

Cite as 2023 Ark. App. 338

ARKANSAS COURT OF APPEALS

DIVISION II

No. CV-20-555

JOYCE HETRICK, CO-TRUSTEE OF
THE JARRELL SAMS AND GLADYS
SAMS IRREVOCABLE TRUST
APPELLANT

V.

THE ESTATE OF GLADYS SAMS,
DECEASED, BY CHARLES GRAY,
PERSONAL REPRESENTATIVE
APPELLEE

Opinion Delivered May 31, 2023

APPEAL FROM THE CONWAY
COUNTY CIRCUIT COURT
[NO. 15CV-18-108]

HONORABLE DAVID H.
MCCORMICK, JUDGE

AFFIRMED

WENDY SCHOLTENS WOOD, Judge

Appellant Joyce Hetrick appeals the judgment entered by the Conway County Circuit Court finding that she breached her fiduciary duty as guardian of her mother, Gladys Sams. Joyce served as both guardian of her mother and co-trustee with Gladys over a trust benefiting Gladys during her lifetime and of which Joyce was the sole beneficiary at Gladys's death. On appeal, Joyce contends that the circuit court clearly erred in (1) finding that she breached her fiduciary duty as guardian when she transferred Gladys's personal funds to the trust; (2) finding that the transfer of Gladys's personal funds to the trust required a court order; and (3) calculating damages. We affirm.

Gladys and Jarrell Sams owned 120 acres of land in Conway County. They have one child, Joyce Hetrick. Joyce has two children—Patrick Alexander and Clay Alexander. Patrick Alexander has been in prison in Texas since 1992 for first-degree murder. Charles Gray is Gladys's nephew.

On January 5, 2004, Jarrell and Gladys, as grantors, established the Jarrell Sams and Gladys Sams Irrevocable Trust (the "Trust"). The Trust names Gladys and Joyce as co-trustees with either to serve as sole trustee if one of them becomes unable or unwilling to serve as a co-trustee. The Samses transferred their 120-acre parcel of land into the Trust, and the land remained in the Trust throughout their lifetimes. Under the terms of the Trust, the Samses could use the assets of the Trust for their benefit while they were both alive. Upon the death of both Jarrell and Gladys, Joyce is the sole beneficiary of the Trust.

According to Joyce, on or around the same date the Trust was formed, Gladys also executed a will (the "2004 Will"). Joyce testified that the 2004 Will contained a pour-over provision that left all of Gladys's personal property to the Trust. The 2004 Will is not in the record and was never introduced into evidence.

Jarrell passed away on January 9, 2005. As time progressed, the relationship between Gladys and Joyce began to deteriorate. In 2007, Joyce unsuccessfully attempted to establish a guardianship over Gladys. They also clashed over Gladys's remaining in contact with and sending money to Patrick in prison. Joyce had become estranged from him because of his criminal history. On March 14, 2007, Gladys revoked a power of attorney she had previously executed in favor of Joyce. And on September 15, 2010, Gladys executed a new will (the

“2010 Will”). The 2010 Will listed Patrick and Charles as her only beneficiaries and appointed Charles as executor. It provided, “None of the property owned at my death by me shall be placed into the trust.” Further, the 2010 Will stated, “I am well aware of my only child, Joyce Alexander Hetrick. I leave her nothing pursuant to this will and am intentionally excluding her from distribution. She has been considered and provided for in the manner I wish to do so through the trust created in 2004.” On October 6, 2016, Gladys executed a power of attorney in favor of Charles. This power of attorney also nominated Charles as her guardian should it become necessary.

On October 31, 2016, Joyce filed another guardianship action against Gladys. On April 13, 2017, Joyce was appointed Gladys’s physical guardian. Charles was appointed Gladys’s temporary financial guardian on the same day. While he was financial guardian, Charles filed an inventory listing all of Gladys’s personal bank accounts, which included twenty-three accounts held at eight institutions, totaling \$903,848.31. His guardianship expired on July 1, at which time Joyce was appointed Gladys’s financial guardian. Joyce assumed her additional duties as financial guardian on August 8.

Gladys passed away on August 27.¹ At the time of her death, she had no personal bank accounts, and her only personal possessions were approximately \$2,000 in furniture and clothing.

¹Joyce testified at trial that Gladys’s death was sudden and that she was not known to have a terminal illness.

Charles opened Gladys's estate (the "Estate") on September 22, and he accepted his position as executor on October 12. On March 27, 2018, Charles filed a lawsuit against Joyce as co-trustee of the Trust. In the complaint, Charles alleged that in the nineteen days Joyce was Gladys's financial guardian, Joyce transferred Gladys's personal funds from thirty-five bank accounts at eight different institutions into the Trust, totaling \$1,216,364.69 (the "Transferred Funds"). The Transferred Funds included all the accounts listed on the inventory previously filed by Charles as well as a number of other bank accounts that Joyce had discovered while she was acting as Gladys's physical guardian. The complaint alleged conversion and breach of fiduciary duty and demanded an accounting and the return of the Transferred Funds to Gladys's Estate.

The circuit court held a bench trial on January 23 and 24, 2020. At trial, Joyce testified that she and her mother served as co-trustees of the Trust after the death of Jarrell. Joyce stated that she believed during the last couple of months of Gladys's life, she was taking income from the Trust and placing it into her personal accounts. Joyce testified that in her role as co-trustee she deemed her mother's actions "as illegal" and removed funds in Gladys's personal account and placed them into the Trust "where they were supposed to have been deposited in the first place." Joyce introduced an exhibit ("Joyce's Exhibit"), and she testified that it contained evidence of the existence of Trust accounts from 2005–2017.

Joyce stated that she did not file suit against Gladys for breach of trust because she is "not that litigious." She said that instead, when she became Gladys's guardian, she used her position to close all of Gladys's personal accounts and move the money back to the Trust.

Joyce testified that returning the money to the Trust that had been improperly removed was her effort to carry out her parents' 2004 estate plan.

During Joyce's testimony, counsel for Charles introduced an exhibit ("Charles's Exhibit") that listed the institutions, account numbers, and total dollar amounts making up the Transferred Funds, which totaled \$1,216,364.69. Joyce agreed that she went to the institutions listed on Charles's Exhibit while she was Gladys's guardian, removed the funds from those accounts listed on the exhibit, and deposited them into the Trust account.

Joyce also acknowledged that she was the sole beneficiary of the Trust, but she added that at the time she transferred the funds, she believed Gladys's 2004 Will was still operative, and all of Gladys's personal assets would be placed into the Trust at Gladys's death. She denied knowing about the 2010 Will until after Gladys's death. However, there was conflicting testimony from Gladys's niece, Carolyn Payne, who stated that Joyce told her in 2017 that "the power of attorney and will are void."

At the conclusion of the trial, the circuit court took the matter under advisement and on April 23, 2020, entered a judgment finding that Joyce had breached her fiduciary duty as guardian of Gladys's Estate by withdrawing the funds from Gladys's personal accounts and depositing them into the Trust. The circuit court found that Joyce failed to establish that the source of the funds in Gladys's personal accounts was the Trust. The circuit court also found that Joyce was aware of the 2010 Will; she placed all of Gladys's personal funds into the Trust for her sole benefit, which had the effect of rewriting Gladys's estate plan; and that Joyce engaged in self-dealing in violation of her fiduciary duty. The circuit court further

found that Joyce failed to comply with Arkansas Code Annotated section 28-65-308 (Repl. 2012) when she failed to obtain court approval before transferring Gladys's personal funds into the Trust. Finally, the circuit court attached Charles's Exhibit to its judgment and ordered Joyce to repay Gladys's Estate \$1,216,364.69. Joyce moved for a new trial on May 7, and the circuit court denied the motion on June 5. This appeal followed.

Joyce raises three points on appeal. She contends that the circuit court clearly erred in (1) finding that she breached her fiduciary duty as Gladys's guardian when she transferred Gladys's personal funds to the trust; (2) finding that the transfer of Gladys's personal funds to the Trust required a court order; and (3) calculating damages.

In civil bench trials, the standard of review on appeal is whether the circuit court's findings were clearly erroneous or clearly against a preponderance of the evidence. *Ellis v. Thompson*, 2019 Ark. App. 579, at 7, 590 S.W.3d 774, 779 (citing *Tadlock v. Moncus*, 2013 Ark. App. 363, 428 S.W.3d 529). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with a firm conviction that a mistake has been made. *Id.*, 590 S.W.3d at 779. Due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. *Id.*, 590 S.W.3d at 779 (citing Ark. R. Civ. P. 52(a)(1)).

For her first point on appeal, Joyce argues that the circuit court clearly erred in finding that she breached her fiduciary duty as Gladys's guardian. The duty of a guardian is to exercise due care to protect and preserve the ward's estate. Ark. Code Ann. § 28-65-301(b)(1)(A) (Repl. 2012). Guardianship shall be used only as necessary to promote and

protect the well-being of the person and his or her property. Ark. Code Ann. § 28-65-105(1) (Repl. 2012). This court has held that the “guardian of the estate of an incompetent person does not become the alter ego of the ward and has no authority to change an act by which the ward exercised personal discretion before becoming incompetent.” *Monk v. Griffin*, 92 Ark. App. 320, 324–25, 213 S.W.3d 651, 655 (2005) (quoting *Brasel v. Est. of Harp*, 317 Ark. 379, 877 S.W.2d 923 (1994)).

The circuit court found that Joyce breached her fiduciary duty as Gladys’s guardian when she (Joyce)—in a period of nineteen² days—liquidated all of Gladys’s personal accounts totaling \$1,216,364.69 and deposited those funds into the Trust. The court found:

During the [nineteen] day period that [Joyce] served as Guardian of the Estate of [Gladys], [Joyce] undertook to close every bank account, certificate of deposit, individual retirement account and any other investments in the name of [Gladys] and transfer the funds from those accounts to the Trust. This was no simple task, given the number of institutions and accounts held in [Gladys’s] name.

The court found that Joyce knew about the terms of the 2010 Will and that she was the sole beneficiary of the Trust, and by her actions, she “in effect, rewrote the estate plan of her mother by taking actions designed to solely benefit herself as the sole beneficiary by moving [Gladys’s] accounts into the Trust.” The circuit court found that Joyce’s actions were “contrary to the well-defined wishes and best interest of the ward.” The circuit court further found that Joyce violated her fiduciary duty as guardian for Gladys by self-dealing:

²The circuit court stated that Joyce made these transfers in a twenty-day period; however, in the court’s findings of fact it found that Joyce assumed her duties as guardian of the estate on August 8, 2017, and that Gladys died on August 27, 2017, at which time the guardianship ended. This is a nineteen-day period.

The Court finds that [Joyce's] actions were taken for the sole and exclusive benefit of the Trust and to the detriment and deterioration of [Gladys's] personal estate. As the sole beneficiary of the Trust (and as an excluded beneficiary under [the 2010 Will]), [Joyce's] actions amount to self-dealings in violation of her duties as [Gladys's] fiduciary.

Self-dealing by a trustee or any fiduciary is always suspect, and it is a universal rule of equity that a trustee shall not deal with trust property to his own advantage without the knowledge or consent of the *cestui que trust*. *Hosey v. Burgess*, 319 Ark. 183, 189-90, 890 S.W.2d 262, 265 (1995) (citing *Alexander v. Alexander*, 262 Ark. 612, 561 S.W.2d 59 (1978)). One of the foundational principles in a fiduciary relationship “is that self-dealing, absent the consent of the other party to the relationship, is strictly proscribed.” *Cole v. Laws*, 349 Ark. 177, 185, 76 S.W.3d 878, 883 (2002) (citing *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 298, 948 S.W.2d 388, 395 (1997)). Self-dealing is a breach of fiduciary duty, even when it is done innocently and without intent. *Id.* at 185-86, 76 S.W.3d at 883. Further, a fiduciary may be held liable for conduct that does not meet the requisite standards of fair dealing, good faith, honesty, and loyalty. *Id.* at 186, 76 S.W.3d at 883.

We hold that these findings of the circuit court are not clearly erroneous. The evidence demonstrates that Joyce admittedly transferred all of Gladys's personal assets into the Trust, which listed Joyce as the sole beneficiary, against Gladys's expressed wishes. This supports the circuit court's finding that Joyce engaged in self-dealing and breached her fiduciary duty as Gladys's guardian.

Joyce does not dispute that she closed all of Gladys's personal bank accounts and deposited the funds into the Trust during the nineteen days she was Gladys's financial

guardian, that she is the sole beneficiary under the Trust, or that the 2010 Will is valid and expressed Gladys's intent for her personal assets to be split between Charles and Patrick. Instead, she raises several other arguments. She first contends that the circuit court clearly erred in failing to consider her duties as co-trustee of the Trust and her efforts to return funds to the Trust that she alleges Gladys improperly removed. However, the circuit court expressly found that Joyce's evidence on this point was not persuasive: "[Joyce] attempted to establish that the source of these funds was the Trust but the proof on this contention was lacking." This finding is not clearly erroneous.

Joyce testified at trial that her only evidence of the existence of Trust accounts from 2005-2017 was included in Joyce's Exhibit, but she also admitted that Charles's Exhibit, which included all the personal accounts of Gladys that Joyce transferred to the Trust, did not include any accounts that were listed in Joyce's Exhibit. We note that while Joyce introduced three checks totaling \$21,528.61 that had been issued to the Trust but deposited into Gladys's personal accounts, the Trust provides that Gladys was permitted to receive "all net income" of the trust during her lifetime.

Joyce next asserts that when she transferred Gladys's personal funds to the Trust, she was attempting to carry out her parents' "irrevocable" 2004 estate plan, which, according to her, included the Trust and Gladys's 2004 Will. Although the Trust is an irrevocable trust, the evidence in this case is undisputed that if there was a 2004 Will, Gladys revoked it with the execution of her 2010 Will. Arkansas Code Annotated section 28-25-109(a)(1) (Repl. 2012) provides that a will or any part thereof is revoked by a subsequent will that revokes the

prior will expressly or by inconsistency. A testator can revoke or change his or her will, and the testator is “presumed to possess knowledge of the legal consequences of his acts or omissions.” *Parker v. Mobley*, 264 Ark. 805, 809-A, 577 S.W.2d 583, 585-86 (1979).

Although the 2004 Will was not introduced into evidence, Joyce argues that it included a pour-over provision that placed all of Gladys’s assets at the time of her death into the Trust. This is inconsistent with the terms of Gladys’s 2010 Will that expressly provides that her assets upon her death are not to be placed into the Trust and are instead to be divided among her grandson and nephew. The 2010 Will also expressly references the Trust and Joyce, expressly excludes Joyce from taking under the will, and states that Joyce is sufficiently provided for under the terms of the Trust.

Under this same argument, Joyce argues that her actions in transferring Gladys’s personal assets to the Trust were not taken to harm Gladys’s Estate because she did not know about the 2010 Will. Instead, she thought the 2004 Will was the operative instrument, and under the 2004 Will, Gladys’s assets would have transferred to the Trust at her death. However, there was testimony that a disinterested relative heard Joyce say that “the will and the power of attorney are invalid.” The circuit court also noted that it “was no simple task” for Joyce to close all of Gladys’s personal accounts at eight financial institutions in just nineteen days, inferring a sense of intent, knowledge, and urgency on the part of Joyce. The circuit court is in a superior position to judge the credibility of witnesses. *Seymour v. Biehlich*, 371 Ark. 359, 361, 266 S.W.3d 722, 725 (2007). We are left with no firm conviction that an error was committed when the circuit court made this finding of fact.

Joyce argues that the circuit court clearly erred in finding that she breached her fiduciary duty as guardian because it did not consider that Gladys was the sole beneficiary for her life of both the Trust and guardianship assets. Joyce contends that she “adhered to her fiduciary duty when she transferred a litany of accounts in Gladys’s name to the Trust, as these investments were beneficial to Gladys. All of both Trust and Guardianship were available for Gladys’[s] income and security.” Joyce argues that because Gladys had the same interest in the guardianship and trust assets, she was not harmed by Joyce’s transfers.

We disagree. Gladys’s Estate and her irrevocable trust are separate entities under the law. *Giles v. Harrington, Miller, Neihouse & Krug*, 362 Ark. 338, 349, 208 S.W.3d 197, 204 (2005) (citing *Calandro v. Parkerson*, 327 Ark. 131, 936 S.W.2d 755 (1997) (stating that an individual is a separate entity from his or her trust)). Moreover, the evidence clearly shows that Gladys and the Trust sought to benefit different people. Gladys wanted her personal assets upon her death to be distributed to Patrick and Charles, while the sole beneficiary of the Trust is Joyce. For all these reasons, we hold that the circuit court did not clearly err in finding that Joyce’s actions in transferring Gladys’s personal funds to the Trust constituted a breach of Joyce’s fiduciary duty to Gladys.

For her second point on appeal, Joyce contends that the circuit court clearly erred in finding that the transfer of Gladys’s personal funds to the Trust required a court order. The circuit court found that Joyce was required to obtain court approval to transfer Gladys’s funds pursuant to Arkansas Code Annotated section 28-65-308(b) (Repl. 2012), which provides, “Upon a showing that the action would be advantageous to the ward and his or

her estate, the court may authorize the guardian to make gifts and disclaimers on behalf of the ward.” The circuit court found that Joyce obtained no court authorization during her “short service as Guardian”; thus, it found, as an independent and alternative ground to violating the fiduciary duty she owed to Gladys, that Joyce violated the statute.

On appeal, Joyce does not dispute that she failed to obtain court approval before transferring Gladys’s funds. Rather, she contends that the statute does not apply in this situation because Gladys—as the ward for whom Joyce served as guardian—was the sole “present” owner of the accounts transferred and, at the time of the transfer, she was also the sole beneficiary of the Trust. That is, until her death, Gladys was the only person to benefit from both her personal accounts and the Trust. Therefore, Joyce argues, because no one other than Gladys had a present interest in any of the Trust accounts, the transfers were not gifts that required court approval.

Whether Gladys would have benefited from the transfers is not determinative. Gladys, as an individual, is a different legal entity from the Trust of which she is a trustee and beneficiary. *Giles*, 362 Ark. at 349, 208 S.W.3d at 204. And while the supreme court has held that there is an exception to this statute when the guardian makes donations or expenditures that are consistent with the ward’s previous donations and expenditures—*Stautzenberger v. Stautzenberger*, 2013 Ark. 148, at 7, 427 S.W.3d 17, 22—Joyce presented no evidence that Gladys had been making transfers from her personal accounts into the Trust. In fact, the opposite was true. Gladys had opened personal bank accounts instead of depositing her assets into the Trust. Moreover, she specifically left Joyce out of her 2010 Will

and expressly stated that she wanted Patrick and Charles to inherit her assets. Therefore, we hold that the circuit court did not clearly err in finding that section 28-65-308(b) required Joyce to obtain court authorization to make gifts to the Trust on Gladys's behalf, and we affirm on this point.

We turn now to Joyce's third and final point on appeal, which is a challenge to the circuit court's calculation of damages. The court found that the Estate suffered damages in the amount of the Transferred Funds—\$1,216,364.69—specifically set forth in Charles's Exhibit, which the court attached to its judgment. Joyce contends that Gladys withdrew \$343,940 in trust funds and deposited them into her personal accounts. She asks this court to reduce the award by this amount.

As previously stated, the circuit court specifically found Joyce failed to prove that the source of the Transferred Funds was the Trust. And Joyce's testimony at trial confirms this. She conceded that her list of trust accounts was not included in Charles's Exhibit. And she admitted transferring all of the funds in Gladys's personal accounts totaling \$1,216,364.69 listed in Charles's Exhibit into the Trust. After reviewing the entire evidence, we are not left with a firm conviction that the circuit clearly erred in assessing damages in this case, and we affirm its award.³

³To the extent Joyce asks this court to reimburse her for the Trust's payment of Gladys's funeral expenses, we note the Trust provides that the trustee may in its "absolute discretion" use Trust assets to pay funeral and burial expenses of either Jarrell or Gladys. Joyce used her discretion to do so for Gladys, and she cites no convincing argument or legal authority in support of her request for reimbursement. It is well settled that this court does not address assertions of error unsupported by convincing argument or citation to

Affirmed.

BARRETT and THYER, JJ., agree.

Beau Wilcox; and *Richard F. Hatfield, P.A.*, by: *Richard F. Hatfield*, for appellant.

Barber Law Firm PLLC, by: *Jim L. Julian* and *Mark W. Hodge*, for appellee.

supporting legal authority. *Henry v. Mitchell*, 2013 Ark. 246, at 16, 428 S.W.3d 454, 464. This is especially true in cases where it is not apparent without further research that the unsupported argument is well taken. *Id.*, 428 S.W.3d at 464.