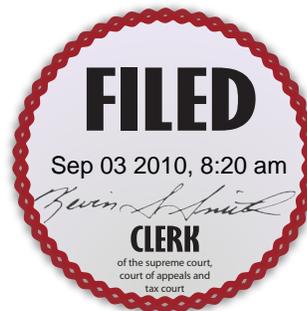


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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE UNSUPERVISED)
ESTATE OF JUDITH E. PHILLIPS, Deceased,)

Appellant-Plaintiff,)

vs.)

RAINER ASSMANN,)

Appellee-Defendant.)

No. 40A05-1001-EU-33

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0705-EU-20

September 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

The Estate of Judith Phillips appeals the trial court's judgment on the claim of Rainer Assmann, awarding him \$34,514.04 following a bench trial. For our review, the Estate raises two issues: 1) whether the trial court abused its discretion by allowing Assmann to testify over the Estate's objections based on the Dead Man's Statute; and 2) whether sufficient evidence supports the judgment. Concluding the trial court did not abuse its discretion and there is sufficient evidence that Assmann made \$34,514.04 in loans to Phillips, we affirm.

Facts and Procedural History

In 2006, Phillips was involved in divorce proceedings in Jennings County and was separated from her husband, Richard Phillips. Also in 2006, Phillips was undergoing treatment for cancer and was not employed, although she received unemployment compensation, rental income from a former residence for which she also paid ongoing expenses, and \$500-per-week payments from Richard. Phillips purchased COBRA health insurance from her former employer, Bonton stores.

In April 2006, Phillips became acquainted with Assmann, having been introduced to him by his daughter Margot Davis, who ran a beauty salon where Phillips was a customer. Phillips and Assmann began dating, and sometime between August and October 2006 Phillips went to Florida to live with Assmann. Phillips and Assmann also made periodic trips to back to Phillips's residence in Indiana.

In Florida, Phillips and Assmann opened a joint account with Washington Mutual Bank (the "WaMu Joint Account"). Assmann separately maintained an account with Central

Florida Educators' Federal Credit Union (the "CFE Account") and a line of credit with Washington Mutual (the "WaMu Line of Credit"). Phillips separately maintained an Indiana-based checking account with Centra Credit Union (the "CCU Account"). The WaMu Joint Account was funded with a \$23,667.71 check from the CFE Account, which yielded a deposit in the WaMu Joint Account of \$23,369.71. Between August 2006 and March 2007, Phillips wrote thirty-four checks on the WaMu Joint Account totaling \$19,817.20. In 2006 and 2007, Assmann paid all of his personal expenses from the CFE Account. Assmann also signed the following checks from the CFE Account: \$417.88 to Cobra - The Bon-Ton on August 7, 2006; \$100.00 to Shane Blackburn on August 17, 2006; \$417.88 to Bonton - Cobra on September 1, 2006; and \$202.20 to Bonton Cobra also on September 1, 2006. The first of these bore the memo "Loan for Insurance," and the latter two bore the memo "Judith Phillips Ins." Appellee's Appendix at 113, 115-16. Each of these checks was signed by Assmann but written out by Phillips in her handwriting, and the checks totaled \$1,137.96.

Assmann made four cash withdraws from the WaMu Line of Credit: a \$10,000 cash advance on September 26, 2006; a \$3,000 cash advance on October 10, 2006; a \$2,000 cash advance on October 13, 2006; and a \$3,000 cash advance on October 19, 2006, totaling \$18,000. Assmann made three of these withdrawals when present at Centra Credit Union in Columbus, Indiana. The fees from all four withdrawals totaled \$360. The bank records for Phillips's CCU Account show her making the following deposits: \$4,000 on September 26, 2006; \$1,500 on October 10, 2006; \$1,500 on October 13, 2006; and \$1,000 on October 19,

2006. Between February and November 2006, Phillips paid her divorce attorneys a total of \$10,445, of which \$7,395 was paid between September 26 and November 15, 2006.

