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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1032**

Kenneth J. Zehrer, by himself
and by Kenneth William Zehrer, as Limited Conservator,
Respondent,

vs.

Nancy Winters,
a/k/a Nancy C. Winters,
Appellant.

**Filed April 27, 2010
Affirmed
Wright, Judge**

Stearns County District Court
File No. 73-CV-07-3061

Mark F. Uphus, Melrose, Minnesota (for respondent)

John E. Mack, Mack & Daby, New London, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this action to determine adverse claims and quiet title, appellant challenges the district court's ruling that two deeds were invalid because respondent lacked donative intent to transfer any property as a gift by delivering the deeds to appellant. Appellant

argues that respondent is estopped from seeking cancellation of the deeds under the doctrines of estoppel by deed and unclean hands. Appellant also argues that the district court abused its discretion by excluding a witness's testimony for untimely disclosure and by failing to accept appellant's offer of proof. We affirm.

FACTS

Respondent Kenneth J. Zehrer (Kenneth)¹ sued his daughter, appellant Nancy Winters (Nancy), regarding two deeds purportedly conveying property known as "Silver Fir" from Kenneth to Nancy. After his appointment as Kenneth's limited conservator, respondent Kenneth William Zehrer (Billy) filed a complaint seeking to set aside the deed transactions based on allegations of fraud in the inducement and undue influence.

Kenneth, who was 77 years old at the time of trial, has four children, including Nancy and Billy. After the death of his first wife, Kenneth married Carolyn Zehrer (Carolyn) in 1979. When Carolyn married Kenneth, she and her father owned a lumber business, called Silver Fir, and the real property on which it was operated. Kenneth later purchased his father-in-law's interest in Silver Fir and operated the business with Carolyn until Carolyn initiated a divorce action in 2005. Prior to the divorce, Carolyn purportedly transferred Silver Fir to Kenneth by quitclaim deed.² Kenneth continued to operate Silver Fir, retain the income it generates, and pay real-estate taxes on the property.

In response to Carolyn's initiation of divorce proceedings, Nancy and Billy helped Kenneth to retain counsel to represent him in the action. That counsel withdrew from

¹ Because many of those involved in this case share the same last name, we depart from the ordinary practice and refer to individuals by their first names.

² That transfer is not the subject of this proceeding.

representing Kenneth approximately six months later, and Kenneth hired a new attorney. Nancy then provided Kenneth with most of the ongoing assistance that he needed in the divorce action. In approximately November 2006, Kenneth and Nancy retrieved several boxes of documents related to the divorce action from the office of Kenneth's newly retained attorney. When those documents were not produced in response to a discovery request, Carolyn's counsel moved for sanctions on the ground that records had been "secreted, withheld, or destroyed." Kenneth's second attorney withdrew from representation in March 2007.

Three months earlier, Nancy told Pamela Zehrer (Pamela), Billy's wife, that Carolyn was seeking Silver Fir in the property division of the divorce action. During this conversation, Nancy suggested removing Kenneth's name from the title to the Silver Fir property. In response, Pamela told Nancy that the property was "frozen" as part of the divorce action. Nancy then proposed transferring the property and having her mother-in-law, a notary, backdate the documents of the transaction.

In March 2007, Kenneth drove Nancy to the Stearns County Recorder's Office, where they recorded two deeds purportedly conveying Silver Fir from Kenneth to Nancy. Kenneth's signatures on the deeds were notarized by Nancy's mother-in-law and dated June 1, 2005, and October 19, 2005, respectively.

One day after the deeds were recorded, Kenneth told Billy that he had transferred Silver Fir to Nancy. Kenneth claimed that Nancy drugged him on the way to the recorder's office and that he did not know what he was doing. Billy contacted Nancy and demanded that she return Silver Fir to Kenneth. She refused. Kenneth also visited

Nancy and told her to return Silver Fir because Billy was angry about the conveyance of the property to Nancy. When Nancy refused, Kenneth became angry and threatened to kill her and her family.

Kenneth commenced this action in April 2007, alleging that Nancy acquired title by breach of fiduciary duty and that Kenneth remained the exclusive owner. Billy assisted Kenneth in hiring a new attorney, who advised Billy to seek appointment as Kenneth's limited conservator to assist in the divorce action and in the recovery of Silver Fir. Pursuant to a marital-termination agreement, a judgment awarding Silver Fir to Kenneth was entered in early 2008.

This case proceeded to trial in November 2008. Nancy defended the transfer and testified that Kenneth gave her Silver Fir to compensate her for physical and sexual abuse that Kenneth committed against her when she was a child. Other witnesses denied that Nancy previously had claimed that Kenneth sexually abused her.³ Nancy sought to call Diana Ilgen to corroborate Nancy's allegation of sexual abuse. But the district court excluded Ilgen's testimony because of an untimely disclosure of the witness.

³ The district court subsequently found that Nancy's testimony on this issue lacked credibility. In its findings, the district court also described an incident that occurred following a deposition related to Kenneth's divorce proceedings as indicative of Nancy's lack of credibility. Kenneth's attorney testified that she was in front of Nancy, who was on crutches, as Nancy crossed the lobby of the law office. Nancy yelled, "She pushed me," and was taken to the hospital. A video camera in the lobby recorded Nancy throwing her crutches in the air and her body on the ground, while the attorney was across the lobby from Nancy. The district court found that Nancy's false allegations against Kenneth's attorney "speak[] volumes to the lack of credibility this Court finds in Nancy's testimony in this trial."

