Missouri Court of Appeals

Southern District

en banc

RICHARD E. IVIE, JIMMIE R. IVIE, LADONNA SMALL, and BERNARD IVIE,	)	
Plaintiffs-Respondents,	)	
vs.	)	No. SD32222
ARNOLD L. SMITH and SIDNEY B. SMITH,	)	**Filed: November 20, 2013**
Defendants-Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY

Honorable Benjamin Frederick Lewis, Special Judge

AFFIRMED

This appeal arises from the trial court's decision in a matter involving a trust and the beneficiary designations on several bank and retirement accounts. Patricia Watson ("Watson") created a trust in 2002. She later signed amendments to it in 2007 and 2008. During the winter of 2007 to 2008, Watson also signed changes to the pay on death beneficiary listed on a number of her accounts. Watson's husband, Arnold Smith ("Smith"), was the primary

beneficiary of these purported changes.[1] Watson's siblings—Richard, Jimmie, Ladonna, and Bernard (collectively "the Ivies")—filed an action challenging these amendments to the trust and pay on death designations. The trial court found the trust amendments and beneficiary designation changes made by Watson to be void. Smith appeals raising seven points. Six of the points relate to the trial court's findings of undue influence and lack of testamentary capacity, and a seventh (Point V) relates to the application of an *in terrorem* clause contained in the trust amendments. We disagree with Smith's arguments and affirm the trial court's judgment.

Standard of Review

"On review of a court-tried case, we will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." ***Watermann v. Eleanor E. Fitzpatrick Revocable Living Trust***, 369 S.W.3d 69, 75 (Mo. App. E.D. 2012). In conducting our review, "[w]e accept as true the evidence and inferences favorable to the prevailing party and disregard all contrary evidence." ***Id.*** Furthermore, "[w]e defer to the trial court's resolution of conflicts in the evidence and its assessment of witness credibility." ***Id.*** The following statement of facts has been prepared in accordance with the foregoing standard of review.

Factual and Procedural Background

[1]The petition also included claims against Smith's son, Sydney B. Smith, because he was named as a beneficiary in the second trust amendment. Although Sydney B. Smith joined in Arnold Smith's notice of appeal and is listed as an appellant, he did not file a separate brief in this Court. Sydney B. Smith raises no independent claims. For clarity, this opinion refers to the Appellants' arguments as those of Arnold Smith alone. This opinion applies to Sydney B. Smith equally.

Watson was the older half-sister of the Ivies. The siblings lived together until Watson left home to attend high school. Watson became a teacher and later moved to California. Nevertheless, Watson retained close ties with the Ivies by talking on the phone with them and visiting them every summer. Although Watson had four different husbands at different times in her life, she had only one child, a daughter who was murdered in 1980.

Watson met Smith in March 2001. The two began dating and were married on February 20, 2002, in California. At the time of their marriage, Watson was 70 years old and Smith was 60 years old. Smith had no assets at the time because he had filed for bankruptcy in 1997.

On May 9, 2002, Watson executed a trust prepared for her by her attorney Reginald Young ("Young"). Various bank accounts and parcels of real estate were included in the trust estate. Under the terms of the trust, after Watson's death, the trust property was to be sold and the proceeds divided among the Ivies. The trust further provided:

> The Grantor is married to Arnold L. Smith and the Grantor has no children. In preparing this Trust Agreement, the Grantor is aware of the existence of Arnold L. Smith and has remembered him with love and affection. It is expressly the Grantor's intention that her husband, Arnold L. Smith, not receive any part of the Trust Estate.

In January 2003, Watson visited her doctor, complaining, among other things, that Smith was trying to poison her. The physician suspected paranoia and made a referral to another doctor "for further recommendations."

Watson and Smith moved to Missouri in 2004 in part so Watson could be near the Ivies. She was already having trouble with memory and word recall. During this time, Watson told one of her brothers she thought she was losing her

mind. Watson told her sister she wanted to divorce Smith because he had ruined her life. Watson believed Smith was misusing her money.

In February 2005, Watson reported her memory difficulties to her doctor. Her doctor prescribed Namenda, a drug used to treat moderate or severe dementia.

Watson continued to believe Smith was trying to poison her. In June 2005, one of her brothers took her to the doctor to assess the situation. The doctor did not believe Watson was being poisoned, but ordered some tests to assuage her fears. The results were within normal limits, although Watson was apparently not satisfied nor convinced by the test results.

