IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 29, 2014 Session

IN RE CONSERVATORSHIP OF ALFONSO B. PATTON

Appeal from the Probate Court for Davidson County
No. 11P1271 David Randall Kennedy, Judge

No. M2012-01078-COA-R3-CV - Filed September 26, 2014

This case involves the authority of an attorney-in-fact to make gifts pursuant to a power of attorney. We agree with the trial court's determination that, in accordance with Tenn. Code Ann. § 34-6-110(a), the power of attorney did not authorize the attorney-in-fact to make gifts.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Paul Andrew Justice, III, Franklin, Tennessee, for the appellant, Patricia Richmond.

David J. Callahan, III, Nashville, Tennessee, for the appellee, Estate of Alfonso B. Patton.

OPINION

FACTUAL AND PROCEDURAL HISTORY

On January 23, 2008, Alfonso B. Patton executed a durable power of attorney appointing his daughter, Patricia Richmond, his attorney-in-fact. Ms. Richmond thereafter transferred substantial amounts (over a million dollars' worth) of Mr. Patton's money and real estate to herself and her husband, Ronnie Richmond. An order appointing conservators of Mr. Patton's person and property was entered in March 2010.

On June 30, 2010, the conservators of the person and property of Mr. Patton, who was 92 at that time, filed a petition against Patricia and Ronnie Richmond for the recovery of property and for damages. The conservators alleged that Ms. Richmond had used the durable

power of attorney to "convey real property owned by Mr. Patton to herself and Ronnie Richmond for no consideration" and to take control of and use Mr. Patton's financial resources "for her own and Ronnie Richmond's benefit to the detriment of Mr. Patton." The conservators asserted that Ms. Richmond breached her fiduciary duty to Mr. Patton by "using [his] financial resources for her own personal benefit." They further asserted that the Richmonds were guilty of conversion, exploitation pursuant to Tenn. Code Ann. § 71-6-102(8), and civil conspiracy.

The defendants answered, alleging that Ms. Richmond's actions were authorized by the power of attorney. As affirmative defenses, they claimed that all actions taken concerning Mr. Patton's property were done "in good faith and based on sufficient consideration since Patricia Richmond and her father developed a close father-daughter personal bond . . . ." They further asserted that their actions were taken "with the knowledge, direction and consent of Mrs. Richmond's father" and that Ms. Richmond used the power of attorney "as directed by her father who was engaged in estate planning culminating in his preparation of a holographic will dated April 21, 2010 . . . designating Mrs. Richmond as his sole beneficiary." The defendants alleged that the conservators had unclean hands. In a counterclaim, the defendants asserted that the conservators had not acted properly, that they should be removed, that they should be ordered to reimburse Mr. Patton's estate for damages, and that the court should order that the defendants be restored their interest in the subject property.

The conservator filed a motion for summary judgment on December 14, 2011. In support of this motion, the conservator submitted a statement of undisputed facts and voluminous attached exhibits. The record contains no response from the defendants to the motion for summary judgment.[1] The hearing took place on January 26, 2012 and, on February 10, 2012, the trial court entered an order granting the motion for summary judgment.

In its order, the court noted that Ms. Richmond had not filed a response to the motion for summary judgment and "filed no competing statement of disputed facts for the Court to consider." The court found no ambiguity in the power of attorney, and therefore no need to consider parol evidence. The court found that "each of the subject transactions listed in the Petitioner's Statement of Undisputed Facts . . . were in fact undisputed by the Respondent."

[1]Three days prior to the date set for the hearing on the motion for summary judgment, counsel for Ms. Richmond filed a motion to continue the hearing, stating that he had been "inundated with other litigation matters" and was "preparing for a felony criminal trial that will likely be in process" at the time of the summary judgment hearing. He further asserted that he had not had time to "adequately prepare a response to Petitioner's motion." The court denied the motion for a continuance.

The court further stated:

> 5. That the subject Power of Attorney does not provide the expansive language as contemplated under T.C.A. § 34-6-110(a)(1)-(2) to have granted legal statutory authority to the Respondent to make gifts as the Power of Attorney for the Ward.
> 6. That the subject Power of Attorney did not provide the Respondent with express authority to make gifts within the four corners of the document.
> 7. That all the gratuitous transfers of the Ward's funds and/or assets made by the Respondent, through the exercise of her Power of Attorney, are void due to the failure of the Power of Attorney to either provide express authority to make any gift transfers or to provide the expansive language contemplated under T.C.A. § 34-6-110(a)(1)-(2) to engage in gifting under the authority of the governing statute. The Respondent exceeded her authority under the empowering document with relation to each and every gratuitous transfer listed in the Petitioner's Statement of Undisputed Facts.