The district court found that Kenneth's "intent was for a transfer of convenience to Nancy in order to extricate the Silver Fir property from any possible award to Carolyn as part of the dissolution action with the intent that the Silver Fir property thereafter be re-conveyed to himself." Because Kenneth had not "formed the requisite intent to make a valid and completed gift of the Silver Fir land to Nancy," the district court concluded that Nancy had not acquired an ownership interest in Silver Fir and that the deeds were invalid. The district court subsequently denied Nancy's motion for a new trial. This appeal followed.

DECISION

I.

Nancy argues that the doctrines of estoppel by deed and unclean hands estop Kenneth from obtaining cancellation of the deeds. An action to cancel a deed is an action in equity. *Sina v. Schifsky*, 296 Minn. 528, 529, 208 N.W.2d 302, 304 (1973). Because granting equitable relief is within the district court's sound discretion, only a clear abuse of that discretion will warrant reversal. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

Estoppel by deed prevents a party to a deed from denying anything recited in that deed if the party has induced another to accept or act under the deed. *Macomber v. Kinney*, 114 Minn. 146, 154, 128 N.W. 1001, 1003 (1910); *see also Cummings v. Shults*, 207 S.W.3d 572, 576 (Ark. Ct. App. 2005) ("Estoppel by deed bars one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material facts asserted.").

“[One] who seeks equity must do equity, and [one] who comes into equity must come with clean hands.” *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (quotation omitted).

Nancy concedes that she is asserting the defenses of estoppel by deed and unclean hands for the first time on appeal. But she argues that she did not have the opportunity to argue these equitable defenses in district court because, despite the fact that the complaint sought to set aside the deeds for fraud in the inducement and undue influence, the district court decided the case on Kenneth’s lack of intent to convey the properties, an issue that Nancy argues was not before the district court. Even assuming that Kenneth’s intent to convey the properties is distinct from his alleged fraud in the inducement and undue influence, Nancy’s argument fails for two reasons. First, the issue on which the district court decided the case was properly raised by Kenneth in the district court. Whether Kenneth intended to make a valid and complete gift was squarely before the district court because Kenneth alleged that he did not intend to convey any interest in the property to Nancy or to deliver the deeds transferring his interest in the property to Nancy. Even Nancy’s letter brief to the district court at the close of the evidence acknowledged that Kenneth raised the argument of ineffective transfer when she countered that Kenneth knowingly and intentionally made a gift of the real estate to Nancy.

Second, whether Kenneth possessed a fraudulent intent has no bearing on her ability to raise the estoppel-by-deed defense in the district court proceeding because the doctrine of estoppel by deed does not require the grantor to have fraudulent intent. *Macomber*, 114 Minn. at 154, 128 N.W. at 1003. Rather, the doctrine simply provides

that a party to a deed is estopped from asserting any rights in derogation of the deed or denying the truth of the deed. *Id.*; *Cummings*, 207 S.W.3d at 576. Here, Nancy was well aware that Kenneth was asserting rights in derogation of the deed.

The record establishes that Nancy received notice of Kenneth's theory of the case from his complaint, which gave her ample opportunity to raise the defenses of estoppel by deed and unclean hands before the district court. By failing to do so, Nancy has waived these defenses, and we decline to consider them for the first time here. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)).

II.

Nancy next argues that the district court erred by denying her motion for a new trial to permit Ilgen's testimony. A district court may exclude evidence when a party fails to comply with a district court's scheduling order. Minn. R. Civ. P. 16.06, 37.02. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result," and absent prejudice, an erroneous evidentiary ruling is not a basis for a new trial. *Id.* at 46.

Although Ilgen was prepared to testify that Nancy told Ilgen that Kenneth had sexually abused Nancy, the district court excluded the testimony because of Nancy's untimely witness disclosure. The district court subsequently denied Nancy's motion for a new trial, concluding that Ilgen's testimony would not be probative of a material issue in light of the district court's determination that Kenneth transferred the deed with the intent to keep the property from Carolyn in the divorce action.

There is no dispute that Nancy did not timely disclose Ilgen as a witness, and Nancy concedes that the district court was within its discretion when it excluded Ilgen's testimony. But Nancy contends that Ilgen also was prepared to testify regarding a telephone call that Ilgen received from Kenneth the day before the trial. During this call, Kenneth advised Ilgen that her testimony was not needed. Nancy argues that this call was an attempt to tamper with a potential witness and impeached Kenneth's testimony that he had not abused Nancy. Although Ilgen did not testify, during Kenneth's testimony, he admitted the substance of Ilgen's proffered testimony regarding the telephone call. Ilgen's testimony on this issue, if admitted, would have been merely cumulative of what already exists in the record. Therefore, the district court's exclusion of Ilgen's testimony on this point was not prejudicial, and the district court did not abuse its discretion by excluding Ilgen's testimony or by denying Nancy's motion for a new trial on this ground.

In a related argument, Nancy contends that the district court's denial of her motion to make an offer of proof regarding Ilgen's testimony was plain error. If a district court excludes evidence, "the substance of the evidence [may be] made known to the court"

through an offer of proof. Minn. R. Evid. 103(a). But an offer of proof is unnecessary when the substance of the evidence is apparent. *See* Minn. R. Evid. 103 1989 comm. cmt. (“[A]n offer of proof must be made to preserve the issue for review unless the substance of the evidence is apparent from its context.”). The record reflects that the offer of proof would have been Ilgen’s corroboration of Nancy’s claim of sexual abuse and the telephone call from Kenneth. Because the substance of this evidence was apparent to the district court and is available for consideration on appeal, the district court’s rejection of Nancy’s offer of proof was within the district court’s sound discretion.

Affirmed.