

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 42057

JANICE FREER, ) 2015 Unpublished Opinion No. 402  
 )  
 Plaintiff-Appellant, ) Filed: March 10, 2015  
 )  
 v. ) Stephen W. Kenyon, Clerk  
 )  
 CODY FREER, ) THIS IS AN UNPUBLISHED  
 ) OPINION AND SHALL NOT  
 Defendant-Respondent. ) BE CITED AS AUTHORITY  
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Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Barbara A. Buchanan, District Judge.

Judgment in favor of defendant in complaint for breach of contract, vacated and remanded.

Arthur M. Bistline of Bistline Law, PLLC, Coeur d'Alene, for appellant.

Cody Freer, Coeur d'Alene, pro se respondent.

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MELANSON, Chief Judge

Janice Freer appeals from the district court's judgment in favor of her nephew, Cody Freer, in a complaint for breach of contract. Specifically, Janice alleges that the district court erred in holding that money she provided to Cody was a gift, not a loan, and that the district court erred in finding the one-year provision of the statute of frauds barred enforcement of the agreement. For the reasons set forth below, we vacate and remand.

**I.**

**FACTS AND PROCEDURE**

The following facts were adduced from documents and testimony admitted during trial. Cody was incarcerated from May 2010 to February 2011. During this time, Janice began visiting him once a month. At these visits, Janice and Cody discussed the possibility of Janice providing

Cody with money upon his release from prison for the primary purpose of purchasing a vehicle so that he could obtain and maintain employment.

Janice testified that she understood the arrangement as requiring Cody, upon securing employment, to repay the loan in a timely manner through monthly payments, even if small, and to maintain insurance on the vehicle; if he failed to do either, the vehicle would be transferred to Janice. Cody testified at trial that his understanding of the agreement was that Janice would gift him the money to buy a vehicle without any expectation of repayment.

Beginning shortly after Cody's release from incarceration, Janice provided Cody with funds on eight occasions between April 2011 and March 2012, totaling \$17,628.36. The largest amount--\$14,000--was wired to Cody on April 6, 2011. Cody subsequently purchased a vehicle with the \$14,000 and began working sporadically. Cody requested and Janice provided various other amounts of money ranging from \$150 to \$1,500 over the ensuing months for expenses including insurance and general assistance with preexisting debts. However, Cody made no payments to Janice and failed to obtain or maintain insurance on the vehicle. As a result, Janice demanded that Cody provide proof of insurance and, eventually, sign the title to the vehicle he had purchased with the funds over to her, both of which he refused to do.

Janice filed a complaint for breach of contract and Cody filed an answer. Both Cody and Janice testified at the bench trial, but only Janice provided documentary evidence in support of her claim that the funds were a loan and not a gift. The district court determined that Cody had met his burden of proving that Janice had intended to make a gift of the funds to Cody and that, even if there was an oral agreement for Cody to repay the funds, the oral agreement was unenforceable under the one-year provision of the statute of frauds. Janice filed a motion to amend the judgment, arguing that the district court had misapplied the law pertaining to determining the existence of a gift and erred in ruling that the statute of frauds applied. The district court denied the motion. Janice appeals.

## **II.**

### **STANDARD OF REVIEW**

Where a trial court sits as a finder of fact without a jury the court is required to enter findings of fact and conclusions of law. I.R.C.P. 52(a); *Estate of Hull v. Williams*, 126 Idaho 437, 440, 885 P.2d 1153, 1156 (Ct. App. 1994). Our review of the trial court's decision is

