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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1243**

Eric Habberstad, et al.,
Respondents,

vs.

Stephen Habberstad,
Defendant,

Kimberly Habberstad,
Appellant.

**Filed July 29, 2013
Reversed and remanded; motion granted.
Peterson, Judge**

Steele County District Court
File No. 74-CV-09-860

Michael R. Quinlivan, Pearson Quinlivan, PLC, Maplewood, Minnesota (for respondents)

Charles A. Bird, Bird, Jacobsen & Stevens, P.C., Rochester, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Peterson, Judge; and Smith, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this dispute involving transfers of stock within an extended family, appellant-mother argues that the district court erred by granting summary judgment in favor of

respondent-children, asserting that purported transfers of bank stock to respondent-children by their paternal aunt were invalid because the transfers did not comply with the Uniform Transfers to Minors Act. During the pendency of this appeal, respondent-children moved to strike from the record on appeal portions of appellant-mother's submissions that were not considered by the district court in its determination of the partial final judgment. We reverse and remand, and we grant respondent-children's motion to strike.

FACTS

Defendant Stephen Habberstad is a third-generation banker whose family owned two banks. The stockholders of the banks created Country Banker's, Inc. (CBI), a holding company that now owns the stock of the banks. Habberstad's marriage to appellant Kimberly Habberstad was dissolved by judgment and decree in Houston County in 2010. Respondents are three of the four children of the marriage, Eric, Brendan, and Nicole (n/k/a Nicole Wiczek).¹

In 2010, respondents initiated an action against their parents in Steele County. Respondents sought a declaratory judgment that defendant violated the Uniform Transfers to Minors Act (UTMA), Minn. Stat. §§ 527.21-.44 (2012), by transferring to himself or to appellant certain CBI stock shares that are in defendant's possession, which he held as custodian (the custodial shares), and that they are the owners of the custodial shares. Respondents also alleged that appellant "had actual or constructive notice" of defendant's conduct and sought an accounting of the dividends and distributions

¹ The fourth Habberstad child, Alyssa, is not a party to this action.

generated by the custodial shares. Respondents' complaint also included claims for rescission of the stock transfers, breach of statutory custodial duties, breach of fiduciary duties, conversion, constructive fraud, fraudulent misrepresentation, negligent misrepresentation, equitable estoppel, constructive trust, and punitive damages.

The custodial shares are more than 3,000 CBI stock shares that were part of a transaction referred to as the "Fair Oaks exchange," which involved an exchange of assets between defendant and his sister, Sally Williamson. In the 2010 dissolution judgment, the Houston County district court found that in 1993 defendant exchanged his and appellant's ownership interest in the Fair Oaks Apartments for Sally Williamson's 6,730 shares of CBI stock.² As part of the exchange, Sally Williamson purportedly transferred 3,130.5 shares of the CBI stock to respondents under the UTMA.

In the dissolution judgment, the Houston County district court found that respondents had filed this lawsuit against their parents in Steele County claiming an interest in the shares involved in the Fair Oaks exchange. The court then specifically declined to address the custodial shares until the conclusion of this action. On appeal in the dissolution, this court noted that respondents had sued their parents and that the Houston County district court had excluded the custodial shares from the marital estate and the property division. *Habberstad v. Habberstad*, No. A10-2126, 2011 WL 5299645, at *1 n.1 (Minn. App. Nov. 7, 2011).

In late 2007 and early 2008, respondents each signed affidavits stating that they had gifted the custodial shares to defendant. Respondents now allege that the affidavits

² Defendant also paid Sally Williamson \$50,000 in the exchange.

were factually inaccurate because they did not intend to gift the custodial shares to their father and took that action only upon his advice, in order to “prevent the liquidation of” those assets.