In October 2006, Phillips was on a visit to Indiana and went to Davis's beauty salon, where Phillips told Davis that Assmann had given her \$10,000 to pay her divorce attorney, but that she was going to repay Assmann "as soon as her divorce was settled and she got her money." Transcript at 36. Phillips also told Carla Cartwright that Assmann had loaned her money "so she could go ahead and get the divorce taken care of" and that she intended to repay Assmann after the divorce was "taken care of." Id. at 48. Phillips also told another acquaintance at the beauty salon that Assmann was helping her financially and "as soon as she got her divorce, she was going to pay him back." Id. at 122.

Phillips's divorce settlement was executed on October 31, 2006. Pursuant to the settlement, Phillips received three Indiana residences, a 2004 Cadillac Escalade, and a \$200,000 cash equalization payment in \$500 weekly installments. Richard Phillips was ordered to pay the first and second mortgages on one of the residences and the balance of the loan on the Escalade.

Phillips died on March 20, 2007. At that time, the WaMu Joint Account had a balance of \$8,353.63. Phillips's unsupervised estate was opened, and Shane Blackburn, her son, was appointed personal representative. Assmann filed a claim seeking repayment from the Estate of \$34,514.04, itemized as:

Checks written from [Assmann's] personal account:	\$1,137.96
Cash advances and fees:	\$18,360.00

WaMu Jt. Account:	<u>\$15,016.08</u>
Total:	\$34,514.04

Exh. 1. Assmann argued all of these cash advances and checks were loans made to tide Phillips over pending receipt of her divorce settlement.

The trial court held a bench trial on July 22 and 23, 2009. At the outset of Assmann's direct testimony, the Estate objected to any testimony by him based on the Dead Man's Statute. The trial court overruled the objection and requested that the Estate instead object to particular lines of questioning. The Estate later objected specifically to "any summary that [Assmann] is about to give as to monies given to [Phillips]" from Assmann's cash advance withdrawals. Tr. at 88. The trial court stated the objection would be "[o]verruled at this point." Id. at 89. The following exchange then occurred:

Q. Okay Mr. Assman [sic], of this Eighteen Thousand Dollars (\$18,000) here,

A. Yes.

Q. Did you spend any portion of that on yourself?

A. No.

Q. Did you take any portion of that Eighteen Thousand Dollars (\$18,000) and put it into any bank accounts of yours?

A. No.

* * *

Q. Mr. Assman [sic], if you did not receive the benefit or spend or deposit any other portion or any portion of this Eighteen Thousand Dollars (\$18,000), did you give, transfer, or use any portion of this Eighteen Thousand Dollars (\$18,000) for someone other than Judith Phillips?

A. No.

Q. Objection, Your Honor. . . .

* * *

The Court: Sustained, that objection is sustained.

Id. at 89-91.¹ After taking the case under advisement, the trial court entered judgment in favor of Assmann for \$34,514.04 but denied his request for prejudgment interest. In a footnote to its decision, the trial court noted that according to a March 2008 inventory, the assets in Phillips's Estate were valued at \$725,554.31. The Estate now appeals.

Discussion and Decision

I. Competence of Assmann's Testimony

A. Standard of Review

A trial court's ruling on witness competency is reviewed for an abuse of discretion. Johnson v. Estate of Rayburn, 587 N.E.2d 182, 184 (Ind. Ct. App. 1992), superseded by statute on other grounds as stated in Gipperich v. State, 658 N.E.2d 946, 950 (Ind. Ct. App. 1995), trans. denied. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or the trial court misinterprets the law. In re Unsupervised Estate of Harris, 876 N.E.2d 1132, 1135 (Ind. Ct. App. 2007).

