IN THE SUPREME COURT OF IOWA

No. 22-1905

APPLICATION FOR FURTHER REVIEW

CONSERVATORSHIP OF JANICE GEERDES by LAURA JENKINS, Conservator,
Plaintiff (Appellee),

vs.

ALBERT GOMEZ CRUZ,
Defendant (Appellant),

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals decision of December 6, 2023)

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QUESTIONS PRESENTED FOR REVIEW

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DID THE COURT OF APPEALS ERR IN ITS HOLDING THAT A HIGHER DEGREE OF MENTAL COMPETENCE IS REQUIRED FOR AN INTER VIVOS GIFT THAN TESTAMENTARY TRANSFERS?

II. QUESTION II.

DID THE COURT OF APPEALS ERR WHEN IT IMPLIED CREDIBILITY FINDINGS AND EXPANDED THE BASIS FOR CREDIBILITY FINDINGS WHERE THE DISTRICT COURT COMMITTED LEGAL ERROR IN FLIPPING THE BURDEN OF PROOF WHILE MAKING NO CREDIBILITY FINDINGS?

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STATEMENT SUPPORTING FURTHER REVIEW

COMES NOW Defendant-Appellant Albert Cruz and seeks further review of the Court of Appeals' decision attached as Attachment 1.

The decision of the Court of Appeals significantly limits the ability of Iowans to freely gift property during their lifetime by applying a higher degree of mental capacity and considering adequacy of consideration and improvidence. The clear effect of this is that every inter vivos gift is now in question because gifts, by their nature, lack consideration and providence.

This is an issue of broad public importance because all Iowans should be free to gift property during their lifetime and enjoy the satisfaction of making such gifts without fear that the lack of consideration involved is grounds to overturn these gifts.

To extend the higher degree of mental capacity from transactions in the ordinary course of business and contract to all inter vivos transfers is an important question of law that this court should settle.

The Court of Appeals further perpetuated the District Court's misapplication of law in flipping the burden of proof onto Mr. Cruz in conflict with decisions of this court.

Additionally, the Court of Appeals and District Court acted as expert witnesses in applying non-conclusive, wishy-washy language in medical records identified by Mr. Cruz without proper foundation as to whether the analysis provided applied to Ms. Geerdes nor its practical effect upon a woman who was living alone with minimal help. The ability of courts to act as medical experts is an important question of law with broad public importance that should be decided by this court.

BRIEF IN SUPPORT

QUESTION I. DID THE COURT OF APPEALS ERR IN ITS HOLDING THAT A HIGHER DEGREE OF MENTAL COMPETENCE IS REQUIRED FOR AN INTER VIVOS GIFT THAN TESTAMENTARY TRANSFERS?

ARGUMENT

In this case, a line has been drawn between testamentary transfers and all inter vivos transfers where a higher degree of mental competence is required for all inter vivos transfers including gifts. The Court of Appeals also implicitly held that adequacy of consideration should be considered in all inter vivos transfers, even gifts. This line calls into question every inver-vivos gift as gifts, by their nature, do not have adequate consideration.

This presents a very important legal principal where additional guidance is needed in order for Iowans to freely gift property while they are still living and to enjoy the satisfaction of making such gifts while they are living.

The issue seems to be that the Court of Appeals and District Court, to a lesser extent, have incorrectly held that a higher standard of mental competency is required for inter vivos

gifts. It has also conjoined and melded the holdings of *Costello* and *Brewster* improperly to require adequacy of consideration to be considered as opposed to it being a factor among a list of factors, that more simply may be considered if relevant under the facts. It makes little sense to consider consideration when the intent is a gift.

In *Brewster*, this Court held that district courts may consider "physical condition; *the adequacy of consideration*; whether or not the conveyance was improvident; [and] the relation of trust and confidence." *Brewster v. Brewster*, 188 NW 672, 674 (Iowa 1922) (emphasis added). Undoubtedly adequacy of consideration and improvidence is a factor that may be considered if the facts indicate consideration and providence were intended. It makes little sense to apply these factors to gifts where providence and consideration are not intended.

In *Costello*, this Court held that "[a] higher degree of mental competence is required for the transaction of ordinary business and the making of contracts than is necessary for testamentary disposition of property." *Costello v. Costello*, 186 N.W.2d 651, 654-655 (Iowa 1971). *Costello* does require a

higher standard for inter vivos transfers in the ordinary course of business or contracts. *Costello* addressed the issue of a purchase agreement for the sale of farmland. *Id.* at 652. The case dealt with a contract and not a gift.