limited to ascertaining whether substantial, competent evidence supports the findings of fact, and whether the trial court correctly applied the law to the facts as found. *Borah v. McCandless*, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009); *Cummings v. Cummings*, 115 Idaho 186, 188, 765 P.2d 697, 699 (Ct. App. 1988). Thus, we defer to findings of fact that are not clearly erroneous, but we freely review the trial court's conclusions of law reached by applying the facts found to the applicable law. *Staggie v. Idaho Falls Consol. Hosps.*, 110 Idaho 349, 351, 715 P.2d 1019, 1021 (Ct. App. 1986). Where there is conflicting evidence, it is the trial court's task to evaluate the credibility of witnesses and to weigh the evidence presented. *Desfosses v. Desfosses*, 120 Idaho 354, 357, 815 P.2d 1094, 1097 (Ct. App. 1991). We will not set aside the trial court's factual findings as clearly erroneous if they are supported by substantial and competent, even if conflicting, evidence. *Kennedy v. Schneider*, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011). Evidence is substantial and competent if a reasonable trier of fact would accept that evidence and rely on it to determine whether a disputed point of fact was proven. *Hull v. Giesler*, 156 Idaho 765, 772, 331 P.3d 507, 514 (2014); *Hutchison v. Anderson*, 130 Idaho 936, 940, 950 P.2d 1275, 1279 (Ct. App. 1997).

### III. ANALYSIS

On appeal, Janice argues that the district court erred in denying her claim against Cody for breach of their oral contract. Specifically, she contends that the district court erred in holding that the funds constituted a gift and erred in finding that the one-year provision of the statute of frauds applied to bar enforcement of the oral agreement. Janice further contends that, even assuming the district court was correct in determining that the statute of frauds applied, the oral agreement was still enforceable under the doctrine of part performance. She also requests attorney fees pursuant to I.C. § 12-120(1).

#### A. Gift or Loan

Janice first contends that the district court erred in determining that Cody had met his burden of proving that the funds were a gift and not a loan. She argues that the district court's finding that Janice intended to make a gift to Cody was not supported by substantial and competent evidence and that the district court misapplied the law regarding *inter vivos* gifts.

Under Idaho law, a “gift” is a voluntary transfer of property by one to another without consideration or compensation therefor. *Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust*, 147 Idaho 117, 126, 206 P.3d 481, 490 (2009); *Stanger v. Stanger*, 98 Idaho 725, 728, 571 P.2d 1126, 1129 (1977). To effectuate a gift, a donor must deliver property to a donee, or to someone on his or her behalf, with a manifested intent to make a gift of the property. *In re Estate of Lewis*, 97 Idaho 299, 302, 543 P.2d 852, 855 (1975); *Boston Ins. Co. v. Beckett*, 91 Idaho 220, 222, 419 P.2d 475, 477 (1966). Delivery is accomplished when the grantor relinquishes all present and future dominion over the property. *Banner Life Ins. Co.*, 147 Idaho at 126, 206 P.3d at 490; *see also Boston Ins. Co.*, 91 Idaho at 222, 419 P.2d at 477. Donative intent may be proven by direct evidence, including statements of donative intent, or inferences drawn from the surrounding circumstances, such as the relationship between the donor and donee. *Banner Life Ins. Co.*, 147 Idaho at 126, 206 P.3d at 490; *Estate of Hull*, 126 Idaho at 443-44, 885 P.2d at 1159-60. The existence of donative intent is a factual finding to be made by the trial court. *See Nielson v. Davis*, 96 Idaho 314, 315, 528 P.2d 196, 197 (1974). *Inter vivos* gifts are not presumed, even in familial relationships, and the burden is on the beneficiary to establish every element of the gift, including donative intent. *See Claunch v. Whyte*, 73 Idaho 243, 248, 249 P.2d 915, 917 (1952).<sup>1</sup>

In this case, the district court determined that there was “compelling evidence that the monies transferred from Janice to Cody were a gift.” The district court narrowed the decisional issue to “whether Janice manifested an intent to make a gift of property.” The district court then