During October 2005, Watson went to the Mayo Clinic for an extensive evaluation. When giving her history to the physician, Watson reported concerns about her memory. She said she could not think, and while she was able to perform daily activities, she did not take care of any of her finances. During the neuro-psychological consultation, the doctor spoke with Smith. Smith stated he had noticed a gradual worsening of Watson's word-finding abilities over the past six months. He reported Watson had difficulty figuring out instructions and remembering things she was told. He also stated Watson allowed him to take over the checkbook in 2004 because of her memory difficulties. During the neuro-psychological testing, Watson was impatient with long test instructions, and the instructions often needed to be simplified so she could understand. The results of the testing showed a mild to moderate degree of cognitive impairment. The report stated Watson would "require continued supervision and assistance with complex activities of daily living, including assistance with any medical,

legal, or financial decision-making." The doctors concluded the cognitive difficulties were consistent with vascular dementia but recommended ongoing monitoring in case a degenerative process was involved.

In March 2006, Watson began seeing Dr. Fred Uthoff ("Dr. Uthoff"). In providing him her history, she stated she had one child who was alive and well. In October 2006, Dr. Uthoff diagnosed probable Alzheimer's dementia. A definitive diagnosis of Alzheimer's dementia was made in November 2006.

In May 2007, Watson attended a family celebration. At that celebration, Watson was unable to recognize several previously known family members.

On June 19, 2007, Dr. Uthoff admitted Watson to the Missouri Delta Medical Center for complications involving Watson's diabetes. Records from the hospital visit showed Watson experienced confusion and made inappropriate statements which suggested impaired memory during the hospitalization. Watson left the hospital against medical advice on June 29, 2007.

On July 27, 2007, Watson signed an amendment to the trust. The amendment, like the original trust, had been prepared by Young. Under the terms of the amendment, when Watson died, each of Watson's half-siblings would receive $25,000 and Smith would receive the remainder of the proceeds from the trust estate.

In November 2007, Watson began receiving in-home nursing care from Home Advantage Home Health Care Services. On November 11, 2007, Smith signed the documentation for the start of care because Watson had zero cognitive retention. The nurse reported Watson's dementia was poorly controlled. Watson answered questions inappropriately, was paranoid, and cried at inappropriate

times. Watson needed assistance in grooming, dressing, and bathing. The nurses reported Watson experienced forgetfulness and mood swings. Watson had bouts of confusion and was dependent on Smith.

On December 7, 2007, Watson signed a change in the title on her Alliance Bank checking account and on her Alliance Bank money market account from her trust to herself individually with a pay on death designation in favor of Smith. On December 21, 2007, Watson signed a change to her Montgomery Bank savings account taking it out of the trust and putting it in her individual name with a pay on death designation in favor of Smith. On January 14, 2008, she signed a change in the beneficiary on her US Bank IRA from the trust to Smith.

Throughout the spring and early summer of 2008, the home health care nurses chronicled Watson's condition. In March 2008, the nurses reported Watson got lost in her own home and sometimes could not find the bathroom. On April 7, 2008, the nurse reported Watson was extremely upset, stating Smith was only with her for her money.

On June 5, 2008, Watson again entered the Missouri Delta Medical Center, this time because she had fallen and was unable to sit up, stand, or walk. On June 9, 2008, Watson "seemed confused about where she was and about her husband, her home and finances." Watson was discharged from the hospital on July 2, 2008.

That same day, Watson signed a second amendment to the trust. The second amendment to the trust was also prepared by Young. This amendment further reduced the shares of the trust estate the Ivies would receive. Under the second trust amendment, each of the Ivies would receive $5,000, Smith's son

from a previous marriage, Sydney B. Smith, would receive $5,000, and Smith would receive the remainder of the trust proceeds. Later that month the beneficiary on Watson's California State Teacher's Retirement ("CALSTRS") was changed from the Ivies to Smith.

Shortly thereafter, Smith sought several doctor's opinions regarding Watson's mental state. On July 22, 2008, Dr. Uthoff executed an affidavit stating Watson was "by reason of advanced age, physical incapacity or mental weakness, incapable of managing his or her own estate." Identical affidavits were executed by other doctors on August 27, 2008, September 20, 2008, September 30, 2008, and February 19, 2009.