The court of appeals decision incorrectly applies the higher standard for ordinary business and contracts to all inter vivos transfers and improperly conjoins these holdings to require adequacy of consideration to be considered in all inter vivos transfers as opposed to transactions in the ordinary course of business and contracts. This calls into question every inter vivos gift.

My best recollection of arguments at the court of appeals is that I was questioned on whether the Court of Appeals was bound to consider the adequacy of consideration under *Costello* and *Brewster* in this case since this was not a testamentary transfer. I replied that *Costello* did not apply since this case involved a gift and not a transfer in ordinary business or a contract and that no case law required adequacy of consideration to considered.

In footnote 1 on page 7, the court of appeals stated, "Cruz summarily argues that we should instead apply the lower testamentary standard because the quitclaim deed [']was a gift.['] But Cruz cites no authority for extending this standard beyond dispositions under a will. We thus follow well-settled law requiring higher mental competence for all other transactions. *See Costello*, 186 N.W.2d at 654-55." Attachment 1, p. 7.

The authority I cited was *Costello* itself because by its own terms it does not require higher mental competence for "all other transactions." *Id.* It requires higher mental competence only for "transaction of ordinary business and the making of contracts[.]" *Id.* Nothing in the language cited or the holding of *Costello* indicates that higher mental competence is required for inter vivos gifts, only inter vivos business transactions. *Id.* While mental competence for transfers lacking consideration most often occur in testamentary case, nothing in existing case law states that the standard for capacity varies between testamentary transfers and inter vivos gifts. The only reference to a higher standard only applies to transfers in the ordinary

course of business and contracts. *Costello*, 186 N.W.2d at 654-55.

It is clear that the Court of Appeals believed it was bound by decisions of this Court to apply a higher degree of mental capacity for inter vivos gifts than in testamentary dispositions. As stated earlier, nothing in *Costello* modifies mental capacity examination outside ordinary course of business and contracts. *Id.* Additional guidance on this issue is needed as this holding calls into question every inter vivos gift.

The Court of Appeals cited no authority that inter vivos gifts require a higher degree of mental competence than testamentary dispositions other than *Costello*. While *Costello* has been cited in passing in other inter vivos gift cases in the Court of Appeals, it has not been central to any holding I have seen. *Cf. Daughton v. Parson,* 423 N.W.2d 894, 896 (Iowa Ct. App. 1988); *ALGOE v. Johnson*, No. 0-360/09-1678, filed June 30, 2010 (Iowa Ct. App. 2010) (unreported) (holding that a person lacked mental capacity to both create a will and inter vivos quitclaim deed); *Mendenhall v. Judy*, 671 N.W.2d 452, 461 (Iowa 2003)(setting aside an inter vivos transfer on the basis of

undue influence while referencing *Costello* even where the transfer does not appear to be ordinary business). This further demonstrates a need for clarification. What do you mean by "ordinary business" and "contract"? A gift transfer of a person's entire interest in a property does not appear to be ordinary business or a contract.

The Court of Appeals holding on this issue was critical to its decision. The last paragraph summarizing the decision begins "[c]onsidering the heightened mental capacity required for an inter vivos transfer…" Attachment 1, p. 11. It is reversable error for the Court of Appeals to hold that heightened mental capacity is required for all inter vivos transfers as opposed to ordinary business and contracts. *Costello*, 186 N.W.2d at 654-55.

Furthermore, guidance is needed to the lower courts to clarify that adequacy of consideration is a factor that gives little guidance when the transfer is for "personal, rather than financial reasons." Attachment 1, p. 16.

We request that this Court reverse on this issue and clarify to the lower Courts that there is no standard of heightened

mental capacity in inter vivos gifts. Additionally, improvidence and lack of consideration are factors that should be considered in transactions where consideration is intended, but improvidence and lack of consideration need not be considered in cases where a gift is intended.

This holding would correspond with Judge Buller's well-reasoned dissent where he stated "[I]t's clear from this record that Geerdes wanted to transfer the property to Cruz for personal, rather than financial, reasons… I do not believe our law allows us to strip a person's autonomy when their motivation to transfer property is more personal than profit driven." Attachment 1, p. 16. What are we Iowa attorneys to advise our clients who want to experience the joy of gifting property to people they care about while still living? Are we to advise them that it is better to wait until after death because gifts while living are subject to a higher standard and lack of consideration automatically counts against validity? What if that gift would have more meaning in that moment? Why is sufficiency of consideration ever a factor in a gift?