In his answer to the amended complaint in this action, defendant sought a declaratory judgment that respondents had gifted the custodial shares to him. In her separate answer to the complaint, appellant asserted a counterclaim against respondents that “3,129 of the [custodial] shares were unlawfully and fraudulently signed by Sally Williamson and then delivered to [defendant] in a sham gift transaction at the direction and control of [defendant] for the purpose of avoiding income taxes and not for the purpose of gifting said shares to [respondents].” According to appellant, “[a]ny transfers to [respondents] . . . were made without the knowledge or consent or donative intent of [appellant].” And [appellant] knew only that bank stock was being paid as part of a contract exchanging an interest in Fair Oaks Apartments.” Appellant also alleged that respondents joined defendant in a conspiracy to defraud her and asserted cross-claims against defendant for intentional misrepresentation, conspiracy to defraud, theft and conversion, forgery, and waste. She further sought indemnification and subrogation from defendant for respondents’ claims and a declaratory judgment “that she is the sole owner of all of the [custodial] shares . . . that were wrongfully placed in the name of defendant . . . as custodian for [respondents].”

In December 2010, respondents entered into a *Pierrenger* settlement with defendant, agreeing to “dismiss with prejudice all causes of action and claims” against

defendant and to satisfy any proportionate share of damages for which defendant is later found liable in this action.

In October of 2011, appellant and respondents moved for summary judgment. Following a hearing, the district court granted summary judgment to respondents, ruling that defendant's transfers of the custodial shares to himself and appellant when he held the shares as custodian for respondents violated the UTMA because the shares had indefeasibly vested in respondents upon the transfers to them in the Fair Oaks exchange.

The district court stated:

[T]he "Fair Oaks" shares indefeasibly vested to [respondents] at the time the transfer was made. Therefore, [appellant] may not challenge the transferor's donative intent. Rather, as a matter of law, statutory compliance with the UTMA created an irrevocable gift to [respondents]. Therefore, summary judgment is appropriate on [respondents'] claim for declaratory judgment.

The court issued a partial summary judgment that respondents own the custodial shares. Respondents asked the district court to issue a supplemental order that CBI reinstate the custodial-stock certificates and deliver the certificates to the lawful owners. The district court issued a supplemental order and entered a partial final judgment. This appeal followed.

On May 3, 2012, Sally Williamson signed an affidavit stating that she made no "gift to any of the children of [defendant] and [appellant]. If there were gifts, that took place after I gave the certificates to [defendant]." On July 3, 2012, appellant submitted to the district court a motion to amend the judgment and to dismiss a conspiracy claim. Attachments to the motion included Sally Williamson's May 3, 2012 affidavit and the

purported original stock certificates from Sally Williamson pertaining to the custodial shares. Respondents moved this court to strike from the record on appeal records and documents that the district court did not consider in its determination of the partial final judgment.

D E C I S I O N

A district court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. An appellate court reviews a district court’s grant of summary judgment de novo to determine whether there is a genuine issue of material fact precluding summary judgment and whether the district court correctly applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp.*, 790 N.W.2d 167, 170 (Minn. 2010); *see Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976) (defining “material fact” as one that is determinative to resolution of case). On appeal from a declaratory judgment, the appellate court reviews the district court’s “determination of questions of law de novo.” *Rice Lake Contracting Corp. v. Rust Env’t & Infrastructure, Inc.*, 549 N.W.2d 96, 98-99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996).

Transfers of Custodial Shares. Appellant argues that because there are material fact issues regarding whether the custodial shares were transferred to respondents in compliance with the UTMA, the district court erred by granting partial summary judgment that respondents own the shares. We agree.

The UTMA provides:

(a) Custodial property³ is created and a transfer is made whenever:

(1) an uncertificated security⁴ or a certificated security⁵ in registered form is either:

(i) registered⁶ in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: “as custodian for (name of minor) under the Minnesota Uniform Transfers to Minors Act.”

Minn. Stat. § 527.29 (a)(1)(i). “A transfer made pursuant to section 527.29 is irrevocable, and the custodial property is indefeasibly vested in the minor” Minn. Stat. § 527.31(b).

