FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-365 / 94-0296

KATHLEEN MAE JACKSON a/k/a
KATHLEEN MAE SCHRADER JACKSON,

Appellant,

vs.

MARTHA SCHRADER, Individually and MARTHA SCHRADER as Executor of the ELMER SCHRADER ESTATE,

Appellees.

Appeal from the Iowa District Court for Crawford County, Richard J. Vipond, Judge.

Jackson appeals the district court's ruling she failed to prove existence of an oral contract providing she would be given a farm, crops, cattle, and machinery from the Elmer Schrader Estate. **AFFIRMED.**

L. Jeffrey Zearly and Lowell E. Dendinger of Casterline & Dendinger, Tipton, for appellant.

D. R. Franck of Franck, Mundt & Franck, Denison, for appellees.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Kathleen Jackson (Kathleen) filed a petition against her mother, Martha Schrader (Martha), individually and as executor of the estate of Kathleen's father, Elmer Schrader (Elmer). Elmer left all of his property to his wife except for one dollar to each of two daughters. Kathleen claims she and Elmer agreed, if she and her family moved to one of his farms and helped with the farming operation, he would give her a farm valued at $237,500. Kathleen states she sold her family's home, gave up a good paying job, and carried out Elmer's wishes in reliance on this promise. She also claims Elmer promised to give her growing crops, machinery, and cattle.

The district court titled this action as one for specific performance of an oral contract to convey real property and as such proof of the contract was subject to the statute of frauds. Following trial, the district court concluded much of Kathleen's evidence was inadmissible under the statute of frauds. However, the court stated the statute and the strict standard of proof were not decisive factors in its decision. The court held even when all the evidence was considered without regard to the statute, Kathleen failed to prove, by a preponderance of the evidence, Elmer promised to convey the farm to her. The district court also denied Kathleen's other claims.

Kathleen appeals. She presents several legal theories in support of her claims. She contends the district court erred in: (1) finding the evidence was insufficient to support existence of the contract based upon payment and receipt of purchase money;

(2) failing to consider Kathleen's possession of the property with Elmer's consent as proof of the contract's existence; (3) failing to find partial performance of the contract made it enforceable; (4) failing to uphold the contract under the "other circumstances" exception to the statute of frauds which, she claims, includes promissory estoppel and estoppel in pais; (5) failing to find a promise or contract to convey the farm existed; (6) failing to find Kathleen held title to the farm by virtue of a constructive trust; (7) failing to find the farm had been given to Kathleen as a gift; (8) failing to find the crops, machinery, and cattle constituted inter vivos gifts or gifts made in expectation of death.

I. Standard of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). Our courts have repeatedly recognized, while in cases of equity the reviewing court is not bound by the fact findings of the district court, factual disputes which depend heavily on the credibility of witnesses are best resolved by the district court which has a better opportunity to evaluate credibility than we do. *Maisel v. Gelhaus*, 416 N.W.2d 81, 86 (Iowa App. 1987).

II. Iowa Code sections 622.32 and 622.33.

Iowa Code section 622.32 (1993) provides evidence of contracts "for the creation or transfer of any interest in lands, except leases for term not exceeding one year" is not competent, unless it is in writing and signed by the party charged or by the party's authorized agent. Section 622.33 creates exceptions to this rule where "the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession of the premises under and by virtue of the contract . . . ."

The reasoning behind the exception to the statute of frauds is payment of purchase money is considered part performance of the contract. *Hawkeye Land Co. v. Iowa Power & Light*, 497 N.W.2d 480, 485 (Iowa App. 1993). Purchase money has been defined to mean "consideration," *Id.*, and may be in the form of services, present or future. *Callon v. Callon*, 185 N.W.2d 762, 766 (Iowa 1971). It is well established, under section 622.33, a party who partially performs under the agreement may avoid the impact of the statute of frauds and introduce evidence of the oral contract. *Gardner v. Gardner*, 454 N.W.2d 361 (Iowa 1990).

In Kathleen's first, second, and third arguments, she claims the purported contract does not fall within the statute of frauds and evidence supports the existence of a contract because: there was payment and receipt of purchase money; Elmer consented to Kathleen's possession of the property; and, there was part performance

of the contract. Because these three arguments stem from Iowa Code sections 622.32 and 622.33, we will address them together.

Our analysis under Iowa Code sections 622.32 and 622.33 is twofold. First, we must determine if the purported oral contract fits into one of the 622.33 exceptions to the statute of frauds. Second, if the agreement does fit into one of the exceptions, we must determine whether there is a preponderance of clear, satisfactory, and convincing evidence of the alleged oral contract to warrant granting specific performance of the contract as to the land in question. *Knight v. Anderson*, 292 N.W.2d 411, 417 (Iowa 1980).