QUESTION II. DID THE COURT OF APPEALS ERR WHEN IT INFERRED CREDIBILITY FINDINGS WHERE THE DISTRICT COURT COMMITTED LEGAL ERROR IN FLIPPING THE BURDEN OF PROOF WHILE MAKING NO CREDIBILITY FINDINGS?

Judge Buller summarized problems regarding the Court of Appeals acting as expert witnesses in this case better than I am able on pages 16-17 in his dissent. Attachment 1, p. 16-17.

Nowhere in the District Court's ruling did it make any credibility findings. The District Court's ruling was not based on the credibility of the witnesses, it was based on an improper flipping of the burden of proof onto Mr. Cruz based upon an incorrect application of confidential relationship. Attachment 2. The Court of Appeals did not even discuss the primary holding of the District Court's ruling, that the deed should be set aside due to a confidential relationship. Id. Even the majority appears to implicitly reject the confidential relationship argument. Id.

The majority of the Court of Appeals inference of credibility findings that did not exist in the District Court's ruling, were merely giving deference to the District Court's misapplication of

law flipping the burden of proof onto Mr. Cruz. *E.g. In re Est. of Johnson*, 739 N.W.2d 493, 496 (Iowa 2007).

The practical reality is that the District Court committed legal error by flipping the burden of proof on Mr. Cruz, and the majority of the Court of Appeals continued the error by inferring credibility findings that were non-existent to support the misapplication. This had the effect of incorrectly continuing to place the burden of proof onto Mr. Cruz.

QUESTION III. DID THE COURT OF APPEALS ERR WHEN IT ACTED AS EXPERT WITNESS IN ANALYZING MENTAL CAPACITY?

Judge Buller summarized problems regarding the Court of Appeals acting as expert witnesses in this case better than I am able on pages 18-21 in his dissent. Attachment 1, p. 18-21.

Plaintiff Jenkins argued that the medical records, admitted at trial as our Exhibit E, demonstrated Ms. Geerdes lacked capacity. Their argument regarding the medical records were based on Ms. Geerdes' SLUMS score. No expert was introduced by Plaintiff Jenkins despite her carrying the burden to prove lack of capacity by a clear, satisfactory, and convincing standard. *Groves v. Groves*, 692, 82 N.W.2d 124, 131 (Iowa 1957).

Analysis of a SLUMS score is far outside the scope of a lay person, including judges. This is particularly true where the record itself provides insufficient evidence to interpret the SLUMS score.

One issue Judge Buller did not discuss in his dissent that I believe is significant is that the SLUMS score itself is based

upon "a person with a high school education." App. pp. 104-105. The record in this case does not indicate Ms. Geerdes' education level including whether she completed high school. The record lacks sufficient evidence for any Court to rule on the application of the SLUMS score.

It was improper for the Court of Appeals to imply a high school education in its analysis of the SLUMS score of Ms. Geerdes where the record does not contain her education level. Attachment 1, p. 9. The record lacks critical information to begin the analysis of the SLUMS score.

Even implying that Ms. Geerdes had a high school education, the SLUMS score itself contains only "generic and wishy-washy language like ['][p]roblems *may be* observed,['] ['][m]inor problems *may be* manifest['] in describing the [']mild['] cognition issues suggested by limited testing." Attachment 1, p. 18 (emphasis in original).

It is also important that these records were not identified in this action as expert testimony in any fashion. No disclosure was ever made that these records would constitute expert testimony under Iowa R. Civ. P. 1.500(2) (under (c) even a

treating physician who need not file a report must be designated). No notice was ever given that these records would be treated as expert testimony nor did Mr. Cruz ever consent to them being treated as expert testimony. We would not have consented to an occupational therapist being treated as an expert in this area.

Mr. Cruz identified the medical records, Exhibit E, precisely because they did not contain any expert opinion and did indicate that Ms. Geerdes' children where not sufficiently concerned with her condition, living alone, during the time period in question.

Application of these non-conclusive findings under a clear, satisfactory, and convincing standard requires expert testimony. The Court of Appeals acted as experts in applying this "wishy-washy" language to conclude Ms. Geerdes lacked capacity under the clear and convincing standard. *Groves*, 692, 82 N.W.2d 131.