B. Dead Man's Statute

The Dead Man's Statute is an exception to the general rule that "[a]ll persons, whether parties to or interested in the suit, are competent witnesses in a civil action or proceeding" Ind. Code § 34-45-2-1. The Dead Man's Statute provides:

- (a) This section applies to suits or proceedings:
 - (1) in which an executor or administrator is a party;

¹ In addition, the trial court sustained an objection based on the Dead Man's Statute when Assmann sought to testify whether these were "all monies that [Assmann] lent to [Phillips] in one form or fashion . . . that she promised to re-pay." Tr. at 95.

(2) involving matters that occurred during the lifetime of the decedent;
and

(3) where a judgment or allowance may be made or rendered for or
against the estate represented by the executor or administrator.

* * *

(d) Except as provided in subsection (e), a person:

(1) who is a necessary party to the issue or record; and

(2) whose interest is adverse to the estate;

is not a competent witness as to matters against the estate.

Ind. Code § 34-45-2-4. Assmann's claim is against the Estate, represented by its personal representative Blackburn, and is based on matters that occurred during the lifetime of Phillips. Assmann is also a necessary party to the issue and his interest is adverse to the Estate. The threshold conditions for application of the Dead Man's Statute are therefore met, such that Assmann is not a competent witness "as to matters against the [Estate]" occurring during Phillips's lifetime. Id.

The Estate argues it was a violation of the Dead Man's Statute to permit Assmann's testimony regarding cash withdrawals he made but did not spend on himself or deposit in his own accounts, implying he gave them as loans to Phillips. The purpose of the Dead Man's Statute is to protect a decedent's estate from spurious claims, Bedree v. Bedree, 747 N.E.2d 1192, 1195 (Ind. Ct. App. 2001), trans. denied, by ensuring "that when one party to a transaction has had her lips sealed by death the other party's lips are sealed by law," Taylor v. Taylor, 643 N.E.2d 893, 896 (Ind. 1994). In light of this purpose, application of the Dead Man's Statute "is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party." Johnson, 587 N.E.2d at 185. Thus, the statute "applies only where the claimant is prepared to testify as to matters or transactions concerning the

decedent, and not merely as to matters that occurred while the decedent was alive.” Id. (quoted with approval in Taylor, 643 N.E.2d at 896).

The trial court permitted Assmann to testify only to the fact he made cash withdrawals that he did not spend on himself or deposit in his own accounts. The trial court sustained the Estate’s objection when Assmann sought to testify that those withdrawals were not given to or spent on anyone besides Phillips. Thus, none of the testimony the trial court admitted related directly to Assmann’s transactions with Phillips or to other matters Phillips could have refuted had she been alive. Therefore, the testimony given by Assmann was not incompetent,² and the trial court did not abuse its discretion in its rulings based on the Dead Man’s Statute.³

II. Sufficiency of the Evidence

A. Standard of Review

When reviewing the sufficiency of the evidence in a civil case, we must determine whether there is substantial evidence of probative value supporting the judgment. Wolfe v. Estate of Custer ex rel. Custer, 867 N.E.2d 589, 595-96 (Ind. Ct. App. 2007), trans. denied. We neither reweigh the evidence nor judge witness credibility, but consider only the evidence most favorable to the judgment and reasonable inferences drawn therefrom. Id. at 596.

² While this court has stated the Dead Man’s Statute “addresses the competence of a witness, not the competence of that witness’s testimony,” we have also stated “an otherwise incompetent witness may be competent to testify as to some matters occurring during the decedent’s lifetime.” Estate of Hann v. Hann, 614 N.E.2d 973, 977 (Ind. Ct. App. 1993). The latter is what occurred here. See also Carlson v. Warren, 878 N.E.2d 844, 849 (Ind. Ct. App. 2007) (noting that “in evaluating competency under the Dead Man’s Statute, this Court has recognized a distinction between the types of information that might be provided by a witness”).

³ We therefore need not address Assmann’s argument that the Estate waived its objections based on the Dead Man’s Statute by cross-examining Assmann about Phillips’s tangible personal property and

When, as here, the trial court enters a general judgment without special findings, the judgment will be affirmed upon any legal theory consistent with the evidence. Splittorff v. Aigner, 908 N.E.2d 669, 671 (Ind. Ct. App. 2009), trans. denied.