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<sup>1</sup> The specific burden of proof applicable to this situation has not been directly addressed by Idaho courts. The Idaho Supreme Court has previously stated that “where the donee stands in a fiduciary or confidential relationship to the donor *the burden is increased* to the extent of requiring the beneficiary to establish the gift by clear and convincing evidence.” *Claunch*, 73 Idaho at 248, 249 P.2d at 917 (emphasis added); *accord Halliday v. Halliday*, 83 Idaho 524, 531, 366 P.2d 130, 133 (1961) (applying clear and convincing burden of proof to issue pertaining to an alleged oral gift of land); *Idaho First Nat’l Bank v. First Nat’l Bank of Caldwell*, 81 Idaho 285, 295, 340 P.2d 1094, 1100 (1959) (applying clear and convincing burden of proof to issue of whether money deposited into a joint account was intended as a gift). Thus, it appears that, absent the presence of a fiduciary or confidential relationship, a lower burden of proof is applied—presumably, a preponderance of the evidence. The district court did not identify which burden of proof it applied here, instead stating only that “compelling evidence” indicated that the money was intended as a gift. This was not the basis of argument for either party, and it does not affect our holding in this case.

noted that Janice had voluntarily sent Cody the money for approximately a year “without any consideration or compensation from Cody” and that Janice acknowledged this fact. The district court further noted that Janice continued to provide Cody with funds “without receiving any payments or express written acknowledgement of the debt from Cody.” This, combined with Janice and Cody’s familial relationship, led the district court to determine that Cody had met his burden of establishing Janice’s donative intent.

This finding was clearly erroneous. A lack of repayment or written acknowledgment of an oral debt does not establish that a transfer of funds is a gift. Moreover, the district court’s finding that Janice acknowledged that she had provided Cody the money “without consideration” is unsupported by substantial and competent evidence, as neither Janice’s trial testimony nor the documentary evidence supports the district court’s finding. On the contrary, Janice’s trial testimony and the documentary evidence support that she offered to provide the money to Cody in exchange for a promise of timely repayment, which constitutes valuable consideration. *See, e.g., Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 891, 332 P.3d 785, 803 (2014) (noting that, where there is an exchange of mutual promises, there is no lack of consideration); *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526 (1967) (stating that consideration for a promise may take the form of an act by the promisee that is bargained for and given in exchange for the promise); RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (“A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”).

Further, although donative intent may be proven by inferences drawn from the surrounding circumstances, the district court did not consider all of the applicable circumstances in this case. At trial, Janice introduced several documents in support of her claim that the funds were a loan, including correspondence between her and Cody regarding the funds, several of her journal entries, and financial documents showing that the funds were transferred. Specifically, plaintiff’s exhibit 2 included an email from Cody a few weeks prior to the purchase of the vehicle in which he states the following:

[S]o in regards to your letter, I totally understand your concern and your questions. I would be just as skeptical so to speak if I were in your shoes. I do want to emphasize that I hope you know your generosity and kindness is [sic] most definatly [sic] appreciated!! *I never did get the impression from you that*

*this was something that was not to be paid back.* I've assumed that it would be the whole time, so no worries there, we are on the same page. As far as price goes I definitely [sic] understand that too. I was only looking at rigs in the ten thousand range but started drifting a bit after seeing some really nice ones that caught my eye.

(Capitalization altered and emphasis added.) The district court dismissed this email as insufficient evidence of a loan because Cody did not expressly acknowledge the existence of the debt. This was error. Although the district court correctly noted that this did not constitute acknowledgement of a then-existing debt (as no debt was yet in existence), that is not the standard. The correct standard is whether Janice manifested donative intent, which the emphasized statement above undermines; indeed, it indicates Cody's acknowledgment before the funds for the purchase of the vehicle were transferred that they were meant to be repaid.<sup>2</sup>

The district court also dismissed, as insufficient evidence of a loan, Janice's journal entries in which she wrote that Cody "will pay back out of 1st paycheck" (exhibit 3), "will pay back when he gets a job" (exhibit 5), "says he will pay back everything" (exhibit 10), and "no worries [he] will pay back" (exhibit 14). The district court discounted this evidence because Janice continued to transfer money to Cody despite his admitted failure to make any payments. This was error. Although not indicative of Cody's view of the agreement, Janice's journal entries provided substantial evidence regarding the key issue of her intent, which the journal entries suggested was to make a loan, not a gift.<sup>3</sup> Further, evidence regarding the circumstances, which included Janice's uncontested testimony that she was providing this money out of her retirement account and hoping to retire soon, buoyed the veracity of the journal entries and undermined any finding that Janice manifested the donative intent necessary to show that the funds were a gift and not a loan.