Some courts have held that SLUMS scores well-below Ms. Geerdes' did not indicate incapacity. *See United States v. Kight*, No. 1:16-CR-99-WSD, 2018 WL 672119, at *3 (N.D. Ga. Feb. 2,

2018); *In re Est. of Kusmanoff*, 83 N.E.3d 1144, 1172 (Ill. App. Ct. 2017).

The majority opinion incorrectly held that Mr. Cruz "left the conservator's medical evidence of Ms. Geerdes's mental weakness unchallenged – presenting no conflicting medical evaluation nor any expert testimony to undermine the otherwise clear conclusions in the medical records." Attachment 1, p. 11.

Again, the medical records were our (Mr. Cruz's) exhibit! App. 71, (Defendant's Exhibit E). They were our records. In all fairness, both parties identified similar records, Plaintiff as Exhibit 3, but we agreed to admit our Exhibit E because it contained all of the records. Trial Tr. p. 3 Ll. 2-7. I did not leave these records unchallenged, they were our records. They were identified by us because they contained no report identified as an expert report under Iowa R. Civ. P. 1.500(2)(c) and demonstrated, in my opinion, that Plaintiff Jenkins never sought any expert opinion or specific examiation to carry her heavy burden of clear and convincing evidence. Ms. Geerdes had been living alone for many years when the transfer occurred. My intent was to use the medical records to show

that her children were not sufficiently concerned with her living alone with minimal outside help since they did not ensure she saw a doctor during this time and that there was no reference to her conclusively lacking the ability to live on her own.

Plaintiff Jenkins bore the burden to prove lack of capacity by a clear, satisfactory, and convincing standard. *Groves*, 692, 82 N.W.2d 131. Defendant's Exhibit E, which contained no report designated as an expert report in any fashion under Iowa R. Civ. P. 1.500(2) nor anything close to conclusive statements regarding capacity fell woefully short of this standard. The records only show that Ms. Geerdes' family was not sufficiently concerned with her condition to have her examined and that no record conclusively established she lacked the ability to function independently.

QUESTION IV. DID THE COURT OF APPEALS CORRECTLY APPLY THE CLEAR AND CONVINCING BURDEN?

Judge Buller summarized problems regarding the Court of Appeals acting as expert witnesses in this case better than I am able on pages 13-16 in his dissent. Attachment 1, p. 13-16.

The majority of the Court of Appeals begin its analysis by stating "While this is a close case[.]" Attachment 1, p. 2. It is difficult to imagine how a close case could exist under the correct clear, satisfactory, and convincing standard. *Groves*, 692, 82 N.W.2d 131.

"Clear and convincing evidence is the highest evidentiary burden in civil cases. It means there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence." *In re N.C.*, 952 N.W.2d 151, 153 (Iowa 2020)(internal quotation marks and citation omitted).

As stated earlier in this brief under question two, the majority of the Court of Appeals did not faithfully examine the case under the applicable standard. Instead, it perpetuated

the District Court's improper flipping the burden of proof upon Mr. Cruz giving deference to its legal conclusion even though it was based upon a misapplication of law. *Johnson*, 739 N.W.2d 496.

"To invalidate a person's autonomy over their property requires more than a close evidentiary record[.]" Attachment 1, p. 14. The Court of Appeals decision significantly heightens the competency and proof of competency associated with inter vivos transfers. This is an issue of broad public importance because Iowans should be free to gift their property to whoever she or he sees fit, regardless of whether the person is a blood relative.

ADDITIONAL NOTE

We have not presented a question related to the primary holding of the District Court regarding confidential relationship because the Court of Appeals completely side-stepped the issue. As the primary holding of the District Court, this issue was briefed extensively by both parties. We

further request that this Court provide additional guidance on the question of confidential relationship if it sees fit.

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CERTIFICATE OF SERVICE

I, Shaun A. Thompson, hereby certify and remember that on the date stated in the file stamp on the cover of the Application for Further Review, I filed the Application of Further Review contained herein with the Clerk of the Supreme Court, 1111 E. Court, Des Moines, Iowa 50319 and all registered parties through EDMS in full compliance with the provisions of the Rules of Appellate Procedure.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains approximately 3,670 words, including the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Bookman Old Style 14.

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