Evidence in the record shows that, following the Fair Oaks exchange, the custodial shares were registered in the name of defendant as custodian for each of the respondents pursuant to the Minnesota Gift to Minors Act.⁷ The district court concluded that these registrations transferred the stock pursuant to section 527.29(a)(1)(i) and, therefore, under

³ The UTMA refers to various types of property but does not include definitions for the types of property. Because the UTMA does not define types of property and this case involves a transfer of securities, we have applied definitions provided in Uniform Commercial Code – Investment Securities, which is Article 8 of the Uniform Commercial Code, Minn. Stat. §§ 336.8-101 to .8-603 (2012). The parties do not dispute that the CBI stock is a security in registered form.

⁴ An “uncertificated security” is defined as “a security that is not represented by a certificate.” Minn. Stat. § 336.8-102(a)(18).

⁵ A “certificated security” is defined as “a security that is represented by a certificate.” Minn. Stat. § 336.8-102(a)(4).

⁶ “‘Registered form,’ as applied to a certificated security, means a form in which: (i) the security certificate specifies a person entitled to the security; and (ii) a transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.” Minn. Stat. § 336.8-102(a)(13).

⁷ The UTMA applies to this transfer even though the transfer purports to be made under the Uniform Gifts to Minors Act. Minn. Stat. § 527.41(1).

the plain language of sections 527.29 and 527.31, the transfers are irrevocable, the stock is indefeasibly vested in respondents, and appellant may not challenge the transfer based on the transferor's intent. In reaching this conclusion, the district court applied the rule of statutory interpretation that "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2012).

We agree with the district court that under the unambiguous words of section 527.29(a)(1)(i), custodial property was created and a transfer was made when the CBI stock was registered in defendant's name as custodian for each of the respondents. But, following the district court's decision, the supreme court explained in another statutory-interpretation case:

When construing a statute, we presume that the Legislature did not intend a result that is absurd or unreasonable. This rule of construction applies when the words of the statute are ambiguous. It is not available to override the plain language of a clear and unambiguous statute, except in an exceedingly rare case in which the plain meaning of the statute "utterly confounds" the clear legislative purpose of the statute.

Schatz v. Interfaith Care Ctr., 811 N.W.2d 643, 651 (Minn. 2012) (citations omitted).

This is an exceedingly rare case in which the plain meaning of Minn. Stat. §§ 527.29 (a)(1)(i) and 527.31 utterly confounds the clear legislative purpose of the UTMA, which is to enable an owner of property to transfer the property to a custodian for the benefit of a minor. *See* Minn. Stat. §§ 527.23 (nomination of custodian to receive property for benefit of minor), .24 (transfer by irrevocable gift to custodian for benefit of

minor), .25 (transfer by will or trust to custodian for benefit of minor); .26 (transfer by fiduciary to custodian for benefit of minor), .27 (transfer by obligor to custodian for benefit of minor). Interpreting sections 527.29(a)(1)(i) and 527.31 to prohibit a challenge to a transfer based on the transferor's intent would permit a transfer of stock that satisfies the requirements of section 527.29(a)(1)(i) to become irrevocable and indefeasible even if the owner of the stock did not intend to transfer the stock to a custodian for the benefit of a minor, or to transfer the stock at all.

Furthermore, interpreting section 527.29(a)(1)(i) as a complete description of all that is required for a valid stock transfer under the UTMA fails to recognize that Minn. Stat. § 527.29 describes only what is required to effect transfers of different kinds of property to create custodial property; it does not describe the different kinds of transfers that create effective custodianships under the UTMA. The different kinds of transfers are described in sections 527.23 to .27. For each kind of transfer, a transfer is effected by satisfying the requirements in section 527.29.

The kind of transfer at issue in this case, a transfer by gift, is permitted under Minn. Stat. § 527.24, which states, "A person may make a transfer by irrevocable gift to . . . a custodian for the benefit of a minor pursuant to section 527.29." Under this section, a transfer of stock can be effected by complying with the requirements of section 527.29(a)(1)(i), but to be permitted under this section, the transfer must be a transfer by irrevocable gift. Consequently, to ensure that a transfer complied with the UTMA, it must be possible to challenge the transfer on the basis that it was not a transfer by irrevocable gift.

