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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001967-MR

MILTON RITCHIE, INDIVIDUALLY AND IN
HIS FIDUCIARY CAPACITIES AS EXECUTOR
OF THE ESTATE OF ORA M. RITCHIE AND
ATTORNEY-IN-FACT FOR ORA M. RITCHIE — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 04-CI-00173

KEVIN ROSS RITCHIE AND
KEITH DALE RITCHIE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, D. LAMBERT, AND J. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: Milton Ritchie appeals from orders of the Bourbon Circuit Court granting summary judgment to Kevin Ross Ritchie and Keith Ritchie. At issue is whether several transfers of funds Ritchie made to himself and his son were authorized under his grandfather's power of attorney.

On December 22, 2000, Milton Ritchie began providing daily care for his elderly grandfather, Ora M. Ritchie. His duties included tasks such as mowing the lawn and grocery shopping.

On June 19, 2001, Ora executed a durable Power of Attorney which authorized Milton

> 1. To receive any sums of money that may be due me, to make deposits to my account in any bank, or to his name as Attorney in Fact for me, and to endorse any checks payable to me; and I hereby direct all banks to recognize and honor his signature on any of my deposits or checks as though I had signed the deposits or the checks myself.
>
> 2. To pay any of my debts, and to draw checks on any funds that I may have on deposit in any bank.
>
> 3. To sell, transfer and deliver any stocks, bonds, notes, certificates of deposit, money market certificates, or other securities which I own as he thinks best and to reinvest the proceeds thereof as he thinks best.
>
> 4. To sell any of my real or personal property upon such terms and conditions as he may in his sole discretion think best.
>
> 5. To have access to any safety deposit box which I might have at any bank and I hereby authorize and direct the bank to allow him to have access to my safety deposit box.
>
> 6. To do any and all things necessary, requisite and proper in order to look after and care for all of my business affairs and material needs and to look after my burial in case of death.

Ora died almost two years later. Under his will, Milton, Milton's sister Rebecca R. Ogden, and their cousins, Kevin and Keith Ritchie, who are

brothers, were all to receive equal shares of the estate. Milton, acting as the Executor of the estate, filed an Inventory which listed Ora's checking account balance as $6,987.33, an amount significantly less than Kevin and Keith expected. When they asked Milton about the shortfall, he replied that Ora had given him several thousand dollars. Kevin and Keith successfully moved the Bourbon District Court to compel an accounting of the assets that Milton controlled while acting as their grandfather's attorney-in-fact prior to his death. Milton responded by filing a petition for a writ of prohibition in the Bourbon Circuit Court, arguing that the district court lacked jurisdiction to compel an accounting in the probate case. The circuit court denied the petition for a writ, holding that the district court had exclusive jurisdiction over probate matters until an adversary proceeding was initiated. Milton filed an appeal. While it was pending, Kevin and Keith filed a complaint against Milton in the Bourbon Circuit Court, alleging that he had violated his fiduciary duties. On August 5, 2005, this Court dismissed as moot Milton's appeal of the denial of the petition for a writ. *See Ritchie v. Phelps*, 2005 WL 1843259 (Ky. App. 2005) (2004-CA-000941-MR).

Kevin and Keith filed a motion for summary judgment, and moved the circuit court to compel Milton to pay into the estate the amount of $47,314.35, plus any accrued interest. This amount included a certificate of deposit worth $17,864.35 that Milton admitted he had transferred as a gift to his then minor son Larry. The remaining amount consisted of numerous checks on Ora's account that Milton had written to himself or to "cash." Many of these checks were drawn

shortly before Ora's death on May 24, 2003, including the following: April 27, 2003, check to Milton for $5,000; May 8, 2003, check to Milton for $10,000; May 14, 2003, check to "cash" for $2,000; May 15, 2003, check to Milton for $5,500; May 20, 2003, check to "cash" for $450; May 22, 2003, check to Milton for $5,000. One check for $5,500 was written by Milton to himself, three days after Ora's death.

The circuit court granted summary judgment, ruling that Milton had not been authorized to make the disputed withdrawals under the terms of the Power of Attorney, and ordered him to pay the sums to the beneficiaries of the estate. Milton filed a motion to alter, amend or vacate which was denied, and this appeal followed.

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03)). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 480 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The circuit court construed the Power of Attorney executed by Ora in light of KRS 386.093(6), which provides that:

> Notwithstanding any provision of law to the contrary, a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of the principal to do so is unambiguously stated on the face of the instrument.

Ora's Power of Attorney contained no provision authorizing Milton to make gifts to himself or to others. In a request for admissions, Milton was asked to admit or deny that the amounts he received from Ora were not gifts. Milton denied that the amounts were not gifts. The circuit court concluded that, by denying the amounts were not gifts, Milton had admitted that they were gifts which, under the plain language of KRS 386.093(6), were unauthorized.

KRS 386.093 as a whole is styled "Effect of disability, incapacity, or death on power of attorney, durable or otherwise." Milton argues that subsection (6), which requires an express grant of gift-giving authority, is inapplicable because at the time the disputed transfers occurred, Ora was not dead, disabled or incapacitated, and that Ora expressly directed Milton to write the disputed checks. At the very least, he contends, Ora's capacity as principal is a factual question that is not appropriate for resolution by summary judgment.

The plain language of subsection (6), which begins with the words "[n]otwithstanding any provision of law to the contrary," indicates that its terms are applicable even when the principal is not disabled, incapacitated or deceased.

The provision is plainly intended to protect the interests of the principal from unauthorized gift-giving, whether the principal is incapacitated or not.

In any event, Milton was only authorized to sign the checks drawn on Ora's account because he was acting in his capacity as Power of Attorney. As the circuit court aptly observed:

> The Defendant claims that he had the authority to sign these checks and transfer these funds under the power of attorney created by Ora Ritchie which explicitly gave him that power and then argues that the statute defining a durable power of attorney and the powers granted to an attorney in fact under a durable power of attorney is not applicable in this case.

We agree with the circuit court that, insofar as the transfers were gifts, they were unauthorized. No question of fact exists that the certificate of deposit given to Milton's son was a gift. In his Supplement to Inventory, Milton declared that the transfer of the certificate of deposit to his son was a gift. This was an unauthorized transfer under subsection (6) because the Power of Attorney instrument did not unambiguously give Milton the authority to make such a gift.

Milton further argues, however, that Ora authorized and directed him to make several transfers to himself, not as gifts, but as consideration and remuneration for providing care for two years. The only question, therefore, is whether

the transfers (apart from the certificate given to Milton's son) could possibly have been authorized under the terms of the Power of Attorney, possibly under section (2) which allows for the payment of debts. In his response to the first set of

interrogatories, Milton stated that he withdrew the funds at the express direction of Ora, and that they are to be considered "gifting and/or paying Defendant in exchange for and in consideration and recognition of Defendant's attention, day to day care, and time . . . ." Milton was not willing to unequivocally state that the funds he received were not a gift. Then, in response to a request for admissions which asked him to "Please admit that the amounts you received from Ora M. Ritchie were not gifts?" he stated: "Objection, calls for legal conclusion. Subject to the foregoing objection, Defendant Denies the Request for Admission."

Milton argues that the request for admission was improper in form, and confusing, because it did not conform to Kentucky Rules of Civil Procedure (CR) 36.01, which permits a written request for admission "of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements or opinions of fact or of the application of law to fact[.]" Although the request is, admittedly, awkwardly phrased, it did require Milton to admit the truth of a matter – that the sums in question were something other than gifts, *i.e.,* payment for services rendered by Milton. Milton's answer shows that he was simply not willing to state unequivocally that the amounts were not gifts. "[A]ny matter admitted under the rule is held to be conclusively established unless the trial court permits the withdrawal or amendment of the admissions. CR 36.02." *Harris v. Stewart*, 981 S.W.2d 122, 124 (Ky. App. 1998).

"It has long been recognized that a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting

at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (citing *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476 (Ky. 1991)). The only remaining evidence proffered by Milton consists of affidavits submitted by Milton and his sister, Rebecca Ogden. Milton's affidavit states:

> During his care for Ora M. Ritchie, Milton Ritchie would occasionally purchase items for Ora M. Ritchie, at the insistence and direction of Ora M. Ritchie, with his own money, and later receive reimbursement from Ora M. Richie;
>
> At all times during his care for Ora M. Ritchie all expenditures, payments, remittances and/or other expenses written and/or paid from the checking account of Ora M. Ritchie were done at the direction of, and with the knowledge and consent of Ora M. Ritchie;
>
> It was the wish and directive of Ora M. Ritchie that Milton Ritchie be compensated and/or receive consideration for his continual care.

The affidavit does not provide any specific, concrete evidence of Ora's wishes or how he manifested these wishes. For instance, there are no receipts for the items Milton allegedly purchased at Ora's behest, or even a description of what these items may have been. The affidavit merely contradicts Milton's response to the request for admissions. "An affidavit which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact to avoid summary judgment." *Gilliam v. Pikeville United Methodist Hosp. of Kentucky*, *Inc*., 215 S.W.3d 56, 62–63 (Ky. App. 2006).

Rebecca Ogden's affidavit states:

> That Ora Mr. Ritchie expressed his thankfulness to affiant for the attention and care from Milton Ritchie and his desire to compensate Milton Ritchie for his day to day care and companionship;
>
> Affiant believes Ora M. Ritchie knew of, intended, authorized and/or approved each expenditure, payment and/or reimbursement made on his behalf by Milton Ritchie.
>
> Affiant believes that it was the wish and directive of Ora M. Ritchie that Milton Ritchie be compensated and/or receive consideration for his continual care and directed Milton Richie to do so.

Again, the affidavit contains no tangible evidence of a factual dispute regarding the nature of the transfers. "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). "A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007).

We agree with the circuit court that no issues of material fact exist, and that Milton was unauthorized, as a matter of law, to make the disputed transfers. The summary judgment is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
M. Scott Mattmiller Lexington, Kentucky	James S. Thomas Cynthiana, Kentucky