Watson died on April 10, 2009. After her death, Smith obtained approximately $288,000 from her various bank accounts.

The Ivies then filed the instant action seeking to have the trust amendments and beneficiary designations set aside. Among the many witnesses at trial, Smith, Young, the Ivies, and two medical experts testified, each giving conflicting testimony.

Dr. Adam Sky ("Dr. Sky"), a geriatric psychiatrist, reviewed Watson's medical records. Based on that review, he opined Watson did not have testamentary capacity at any time after July 1, 2007. Dr. Randall Huss ("Dr. Huss") testified on Smith's behalf. He stated people with early dementia can have testamentary capacity at times. Based on Young's description of the transactions, he believed Watson had testamentary capacity when she executed the amendments to the trust.

Watson's attorney, Young, testified regarding the legal work he did for Watson and explained the reasons for amending the trust. He stated, "I think she realized that without her [Smith] was not going to have anything and I believe that was the motivation for giving [Smith] the bulk of her estate." At the time of the first amendment, Young believed Watson understood she was leaving most of her estate to Smith. Smith brought Watson to Young's office on July 27, 2007, and left the room while the first trust amendment was executed. Young also believed Watson understood what she was requesting when she asked him to prepare the second trust amendment. Young went to Watson's home on July 2, 2008, to have her sign the second trust amendment. Young explained the documents to Watson, and he felt like she understood. Young admitted he was not aware of Watson's dementia diagnosis and the diagnosis would have raised some concerns.

The trial court entered judgment against Smith on July 17, 2012. The trial court found Watson experienced severe mental impairments at the time she made the trust amendments and the changes in the bank account and retirement account beneficiary designations. The trial court further found Young's testimony was not credible because his testimony was inconsistent, and he did not know about the dementia diagnosis. The trial court credited Dr. Sky's testimony over Dr. Huss's testimony. The trial court concluded Watson lacked testamentary capacity at the time she executed the first amendment to the trust and at all times thereafter. The trial court invalidated the first and second trust amendments and the nonprobate transfers involving Watson's bank and retirement accounts. Smith appeals.

Discussion

Smith raises seven points on appeal: (1) the trial court erred in invalidating the first trust amendment based on its finding of undue influence; (2) the trial court erred in finding Watson lacked testamentary capacity when she executed the first trust amendment on July 27, 2007, because the medical records did not relate to that specific date; (3) the trial court erred in invalidating the second trust amendment based on its finding of undue influence; (4) the trial court erred in finding Watson lacked testamentary capacity when she executed the second trust amendment on July 2, 2008, because the medical records did not relate to that specific date; (5) the trial court erred in failing to enforce the *in terrorem* clause contained in the first and second trust amendments; (6) the trial court erred in finding the changes in beneficiary designations on Watson's various bank accounts were the result of undue influence and lack of testamentary capacity; and (7) the trial court erred in finding the beneficiary designation for the CALSTRS retirement benefit was the result of undue influence and lack of testamentary capacity. For ease of analysis, we first address Points II and IV together. Then we proceed to discuss Points I, III, V, VI, and VII.

Points II and IV: Lack of Testamentary Capacity

In both his second and fourth points, Smith challenges the trial court's findings with respect to Watson's testamentary capacity. Point II addresses her testamentary capacity on July 27, 2007, while Point IV addresses her testamentary capacity on July 2, 2008. Both of these points are without merit

because there was substantial evidence demonstrating Watson lacked testamentary capacity at all times after July 1, 2007.