Appellant argues that there are material fact issues regarding whether Sally Williamson transferred CBI shares to respondents by irrevocable gifts. We agree. There is evidence in the record that indicates that Sally Williamson exchanged her CBI shares for defendant's interest in the Fair Oaks Apartments. In an October 28, 1993 letter from defendant to Sally Williamson and her husband, defendant described the Fair Oaks exchange as follows:

The understanding is that my undivided one-half interest in Fair Oaks Apartments would be traded in exchange for all of Sally's interest in outstanding common stock of [CBI]. The trade will be effective as of December 31 and January 1. I have talked to our accountant, and it looks like the best approach will be using gifts back and forth relative to this exchange.

This letter suggests that Sally Williamson intended to give her CBI stock to defendant, rather than to respondents, in the Fair Oaks exchange. The terms of the exchange might have changed before the transaction was completed, but we have found nothing in the record that permits us to conclude that Sally Williamson made an irrevocable gift of the stock to respondents. Under these circumstances, the district court improperly granted summary judgment to respondents based on its determination that appellant may not challenge the validity of the transfers of the custodial stock based on the transferor's intent.

Collateral Estoppel. The district court ruled that appellant was collaterally estopped from raising the issue of whether transfers of the custodial shares complied with the UTMA, because that issue was decided in the 2010 Habberstad dissolution. But, although the dissolution court found that the transfers of CBI stock from Sally

Williamson to respondents were made “pursuant to the Uniform Transfers to Minors Act,” it then stated that it would not address the stock involved in this lawsuit. The dissolution court expressly stated that it would “not include any shares involved in the Steele County lawsuit as marital or non-marital property” and that the distribution of the stock would be decided following the outcome of this case.

“Collateral estoppel is the binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based.” *In re Murrin*, 821 N.W.2d 195, 205 (Minn. 2012) (quotations omitted). The supreme court has adopted a four-part test, each element of which must be met to apply collateral estoppel:

(1) the issues in the prior and present adjudication must be identical; (2) there must have been a final adjudication on the merits; (3) the estopped party must have been a party or in privity with a party to the prior adjudication; (4) and the estopped party must have been given a fair and full opportunity to be heard on the adjudicated issue.

Heine v. Simon, 702 N.W.2d 752, 761 (Minn. 2005).

The Habberstad dissolution judgment did not include a final adjudication of the ownership of the custodial stock on the merits. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 837-38 (Minn. 2004) (requiring that “issue [was] distinctly contested and directly determined in the earlier adjudication for collateral estoppel to apply”). The dissolution court expressly excluded the stock from its consideration until the conclusion of this case. No court has determined whether Sally Williamson transferred CBI shares to respondents pursuant to the UTMA. Under these circumstances, collateral estoppel

does not apply to preclude appellant from challenging the transfers of the custodial stock in this action.

Effect of Respondents' Re-Gifting of Shares and Affidavits. Appellant argues that respondents' executions of affidavits confirming that defendant owned the custodial shares, and the effect of respondents' later repudiations of their affidavits, create a material fact issue "about ownership of the stock that is the subject of this action." Appellant contends that "the finder of fact (in this case a jury) ought to be able to take into consideration the affidavits signed by these adult Respondents in determining ownership of the shares of bank stock." It is not apparent what relief appellant is seeking with respect to the affidavits. Appellant does not cite anything in the record that indicates that a fact finder may not consider the affidavits or respondents' later repudiations of the affidavits.

Motion to Strike. On August 7, 2012, respondents submitted a motion to this court to strike documents that were submitted to the district court after the appeal was filed in this court. The documents include a motion for an amended judgment and memorandum of law, five affidavits that were filed in support of the motion to amend the judgment, a proposed order, and a transcript of the hearing on the motion. "The papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). The materials submitted by appellant were not presented to or

considered by the district court in its determination of the partial final judgment. We therefore grant respondents' motion to strike these materials.

Reversed and remanded; motion granted.