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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID HARROLD,)
)
Appellant-Defendant,)
)
vs.)
)
ROBERT THORNBURG,)
PERSONAL REPRESENTATIVE OF THE)
ESTATE OF ROLAND J. WALKER,)
)
Appellee-Plaintiff.)

No. 68A05-0911-CV-671

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Jay L. Toney, Judge
Cause No. 68C01-0601-PL-0033

February 1, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

David Harrold (“David”) appeals the judgment of the Randolph Circuit Court in favor of Robert Thornburg, as the personal representative of the estate of Roland J. Walker (“the Estate”) in the Estate’s action against David as a result of David’s transfer of real estate to himself while acting as attorney-in-fact for the decedent, Roland J. Walker (“Roland”). On appeal, David presents five issues, which we renumber, reorder, and restate as: (1) whether the trial court erred in excluding David’s testimony; (2) whether the trial court erred in excluding the testimony of Roland’s attorney; and (3) whether the trial court erred in concluding that David failed to rebut the presumption that the real estate transfers were fraudulent. Concluding that David was without authority to transfer the real estate to himself, we affirm.

Facts and Procedural History

In the early 1990s, David was appointed as legal guardian for his uncle Roland. When the guardianship ended a few years later, Roland decided to appoint David as his attorney-in-fact. On February 17, 1993, Roland executed a durable power of attorney naming David as his attorney-in-fact. Both the earlier guardianship and the power of attorney were prepared by Roland’s lawyer, Thomas Cockerill (“Cockerill”).

On January 24, 2002, acting as Roland’s attorney-in-fact, David executed two warranty deeds which transferred ownership of five tracts of real estate from Roland to David himself. These warranty deeds were also prepared by Cockerill.

On April 14, 2002, Roland died at the age of eighty-nine. Roland’s Estate was opened, and Robert Thornburg was named as the personal representative of the Estate. On January 25, 2006, the Estate filed suit against David seeking to impose a constructive

trust on the transferred real estate and any income derived therefrom, monetary damages, and treble damages, costs, and attorney fees for criminal conversion.

At a bench trial in April 2008, David took the stand to testify on his own behalf and answered preliminary questions regarding his background. But when his counsel asked a question regarding David acting as attorney-in-fact for Roland, counsel for the Estate objected that David was not competent to testify under Indiana Code section 34-45-2-4 (Supp. 2010), also known as the “Dead Man’s Statute.” Tr. pp. 13-14. After hearing arguments by counsel for both parties, the trial court took a brief recess. After the recess, the trial court sustained the Estate’s objection and ruled that David was not competent to testify. David’s counsel then sought and was granted a continuance.

When the bench trial recommenced almost a year later on March 31, 2009, David called attorney Cockerill as a witness. After a few questions regarding Cockerill’s identity, counsel for the Estate objected that Cockerill was not competent to testify under another portion of the “Dead Man’s Statute,” Indiana Code section 34-45-2-7 (1999). After hearing the arguments of counsel, the trial court took another recess to consider the issue. After the recess, the trial court permitted the parties to ask Cockerill preliminary questions pertaining to the issue of his competency. The trial court then ruled that Cockerill was incompetent to testify under Indiana Code section 34-45-2-7 because he had acted as an agent in the making of a contract with a person who had died.

On June 17, 2009, the trial court entered judgment for the Estate, finding that David had transferred the real estate to himself, without consideration, while acting as Roland’s attorney-in-fact. The trial court also determined that, because of the fiduciary

relationship between David and Roland, the burden shifted to David to show by clear and convincing evidence that the real estate transfers were not fraudulent. The trial court concluded that David did not present clear and convincing evidence to meet his burden and that the deeds were void as a matter of law. The trial court determined, however, that the Estate had not proved that David committed criminal conversion. The trial court ordered that the warranty deeds transferring the real estate to David be set aside as void.

David filed a motion to correct error on July 16, 2009, claiming that the trial court erred in declaring the deeds void and that David should have been credited for \$64,615 he had distributed to Roland's heirs. A hearing on the motion to correct error was held on October 20, 2009, and on October 21, 2009, the trial court entered an order modifying its original judgment. Specifically, the court recognized that since David had sold the real estate, he could not transfer title to the Estate; that the fair market value of the real estate was \$233,000; that David was entitled to credit for \$10,769.22 he paid to two heirs of the Estate; and that the Estate was therefore entitled to judgment in the amount of \$222,230.78. David filed his notice of appeal on November 18, 2009.

Discussion and Decision

Although David presents multiple issues on appeal, we find one to be dispositive: whether David, acting as Roland's attorney-in-fact, had the authority to deed to himself real estate worth over \$200,000. The Estate claims that such a gift¹ was impermissible

¹ The trial court found that the deeds transferred the real estate to David without consideration. David does not challenge this finding on appeal and repeatedly refers to the transactions as "gifts." See Appellant's Br. p. 14.

under the Indiana Power of Attorney Act, specifically Indiana Code section 30-5-5-9 (2009) (“Section 9”), which provides:

(a) Language conferring general authority with respect to gift transactions means the principal authorizes the attorney in fact to do the following:

(1) Make gifts to organizations, charitable or otherwise, to which the principal has made gifts, and satisfy pledges made to organizations by the principal.

(2) Make gifts on behalf of the principal to the principal's spouse, children, and other descendants or the spouse of a child or other descendant, either outright or in trust, for purposes the attorney in fact considers to be in the best interest of the principal, including the minimization of income, estate, inheritance, or gift taxes. *The attorney in fact or a person that the attorney in fact has a legal obligation to support may not be the recipient of gifts in one (1) year that total more than the amount allowed as an exclusion from gifts under Section 2503 of the Internal Revenue Code.*

(3) Prepare, execute, consent to on behalf of the principal, and file a return, report, declaration, or other document required by the laws of the United States, a state, a subdivision of a state, or a foreign government that the attorney in fact considers desirable or necessary with respect to a gift made under the authority of this section.

(4) Execute, acknowledge, seal, and deliver a deed, an assignment, an agreement, an authorization, a check, or other instrument the attorney in fact considers useful to accomplish a purpose permitted under this section.

(5) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to a claim existing in favor of or against the principal based on or involving a gift transaction, or intervene in a related action or proceeding.

(6) Hire, discharge, and compensate an attorney, accountant, expert witness, or other assistant when the attorney in fact considers the action to be desirable for the proper execution by the attorney in fact of a power described in this section and keep needed records.

(7) Perform any other acts the attorney in fact considers desirable or necessary to complete a gift on behalf of the principal.

(b) The powers described in this section are exercisable equally with respect to a gift of property in which the principal is interested at the time

of the giving of the power of attorney or becomes interested in after that time, whether conducted in Indiana or in another jurisdiction.

I.C. § 30-5-5-9.

Pursuant to Section 9, a power of attorney which confers general authority with respect to gift transactions means that the attorney-in-fact may make gifts on behalf of the principal to the principal's spouse, children, and other descendants, but the attorney-in-fact, or a person the attorney-in-fact is legally obliged to support, may not be the recipient of gifts in one year that total more than the amount allowed as an exclusion from the gift tax as set forth in the Internal Revenue Code, which at the time of the warranty deeds at issue here was \$11,000.

David acknowledges that this statute would apply “if [David], as attorney-in-fact, had decided, on [Roland]’s behalf, to gift himself the real estate, and had done so in reliance on language in the [power of attorney document] ‘conferring general authority with respect to gift transactions[.]’” Appellant’s Reply Br. p. 11. David claims, however, that neither of these conditions is true and that the statute therefore is inapplicable.

David first claims that he did not, on Roland’s behalf, decide to gift himself the real estate. Instead, he claims that Roland made the decision to gift the real estate and that he simply “did the paperwork to carry out [Roland]’s decision.” *Id.* However, this is precisely what Section 9 means when it refers to an attorney-in-fact acting on behalf of the principal. Roland did not execute the warranty deeds; David did. And he did so on Roland’s behalf acting as his attorney-in-fact.

Importantly, the power of attorney document contains no mention of David having any power with regard to gift-giving. This could be taken to mean that David's gifts to himself were wholly without authority under the power of attorney. But David claims that he acted not under any gift power, but under the power granted to him to "execute, deliver, and acknowledge deeds[.]" Appellant's App. p. 143. With respect to real property, David's underlying power of attorney document states in relevant part:

My Attorney-in-Fact is authorized:

* * *

6. To lease, sublet, let, sell, transfer, release, hire professional managers, convey and mortgage any real property owned by me, including my residence, or in which I have an interest upon such terms and conditions and under such covenants as my said Attorney-in-Fact shall think fit, including the sale of my real estate and to sign, seal, execute and deliver deeds and conveyances therefore including the right to describe such real estate by appropriate metes and bounds; and

7. To purchase or otherwise acquire any interest in and possession of real property and to accept all deeds for such property on my behalf; and to manage, repair, improve, maintain, restore, build, or develop any real property in which I now have or may have an interest.

8. *To execute, deliver, and acknowledge deeds*, deeds of trusts, covenants, indentures, agreements, mortgages, hypothecations, bills of lading, bills, bonds, notes, receipts, evidences of debts, releases and satisfactions of mortgage, judgment, ground rents and other debts[.]

Appellant's App. p. 25 (emphasis added).

David claims that his power to execute deeds includes the power to make gifts to himself, without being subject to the limitations that would apply if the power of attorney document actually included an explicit general authority with respect to gifts, subject to the statutory limitations contained in Section 9. David's position would have the law give more authority to an attorney-in-fact whose underlying power of attorney document

makes no explicit provision with respect to gifts than an attorney-in-fact whose underlying power of attorney document includes even a general authority with respect to gifts. This is nonsensical. So holding would frustrate the purpose of Section 9, which clearly is to limit the power of an attorney-in-fact to make gifts to himself in a manner which could have potential tax consequences, unless such power is specifically provided by the power of attorney document itself. See Ind. Code § 30-5-5-1(d) (providing that “[a] power of attorney may in writing delete from, add to, or modify in any manner a power incorporated by reference, including the power to make gifts under section 9 of this chapter.”).

For all of these reasons we conclude that, to the extent that David’s power to execute deeds included the power to make gratuitous transfers of real estate to himself, it is effectively a “general authority with respect to gift transactions,” and Section 9 is applicable. Because Section 9 is applicable, David had no authority to gift to himself real estate worth in excess of \$200,000. Given our conclusion that David was without authority to make the gifts he made to himself, the trial court did not err in entering judgment in favor of the Estate.²

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.

² Because we conclude that David had no authority to make the gifts he made to himself, we need not address the propriety of the trial court’s decision to exclude the testimony of David and Roland’s lawyer under the “Dead Man’s Statutes.”