"The capacity required to create, amend, revoke, or add property to a revocable trust . . . is the same as that required to make a will." § 456.6-601, RSMo Cum. Supp. (2013). To have testamentary capacity, the testator must, at the time the document is executed, "be able to: (1) understand the ordinary affairs of her life; (2) understand the nature and extent of her property; (3) know the persons who were the natural objects of the bounty; and (4) intelligently weigh and appreciate her natural obligations to those persons and know that she is giving her property to the persons mentioned in the document." ***In re Gene Wild Revocable Trust***, 299 S.W.3d 767, 777-78 (Mo. App. S.D. 2009). While such capacity must exist at the time the instrument is executed, "[e]vidence, not too remote, of mental unsoundness either before or after the will's execution is admissible, provided it indicates that such unsoundness existed at the time the will was made." ***Ambruster v. Sutton***, 244 S.W.2d 65, 72 (Mo. 1951). That is, the person's testamentary capacity may be proven by reasonable inference, and "[i]t is not required that proof of testamentary incapacity at the very moment be made by eyewitnesses." ***Thompson v. Curators of Univ. of Mo.***, 488 S.W.2d 617, 620 (Mo. 1973). Furthermore, "medical opinion testimony may be introduced to establish the mental unsoundness of a person at the time a challenged instrument is executed." ***Dorsey v. Dorsey***, 156 S.W.3d 442, 446 (Mo. App. E.D. 2005). Additionally, Missouri courts have found that a testator was unable to understand the nature of her property where there was evidence

another person had to pay her bills and manage her finances. ***Disbrow v. Boehmer***, 711 S.W.2d 917, 924-25 (Mo. App. E.D. 1986).

In the present case, there was substantial evidence that Watson lacked testamentary capacity on July 27, 2007, and on July 2, 2008. First, as early as 2004, Watson was unable to pay her own bills because of her increasing cognitive problems. Second, the medical records showed a continually worsening mental state from 2005 onwards. In 2005, Watson was diagnosed with dementia, and the examining physician opined she would need help with legal and financial matters. In November 2006, Watson's treating physician confirmed a diagnosis of Alzheimer's, a progressive form of dementia. Finally, Dr. Sky testified that based on those medical records, Watson did not have testamentary capacity on July 1, 2007, or at any date thereafter. Watson's inability to handle her financial affairs and continually declining mental state after 2005 supports the trial court's finding that Watson did not understand the nature and extent of her property. Furthermore, there was testimony showing that shortly before the first trust amendment, Watson was unable to recognize known relatives. That evidence supports the conclusion that Watson did not know the persons who were the natural objects of her bounty. The trial court's finding that Watson did not have testamentary capacity at the time she executed the first and second trust amendments was supported by substantial evidence and was not against the weight of the evidence.

Both of Smith's primary arguments to the contrary ignore the standard of review. Smith's first argument relies on the testimony of Young, stating Young was the only witness who provided direct evidence of Watson's mental state at

the time the documents were executed. But testamentary capacity need not be proven by an eyewitness, and may be proven by inference from medical records. *See* ***Thompson***, 488 S.W.2d at 620. Furthermore, this argument ignores the framework for presenting evidentiary challenges to a trial court's judgment.

At trial, the Ivies were the parties challenging the trust, and they bore the burden of proof. *See* ***Watermann***, 369 S.W.3d at 75. Any analysis of the evidentiary support for the trial court's judgment is thus guided by the framework enunciated in ***Houston v. Crider***, 317 S.W.3d 178 (Mo. App. S.D. 2010). A not-supported-by-substantial-evidence argument is analytically distinct from an against-the-weight-of-the-evidence argument. *See* ***id.*** at 186-87. In addressing a claim that there was no substantial evidence to support the judgment, we look to see if the record contains evidence which has probative force on the issues and from which the judge could reasonably have decided the case. ***Id.*** at 186. In the analysis of such a claim, "any citation to or reliance upon evidence and inferences contrary to the judgment is irrelevant and immaterial[.]" ***Id.*** "On the other hand, '[w]eight of the evidence refers to weight in probative value, not quantity or the amount of evidence. The weight of evidence is not determined by mathematics, but on its effect in inducing belief.'" ***Id.*** (quoting ***Gifford v. Geosling***, 951 S.W.2d 641, 643 (Mo. App. W.D. 1997)). "Although consideration of probative value necessarily involves some consideration of evidence contrary to the judgment, we nevertheless 'defer to the trial court as the finder of fact in our determination as to whether . . . that judgment is against the weight of the evidence.'" ***Id.*** (quoting ***Wildflower Cmty. Ass'n, Inc. v. Rinderknecht***, 25 S.W.3d 530, 536 (Mo. App. W.D. 2000)). In either type of

argument, failing to identify the favorable evidence in the record supporting a factual proposition necessary to sustain the judgment robs the argument of its persuasive force. ***Id.*** at 187.