Moreover, the district court did not consider other admitted documentary evidence, which supported Janice's contention that the funds were a loan and undermined Cody's assertion that

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<sup>2</sup> Cody provided no evidence indicating that either his or Janice's understanding of the agreement had changed in the approximately three weeks between when this email was sent and when she made the first transfer of money.

<sup>3</sup> We note that Cody did not challenge the foundation of these exhibits, which were all admitted at trial. As such, we assume that the statements in them were made by Janice on or near the dated page on which the statements appear.

they were a gift. Specifically, Janice introduced an email she received from Cody in May 2012 as plaintiff's exhibit 19. In that email, Cody asked for another \$2,000. In Janice's response, admitted as plaintiff's exhibit 20, she refused to send Cody any more money, noting that she had already sent him a large amount of money and he lacked a job to allow him to "try and begin repayment." She concluded by confronting him about his failure to maintain insurance on the vehicle and telling him that the vehicle must have insurance because "*you cannot afford and I cannot afford for the truck to be uninsured.*" Had Janice intended to make a gift of the money, she would have had no interest in the vehicle, which would make the quoted portions of her letter meaningless.

Janice sent Cody another letter in October 2012 requesting that he transfer the vehicle's title to her so that she could sell the vehicle. In Cody's response, admitted as plaintiff's exhibit 22, he refused to do so. He then asserted that, contrary to his statements in plaintiff's exhibit 2, he did not consider the funds for the vehicle to be a loan. However, he shortly thereafter made the following statement:

The sooner I am out and working the sooner I can and *will* be sending you monthly payments. Perhaps we should both put some ideas to paper in regards to a contract. That way we have a more "in stone" understanding as to what is expected, opposed [sic] to our own understandings of the oral contract.

Thus, in plaintiff's exhibit 22, Cody acknowledged the existence of the "oral contract" and his intent to make "monthly payments" despite claiming just prior that he did not consider the funds to be a loan.

Finally, because Cody provided no other evidence at trial to support his claim that the funds were a gift, the district court necessarily had to rely on Cody's unsupported testimony in order to find that Janice manifested donative intent when she gave the money to Cody. However, the district court provided no basis or explanation for accepting Cody's unsupported testimony at trial, which was contradicted by his own prior written acknowledgment of the loan, while rejecting Janice's supported testimony. Indeed, Cody contradicted his written acknowledgments of the oral contract and his expressed intent to make monthly payments to Janice, testifying that he had never made such representations. Conversely, Janice's testimony was entirely consistent with the admitted exhibits and remained unimpeached.

Thus, the district court failed to consider all of the admitted evidence and make necessary credibility evaluations on the record in deciding that Cody had met his burden of showing that the funds constituted a gift and not a loan. Moreover, the district court did not base its finding that Janice manifested donative intent on substantial and competent evidence, as the clear weight of the evidence, even taken in the light most favorable to the verdict, supported that Janice did not intend to make a gift of the money. Accordingly, the district court's factual finding of Janice's donative intent was clearly erroneous and its holding that the funds constituted a gift was incorrect as a matter of law.