In order to bring the case within the statute of frauds exception, the conduct, acts, and circumstances offered to show part performance must be referable exclusively to the agreement to transfer land. *Id.* at 416. If they admit of explanation without reference to the alleged agreement, they do not constitute part performance. *Id.* A performance of services or a taking of possession is not sufficient if it is equally consistent with an explanation other than the existence of a contract. *In re Estate of Hayers*, 234 Iowa 299, 307, 12 N.W.2d 520, 523 (1944). "If the performance was referable to the verbal contract, 'it must be because the circumstance put in evidence permits no other rational hypothesis.'" *Id.*

The district court correctly concluded this purported contract was subject to the statute of frauds. It does not fit into the 622.33 exception because Kathleen's actions

were explainable without reference to the alleged contract to convey land. The district court's factual findings reveal, and we agree for the following reasons, Kathleen's quitting her job, selling her house, and moving to Moberly are not clearly referable to the existence of a contract to give the farm to Kathleen.

Kathleen's moving does not seem motivated by a promise. Elmer was to take possession of the farm on March 2, 1989, yet plaintiff sold her house, quit her job, and moved in late December. After the alleged promise and upon leaving her home, Kathleen moved to Moberly, Missouri, instead of moving immediately to Crawford County, Iowa, by her parents. Furthermore, Kathleen's possession of the house was referable to a simple rent arrangement rather than a contract to give the farm to her. Any work done by Kathleen and her sons on the farm was referable to a contract to receive wages and other benefits from Elmer. Lastly, the letter written by Elmer does not prove a promise to convey the farm. The letter stated Elmer thought it was nice Janice and Kathleen each would have her own farm. As neither received a farm during his life or upon his death, this statement refers to the two daughters being allowed to live on the farms rather then Elmer giving the farms to them.

After thoroughly reviewing the record, the aforementioned and several other facts lead us to conclude the evidence offered by Kathleen to show part performance was not referable exclusively to the agreement to transfer land. As such, this alleged contract does not fit within the 622.33 exception, and the statute of frauds applies.

Consequently, much of Kathleen's evidence is inadmissible. The remaining admissible evidence is insufficient to establish the existence of a contract.

Even if this contract fit into the exception and was not subject to the statute of frauds, we would reach the same conclusion. As stated above, if an exception to the statute of frauds is found, the court should then decide whether there is a preponderance of clear, satisfactory, and convincing evidence of the alleged oral contract to warrant granting specific performance of the contract. *Knight*, 292 N.W.2d at 417. We agree with the district court's conclusion that, although the evidence presented by Kathleen is inadmissible under the statute of frauds, the statute is not the decisive factor in this decision. We too believe, when all the evidence is considered without regard to the statute of frauds, Kathleen failed to establish her claim by a preponderance of the evidence.

III. "Other Circumstances" Exception.

Iowa Code section 622.33 provides another exception to the statute of frauds "when there is any circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds." Kathleen claims there is a basis for an enforceable contract under this "any other circumstances" provision which, she argues, includes promissory estoppel and estoppel in pais.

The elements of promissory estoppel are: (1) a clear and definite oral agreement; (2) proof the party urging the doctrine acted to her detriment in relying on the

agreement; and, (3) finding the equities support enforcement of the agreement. *Warder & Lee Elevator Inc. v. Britten*, 274 N.W.2d 339, 342 (Iowa 1979); *Uhl v. City of Sioux City*, 490 N.W.2d 69, 73 (Iowa App. 1992). Taking into consideration the factual situation as presented in part II, we determine, even if all the evidence was considered without regard to the statute of frauds, the facts of this case do not reveal a promise or clear and definite agreement. Furthermore, detrimental reliance was not proven, and the equities do not require or warrant enforcement of the purported agreement.

We do not determine whether estoppel in pais is specifically applicable under the "other circumstances" exception to chapter 622.32. However, even if it were applicable, it has not been proven in this case. The essential elements of estoppel in pais or equitable estoppel are: (1) a false representation or concealment of material facts; (2) made to one without knowledge of the real facts; (3) with the intention it be acted upon; and, (4) reliance by the party to whom the representation was made to his or her prejudice or injury. *Hawkeye Land Co. v. Iowa Power & Light*, 497 N.W.2d 480, 486 (Iowa App. 1993); *Walters v. Walters*, 203 N.W.2d 376, 379 (Iowa 1973); *Dart v. Thompson*, 154 N.W.2d 82, 86 (Iowa 1967). Kathleen has not proven the elements of estoppel in pais because she has not proven Elmer made a false representation or concealment. Furthermore, as stated in part II, there is no convincing evidence Kathleen relied upon any representation to her detriment.

