COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0361-FT **Cir. Ct. No. 01GN000078**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE MATTER OF THE GUARDIANSHIP OF EMMA W.:

FAMILY SERVICES OF BARRON COUNTY, INC.,

PETITIONER-RESPONDENT,

V.

PAUL W. AND GARY W.,

RESPONDENTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. This is the second time this case is before us on appeal. In ***Family Services, Inc. v. Gary W.***, No. 02-3139-FT, unpublished slip op. at ¶10 (Wis. Ct. App. May 28, 2003), we remanded this matter to the circuit court to hear

evidence as to whether four certificates of deposit (CDs) Emma W. established were joint accounts that allowed her sons, Paul W. and Gary W., to access the funds prior to Emma's death. On remand, the trial court found they were not. Paul and Gary argue the trial court erroneously admitted hearsay evidence and erroneously considered Family Services' guardianship interests in rendering its decision. They also argue there is insufficient evidence to sustain the trial court's finding. We affirm the judgment.[1]

BACKGROUND

¶2 On September 7, 1997, Emma established four CDs, two of which were titled in her or Paul's name while the other two were titled in her or Gary's name. Written on the CDs was the following: "When two or more depositors are named on the certificate, they will be considered joint depositors with rights of survivorship unless otherwise stated herein." The CDs did not contain language stating otherwise. Emma kept the CDs in her safety deposit box, to which neither Paul nor Gary had access.

¶3 In January 2002, Emma was found incompetent and protectively placed in a local nursing home. Family Services, Emma's guardian, removed the CDs from Emma's safety deposit box, took possession of them, and filed an inventory with the trial court that showed the CDs as estate assets. In June 2002, Family Services was notified that Paul and Gary had withdrawn the CDs' funds.[2]

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Paul and Gary did not receive all of the CDs' funds because of early withdrawal penalties and because another individual, Paul Wilson, used the CDs on which Gary's name appeared as collateral for a loan.

Paul and Gary obtained the funds by signing an "indemnification form" at the bank indicating the CDs were lost. Paul, Gary and the bank knew the CDs were not lost.

¶4 Family Services filed a petition requesting the return of the funds. The trial court concluded Paul and Gary were joint tenant owners of the CDs and, accordingly, had full legal authority to cash the CDs irrespective of Family Services' guardianship. Family Services appealed, arguing, among other things, that the trial court erred by not allowing it to present evidence of Emma's intent to not allow Paul and Gary to withdraw funds from the account until she died. *See* WIS. STAT. § 705.03.[3] We agreed. ***Family Servs.***, slip op. at ¶8.

¶5 On remand, Family Services presented various witnesses. Notably, Harriet Dzimiela, Emma's personal banker, testified she discussed establishing CDs with Emma about one month prior to the date the CDs were actually created. Although Dzimiela did not prepare the actual CDs Emma eventually established, Dzimiela testified that Emma stated it was her intent that her sons not have access to the funds until her death. Dzimiela indicated she had no idea why the CDs were set up as joint accounts, as opposed to payable on death accounts. Family Services

[3] As is pertinent to this appeal, WIS. STAT. § 705.03(1) states in part:

> **Ownership during lifetime.** Unless there is clear and convincing evidence of a different intent:
>
> **(1)** A joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment. The application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability….

also established Paul and Gary did not have access to the CDs in Emma's safety deposit box, nor did they contribute or withdraw funds from the CDs prior to Emma's guardianship.

¶6 The trial court found Family Services proved by clear and convincing evidence that Emma intended her sons to not have access to the accounts until her death. Paul and Gary appeal.

DISCUSSION

I. ADMISSIBILITY OF DZIMIELA'S TESTIMONY

¶7 Paul and Gary first argue the trial court erred by allowing Dzimiela to testify to Emma's out-of-court statement for its truth as to her intent regarding the CDs. We disagree.

¶8 A trial court's decision to admit or exclude evidence is discretionary and we will not overturn it absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶9 The testimony at issue involves the following:

> [Family Services]: … What had Emma told you was her intent with the [CDs]?
>
> [Dzimiela]: Her intent was that it was her money and on her demise, they would go to her sons, Paul and Gary.
>
> [Family Services]: And that's what she told you is why she wanted to create these CDs with their names on them?
>
> [Dzimiela]: Right.