**B. Statute of Frauds**

Janice further contends that the district court erred in determining that the one-year provision of the statute of frauds barred enforcement of the oral agreement. Idaho's statute of frauds is found in I.C. § 9-505. Section 9-505 provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or by his or her agent. Courts construe this statute narrowly. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 411, 179 P.3d 1064, 1067 (2008); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 130, cmt. a (1981). In Idaho, the enforceability of a contract under the one-year provision does not turn on the actual course of subsequent events or the expectations of the parties as to the probabilities. *Mackay*, 145 Idaho at 411, 179 P.3d at 1067. Instead, contracts of uncertain duration are simply excluded. *Id.*

Indeed, it is well settled that the one-year provision of the statute of frauds covers only those contracts whose performance *cannot possibly* be completed within a year. *Id.*; *see also* 9 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 24:3 (1999). Even if a promise is not likely to be performed within a year or is not actually performed within a year, it is, nonetheless, not within the statute of frauds if there remains a possibility in law and fact that full performance may be completed within a year. *See Mackay*, 145 Idaho at 411, 179 P.3d at 1067. Thus, the question is not what the probable, expected, or actual performance of the contract was, but rather whether the contract, according to the reasonable interpretation of its terms, required that it *could not* be performed within the year. *Id.*; *see also Warner v. Texas & P. Ry. Co.*, 164 U.S. 418, 429 (1896).

Here, the district court determined that the oral agreement fell within the statute of frauds because of Janice's knowledge of Cody's sporadic work history and, in the district court's view, the limited amount of time that remained for Cody to obtain employment and make repayment following completion of Janice's performance (March 25, 2012) and within a year after the first loan (April 3, 2012). Thus, the district court determined that it was not a reasonable interpretation of the alleged contract's terms to believe that Cody was required to fully perform the contract in the limited time remaining and concluded that the alleged contract could not be performed within a year.

Assuming the accuracy of the district court's findings of fact, the district court's application of the law to those facts is incorrect. As noted in *Mackay*, the statute is to be narrowly construed. *Mackay*, 145 Idaho at 411, 179 P.3d at 1067. Neither the actual course of events nor the expectations of the parties as to the probabilities involved determines whether a contract is barred by the one-year provision of the statute of frauds. *Id.* Instead, the proper inquiry is whether the reasonable interpretation of the terms of the contract *required* that the contract could not be performed within a year. *Id.*

Here, no evidence was presented indicating that a term of the contract could reasonably be interpreted as requiring that performance could not be completed within a year. Indeed, Janice testified, and the record supports, that the oral agreement was that, in exchange for the funds, Cody would make monthly payments of an indeterminate amount and maintain insurance on the vehicle he purchased with those funds until the debt was paid. This claim was not specifically disputed by Cody; he only disputed in a general sense the characterization of the funds as a loan. Thus, any alleged contract was of uncertain duration and, therefore, could have been performed within a year, however remote that possibility might have been under the circumstances. As a result, the alleged contract was simply excluded from the purview of the statute of frauds, *see id.*, and the district court erred in holding otherwise.<sup>4</sup>

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<sup>4</sup> Because we conclude that the district court erred in determining that the one-year provision of the statute of frauds applied to bar enforcement of the alleged contract, we need not address Janice's alternate assertion regarding the doctrine of part performance.

**C. Attorney Fees**

Janice requests an award of attorney fees pursuant to I.C. § 12-120(1). Idaho Code Section 12-120(1) provides, in pertinent part:

[I]n any action where the amount pleaded is thirty-five thousand dollars (\$35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action . . . .

The amount pled in this case was less than \$35,000. Although Janice was the prevailing party on appeal, there has been no evidence presented of a *written* demand for payment of the claimed amount at least ten days prior to commencement of this action. As a result, Janice is not entitled to an award of attorney fees on appeal.

**IV.**

**CONCLUSION**

The district court erred in determining that Cody had met his burden of proving that the funds constituted a gift. Additionally, the district court erred in determining that the oral agreement was barred by the one-year provision of the statute of frauds, as the agreement could be performed within a year consistent with Idaho law. Accordingly, we vacate the district court's judgment and remand for entry of judgment in favor of Janice consistent with this opinion. Costs, but not attorney fees, are awarded to Janice on appeal.

Judge LANSING and Judge GRATTON, **CONCUR.**