The court scheduled another hearing to determine the final judgment amount.

On February 24, 2010, Ms. Richmond filed a motion to alter or amend or, in the alternative, to set aside for lack of notice. Shortly thereafter, a new attorney filed a motion to amend judgment pursuant to Tenn. R. Civ. P. 59.04. The trial court denied both motions.

The trial on damages was held on three days in January and February 2013. The court entered a judgment on April 4, 2013. The court found that the conservator's statement of undisputed facts, consisting of sixteen pages, described "in great detail numerous transactions engaged in by Patricia Richmond wherein she transferred substantial sums of Mr. Patton's money and real estate from Mr. Patton through the use of a Power of Attorney . . . to herself and her husband, Ronnie Richmond, for her own use and benefit." Mr. Richmond had not presented any evidence to dispute any of the listed transactions, "[n]or has Ms. Richmond presented any evidence that would reflect that any of these transactions were intended for (or resulted in) any benefit to Mr. Patton."

The court made findings regarding a loan made by Ms. Richmond:

> Among the transactions engaged in by Ms. Richmond involving Mr. Patton's money, she loaned the principal sum of $222,000, at 0% interest to her daughter and son-in-law . . . to assist them in the purchase of a home in Georgia. All monthly payments were payable to the order of Ronnie Richmond and Patricia Richmond. Prior to trial, this note was assigned to Mr.

> Patton. The parties have stipulated that prior to assignment, Ms. Richmond received payments from the Lowes reducing the principal balance to $209,338.51.

After considering the arguments of both parties, the court concluded that the present value of the promissory note was $147,351.

Ms. Richmond filed an accounting reflecting transactions in which she had engaged but which had never been approved by the court. The accounting was examined by a certified public accountant ("CPA"), who prepared a summary analysis of the financial records provided by Ms. Richmond. The CPA confirmed that Ms. Richmond "engaged in many transfers and transactions that deprived Mr. Patton of the benefit and use of his money." The gross amount of the "transactions, withdrawals, and or expenditures made by Ms. Richmond for her own benefit, and/or for the benefit of persons other than Mr. Patton" was $1,407,246. The court determined that Ms. Richmond was entitled to some credits for expenditures she had made; these credits totaled $490,630. The court concluded as follows:

> Ms. Richmond breached her fiduciary duty to Mr. Patton in her capacity as attorney in fact under a Power of Attorney and she has misappropriated, expended, converted, retitled, consumed for her own personal use and or the use of persons other than Mr. Patton, or otherwise wrongfully disposed of $1,407,246. She is entitled to credit or offsets in the amount of $490,630, such that Ms. Richmond is liable to Mr. Patton for a net money judgment of $916,616.

The court entered a judgment against Ms. Richmond in the amount of $919,616.

On June 24, 2013, the court denied a motion to vacate the judgment or to stay execution pending appeal. Ms. Richmond filed a motion to set aside the June 24, 2013 order, and the court denied that motion on September 12, 2013.

The issue in this case is whether the trial court erred in granting the conservator's motion for summary judgment. Ms. Richmond argues that, despite her failure to respond to the conservator's motion for summary judgment or statement of undisputed material facts, she should be able to rely on the defenses of consent and good faith based upon her assertion that Mr. Patton, her father, authorized her to make the transfers in question.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and

the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.*; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).[2]

A power of attorney is a written instrument; as with other contracts and written instruments, the legal effect of a power of attorney is a question of law. *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 749-50 (Tenn. 2007). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

I.

Ms. Richmond's first argument is that summary judgment was not properly granted because (a) it did not establish any claim, such as conversion or any other tort, and (b) it did not negate her defense of consent.