IV. Oral Promise or Contract.

In her fifth argument, Kathleen claims the district court erred in failing to find a promise or contract to convey the farm to Kathleen. Although we believe this argument was sufficiently addressed in parts II and III, we will briefly mention it here. An oral agreement to transfer an interest in land must be established by more than a mere preponderance of the evidence. *Peterson v. Peterson*, 355 N.W.2d 26, 28 (Iowa 1984). The contract must be proven by a preponderance of the clear, satisfactory, and convincing evidence. *Id.* at 29. A greater quantum of proof is required because enforcement of such an agreement without convincing evidence would tend to frustrate the purpose of the statute of frauds. *Id.* at 28. Additionally, questions of whether an oral contract existed and whether it was breached are ordinarily for the trier of fact. *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 165 (Iowa App. 1993).

We determine Kathleen did not meet her burden of proving the existence of an oral contract. As stated above, the statute of frauds excludes much of Kathleen's evidence. The evidence remaining after applying the statute falls substantially short of proving an oral contract. Furthermore, after thoroughly reviewing the evidence, we agree with the district court's determination about the existence of the contract. The district court was not convinced by the evidence presented by Kathleen, and stated, "Even when all the evidence is considered without regard to the statute of frauds, the plaintiff has failed to establish her claim . . . ." Kathleen has not proven by the

preponderance of clear, satisfactory, and convincing evidence Elmer gave the farm to her.

V. Constructive Trust.

Kathleen's argument concerning the constructive trust was neither plead nor argued by Kathleen at the district court level. We have repeatedly held matters not raised in the district court cannot be effectively asserted for the first time on appeal. *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974). As error was not preserved, we will not consider this issue.

VI. Gift.

Kathleen argues the farm, crops, machinery, and cattle were gifts given to her from Elmer. To meet the requirements of a gift, there must be: (1) donative intent; (2) delivery; and, (3) acceptance. *Gray v. Roth*, 438 N.W.2d 25, 29 (Iowa App. 1989). The intent of the grantor is the controlling element. *Id.* The donor must have a clear intention to pass all right, title, and dominion over the gift to the donee. *Id.* In Iowa, less positive proof is needed to show gifts between related parties as opposed to gifts to unrelated parties. *Frederick v. Shorman*, 147 N.W.2d 478, 483 (Iowa 1966). We emphasize, however, "evidence of a claimed oral gift from a person deceased, or similar transaction, challenges the scrutiny and skepticism of the court and imposes upon it the duty to subject the evidence to every fair test which tends to weaken its credibility." *Hamilton v. Bethel*, 256 Iowa 1357, 1362, 131 N.W.2d 445, 447-48 (1964). The proof

of such gift should be clear, convincing, and satisfactory, and when so established is upheld. *Lynch v. Lynch*, 239 Iowa 1245, 1253, 34 N.W.2d 485, 489 (1948).

Clearly, Elmer neither had the requisite intent nor relinquished control over the farm, crops, machinery, or cattle. Elmer continued to actively farm the property right up to his death and did not bequeath the property to Kathleen in his will. Kathleen and her family were only permitted to live in the farmhouse. Although Kathleen and her family worked and performed services on the farm, these services appeared to be in exchange for wages, use of the house, meat, and payment of their utility bills. Elmer's letter does not prove he had intent to transfer the farm to Kathleen. The letter stated Elmer thought it was nice for Janice and Kathleen to each have her own farm. From the circumstances surrounding this case, the intent of the letter was to allow each daughter to live on one of his farms -- not to give each daughter a farm. Neither Janice nor Kathleen received a farm upon Elmer's death. Martha, his wife, received the farms as surviving joint tenant.

Additionally, the livestock, crops, and machinery remained in the possession of Elmer until his death. Elmer sold part of the crops in the field before they were harvested and deposited the money into his own account. A disinterested attorney stated Elmer told him Kathleen's family had taken a tractor belonging to him and he was having trouble getting it back. Possession of machinery was not delivered to Kathleen, the machinery was merely kept at the farm for use in the field. Both of

Kathleen's children testified the tractors may just have been left at the farm to use rather than as gifts. Kathleen's argument concerning the equipment is further undermined because she did not claim the equipment in any pleading until after Martha's counterclaim filed April 7, 1993.

VII. Conclusion.

Our examination of the record leads to the conclusion there is not sufficient evidence to support Kathleen's claims. We affirm.

AFFIRMED.