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DISTRICT IV

March 16, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2728 In re the estate of Delvin W. Molkentin: Renee Barlog v. Del L. Molkentin, Personal Representative (L.C. # 2011PR50)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Renee Barlog appeals an order of the circuit court, which found that she unlawfully converted property from her father's estate and entered a money judgment against her. Renee's brother, Del L. Molkentin, filed a cross-appeal as personal representative of their father's estate. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

This appeal arises from a probate case pertaining to the estate of Delvin W. Molkentin, who died on September 23, 2011. Delvin's daughter, Renee Barlog, was named in the will as personal representative of the estate. In December 2011, Delvin's son, Del L. Molkentin, took over as personal representative. Del L. believed that a substantial amount of his father's personal property was missing from the estate. Del L. initiated discovery proceedings pursuant to WIS. STAT. § 879.61 to determine what had happened to the property.

After a series of hearings, the circuit court found that nearly all the personal property Del L. believed was missing from the estate had, in fact, been given away by Delvin prior to his death. However, the circuit court also found that Renee had converted to her own possession two piggy banks containing silver dimes that had belonged to Delvin. Renee now appeals, arguing that the evidence is insufficient to sustain the circuit court's finding that she unlawfully converted the silver dimes. On cross-appeal, Del L. argues that the circuit court erred when it found that Delvin had given twenty percent of the silver dimes in his safe to Michael Molkentin, and when it made its damages calculations.

We begin by noting that we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***Midwestern Helicopter, LLC v. Coolbaugh***, 2013 WI App 126, ¶7, 351 Wis. 2d 211, 839 N.W.2d 167, *review denied*, 2014 WI 22, 353 Wis. 2d 450, 846 N.W.2d 15. *See also* WIS. STAT. § 805.17(2). In this case, the circuit court's finding that Barlog converted the coins is supported by record facts. Gloria Rasmussen, who had been Delvin's girlfriend for eighteen years, testified that Delvin kept a safe in his bedroom. She testified that he had a lot of silver dimes that he kept in storage bags. One day Gloria brought a piggy bank over to Delvin's house upon his request. Delvin opened the safe and Gloria saw that there were two piggy banks

already inside. She helped him fill the third piggy bank with dimes. Gloria testified that two of the piggy banks were about the same size, but one was smaller, about half the size of the others.

Gloria further testified that the last time she saw the contents of the safe was on February 25, 2011, Delvin's birthday. She asked him for some change and when he opened the safe he said, "Oh. My banks" and seemed very surprised. Gloria testified that the three piggy banks that previously had been inside the safe were gone.

The court found that Renee was the only person who could have had access to the safe where the piggy banks were stored. This finding is supported by Renee's own testimony that, to her knowledge, only she and her father knew the combination to the safe. The court also factored in Gloria's testimony about Delvin's surprised reaction when he opened his safe and saw that the piggy banks were missing. Renee denied that she took any of her father's silver. The court weighed Renee's testimony and, while it believed her when she said that she and her father were the only ones with the safe combination, the court found other aspects of her testimony not to be "all together credible, primarily because she took advantage of some assets that she clearly was not entitled to."

We defer to the circuit court in its determinations of what weight to give to particular testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) ("due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses"). The circuit court's finding that Renee converted the silver dimes is supported by the record and based largely on credibility determinations that we will not disturb on appeal. *See* ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983)

(generally, a circuit court's credibility determination will not be disturbed on appeal). Therefore, we affirm the circuit court's finding.

We turn next to the cross-appeal, in which Del L. argues that the circuit court erred in finding that twenty percent of the silver dimes that had been located in Delvin's safe had been given by Delvin to his son, Michael Molkentin. As a result of this finding, the court reduced by twenty percent the judgment entered against Renee. Del L. also argues that the court made errors in its damages calculations with respect to the value of the silver dimes converted by Renee. For the reasons discussed below, we reject both of these arguments.

The circuit court's finding that twenty percent of the silver dimes from Delvin's safe had been given to Michael is supported by facts in the record. Michael testified that his father gave him a bag of silver coins prior to his death. Michael further testified that the bag weighed somewhere between 35 pounds and 50 pounds. He estimated that 40 percent of the bag's weight was from silver dimes. The rest of the coins were quarters, half dollars, and silver dollars. Michael testified that he sold some of the dimes to a jeweler but that he still had twenty-three pounds worth of silver coins leftover. The court found that Michael's testimony was credible.

The court inferred that, of the silver coins Michael was given, the dimes came from the collection Delvin kept at home and the other denominations of coins came from Delvin's safe-deposit box at the bank. This inference is supported by record facts. Gloria saw the safe-deposit box in 2001, ten years before Delvin died, and she described the contents as "various types of coins: [s]ilver dollars." Brad Molkentin, Delvin's son, saw the safe-deposit box in 2008 and described the silver coins there as "mostly silver dollars, Morgans, Liberties" and "Peace silver

dollars." There is no evidence in the record to suggest that any silver dimes were kept in the safe-deposit box at the bank.

Renee testified that, when she opened the safe-deposit box after her father's death, there was a bag of quarters inside, but no silver coins. Although the safe-deposit box was in both her and her father's names, the bank's entry records reflect that the first time Renee went into the safe-deposit box was three days after her father's death. The court, weighing Renee's credibility, stated that when Renee said she did not have any silver coins from the deposit box, "it appears that that was true." From these facts, the court inferred that the silver coins that had been in the safe-deposit box, previously seen by Gloria and Brad, were given to Michael as part of the 35 to 50 pounds of silver coins that he received. The court concluded that the rest of Michael's coins came, in silver dime form, from one of the piggy banks from Delvin's safe.

Gary Lee Rosencrans, a professional coin dealer, gave expert testimony regarding how much one of Delvin's piggy bank full of silver dimes would weigh. Rosencrans testified that one full piggy bank would weigh approximately 45 pounds. The weight of one full piggy bank, therefore, exceeds the total weight of the coins Michael received. From this information, the court inferred that the silver dimes Michael received were from the half-sized piggy bank in Delvin's safe—the smaller one that Gloria had mentioned in her testimony. The court reasoned that this would have left two full-sized piggy banks full of dimes, or 80% of the total amount of dimes, for Renee to have converted.

As stated above, we afford a high level of deference to a circuit court's findings of fact, and will overturn them only if "clearly erroneous." *See* ***Midwestern Helicopter, LLC***, 351 Wis. 2d 211, ¶7. Here, the circuit court's finding that Michael had been given twenty percent of

the silver dimes from Delvin's safe is supported by the facts in the record described above and, therefore, is not clearly erroneous. In addition, the circuit court relied in large part on its credibility assessments of the witnesses' testimony. Del L. urges us to overturn the circuit court's credibility findings. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Del L. has not persuaded us that that is the case here.

Del L. also argues on cross-appeal that the circuit court erred in its damages calculations when it used the dealer "buy" price of the silver dimes rather than its "sell" price as the basis for valuation, and when it used a valuation dated 17 months after the conversion of the coins occurred. Renee asserts that Del L. has forfeited these issues by failing to raise them in a post-judgment motion. *See* ***J.K. v. Peters***, 2011 WI App 149, ¶¶25-27, 337 Wis. 2d 504, 808 N.W.2d 141 (failure to raise alleged errors in a postjudgment motion constitutes forfeiture of the error even where proper objection was made). Del L. failed to file a reply brief responding to this assertion. A proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Thus, we take Renee's forfeiture argument to be conceded by Del L. and we reject his arguments regarding the circuit court's errors in damages calculations on that basis.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals