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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1520**

In re the Estate of Marie Josephine Gabrysh, Deceased

**Filed May 30, 2017
Affirmed
Worke, Judge**

Ramsey County District Court
File No. 62-PR-14-791

Kirk C. Thompson, Kirk C. Thompson Law Office PA, Minneapolis, Minnesota; and
Karen R. Cole, Law Office of Karen Cole, Minneapolis, Minnesota (for appellant Richard
Edmund Carlson)

William D. Siegel, Tarshish Cody, PLC, Richfield, Minnesota (for respondent Gloria Jean
Risberg)

Considered and decided by Jesson, Presiding Judge; Halbrooks, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's order in this probate dispute, arguing that
the district court abused its discretion by directing appellant to focus on two issues at trial
but deciding three issues, relying on the special administrator's reports, and denying his
motion for a new trial. We affirm.

FACTS

In 1989, Marie Josephine Gabrysh executed her last will and testament, leaving her estate to her husband. If her husband did not survive her, Gabrysh bequeathed her estate, in equal shares, to respondent Gloria Jean Risberg and appellant Richard Edmund Carlson. Risberg is Gabrysh's step-daughter, and Carlson is her step-grandson (Risberg's son).

In the summer of 2011, Risberg began caring for the Gabryshes after her father's health deteriorated. Risberg also handled the Gabryshes' finances until Carlson moved in with the Gabryshes in September 2011. Gabrysh's husband died on April 12, 2012. On June 8, 2012, Gabrysh executed a second will, leaving her estate to Carlson and making no provision for Risberg, and a quit claim deed conveying the interest in her home to Carlson. Gabrysh died on September 14, 2014.

In October 2014, Risberg petitioned for the appointment of a special administrator to protect Gabrysh's estate, claiming that Carlson coerced Gabrysh into executing the second will and liquidated a substantial portion of the estate. Risberg's personal friend, Alexander McKinney III, was appointed as the special administrator.

On November 13, 2015, the district court filed an order that required the parties to state the issues they intended to raise at trial and provide a witness list. The parties were also ordered to provide affidavits accounting for any money received from Gabrysh's estate and how that money was used. The district court required Carlson to provide receipts for money that he received from the estate and expenditures that he made with the estate's money. Although both parties received the order, only Risberg complied with it.

Trial began on March 15, 2016. Risberg argued that Carlson unduly influenced Gabrysh to execute the second will and deed, which she was not competent to execute. A neurologist, who had examined Gabrysh, testified in support of Risberg's contention, stating that Gabrysh suffered from dementia, most likely reflecting Alzheimer's disease, was not competent to execute the second will, and could have been easily influenced due to her mental condition.

Risberg also testified that after Carlson moved in with the Gabryshes, she noticed unusual cash withdrawals from the Gabryshes' account. In order to protect the estate, Risberg, who was Gabrysh's attorney in fact, removed \$39,000 from the Gabryshes' savings account, obtained a cashier's check in that amount, and placed it in a safety deposit box in her and the Gabryshes names. Shortly thereafter, Carlson removed the cashier's check.

McKinney testified that Carlson broke down the cashier's check into four cashier's checks. One check for \$10,000 was endorsed to a car dealership, and two checks each for \$10,000 were cashed. The fourth check for \$9,000 was used to open an account at TCF Bank. Carlson put his name on the TCF account and between 2011 and 2014 withdrew approximately \$20,000 that McKinney was unable to trace.

McKinney also found questionable charges made to the TCF account that totaled \$37,679.87, including payments: to bars; to Menards; to a casino; to Best Buy; to other stores; for a cell phone; for pet expenses; for adult websites, dating sites, and adult novelty

stores; and to Carlson's then-girlfriend.¹ Additionally, McKinney identified the issuance of a cashier's check for \$8,000 made out to Gabrysh and Carlson that he was unable to trace.

Risberg testified that Gabrysh had nice furniture; a car; and jewelry including a mother's ring, a diamond ring, wedding bands, and necklaces. McKinney testified that when he visited the home, he inquired about the personal property Risberg inventoried for him, but was told by Carlson's girlfriend that no property in the home, except for a loveseat, belonged to Gabrysh. With no way to ascertain the value of the estate's personal property, McKinney testified that he assigned a \$20,000 value, which he believed was conservative because it was unreasonable to believe that Gabrysh owned nothing.

Carlson testified that he deposited his money into Gabrysh's TCF account and comingled their funds because it did not make sense to have his own bank account when he was paying all of the bills. Carlson testified that he made weekly deposits and deposited larger checks into the account that he received from workers' compensation. Carlson stated that the money he withdrew from Gabrysh's account belonged to him.

The district court concluded that Gabrysh's second will and deed were invalid because she lacked capacity to execute them. The district court also concluded that Carlson improperly converted \$115,670 from Gabrysh's estate and ordered that \$57,835 be deducted from Carlson's proceeds from the estate. Carlson moved for a new trial and amended findings, which the district court denied. This appeal followed.

¹ McKinney did not include charges for groceries, gas, and utilities.

DECISION

Issues at trial

Carlson does not challenge the district court's conclusion that the will and deed are invalid; rather, he challenges only the district court's ruling on the conversion of assets.

Carlson first argues that the district court erred by directing him to focus on two issues at trial, which did not include the conversion-of-assets issue that the district court decided. Essentially, Carlson claims that the district court failed to consider his evidence on the issue. Absent an erroneous interpretation of the law, the question of whether to admit or exclude evidence is within the district court's discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). The party asserting an improper evidentiary ruling must demonstrate that the error was prejudicial. *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998). "An evidentiary error is prejudicial if the error might reasonably have changed the result of the trial." *Id.*

Initially, we note that the November 13, 2015 order required Carlson to provide evidence on the conversion issue. Carlson was ordered to "provide receipts . . . to account for all money received from [Gabrysh's] estate. . . . [I]nclud[ing] receipts showing expenditures made with money withdrawn from [Gabrysh's] estate with cashier's checks signed by . . . Carlson." Carlson acknowledged receipt of this order, but failed to comply with it. If he had complied, he would have been able to show how he spent money withdrawn from the estate, which he claimed was for Gabrysh's benefit and not his own.

Further, the district court made Carlson aware at trial that he was to address the conversion issue after McKinney testified about specific withdrawals from Gabrysh's

account. Carlson asked the district court why the specific expenses were relevant. The district court explained that receipts for specific expenses were relevant because Risberg alleged that Carlson took advantage of Gabrysh, and the receipts were intended to establish that Carlson was spending Gabrysh's money on things that were not likely for Gabrysh.

Finally, at oral argument before this court, Carlson stated that his real concern was that the district court did not allow him to present evidence on money he deposited into Gabrysh's account. But while we acknowledge that the district court directed Carlson to focus his testimony on Gabrysh's competency and whether he unduly influenced her, he testified about the money he deposited into Gabrysh's account.

Carlson testified that he deposited \$300 a week into Gabrysh's account to help pay the bills. Carlson testified that he deposited two \$8,000 checks he received from workers' compensation into Gabrysh's account, asserting that the bank statements were proof that that is where that money came from. But Gabrysh's bank statements were admitted into evidence and did not show the \$8,000 deposits.

The district court found that Carlson claimed to have deposited money into Gabrysh's account, but failed to provide a credible or reasonable explanation for comingling his money with Gabrysh's money. The district court found that the sources of "sporadic deposits totaling only a few thousand dollars" were "unknown and cannot be verified as having come from . . . Carlson." Thus, the district court considered evidence that Carlson deposited his money into Gabrysh's account, but did not find Carlson credible. See Minn. R. Civ. P. 52.01 (stating that this court affords due regard to the district court's opportunity to judge witness credibility); *see also* Minn. Stat. § 524.1-304(a) (2016)

(stating that, unless inconsistent with probate statutes, probate proceedings are to be governed by the rules of civil procedure). Accordingly, the district court did not abuse its discretion by exercising its authority to act as a gatekeeper for the admission of evidence.

Evidence

Carlson next argues that the district court improperly relied on McKinney's reports and testimony, claiming that they were flawed. Carlson asks us to reweigh the evidence. But we do not reweigh the evidence presented to a district court. *In re Salkin*, 430 N.W.2d 13, 16 (Minn. App. 1988) (stating that an appellate court determines whether the evidence as a whole sustains the district court's findings), *review denied* (Minn. Nov. 23, 1988). We also afford due regard to the district court's opportunity to judge witness credibility. Minn. R. Civ. P. 52.01. And the district court found McKinney's reports and testimony to be credible.

Carlson also argues that the evidence does not support the value McKinney assigned to the estate's personal property. When McKinney visited the home, he was told that only one piece of furniture in the home belonged to Gabrysh, despite the fact that Risberg had provided McKinney an inventory of the estate's property. The district court found that McKinney "credibly testified" that Carlson dissipated \$20,000 in personal property from Gabrysh's estate. We will not reweigh the evidence or second guess the district court's credibility determinations.

Denial of new trial

Lastly, Carlson argues that the district court abused its discretion by denying him a new trial. The decision to grant a new trial rests in the discretion of the district court and

will be reversed only for a clear abuse of discretion. *Connolly v. Nicollet Hotel*, 258 Minn. 405, 419, 104 N.W.2d 721, 731 (1960). Carlson asserts that he is entitled to a new trial because he was denied a continuance, the district court did not allow him to present evidence, and the district court wrongly excluded exonerating evidence.

The decision to deny a continuance is discretionary, and the ruling will not be reversed absent a clear abuse of discretion. *Chahla v. City of St. Paul*, 507 N.W.2d 29, 31 (Minn. App. 1993), *review denied* (Minn. Dec. 14, 1993). “The test is whether a denial prejudices the outcome of the trial.” *Id.* at 32.

Here, Carlson appeared pro se on the first day of trial and requested a continuance, claiming that he did not have time to review Risberg’s exhibits and wanted to retain counsel. Trial had already been rescheduled several times. On November 13, 2015, the original date of trial, the district court granted Risberg a continuance in order to retain counsel, and advised both parties that it would be in their best interests to retain counsel. Trial was continued to January 11, 2016. The district court granted Risberg another continuance after Carlson refused to allow one of Risberg’s witnesses to testify via telephone due to his inability to travel to Minnesota.

The district court denied Carlson’s subsequent request for a continuance because he received the exhibits in accordance with the timelines provided by the district court, he was aware of the trial date for two months and could have retained counsel during that time, and it would have been unfairly prejudicial to Risberg to continue the trial when her out-of-state witness had traveled to appear. Because these are legitimate reasons to deny

Carlson's request based on the record and the history of this case, the district court did not abuse its discretion in denying Carlson's request for a continuance.

Next, Carlson argues that the district court excluded his evidence because it was not provided seven days before trial. Carlson admitted that he received the November 13, 2015 order requiring him to provide his issues for trial, a witness list, and documentary evidence. Carlson failed to comply with the order even though it was issued in November 2015 and trial did not begin until March 2016. Further, despite Carlson's failure, the district court still allowed Carlson's witnesses to testify and allowed him to offer exhibits.

Finally, Carlson claims that the district court wrongly excluded evidence that showed he was exonerated of neglect claims and that Risberg was convicted of an unrelated theft. As neither of these instances was relevant to the issues presented at trial, the district court did not wrongly exclude them.

Affirmed.