One of the claims the conservator alleged was breach of fiduciary duty, and the trial court found, in ruling on the motion for summary judgment, that Ms. Richmond "breached her fidiciary duty." Thus, the trial court did specifically find that there was a valid claim

[2] Tennessee Code Annotated section 20-16-101 (2011), a provision that is intended to replace the summary judgment standard adopted in *Hannan,* is inapplicable to this case. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n. 2 (Tenn. 2011) (noting that section 20-16-101 is only applicable to actions filed on or after July 1, 2011). The conservator filed this petition on June 30, 2010.

against Ms. Richmond. Moreover, conversion is defined as "the appropriation of another's property to one's own use and benefit, by the exercise of dominion over the property, in defiance of the owner's right to the property." *Ralston v. Hobbs*, 306 S.W.3d 213, 221 (Tenn. Ct. App. 2009). The trial court found that, in breaching her fiduciary duty under the power of attorney, Ms. Richmond "misappropriated, expended, converted, retitled, consumed for her own personal use or the use of persons other than Mr. Patton, or otherwise wrongfully disposed of" Mr. Patton's assets. While the trial court did not specifically use the term "conversion," it made findings sufficient to constitute that claim.

Thus, we find no merit in Ms. Richmond's argument that the plaintiffs did not establish a claim against her.

Ms. Richmond also argues that summary judgment was in error in that the conservator did not negate her defense of consent. She alleges that her father authorized her to make the transfers in question; thus, she did not act under the power of attorney. In addressing this argument, it is important to emphasize that Ms. Richmond did not file any response to the conservator's motion for summary judgment or statement of undisputed material facts. As we have previously recognized, "a nonmoving party's failure to comply with Rule 56.03 may result in the trial court's refusal to consider the factual contentions of the nonmoving party even though those facts could be ascertained from the record." *Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 774 (Tenn. Ct. App. 2001). In granting the conservator's motion for summary judgment, the trial court specifically noted Ms. Richmond had filed no response or competing statement of disputed facts for the court to consider. In its judgment, the court stated that it had denied Ms. Richmond's "Motion to set aside Order deeming 'Undisputed Facts' admitted, or in the alternative, alter or amend the Court's ruling that Mr. Patton's Statement of Undisputed Facts are 'Undisputed.'"

While conceding that she failed to file any response or competing statement of undisputed facts, Ms. Richmond contends that the trial court's motion granting summary judgment did not take into account her defense of consent. We disagree. Some of the statements of undisputed facts submitted by the conservator without any competing evidence or statement from Ms. Richmond are as follows:

> On February 14, 2008, Respondent *through the use of her power of attorney*, transferred Four Hundred Eighty Two Thousand Two Hundred Sixty One Dollars and Thirty Cents ($482,261.30) from the Ward's personal account at Citizen's Bank . . . to an account titled in the name of Alfonso B. Patton POA/POD Patricia D. Richmond at US Bank. . . .
>
> On February 15, 2008, the Ward signed his last check and effectively made his

> last transfer of assets . . . , thereafter all checks and/or transfers *were made by the Respondent as power of attorney*.
>
> Following February 15, 2008, the Respondent assumed all responsibility and control for the Ward's finances, considering herself to be accountable for all actions related to the finances as the power of attorney.
>
> Following February 15, 2008, the Respondent referenced her authority to act, on behalf of the Ward, through the designation of "POA" or through stating that she was *Power of Attorney on all transactions related to the transfer of assets out of the Ward's estate*.

(Footnotes omitted) (emphasis added). The conservator's subsequent statements detailing transfers made by Ms. Richmond all reiterate that the transactions were accomplished "through the use of her power of attorney." By failing to object to the conservator's factual statements, Ms. Richmond admitted that all of the transactions at issue were accomplished through the use of her power of attorney. Her contentions otherwise—for example, that the transactions were authorized by Mr. Patton—conflict with these admissions.

In her brief, Ms. Richmond also mentions the defense of good faith. Under Tennessee law, "the dominant party in a fiduciary relationship is obligated to deal with the property of the other party in the utmost good faith." *Martin v. Moore*, 109 S.W.3d 305, 309 (Tenn. Ct. App. 2003). The trial court's finding that Ms. Richmond breached her fiduciary duty conflicts with her allegation of good faith. Moreover, the rule in Tennessee is that "the existence of a fiduciary relationship, 'followed by a transaction wherein the dominant party [the attorney-in-fact] receives a benefit from the other party [the principal], a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction.'" *Ralston*, 306 S.W.3d at 227 (quoting *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995)); *see Tenn. Farmers*, 239 S.W.3d at 751.

Ms. Richmond failed to respond to the conservator's motion or to provide evidence to support a different set of facts than those set forth in the conservator's statement of facts. She further failed to produce any evidence to support her defenses. We find no merit in Ms. Richmond's arguments.

II.

