FILED.
JUN 4 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HESTER L. LUND,	)	
Plaintiff-Appellant,	)	179
vs.	)	
NORMA JEAN PEDERSEN, ARLYN L. LUND, and IVYN L. LUND, as Executors of the Estate of GEORGE J. LUND, Deceased,	)	FILED JUNE 4, 1986
	)	6-37
	)	85-928
Defendants-Appellees.		

Appeal from the Iowa District Court for Cass County (19407) - Leo F. Connolly, Judge.

Plaintiff appeals the trial court's order dismissing her petition to set aside an antenuptial agreement. **AFFIRMED.**

Martin L. Fisher of Fisher, Fisher & Fisher, Adair, Iowa, for plaintiff-appellant.

Roland K. Landsness of Cambridge, Feilmeyer, Landsness, Chase & Wells, Atlantic, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J. 180

Plaintiff appeals the trial court's order dismissing her petition to set aside an antenuptial agreement. She contends that the court erred in 1) requiring proof of decedent's fraudulent intent, and 2) failing to find fraud. We affirm.

Plaintiff, Hester L. Dorsey Lund, and decedent, George V. Lund, began dating in the early part of 1973. Hester was a widow and George was a widower. Plaintiff was unemployed. George was a farmer and seed corn salesman. George was a one-third owner of the stock of Lund Farms, Inc. and his two sons each also owned one-third. George had deeded his residence, where he continued to live, to the corporation in 1970. The corporation provided him use of the residence, a corporate car, insurance, and a stipend of $500 per month. George also owned 160 acres in his own right.

Before they were married, George and Hester entered into negotiations for an antenuptial agreement. Hester refused to sign the first proferred agreement which merely provided the parties keep their own property. Hester testified she signed a subsequent draft on November 27, 1973, only because it provided a life interest in the house. The agreement provided, in pertinent part:

> 3. That George J. Lund shall provide by will or otherwise that at his death and in the event Hester L. Dorsey survives him, that Hester L. Dorsey shall have the right to use the home that he now has for so long as she shall be able to live there or until she remarries. In the event she remarries or is no longer able to stay in said house, then all interest she has in said property of George J. Lund shall cease.
>
> 4. Said George J. Lund further agrees that by will or otherwise he will provide that all household goods, except for one family cherry bedroom suit, shall pass to and become the property of Hester L. Dorsey.
>
> * * *
>
> 5. . . . That after the death of either of the parties hereto subsequent to the marriage, all property belonging to either at the commencement of the marriage or coming to or acquired or accumulated by either of them during

> the marriage shall be free of any claim by the other on account of dower, curtesy, or other statutory rights . . . .

At the time of the signing, George did not have the authority to promise Hester a life interest in the house. Apparently George told Hester he had to get approval of the corporation to convey to her a life estate. Testimony is at odds, however, as to whether Hester realized at the signing of the agreement that he had not yet received his sons' approval.

George and Hester married in December 1973. They began extensive remodeling on George's house and moved into Hester's house. George suffered a severe incapacitating stroke in May 1974. Neither he nor Hester ever moved into his house and he never received the approval of the corporation to grant Hester a life interest. He spent the last nine years of his life in nursing homes until his death on December 18, 1983.

The record reflects that the corporation sold the house in August 1976. There is no evidence concerning Hester's knowledge of the sale or whether she objected to sale. George's adult children took some of the furnishings, and gave Hester a washer and dryer, a freezer, and various smaller items. The remaining furnishings were sold at an auction.

Hester filed this petition in August 1984 to set aside the antenuptial agreement and requesting equitable relief. In January 1985 she filed her election to take against the will and requested the court to set off her share as surviving spouse. After a hearing, the judge ruled she had not proved the decedent's fraudulent intent in the making of the antenuptial agreement and therefore he dismissed her petition to set it aside. This appeal followed.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We give deference to the trial court's findings, but we are not bound by them. Iowa R. App. P. 14(f)(7).

As a general rule, antenuptial contracts are favored in the law and should be construed liberally to carry out the intention of the parties. Such agreements are upheld if they are fair between the parties and fairly, freely, and understandingly entered into. Norris v. Norris, 174 N.W.2d 368, 369 (Iowa 1970).

In the present case, Hester claims that antenuptial contract was procured by fraud and should be set aside on that ground. We disagree.

First, contrary to Hester's assertion, she had the burden of proving that George had fraudulent intent at the time he entered into the agreement.

The elements of a cause of action for fraud include 1) a representation, 2) falsity, 3) materiality, 4) scienter, 5) intent to deceive, 6) reliance, and 7) resulting injury and damage. Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 292 (Iowa 1975). The party asserting the theory has the burden of proving each and every element by clear, satisfactory and convincing evidence whether such proof be by direct or circumstantial evidence. Id. Fraud will only be presumed when the antenuptial agreement is unjust or unreasonable in its terms. In such a case, the burden is cast upon the opposing party to show that the contract was fairly procured. Fisher v. Koontz, 110 Iowa 498, 500, 80 N.W. 551, 551 (1900).

Hester has failed to establish that the agreement in question was unjust or unreasonable on its face. In fact, it is not the terms of the instrument, but the inability to enforce them which is the subject of this appeal. Based on the record before this court, we find that the burden was properly placed on Hester to establish the elements of fraud, including the intent to deceive.

Hester further argues that the record supports a finding of fraud. She claims that George led her to believe that at the time the agreement was signed he had the authority to transfer a life estate in the home. Hester was aware that the corporation owned the home. She claims, however, George told her

he had discussed the matter with his sons and they agreed to guarantee housing and utilities. It was this alleged misrepresentation that induced her to sign the agreement.

We have carefully reviewed the record and fail to find sufficient evidence to warrant a finding that George intentionally misrepresented the ownership of the house or concealed material facts.

The evidence offered by Hester shows that she understood the extent of George's property at the time she entered into the agreement. She knew that the home in question was in the name of the corporation and that George's sons each owned one-third of the corporate shares. When Hester signed the agreement, she either read it herself or had it read to her. In any event, the agreement does not on its face represent that George owned the home. Rather, it states that he will provide her with a life estate by will or otherwise. The attorney who was present when the agreement was signed expressed some reservation about its terms and stated "this may not be exactly as it seems." Finally, it is noteworthy that the corporation sold the home in 1976 apparently without any objection by Hester. This event should have put Hester on notice that the life estate provided in the antenuptial agreement was unenforceable. However, it was not challenged until several years later when her husband died.

The aforementioned facts would indicate that Hester knew George could not give a life estate at the time she signed the agreement and that he would need the consent of the corporation to do so. The only evidence that detracts from this finding is Hester's assertion that George indicated his sons had "guaranteed" her housing and utilities. This assertion standing alone is insufficient to support a finding of fraud. By the nature of the case, this testimony cannot be directly contradicted and, thus, must be scrutinized with caution. Fisher, 110 Iowa at 501, 80 N.W. at 552 (1900). We are not inclined to interfere with

the trial court's apparent determination that Hester's assertion was not credible in light of other known facts.

Our decision today is not reached lightly. Hester undoubtedly signed the agreement believing she would eventually receive a life estate and be provided for in the event of her husband's death. The fact remains, however, that George needed to obtain corporate consent before this transaction could take place. Evidence does not support a finding that he intended to conceal this from Hester. George was having difficulty obtaining corporate approval to grant the life interest and did not execute the necessary documents prior to his disabling stroke and subsequent death. While the result is an unfortunate one, the record does not support the conclusion that the antenuptial agreement should be set aside.

The decision of the trial court is therefore affirmed. Hester's request for appellate attorney fees is denied.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.