¶10 The trial court concluded Dzimiela's testimony regarding Emma's intent was admissible under the "state of mind" exception to the hearsay rule, WIS. STAT. § 908.03(3). That exception provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> **(3)** THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, *such as intent*, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. (Emphasis added.)

¶11 We agree with the trial court. This exception explicitly allows Emma's out-of-court statement regarding her intent to be offered for its truth. Because Emma's statement was excepted under the hearsay rule, the trial court properly exercised its discretion.

¶12 Paul and Gary allege that Dzimiela's testimony was offered to prove a statement of memory or belief to prove the fact remembered or believed, something specifically prohibited by WIS. STAT. § 908.03(3). The record belies their allegation. There is nothing in Dzimiela's testimony to suggest Emma's statement was expressed in terms of what Emma's memory or belief about her intent was. Instead, Dzimiela testified Emma told her it was her intent—an intent expressed presently—that the money go to Paul and Gary upon her death.

¶13 Paul and Gary also present the following unsubstantiated contentions regarding Dzimiela's testimony as to Emma's statement: it was not trustworthy, it had no rational connection to the creation of the CDs in question, and it was not probative. As to their first contention, all exceptions under WIS. STAT. § 908.03

"are deemed to bear sufficient indicia of trustworthiness to warrant the admissibility of out-of-court statements regardless of the declarant's ability to testify." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE, § 803.0 at 593 (2d ed. 2001). Thus, this contention essentially relates only to the weight, not admissibility, of the evidence.

¶14 As to their second and third contentions, although Emma's statement was made one month before the CDs in question were created, the statement nonetheless has a "tendency to make the existence of any fact that is of consequence to the determination of the action," specifically Emma's intent at the time the CDs were drafted, "more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Therefore, the trial court properly exercised its discretion by admitting the evidence.

II. CONSIDERING GUARDIAN'S INTEREST IN PRESERVING THE WARD'S ESTATE

¶15 Paul and Gary next argue the trial court erred by considering Family Services' interest in preserving Emma's estate as being a superseding interest. As foundation for this argument, Paul and Gary note that in this case's initial appeal, Family Services argued a guardianship superseded a joint account owner's right to remove funds. Noting that Family Services did not provide any authority to support its claim, we construed the plain language of WIS. STAT. § 705.03 and concluded that "[a] guardian … steps into the shoes of the ward and cannot prevent another party from withdrawing funds from a joint account." ***Family Servs.***, slip op. at ¶7.

¶16 In rendering its decision on remand, the trial court stated:

> I think it is against public policy as well to have a property that a person holds turned over to a guardian for protection

> and to be put under the scrutiny of the court when a person becomes incompetent and then to have sons realize that there is a joint account, tell the bank they are lost and to cash this account when, in fact, they should have gone to the guardian and someone should have went to the courthouse and asked should these things be distributed.
>
> And it seems to me to be a total attempt to circumvent the supervision of the court of a ward's estate and regardless of the outcome, I would find that is not in the public interest or the ward's interest. That's why we go through these guardianship proceedings when people become incompetent so that we can avoid these kind of circumstances.

From these comments, Paul and Gary argue the trial court erred by considering Family Services' interest as guardian as being a superseding interest, something we specifically prohibited in the first appeal. We disagree.

¶17 Paul and Gary attempt to make much out of very little. When viewed in context, the court's comments were nothing more than an aside wherein the court expressed its concern about Paul's and Gary's conduct. Immediately following these comments, the court refocused the inquiry and stated, "But to the single issue of this account …." The court then gave its reasons for its finding, none of which included any consideration of Family Services' interests. Thus, Paul's and Gary's argument is baseless.

III. SUFFICIENCY OF THE EVIDENCE

¶18 Finally, Paul and Gary argue there was insufficient evidence to prove Emma intended to block their access to the accounts until she died. We disagree.

¶19 WISCONSIN STAT. § 705.03 requires proof by clear and convincing evidence that Emma did not intend to create a joint account that her sons could

have access to during her lifetime. The trial court found there was such proof based on the following: (1) Dzimiela's testimony as to Emma's statement regarding her intent; (2) Emma secured the CDs in a safety deposit box outside of Paul's and Gary's reach; and (3) Paul and Gary did not attempt to cash or exercise any joint control over these accounts until Emma was incompetent and needed money to pay for her nursing home expenses. Based on this evidence, the trial court's finding as to Emma's intent is not clearly erroneous.

By the Court.—Judgment affirmed.

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