The other issue for our consideration is whether the power of attorney authorized Ms. Richmond to make gifts.

The legal effect of a power of attorney is a question of law. *Tenn. Farmers*, 239 S.W.3d at 750. The following principles apply:

> [P]owers of attorney should be interpreted according to their plain terms. There is no room for the construction of a power of attorney that is not ambiguous or uncertain, and whose meaning and portent are perfectly clear. However, when the meaning of a power of attorney is unclear or ambiguous, the intention of the principal, at the time of the execution of the power of attorney, should be given effect.

Id. (citations omitted). The trial court found no ambiguity in the power of attorney at issue here, and Ms. Richmond has not assigned error to that finding.

Tennessee Code Annotated section 34-6-110 addresses gift-giving under a power of attorney. Subsection (a) of Tenn. Code Ann. § 34-6-110 is the relevant provision[3]:

> (a) If any power of attorney or other writing:
> (1) Authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do; or
> (2) Evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or to deal with the principal's property; then the attorney in fact or agent shall have the power and authority to make gifts, in any amount, of any of the principal's property, to any individuals . . . in accordance with the principal's personal history of making or joining in the making of lifetime gifts. This section shall not in any way limit the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property.

Ms. Richmond emphasizes certain provisions (italicized below) in the list set out in the power of attorney:

> I, Alfonso B. Patton . . . do make, constitute and appoint my daughter, Patricia D. Richmond . . . my true lawful attorney for me . . . to ask, demand, *sue* for, collect and *receive all sums of money, dividends, interest, payments on account of debts and legacies and all property* now due or which may hereafter become due and owing to me, . . . ; to sell, assign and transfer stocks and bonds and

[3]Subsection (b) of Tenn. Code Ann. § 34-6-110 allows an attorney-in-fact to petition the court for authority to make certain gifts.

> securities standing in my name or belonging to me; to buy and sell securities of all kinds in my name and for my account . . . ; to sign, execute, acknowledge and deliver in my name all transfers and assignments of securities; to borrow money and to pledge securities for such loans . . . ; to consent in my name to reorganizations and mergers, and to the exchange of securities for new securities; *to manage real property, to sell, convey and mortgage realty*, to foreclose mortgages and to take title to property in my name if she thinks proper, and to execute, acknowledge and deliver deeds of real property, mortgages, releases, satisfactions and other instruments relating to realty which she considers necessary; to place and effect insurance; *to do business with banks*, and particularly to endorse all checks . . . ; to sign in my name checks on all accounts standing in my name, *and to withdraw funds from said accounts,* to open accounts in my name or in her name as my attorney-in-fact; to open, maintain, have access to the contents of safety deposit boxes in any banks or other financial institutions; to make such payments and expenditures as may be necessary in connection with any of the foregoing matters or with the administration of my affairs; to retain counsel and attorney on my behalf, to *appear for me in all actions and proceedings* to which I may be a party in the courts of Tennessee, or any other state in the United States, or in the United States courts, to commence actions and proceedings in my name if necessary, to sign and verify in my name all complaints, petitions, answers and other pleadings of every description; to make and verify income tax returns, and to represent me in all income tax matters . . . ;

(Emphasis added). According to Ms. Richmond, "[i]t is unrealistic to suggest that this extensive, ridiculously long document did not show any 'intent' to let Mrs. Richmond handle property and affairs" as provided in Tenn. Code Ann. § 34-6-110(a)(2).

There is other language in the power of attorney (italicized below) to which Ms. Richmond points in support of her position. The following provisions appear immediately after those quoted above:

> . . . to employ and compensate medical personnel . . . my Attorney-in fact shall deem appropriate for the proper care, custody, and control of my person and to do so without liability for any neglect, omission, misconduct or the fault of any medical personnel, provided the medical personnel was selected and retained with reasonable care, and to dismiss any persons at any time, with or without cause; to authorize any and all kinds of medical procedures and treatment . . . and to consent to all treatment, medication, or procedures where consent is required; to obtain the use of medical equipment and devices, or