B. Loans Made to Phillips

The theory underlying Assmann's claim is that his advancement of money to Phillips and direct payment of certain of her expenses was matched by an express or implied promise on the part of Phillips to repay those amounts. In general, where a claimant has performed valuable services or paid debts and bills on behalf of a decedent, "an agreement to pay may be implied from the relationship of the parties, the situation, the conduct of the parties, and the nature and character of the services rendered." Cole v. Cole, 517 N.E.2d 1248, 1250 (Ind. Ct. App. 1988). However, where the parties are family members living together and services are rendered in that context, there is a rebuttable presumption the services are gratuitous. Estate of Prickett v. Womersley, 905 N.E.2d 1008, 1012 (Ind. 2009). To rebut that presumption, the claimant must produce evidence of an express or implied contract, which requires two specific elements: an intention on the part of the recipient to pay or compensate, and an expectation of payment or compensation on the part of the one rendering the services. Id. "The same rule as applied to services also applies where a claimant has paid bills and debts on behalf of a decedent." Cole, 517 N.E.2d at 1250; see Prickett, 905 N.E.2d at 1010 n.1 (same presumption applies to both services and expenses).

Phillips and Assmann were not family members and were not married, but they were living together in a domestic relationship at the time of the transactions at issue. Even if the

conversations concerning the same.

presumption applies, due to this domestic context, that Assmann's advancement of money and payment of bills for Phillips was gratuitous, Assmann produced evidence of Phillips's intention to repay. Specifically, three people testified that Phillips told them she intended to repay Assmann when her divorce was finalized and her affairs more settled. Other circumstances of the transactions are consistent with that intention: Phillips wrote all of the checks for her personal expenses out of different accounts than Assmann used for his own expenses, from which it could be inferred that Phillips wanted to keep track of how much of Assmann's money she had spent in order that he could later be repaid. As for Assmann's expectation of repayment, the Estate's objections based on the Dead Man's Statute prevented him from testifying to his understanding of the transactions. Nonetheless, the trial court could have inferred from the surrounding circumstances that Assmann reasonably expected to be repaid. Despite Phillips's low income relative to her short-term expenses, she had, as confirmed in her divorce settlement, ownership interests in numerous valuable assets. As the trial court noted in its decision, the value of these assets supports an inference Assmann expected to be repaid, knowing Phillips was hardly "living on the edge of poverty during her time with [Assmann]." Appellant's Appendix at 9.

The Estate argues only that there is insufficient evidence to support the full dollar amount of Assmann's claim. However, Assmann's and the trial court's computation of \$34,514.04 is supported by evidence in the record. First, Assmann wrote checks from his CFE Account for Phillips's personal expenses, those four checks totaling \$1,137.96. Second, Assmann took cash advances, correlating with deposits by Phillips in her CCU Account, that

totaled \$18,360 including fees. Assmann was permitted to testify that he did not spend any part of the advances on himself, and from the surrounding circumstances including Phillips's statements about Assmann loaning her money, the trial court could reasonably have inferred that Assmann gave the entirety of the cash as a loan to Phillips and incurred the fees on her behalf. Third and finally, there is evidence that Assmann transferred \$23,369.71 of his own money to the WaMu Joint Account, that between that time and Phillips's death only she wrote checks on that account, and that when Phillips died the account balance had been reduced to \$8,353.63. Assmann correctly computed the difference of these amounts as \$15,016.08. Adding amounts one, two, and three together, the trial court reasonably concluded based on evidence in the record that Assmann loaned Phillips \$34,514.04.

Conclusion

The trial court did not abuse its discretion in ruling on the competence of Assmann's testimony under the Dead Man's Statute, and sufficient evidence supports the trial court's judgment in favor of Assmann for \$34,514.04.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.