STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0245

Howard McKinley, et al.,
Appellants,

vs.

Dale McKinley, et al.,
Respondents.

Filed March 24, 2009
Affirmed
Bjorkman, Judge

Goodhue County District Court
File No. 25-C3-06-000341

John R. Neve, Neve & Associates, PLLC, 8500 Normandale Lake Boulevard, Suite 1080, Minneapolis, MN 55437 (for appellant Mary Lundell)

George L. May, May & O'Brien, LLP, 204 Sibley Street, Suite 202, Hastings, MN 55033 (for respondents)

Considered and decided by Klaphake, Presiding Judge; Bjorkman, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

In this property-transfer dispute, appellant argues that (1) the district court applied the wrong standard of proof and (2) the record does not support the district court's decision even under the standard of proof it applied. Because we conclude that the district court applied the correct standard of proof and did not clearly err in finding that appellant failed to satisfy that standard, we affirm.

FACTS

Luella McKinley (mother) and the late Howard McKinley (father) are the parents of appellant Mary Lundell and respondent Dale McKinley. Father executed a will on August 15, 1991, when his primary real-estate asset was a 160-acre farm. The will provided that all of his property was to be divided equally between appellant and respondent, subject to a life estate in the home to mother in the event she survived him.

On December 14, 2001, father and mother conveyed approximately 86 acres of the land to appellant and her husband. The land was encumbered by a lease to a power company that maintained a transmission tower on the land. The power company initiated quick-take eminent-domain proceedings in 2003, eventually resulting in a substantial condemnation award to appellant.

Respondent first learned of the condemnation award on January 3, 2006, while examining property records in connection with other intra-family litigation. Appellant had not informed their parents of the award. According to respondent, father and mother were already upset with appellant and upon learning of the undisclosed award, they asked

respondent to prepare a deed conveying approximately 75 acres—the remainder of the original 160 acres—to respondent. On January 13, 2006, respondent drove father and mother to a bank, where father and mother signed the deed before a notary.

Appellant learned of the deed from her parents' attorney in early February 2006. On the attorney's advice, appellant had her parents' mental status evaluated by their treating physicians on February 16, 2006. Mother's physician, who had been caring for her for about eight years, determined that mother had mild-to-moderate dementia and that she did not remember signing any papers giving land to her son. Father had been in his physician's care for at least three years; the doctor determined that father had mild dementia. Father's physician did not specifically ask about the deed, but concluded that father lacked the ability to make executive decisions. The parents' attorney, who had represented them for at least ten years, visited father and mother on February 24, 2006. According to the attorney, father and mother did not know that they had given away their property and father could not even remember going to the bank with his son.

Appellant commenced this declaratory-judgment action seeking to set aside the conveyance of the 75 acres, primarily on the ground that her parents lacked sufficient mental capacity to transfer the property.[1] During the pendency of the litigation, father died and mother moved into a long-term care center. The matter proceeded to trial before the district court in May 2007.

[1] Appellant also initiated this action on behalf of father and mother. By prior order, we dismissed the portions of the appeal involving the parents' interests. Respondent's wife, Kathleen McKinley is also a respondent, but we use "respondent" to refer only to Dale McKinley.

At trial, the district court heard testimony from 12 witnesses, including the parents' treating physicians. The district court found both physicians to be credible witnesses, but noted that their examinations and conclusions may have been affected by the parents' substantial hearing loss. Appellant presented the testimony of a psychologist who examined mother on January 12, 2007. The psychologist opined that mother has mild-to-moderate dementia.

The director of nursing at mother's care facility testified regarding mother's physical and mental status from the time she arrived at the facility (September 2006) up to the time of trial. She described mother as alert and oriented to persons, place, and time, and testified that the mental evaluation performed at the time of mother's admission revealed no indicia of dementia and that mother was "cognitively intact." The director testified regarding her substantial training and experience caring for persons suffering from Alzheimer's disease and dementia and stated mother did not have dementia.

An attorney who specializes in elder law testified about his meeting with father and mother on January 18, 2006, five days after the conveyance at issue. He stated that he had no concerns about the parents' mental capacity.

Mother testified that she and father always intended that the family farm, the original 160 acres, would be divided evenly between appellant and respondent. Although mother had obvious hearing difficulties that required multiple reconfigurations of the courtroom technology, the district court concluded that she was a credible witness who did not lack capacity to testify. The district court found that mother was "spry and opinionated" and wanted respondent to have the 75-acre parcel.

The district court concluded that appellant had not met her burden of proving by clear and convincing evidence that father and mother lacked sufficient mental capacity to convey the land to respondent. The court identified mother's testimony as a substantial factor in reaching its decision. Additionally, the district court emphasized the importance of the standard of proof, stating that had the standard been only a preponderance of the evidence, appellant "would have likely prevailed." The district court denied appellant's motion for a new trial or for amended findings and conclusions, again stressing the significance of the standard of proof. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred in applying the clear-and-convincing standard of proof to her mental-incapacity claim. Respondent contends that (a) appellant waived this argument by failing to present it to the district court and (b) the district court applied the proper standard.

As a reviewing court, we generally consider only the issues and theories presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But the supreme court has recognized an exception to this limitation where (1) the question is "plainly decisive of the entire controversy on its merits" and (2) neither party gains an advantage or suffers a disadvantage by not having had a prior ruling from the district court. *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997) (emphasis omitted) (quotation omitted).

Despite her acknowledgment that this issue was not submitted to the district court and that she, in fact, advocated the clear-and-convincing standard throughout the district court's proceedings, appellant argues the *Watson* exception applies here. We disagree. The determination of the appropriate standard of proof does not resolve the entire controversy. Although the district court stated that appellant "would have likely prevailed" under a less-strenuous standard, the court did not conclusively find that she would have. And because the parties argued the facts against the clear-and-convincing evidence standard, they would be disadvantaged were we to apply a different standard on appeal.

But to settle all doubt between the parties, and because we conclude that the district court applied the proper standard of proof, we address the merits of this controversy. Identification of the appropriate standard of proof is a legal question we review de novo. *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008).

The donor of a gift must be of sound mind and clearly understand the transaction. *Bentson v. Ellenstein*, 215 Minn. 376, 377, 10 N.W.2d 282, 283 (1943); *see also Rebne v. Rebne*, 216 Minn. 379, 382, 13 N.W.2d 18, 20 (1944) (stating that a deed may be set aside if the grantor lacks sufficient mental capacity to understand the nature and effect of the grantor's actions). A party seeking to set aside a gift because the donor lacked mental capacity has the burden of proving lack of capacity by clear and convincing evidence. *Sullivan v. Brown*, 225 Minn. 524, 531-32, 31 N.W.2d 439, 444 (1948). Gifts from parent to child are presumed to be valid, and the burden is on the party challenging the

gift to prove the gift is somehow invalid. *Rader v. Rader*, 108 Minn. 139, 141, 121 N.W. 393, 394 (1909).

In *Sullivan*, the supreme court affirmed the district court's use of the clear-and-convincing evidence standard and findings that the donor had sufficient mental capacity to make inter vivos gifts of bonds and personal items. 225 Minn. at 531-33, 31 N.W.2d at 444-45. In *Jeruzal's Estate*, the supreme court likewise declined to disturb the district court's determination that the party contesting various inter vivos transfers into Totten trusts had failed to prove by clear and convincing evidence that the transferor lacked sufficient mental capacity at the times of the transfers. *Jeruzal's Estate v. Jeruzal*, 269 Minn. 183, 186–87, 197, 130 N.W.2d 473, 476, 482 (1964).

Appellant cites an unpublished decision of this court for the proposition that the correct standard of proof is a preponderance of the evidence; the unpublished decision relies on *In re Estate of Nordorf*, 364 N.W.2d 877 (Minn. App. 1985), for the same proposition. Appellant's argument is unavailing. First, *Nordorf* does not discuss the standard of proof, it discusses the standard of capacity. 364 N.W.2d at 880 (concluding that the standard of capacity under the Multi-Party Accounts Act is capacity to contract, not testamentary capacity). Standard of capacity is the ultimate factual question—what level of mental acuity a person must have for an act to have legal effect; standard of proof is a party's procedural hurdle—what burden the party bears to prove a fact. The dispute here concerns appellant's burden of proof, not the level of mental acuity father and mother needed to execute the deed to respondent. Second, appellant's reliance on an unpublished, non-precedential case is misplaced. *See* Minn. Stat. § 480A.08, subd. 3(c)

(2008) (stating that unpublished opinions are not precedential); *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (discussing the dangers of citing unpublished opinions).

The appropriate standard of proof in an action seeking to set aside an inter vivos gift on the ground of insufficient mental capacity is clear and convincing evidence. The district court did not err in applying this standard to appellant's claim.

II.

Appellant also challenges the district court's finding that she did not establish by clear and convincing evidence that her parents lacked sufficient mental capacity to give the land to respondent.

A district court's findings of fact will not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01. We view the record in the light most favorable to the district court's judgment and will not disturb the findings so long as they are supported by reasonable evidence. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

Initially, we note that appellant misstates the dispositive question and the effect of the standard of proof. Appellant urges us to reverse the district court because "the evidence does not support a finding that [father] or [mother] had the appropriate mental capacity to execute the deed." But the district court did not find that they *had* capacity; it found that there was insufficient evidence to prove they *lacked* capacity. The burden of proving lack of capacity was on appellant, and the standard was clear and convincing evidence. The district court concluded that appellant failed to meet this standard.

Appellant argues the district court clearly erred in not adopting her experts' testimony that father and mother lacked capacity. She notes that respondent offered no contrary expert evidence. But expert evidence is merely helpful, not conclusive or dispositive. *In re Estate of Congdon*, 309 N.W.2d 261, 267 (Minn. 1981). The district court weighed the expert testimony, but expressly stated that mother's testimony had a profound impact on its decision. It is not our province to reconcile conflicting evidence. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Nor do we second-guess the fact-finder's weighing of the evidence. *Mayzlik v. Lansing Elevator Co.*, 241 Minn. 468, 473, 63 N.W.2d 380, 384 (1954).

Finally, appellant argues that the district court failed to make any meaningful findings regarding father's mental status and that the evidence requires a finding that he lacked capacity. But the district court specifically addressed the "absence of more specific findings" on this issue, stating that "the record developed at the trial was not sufficient to support such findings." It was appellant's burden to develop the record, and she failed. The district court's findings are not clearly erroneous.

Affirmed.