> other equipment and devices; all as my Attorney-in-fact shall deem appropriate for the proper care, custody, and control of my person . . . ; to arrange and effect my admission to or discharge from hospitals, psychiatric hospitals or institutions, nursing homes or similar facilities, wherever located; to move my person to or from any county, state, or country, temporarily or permanently; to change my residence or domicile, or both; to assert my rights under any "living will" or similar instrument I shall have executed and shall not have revoked; all as my Attorney-in-fact shall deem appropriate for the proper care, custody, and control of my person . . . ; to request, review and receive any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to execute any releases or other documents that may be required in order to obtain this information; to give or withhold consent to my medical care, surgery, or any other medical procedures or tests, and to revoke, withdraw, modify, or change medical consents . . . ; to sign documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice" as well as any necessary waivers of, or releases from, liability required in my Attorney-in-fact's sole discretion; to request that aggressive medical therapy not be instituted, or to be discontinued, . . . ; to specifically request and concur with the writing of a "no-code" (DO NOT RESUSCITATE) order by my attending or treating physician; and to exercise my right of privacy to make decisions regarding my medical treatment and my right to be left alone . . . ; to take appropriate legal action, if necessary in the sole judgment of my Attorney-in-fact, to enforce my right in this regard; *hereby giving and granting my said attorney full power and authority to do and perform all and every act and thing whatsoever necessary to be done in the premises, as fully to all intents and purposes as I might or could do if personally present*, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney may do pursuant to this power.

(Emphasis added). The paragraph following the above quotation addresses the attorney-in-fact's right to receive Mr. Patton's medical information.

As Ms. Richmond emphasizes, the italicized language at the end of the second half of the quoted paragraph is similar to the language of Tenn. Code Ann. § 34-6-110(a)(1). In construing a written instrument, however, we must not read language in isolation, but must construe it in the context of the instrument as a whole. *See Pitt v. Tyree Org. Ltd.*, 90 S.W.3d 244, 253 (Tenn. Ct. App. 2002). All of the key provisions of the power of attorney at issue, which is not a model of skillful drafting, appear in one long paragraph. The beginning of the paragraph addresses business and financial matters, whereas the latter part of the paragraph

(quoted in the preceding paragraph of this opinion) addresses Mr. Patton's medical needs and wishes. Thus, in one paragraph, the document attempts to create both a durable general power of attorney and a durable power of attorney for health care. Because the language upon which Ms. Richmond relies appears in the section of the paragraph related to medical matters, we interpret the language as being limited to the health care context. In this instance, context matters. Consequently, we find that the broad language upon which Ms. Richmond relies relates only to Mr. Patton's medical needs. The power of attorney does not reference Tenn. Code Ann. § 34-6-110(a)(1) or give Ms. Richmond the type of authority described therein.

Tennessee Code Annotated section 34-6-110(a)(2) also provides that, if the attorney-in-fact has the authority to make gifts, he or she may make gifts of the principal's property "in accordance with the principal's personal history of making or joining in the making of lifetime gifts." In arguing that her actions were in accordance with Mr. Patton's history of making gifts, Ms. Richmond states:

> [Ms. Richmond's] father would routinely bring money to her mother—typically amounts such as $100. Admittedly, the record does not establish the number or frequency of these payments. But over time, it could potentially have been a very large amount—especially in today's dollars. For unknown reasons, Mrs. Richmond's father stopped bringing the gifts in 1994.

Even if we accept Ms. Richmond's factual statements as true, we do not consider them sufficient to justify the large amounts of money Ms. Richmond gave to herself and her husband.

In *Martin v. Moore*, 109 S.W.3d at 311, the court considered Mr. Moore's history of gift giving in evaluating the propriety of gifts made by the attorney-in-fact (Mr. Moore's wife) to herself and her brother. The court noted, "There is little evidence in the record that Mr. Moore ever expressed an intention to confer such a benefit on his wife, and no evidence at all that he bore such a benevolent intention towards Mr. Bautista [attorney-in-fact's brother]." *Martin*, 109 S.W.3d at 310. Affirming the trial court's conclusion that the attorney-in-fact's gifts were not reasonable, the court stated: "While Mr. Moore may have been a generous husband, there is no evidence in the record that he ever made joint gifts to his wife and his brother-in-law." *Id.* at 311. Likewise, in the present case, Ms. Richmond has not pointed to any evidence that Mr. Patton had a history of making gifts to her or her husband. In addition, the gifts upon which she relies stopped in 1994, and there is a vast difference between gifts of one hundred dollars and gifts totalling almost one million dollars.

We must conclude that the trial court correctly granted summary judgment in favor

of the conservator.

CONCLUSION

We affirm the judgment of the trial court. Costs of this appeal are assessed against Ms. Richmond, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE