

NOTICE
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2019 IL App (5th) 180059-U

NO. 5-18-0059

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> ESTATE OF KENNETH J. COLEY SR.,)	Appeal from the
Deceased)	Circuit Court of
(Shirley Coley,)	Randolph County.
Plaintiff-Appellant,)	
v.)	No. 17-P-4
Jordan D. Gremmels, as Administrator of the)	
Estate of Kenneth Coley Sr., Deceased, and)	
Barbara Coley,)	Honorable
Defendant-Appellees).)	Richard A. Brown,
	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Overstreet* and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The probate court's finding that the income from the decedent's trust was not gifted to the plaintiff but rather belonged to his estate and was properly included in the estate's inventory by the administrator was not against the manifest weight of the evidence.

*Justice Goldenhersh was originally assigned to participate in this case. Presiding Justice Overstreet was substituted on the panel subsequent to Justice Goldenhersh's retirement and has read the briefs and listened to the recording of oral argument.

¶ 2 The plaintiff-appellant, Shirley Coley, the decedent's mother, appeals from the Randolph County circuit court's order finding that the decedent, Kenneth Coley Sr. (Kenneth), did not intend to gift her the future stream of income from his structured settlement payments, and therefore, the administrator of the estate properly added the settlement to the estate's inventory. For the following reasons, we affirm.

¶ 3 On May 14, 1989, Kenneth's wife, Mary Coley, and his child, Kenneth Coley Jr., died in childbirth. On March 26, 1990, Kenneth filed suit against the doctor, Dhan Chettri, and Prudential Health Care (PruCare)¹ in St. Clair County for the wrongful death of his wife and child. On March 19, 1992, Kenneth entered into a "covenant not to sue and settlement agreement" with Chettri (Chettri settlement) comprised of a \$300,000 tax-free lump sum payment, tax-free monthly payments of \$3466, ending on April 25, 2022, and a \$549,000 lump sum payment to be made on November 25, 2021. The agreement stated that if Kenneth died before April 25, 2022, the payments shall be made to his estate.

¶ 4 Pursuant to the terms of the Chettri settlement, a trust was established on Kenneth's behalf. Article IV, paragraph 14 of the trust agreement stated as follows:

"No person entitled to receive income or principal of the Trust shall have any right, power or authority to sell, mortgage, hypothecate, assign, pledge or in any other manner anticipate, encumber, alienate or impair all or any part of any payment which such person is to receive. *** All income and principal to be paid to any recipient shall be paid directly to such recipient or, where authorized,

¹In January 1994, Kenneth entered into a settlement with PruCare comprised of tax-free monthly payments of \$6446 ending in January 2023 and a \$1.45 million lump sum payment to be made in February 2023. This settlement also included structured payments to Mary's parents. No party asserts that the PruCare settlement is not an asset of the estate.

applied for the benefit of such recipient at the time and in the manner provided herein and not upon written or oral order or decree nor upon any assignment or transfer by the recipient nor by operation of law."

Further, article III, paragraph 3 stated that:

"If any of the persons to whom payment is to be made should die before termination of this Trust, the payments to the deceased person in the amounts set forth in the Directions for Payment *** shall instead be paid and distributed, at the times set forth in the Directions for Payment, and in pro tanto satisfaction of the Trustor's obligations as set forth in the Assignment Agreement, to the estate of the deceased person or shall be paid as otherwise directed in writing by the Trustor."

¶ 5 Kenneth executed a will on March 25, 1992. In the third paragraph, he devised his right to receive the Chettri settlement payments, intending that one-half of it go to his parents and the other one-half go to Mary's parents to "represent compensation paid for the wrongful death of said Mary Coley." Kenneth's father and Mary's parents predeceased Kenneth, leaving Shirley the sole living legatee named in his will.

¶ 6 Approximately five years prior to his death, Kenneth remarried to Barbara Coley (Barbara). Kenneth died on January 8, 2017. His will was admitted to probate on February 28, 2017, and attorney Jordan Gremmels was appointed as administrator. On March 13, 2017, Barbara filed a renunciation of the will.

¶ 7 On April 20, 2017, Barbara filed a petition for citation to recover assets. The petition alleged that Shirley was concealing and withholding Chettri settlement payments and requested that the probate court enter an order permitting the administrator to recover the payments from Shirley.

¶ 8 On June 2, 2017, the administrator filed an inventory that included both Kenneth's real estate and personal estate. Under the subheading "Trust" in the personal estate

accounting, the administrator listed the details of his settlement with PruCare. It also stated that "[a]s part of the above-mentioned Trust, [Kenneth] also received the sum of \$3,630.25 per month" and that "[t]he maturity of said payment is to occur on February 20, 2023 for a final payment of \$300,000."²

¶ 9 On September 1, 2017, the administrator filed a motion to recover assets. The motion stated that Kenneth's monthly Chettri settlement checks, payable to him, had been directed to Shirley, and that she "currently [had] a number of said checks in her possession." The motion requested that Shirley "immediately turn over said checks in her possession, that [Regions Bank] direct all future checks to the Administrator, and that any further checks which may be delivered to [Shirley] be immediately forwarded to the Administrator."

¶ 10 A hearing on the motion was held on September 5, 2017. The administrator explained to the probate court that the Chettri settlement checks were being mailed to Shirley but were in Kenneth's name; Shirley's position was that the Chettri settlement checks were given to her by Kenneth as an *inter vivos* gift. The administrator believed that the money belonged to the estate and asked that the court enter an order directing her to turn over the checks in her possession and direct Regions Bank to mail future checks to the estate.

¶ 11 Shirley's lawyer, Pat Ducey, elucidated Shirley's position. He noted that, at the time of Mary's death, Kenneth's parents and Mary's parents did not have standing to bring

²These details, of course, do not accurately reflect the Chettri settlement. According to Shirley's brief, these are the details of Mary's parents' settlement with PruCare.

suit for Mary's wrongful death; therefore, Kenneth intended to give his parents the Chettri settlement money because Mary's parents had later negotiated their own settlement with PruCare. Ducey explained that because of the anti-assignment clause in the structured settlement documents, Kenneth could only offer his parents the future income stream from the Chettri settlement. Ducey stated that, while there was no writing reflecting Kenneth's wishes, Kenneth had the checks delivered to his parents' home for 18 years.

¶ 12 Shirley Coley testified that she had been receiving the Chettri settlement checks for about 18 years and that Kenneth had told her to quit her job and live off of the settlement income. At the time of his death, she was in possession of two unindorsed checks, from November and December 2016.

¶ 13 Shirley explained that the checks were in Kenneth's name, so when a check arrived at her house, she would take it to him to be indorsed. She stated that "he would endorse the [settlement] check and then write me a [personal] check, and I would deposit [the settlement check] and then cash the check that he wrote for me." She clarified that Kenneth would write her a personal check using the proceeds from that month's settlement check. She agreed that, after Kenneth's death, she had uncashed checks in her possession; she did not cash them "[b]ecause [Kenneth] couldn't sign them," noting that, "[s]o I just left them lay [*sic*], because I wasn't going to mess with something that I shouldn't touch, you know, without his signature." She explained that the checks that were dated before Kenneth's death were unsigned because the bank wanted Kenneth to come in and show his photo identification, and he did not want to do that. She told the court that there had also been an issue with Kenneth's order of personal checks from the

bank, explaining that, because they were delayed, "I could have deposited his [settlement] check, but he couldn't write me a [personal] check."

¶ 14 Barbara Coley testified that she would meet Shirley once a month at the bank in Belleville. She would deposit the settlement checks into her and Kenneth's checking account and write Shirley a personal check for \$3400. She stated she did this every month until May 25, 2016; after that date, neither she nor Kenneth met Shirley at the bank to write her a check.

¶ 15 Shirley was recalled to testify and denied that she stopped receiving money from Kenneth after May 2016. The probate court then entered an order continuing the motion to recover assets so that the administrator could look into whether Kenneth was writing Shirley checks after that date.

¶ 16 On October 2, 2017, Shirley submitted an exhibit in support of the finding that Kenneth gifted her the future Chettri settlement payments. She submitted bank statements from Kenneth and Barbara's joint account from January 2016 through May 2016, each showing a check for \$3400, written to Shirley Coley. On October 4, 2017, Barbara submitted an affidavit and exhibit showing that no check from the joint account was written to Shirley in June.³

³The record reflects that on July 22, 2016, Kenneth deposited \$9912.06 into his personal checking account (*i.e.*, not his joint account with Barbara); this amount is the sum of the monthly Chettri settlement payment and the monthly PruCare settlement payment. The only debit to this account that month was a withdrawal of \$3000, also on July 22.

¶ 17 On October 19, 2017, the administrator filed an amended inventory. This inventory again included the details of the PruCare settlement but revised the description of the second settlement to reflect the details of the Chettri settlement.

¶ 18 On November 3, 2017, the administrator filed an amended inventory that included the Chettri settlement as an asset of the estate. On November 9, 2017, Shirley filed an objection to and motion to strike the inclusion of the Chettri settlement in the inventory of Kenneth's estate.

¶ 19 On January 26, 2018, the probate court entered an order finding that the settlement was not gifted to Shirley and that it was properly added to the inventory filed by the administrator. The court noted that Kenneth had the settlement checks mailed to Shirley for 18 years and that he made monthly gifts of income to her, "[h]owever, by making said monthly gifts, once the income was his property free from the Trust, he did not transfer the entirety of the Trust to his mother." The court also reviewed the terms of the trust, particularly article IV, paragraph 14 and article III, paragraph 3, and found that the trust prohibited Kenneth from assigning the payments and ordered the payments to be directed to the estate of the deceased person. The court concluded that, "[b]ased upon the plain language of the Trust, [Kenneth] did not gift the entire portion or future payments to his mother."

¶ 20 The probate court noted that Shirley had unendorsed Chettri settlement checks in her possession at the time of Kenneth's death but "[b]y her own testimony, she had no authority to cash the checks without her son's signature." He also could not complete

delivery because he was prohibited from assigning any portion of the trust. The court concluded that:

"The fact that [Kenneth] had to authorize, on a monthly basis, any check or gift to his mother proves he did not lose control or the power to revoke said gifts. There is no evidence that [Kenneth] made any payments to or wrote any checks to his mother after the May 2016 check. This essentially defeats the argument that all future payments were gifted."

¶ 21 The probate court also rejected Shirley's argument regarding promissory estoppel. Noting Shirley's testimony that Kenneth told her to quit her job and that she relied on the monthly checks for her daily living expenses, the court nevertheless found that, "as the court has stated above, it does not believe [that Kenneth] actually made a valid gift to which promissory estoppel would attach." The court reiterated that, for 18 years, each month was a gift from Kenneth to Shirley, which he could not have later revoked; however, Kenneth actually had to sign each check to complete the monthly gifts, and he stopped doing so in May 2016. Therefore, the court concluded that, "as there was no valid gift of the entirety of the trust income, there is no estoppel argument." Shirley appeals.

¶ 22 The objectives of a citation proceeding under the Probate Act of 1975 (Probate Act) are to obtain the return of personal property belonging to the estate but in the possession of, or being concealed by, others or to obtain information to recover estate property. 755 ILCS 5/6-1 (West 2016); *In re Estate of Joutsen*, 100 Ill. App. 3d 376, 426 (1981). To recover property in a citation proceeding, an executor must initially establish a *prima facie* case that the property at issue belongs to the decedent's estate; the burden then shifts to the respondent to prove his or her right to possession by clear and

convincing evidence. *In re Estate of Casey*, 155 Ill. App. 3d 116, 121-22 (1987). A finding of the trial court that certain property belonged to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence, as the trial court in such proceedings is authorized to determine all questions of title, claims of adverse title, and the right of property. *Joutsen*, 100 Ill. App. 3d at 380.

¶ 23 In her appeal to this court, Shirley first argues that the administrator failed to meet his burden of proving at the citation hearing by clear and convincing evidence that the two settlement checks in her possession at the time of Kenneth's death (those dated from November and December 2016) were not a gift. The administrator's burden was to demonstrate a *prima facie* case that the checks in Shirley's possession belonged to the estate; if the administrator successfully did so, then the burden shifted to Shirley to demonstrate by clear and convincing evidence that they belonged to her.

¶ 24 We find that the administrator made a *prima facie* showing that the Chettri settlement checks belonged to Kenneth's estate. Proof that a certificate of deposit bears the name of the decedent as an owner, combined with fact that it is not indorsed, presents a *prima facie* case of ownership by the estate. See *Casey*, 155 Ill. App. 3d at 123-24; *Multi-Clean Products, Inc. v. Kasper*, 3 Ill. App. 3d 12, 15 (1971). While the facts of this case involve checks drawn from a trust, and not a certificate of deposit, we find the situations analogous. The evidence presented reflects that the checks were drawn from a trust in Kenneth's name and made payable to him. The checks in Shirley's possession were unindorsed. Therefore, the administrator met his evidentiary burden.

¶ 25 As the administrator presented a *prima facie* case that the settlement checks belonged to the estate, the burden shifted to Shirley to demonstrate by clear and convincing evidence that they did not. "Clear and convincing evidence falls midway on the spectrum of degrees of proof, between the normal civil burden of 'preponderance' and the criminal burden of 'beyond a reasonable doubt.'" *Casey*, 155 Ill. App. 3d at 122. It is "the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question." *Bazydlo v. Volant*, 164 Ill. 2d 207, 213 (1995).

¶ 26 The party alleging ownership of a gift must prove (1) donative intent and (2) absolute and irrevocable delivery of the subject property. *In re Estate of Wittmond*, 314 Ill. App. 3d 720, 730 (2000). Donative intent is determined at the time of the alleged transfer of property; it is controlled by what the parties said or did at the time of the transaction and not what is said at a later time. *Koerner v. Nielsen*, 2014 IL App (1st) 122980, ¶ 19. A gift to a donee is not shown unless the donor has relinquished all present and future dominion and power over the subject matter of the gift. *Hall v. Country Casualty Insurance Co.*, 204 Ill. App. 3d 765, 778 (1990).

¶ 27 Shirley asserts that a gift of an unindorsed negotiable instrument is complete upon delivery and not indorsement. She correctly notes that the Illinois Supreme Court has stated that "negotiable instruments are subjects of a valid gift without indorsement or written assignment by the payee, if delivered to the donee by the payee with intent to transfer the title." *Rothwell v. Taylor*, 303 Ill. 226, 230 (1922). However, the *Rothwell* court went on to explain that "[m]ere possession by one claiming property as a gift, after death of the owner, is universally, we believe, held insufficient to prove a valid gift." *Id.*

at 230-31. The court clarified that intent to transfer title cannot be inferred from the fact of delivery alone. *Id.* at 232.

¶ 28 Here, the probate court heard evidence that two of the Chettri settlement checks were in Shirley's possession because they were mailed to her residence and that the checks were mailed to Shirley for 18 years because Kenneth wanted her to live off of this income. However, the court noted that Shirley did not demonstrate that Kenneth relinquished control over the money or the power to revoke the gifts; in fact, the evidence presented at the hearing begs the opposite conclusion. Every month, Kenneth retrieved the \$3466 Chettri settlement check from Shirley and deposited it into his own account; only then did he write Shirley a personal check for the lesser amount of \$3400. The testimony reflected that Kenneth had the power to stop signing the settlement checks in Shirley's possession, as he did when he refused to sign the November and December 2016 checks because of the bank's request for photo identification. Kenneth also had the power to stop giving Shirley money derived from the Chettri settlement, which the court found he did when he stopped giving Shirley money after May 2016. Shirley could not cash the settlement checks without Kenneth's signature. Therefore, the probate court's finding that the unindorsed Chettri settlement checks in her possession were not gifts was not against the manifest weight of the evidence.

¶ 29 Next, Shirley argues that the probate court erred in finding that Kenneth's alleged discontinuation of writing Shirley monthly checks established his lack of donative intent to give her a present gift of the future settlement payments; that she presented clear and convincing evidence that Kenneth gave her a present gift of a future interest in the Chettri

settlement payments; and that the court misconstrued the trust agreement as prohibiting Kenneth from giving her a present gift of the future settlement payments.

¶ 30 First, we note that the probate court did not misconstrue the trust agreement; its plain language prohibited Kenneth from assigning his settlement as an *inter vivos* gift to Shirley.

¶ 31 The language of a contract must be given its plain and ordinary meaning. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2002). When interpreting a contract, a court must consider the document as a whole, rather than focusing upon isolated portions. *Id.*

¶ 32 Article III, paragraph 3 of the trust agreement required that, if Kenneth died before the termination of the trust, the settlement would be paid to Kenneth's estate or "paid as otherwise directed in writing by the Trustor." The record is devoid of writing by the trustor directing payment elsewhere. Thus, upon Kenneth's death, the remaining payments were to be directed to Kenneth's estate. Further, article IV, paragraph 14 of the trust agreement explicitly prohibited Kenneth from assigning the trust income. Shirley correctly points out that the agreement does not restrict Kenneth's right to decide who would inherit the settlement upon his death. However, this issue was resolved by Kenneth's March 25, 1992, will in which he bequeathed the settlement to his parents and Mary's parents. This will was renounced by Barbara; thus, the assets of Kenneth's estate, including the Chettri settlement, are distributed pursuant to the Probate Act. See 755 ILCS 5/2-8 (West 2016).

¶ 33 As to Shirley's remaining arguments, pursuant to the same Illinois law that we recited regarding the checks in her possession at the time of Kenneth's death, we conclude that the probate court did not err in determining that Kenneth did not gift Shirley the future payments from the Chettri settlement. The evidence demonstrated that Kenneth was unable to *inter vivos* transfer or assign any portion of the trust to Shirley, and thus he maintained ownership of the settlement. Kenneth retained control of the money derived from the settlement by depositing the checks into his own account and then writing Shirley a personal check for a lesser amount; by his ability to stop signing the settlement checks that Shirley possessed; and by his ability to stop writing Shirley personal checks at any time. Based on the foregoing, we will not disturb the trial court's finding that the Chettri settlement was not a gift to Shirley, but rather, belonged to Kenneth's estate.

¶ 34 Next, Shirley argues that the probate court erred in finding that the administrator had the authority to attack the validity of Kenneth's gift to her. However, the appellee properly points out that the administrator has a duty to attempt recovery of the settlement checks on behalf of the estate. One of the administrator's purposes is to conserve the personal assets of the estate. *In re Estate of Lis*, 365 Ill. App. 3d 1, 9 (2006). Furthermore, the representative of an estate has a fiduciary obligation to all of the individuals having an interest in the decedent's estate, including the decedent's heirs and creditors. *In re Estate of Cappetta*, 315 Ill. App. 3d 414, 429 (2000). Thus, the administrator owed Kenneth's estate the duty to protect its interests in the Chettri

settlement; as such, he had both the authority and the duty to contest the validity of Shirley's claim to it.

¶ 35 Finally, Shirley argues that the probate court erred in rejecting her promissory estoppel argument. She asserts that, because the administrator stands in the shoes of the decedent and acquires the same interest in the property as the decedent had (see *Matter v. Sedam*, 191 Ill. App. 3d 369, 369 (1989)), the administrator was estopped as a representative of Kenneth's estate from denying the gift because Kenneth would have been estopped from denying that he made the gift.

¶ 36 A promise to make a gift may give rise to an estoppel claim when the promisee's reliance on the promise is foreseeable and reasonable and involves a definite and substantial change of position which would not have occurred if the promise had not been made. *Hux v. Woodcock*, 130 Ill. App. 3d 721, 724 (1985).

¶ 37 Shirley asserts that, 18 years ago, Kenneth promised her the gift of the Chettri settlement payments for her financial livelihood and that she quit her job in reliance on that promise. She argues that it would be "a grave injustice to both the decedent and his mother if the Administrator *** were allowed to pull out from under [Shirley's] feet the financial support rug that the decedent encouraged his mother to stand on."

¶ 38 On this issue, the probate court concluded that "as there was no valid gift of the entirety of the trust income, there is no estoppel argument." We agree. Shirley failed to show by clear and convincing evidence that Kenneth intended for her to have the future income stream from his Chettri settlement payments. Thus, if there was no valid gift of the entirety of the trust income, there was no promise on which to detrimentally rely.

¶ 39 For the foregoing reasons, we affirm the probate court's conclusion that the income derived from the Chettri settlement was not gifted to Shirley but rather belonged to Kenneth's estate, and, therefore, the trust was properly admitted in the inventory filed by his estate's administrator.

¶ 40 Affirmed.