Here, Smith's arguments have no persuasive force because they completely ignore facts that were favorable to the trial court's finding that Watson lacked testamentary capacity. Smith's argument does not mention Watson's Alzheimer's diagnosis. Neither does it mention the evidence showing Smith handled Watson's finances from 2004 onward. The trial court was entitled to believe that evidence. Without consideration of that evidence, Smith's argument is analytically useless and has no persuasive force. *See* ***id.***

Smith next argues that "[t]his Court in ***Hahn v. Tanksley***, 317 S.W.3d 145, 155 (Mo. App. S.D. 2010), specifically discounted exactly the type of evidence [the Ivies] purported to rely on to establish a lack of testamentary capacity." The problem with this argument is that it ignores the standard of review by failing to recognize that the standard of review applied differently in ***Hahn***. In ***Hahn***, the trial court found the lay testimony more credible than the medical testimony. ***Id.*** at 147. Thus, under the proper standard of review, on appeal, this Court was required to defer to that credibility finding. *See, e.g.*, ***Watermann***, 369 S.W.3d at 75. Here, in contrast, the trial court found the medical testimony of Dr. Sky credible. Consequently, we must defer to that credibility finding. Stated another way, ***Hahn*** does not stand for the general proposition that medical opinion testimony is not substantial evidence to support a finding that a testator lacked testamentary capacity. Rather, it stands for the proposition that where the evidence is in conflict, the appellate court defers to the trial court's resolution of

that conflict. In ***Hahn***, the trial court resolved the conflict in favor of the lay testimony. Here, in contrast, the trial court resolved the conflict differently, so our standard of review dictates a different result.

In sum, there was substantial evidence from which the trial court could reasonably conclude Watson lacked testamentary capacity on July 27, 2007, and on July 2, 2008. Smith's second and fourth points are denied.

Points I and III: Undue Influence

Smith's first and third points challenge the trial court's findings regarding undue influence. As we have already found the trial court did not err in concluding the trust amendments were invalid based on Watson's lack of capacity, we need not address these points in order to affirm the judgment.

Point V: In Terrorem Clause

In his fifth point, Smith argues the trial court erred in failing to enforce the *in terrorem* clause contained in the first and second trust amendments. He tacitly admits his argument under this point depends upon a finding that the two amendments were valid. However, as discussed in more detail above, the first and second trust amendments were not valid because Watson lacked testamentary capacity to execute them. Thus, the *in terrorem* clause is ineffective. Smith's fifth point is denied.

Point VI and Point VII: Nonprobate Transfers

In his sixth point, Smith argues the trial court erred in finding the changes to the beneficiary designations on Watson's various bank accounts were the result of undue influence and lack of testamentary capacity. In his seventh point, Smith argues the trial court erred in finding the beneficiary designation for the

CALSTRS retirement benefit was the result of undue influence and lack of testamentary capacity. These arguments are without merit.

In support of both points, Smith first claims the finding was not supported by substantial evidence as there was no evidence of the circumstances surrounding the changes. This argument can be dealt with summarily. As discussed above, there was substantial evidence that Watson lacked testamentary capacity at all times after July 1, 2007. Smith's arguments to the contrary ignore the standard of review and are without merit.

Smith also claims the findings were contrary to the law because lack of testamentary capacity is not a basis for setting aside a nonprobate transfer under Section 461.054.[2] We disagree because, notwithstanding Section 461.054, the nonprobate transfers law of Missouri did not abrogate the fundamental foundational requirement of testamentary capacity to create a nonprobate transfer in the first instance.

Analysis of Smith's second argument regarding lack of testamentary capacity requires interpretation of the nonprobate transfers law of Missouri[3] because the beneficiary designations were made with respect to a pension plan and several deposit accounts. *See* § 461.001(4) (providing, among other things, that the nonprobate transfers law, "except to the extent specifically excluded thereunder," applies to provisions in deposit agreements and pension plans which order payment of money or other benefits to a designated person on the death of the account holder). "When construing a statute, our primary aim is to

