the testator (1) understands the nature of the act he is doing, (2) recollects and understands the nature and situation of his property, and (3) recognizes his relations to the persons who would inherit via intestacy. *In re Lingenfelter's Estate*, 241 P.2d 990, 997 (Cal. 1952). "Testamentary capacity is always presumed to exist unless the contrary is established." *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, 135 Cal. Rptr. 2d 888, 900 (Ct. App. 2003) (citation omitted); *see also* 79 Am. Jur. 2d *Wills* § 90 (2016) ("Testamentary capacity in the testator is thus presumed, especially where the will is shown to be executed in legal form.") (internal footnote omitted).

"This presumption continues even after the testator has been adjudicated incompetent to handle his or her affairs because it is recognized that even such a person may have lucid intervals during which he or she knows the extent of his or her estate and the proper objects of his or her bounty." 79 Am. Jur. 2d *Wills* § 90. Thus, despite Dr. Johnston's conclusion that Martin had been suffering from cognitive impairment since he first examined him on October 10, 2006, and deeming Martin incapable of conducting his own financial affairs and making good financial decisions, the law presumes Martin had the requisite

testamentary capacity to execute his March 3, 2008, will. *See id.* Accordingly, Thomas bore the burden to provide evidence to the contrary. *See Moore*, 135 Cal. Rptr. at 900.

The probate commissioner did not make specific findings as to Martin's testamentary capacity; however, "in the absence of express findings, [we] will imply findings where the evidence clearly supports the judgment." *Gorden*, 93 Nev. at 496, 569 P.2d at 398. Here, the Nevada guardianship judge determined just a few days after the execution of the 2008 will, that Martin, age 94, was incapacitated to the extent that a temporary guardian of the person and the estate should be appointed. The parties later stipulated to extend the temporary guardianship. Medical evidence—i.e., the letter from Dr. Johnston—also supported the guardianship petition. In the 2008 will, Martin gave his entire estate to his two sons, a complete repudiation of Martin's prior estate plan established by the 2004 trust and subsequent amendments. Martin executed the 2008 will shortly after one of his disinherited sons took him from his home in Las Vegas to California. Additionally, Martin's estate plan was clearly established to transfer assets by trust, not will.

Moreover, Martin died less than five months after executing the 2008 will, while guardianship proceedings were pending. Thus, we conclude the evidence presented supports the conclusion that Martin lacked the capacity to execute any testamentary documents in 2008. *See Hannam*, 114 Nev. at 357, 956 P.2d at 799.

Substantial evidence supports the award of treble damages

Thomas claims the district court's award of treble damages should be reversed because he relied on his attorney's and Bank of America's legal advice that he was entitled to use the funds as the estate's

special administrator. Further, Thomas argues that because the frozen account bore Janet's name, he could not have converted property from Martin's estate.

If it appears a person has converted money of a decedent, the court may order the person to deliver the money to the decedent's personal representative. NRS 143.120(2). "The order of the court for the delivery of the property is prima facie evidence of the right of the personal representative to the property in any action that may be brought for its recovery, and any judgment recovered must be for treble damages equal to three times the value of the property." NRS 143.120(3).

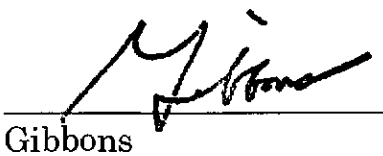
"Conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (internal quotation marks omitted). "Further, conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge." *Id.* "Whether a conversion has occurred is generally a question of fact for the jury." *Id.* Therefore, the question before this court is whether substantial evidence supports the district court's finding of conversion. *See Hannam*, 114 Nev. at 357, 956 P.2d at 799.

Here, the district court's October 3, 2011, order constitutes prima facie evidence that Martin's estate representative had a right to the property, not Thomas. *See* NRS 143.120(3). Thomas testified that although he knew the district court ordered Janet's account blocked, he nevertheless depleted the funds upon his counsel's advice. Thomas also testified that he had not restored the account as required by the district

court's October 3, 2011, order. Thomas's claim of depleting the funds upon legal advice and in good faith is an unavailing defense to conversion. *See Evans*, 116 Nev. at 606, 5 P.3d at 1048. Therefore, substantial evidence supports the probate commissioner's finding of conversion and award of treble damages.

Based on the foregoing, we conclude that substantial evidence supports the district court's order adopting the probate commissioner's findings. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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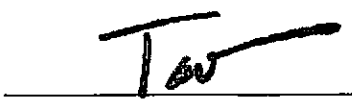

_____, J.
Tao

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Silver

cc: Hon. Gloria Sturman, District Judge
Carolyn Worrell, Settlement Judge
Hutchison & Steffen, LLC
Trent, Tyrell & Phillips
Eighth District Court Clerk