[2] All subsequent statutory references are to RSMo (2000).
[3] Smith assumes that Missouri law applies, so we assume likewise for the purpose of considering Smith's arguments

ascertain the intent of the legislature from the language used and give effect to that intent[.]" ***Webster County Abstract Co., Inc. v. Atkison***, 328 S.W.3d 434, 440 (Mo. App. S.D. 2010). "In determining the legislature's intent, we are to read the statute as a whole and *in pari materia* with related sections." ***Heslop v. Sanderson***, 123 S.W.3d 214, 222 (Mo. App. W.D. 2003). Furthermore, we presume the legislature acts "with full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent." ***Lindahl v. State***, 359 S.W.3d 489, 493 (Mo. App. W.D. 2011). When the legislature adopts statutes changing some aspects of the law, but not others, prior interpretations of the unchanged aspects of the law will be applied. ***Id.***

With these principles in mind, we turn to the text of the nonprobate transfers law of Missouri. The nonprobate transfers law was enacted to allow parties to avoid some of the formalities associated with wills and probate. *See* §§ 461.001, 461.009. However, the nonprobate transfers law did not do away with the fundamental foundational requirement of testamentary capacity to take an action in the first instance. This can be seen by examining the plain language of Section 461.001. That section provides that certain provisions in listed accounts and instruments, including deposit accounts and pension plans, are "exempt from the requirements of [S]ection 473.087 and [S]ection 474.320[.]" § 461.001. But the requirement of testamentary capacity is not found in Section 473.087 or Section 474.320. Rather, the requirement of testamentary capacity is found in Section 474.310, a section of the law whose operation was not altered by the enactment of the nonprobate transfers law. The nonprobate transfers law did not modify the requirement that the owner/grantor must have the testamentary

capacity to make a gift effective on the death of the owner/grantor. *See also* Restatement (Third) of Property (Wills & Don. Trans.) § 7.2 (2003) ("Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions."); 5 John A. Borron, Jr., *Missouri Practice Probate Law and Practice* § 14 (3d ed. 1999) ("it follows that if the owner was, in fact, without mental capacity to make the beneficiary designation at the time it was made, the result would be that the designation would be void and the beneficiary would be disqualified from taking.").

Here, as discussed above, Watson lacked testamentary capacity at all times after July 1, 2007. Because she lacked testamentary capacity at any time after that date, the purported changes to the beneficiary designations on the various bank accounts and the CALSTRS retirement benefit made after July 1, 2007, were void.

Our conclusion is supported by an examination of general legal principles. In many areas of the law, persons lacking mental capacity do not have the right to take legally effective actions. For example, it is a fundamental tenant of contract law that a person without mental capacity is unable to make a valid, enforceable agreement. § 475.345; 17B C.J.S. *Contracts* § 988 (2013) ("A contract is rendered null and void as made by a mentally incompetent person where such finding is supported by the evidence."). The same is true of the creation of deeds and trusts. *See* ***Lee v. Hiler***, 141 S.W.3d 517, 523-25 (Mo. App. S.D. 2004) (holding the evidence was sufficient to support the trial court's decision to set aside a deed

based on a claim that the grantor lacked mental capacity); ***Estate of Helmich v. O'Toole***, 731 S.W.2d 474, 477-78 (Mo. App. E.D. 1987) (same); § 456.6-601 ("The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.").

In fact, under Section 461.012, nonprobate transfers are a matter of agreement between the owner and the transferring entity. § 461.012. That is, a beneficiary designation is a matter of contract. Thus, under the general principles discussed above, a person without mental capacity to contract cannot create a valid beneficiary designation. *See* § 461.005(8) (providing that an owner is "a person or persons having a right, exercisable alone or with others, . . . to designate the beneficiary of a nonprobate transfer").

It is true that in the case of attempted agreements by incompetents, some cases make a distinction between void and voidable agreements, stating that a contract entered into by a person who has not been adjudicated incompetent is merely voidable upon proof of mental incapacity. *See, e.g.*, ***Cohen v. Crumpacker***, 586 S.W.2d 370, 374-75 (Mo. App. W.D. 1979) (upholding the trial court's order of specific performance of a contract where the party seeking to avoid the contract failed to introduce evidence of the seller's mental condition). However, even in cases where there was no adjudication of incompetence, once the agreement was challenged and lack of mental capacity was proven, the agreement has been declared void. *E.g.*, ***Pazdernik v. Decker***, 652 S.W.2d 319, 320 (Mo. App. E.D. 1983) (holding that a power of attorney signed by a person who was mentally incompetent was void). Here, the Ivies challenged the

beneficiary designations and proved Watson lacked mental capacity when she signed the documents purporting to make the beneficiary designations. Consequently, those designations were void.

In concluding that lack of testamentary capacity renders a beneficiary designation void, we are aware of the Eastern District's opinion in ***In re Estate of Goldschmidt***, 215 S.W.3d 215 (Mo. App. E.D. 2006). We believe the ***Goldschmidt*** case as it relates to testamentary incapacity was wrongly decided.

In ***Goldschmidt***, the personal representative of an estate filed a petition to set aside a beneficiary designation, alleging, among other things, forgery, fraud, and undue influence. 215 S.W.3d at 220. The claims were denied in the trial court. ***Id.*** In one of his points on appeal, the representative argued the trial court erred in denying his motion to amend his petition. ***Id.*** at 223. The motion to amend the petition sought to add a number of claims to the petition, including "*mental incapacity*, invalid gift, conversion/trover, negligent misrepresentation, breach of fiduciary duty, two counts of negligence per se, unilateral mistake, breach of express promise, and breach of implied promise[.]" ***Id.*** (emphasis added). The appellate court treated all of those claims as one group and relied on Section 461.054 to deny the point on appeal. ***Id.*** at 224. The court reasoned that because the legislature expressly mentioned only fraud, duress, undue influence, and murder as a basis for setting aside a nonprobate transfer in Section 461.054, the additional claims could not be grounds for remedial action involving a payable on death account. ***Id.*** The appellate court then denied the point on appeal because the additional claims would have been without merit. ***Id.***

However, the analysis in ***Goldschmidt*** is flawed as to the mental incapacity claim because it fails to consider whether the beneficiary designations on the amended accounts were effectively created at the time Watson made the amendments. The nonprobate statute did not abrogate the traditional requirement for the necessity of testamentary capacity in order to make the designation. If Watson did not have the capacity to make the amended designation, then one never reaches the Section 461.054 determination of whether the designation was a result of fraud, duress or undue influence. To the extent ***Goldschmidt*** holds that an owner does not have to have mental capacity in order to make a valid nonprobate transfer, we believe it wrongly decided and do not follow it.

To do otherwise would create absurd results. If the reasoning in ***Goldschmidt*** is followed to its logical conclusion, courts would be powerless to provide a remedy where a beneficiary designation was, for example, forged. That cannot be what the legislature intended. *See* ***Reichert v. Board of Educ. of City of St. Louis***, 217 S.W.3d 301, 305 (Mo. banc 2007) ("Construction of statutes should avoid unreasonable or absurd results").

Furthermore, our conclusion is in line with interpretations of other laws affecting deposit accounts. *See* ***George Weis Co. v. Stratum Design-Build, Inc.***, 227 S.W.3d 486, 489 (Mo. banc 2007) ("[I]t is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed.") (quoting ***Cook Tractor Co., Inc. v. Director of Rev.***, 187 S.W.3d 870, 873 (Mo. banc (2006)). For example, although Section 362.470, governing joint deposits, states

that "[t]he making of a deposit in such form, . . . in the absence of fraud or undue influence, shall be conclusive evidence in any action or proceeding . . . of the intention of all the parties to the account to vest title to the account and the additions thereto and all interest thereon in the survivor[,]" that section has been interpreted to allow a remedy on a showing of mental incapacity or mistake. § 362.470; *see* ***Fix v. Fix***, 847 S.W.2d 762, 765 n.2 (Mo. banc 1993) (discussing how the legislature amended Section 362.470 to incorporate the holding in ***In re Estate of LaGarce***, 487 S.W.2d 493 (Mo. banc 1972), which held that "if the statute is complied with, in the absence of fraud, undue influence, mental incapacity, or mistake, the survivor will become the owner of the account.").

In the present case, Watson lacked testamentary capacity at all times after July 1, 2007. The trial court did not err in finding the nonprobate transfers were void on that basis. Smith's sixth and seventh points are denied.

Conclusion

The trial court's judgment is affirmed.

MARY W. SHEFFIELD, J. - OPINION AUTHOR

WILLIAM W. FRANCIS, JR., C.J. - CONCURS

NANCY STEFFEN RAHMEYER, J. - CONCURS

JEFFREY W. BATES, J. - CONCURS

GARY W. LYNCH, J. - CONCURS

DANIEL E. SCOTT, J. - CONCURS

DON E. BURRELL, J. - CONCURS