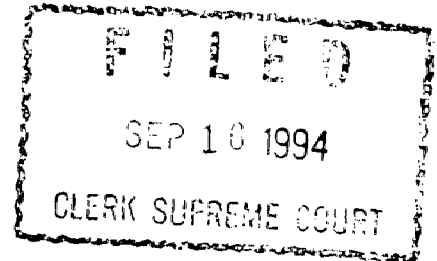


IN THE COURT OF APPEALS OF IOWA

No. 4-046 / 93-143

ROY STETZEL, Administrator of the
Estate of Frank E. Stetzel, Deceased,
Plaintiff-Appellee/Cross-Appellant,
vs.

NORMA STETZEL and MAXINE STETZEL,
Defendants-Appellants/Cross-Appellees.



Appeal from the Iowa District Court for Guthrie County,
Ross Walters, Judge.

The defendants appeal and the plaintiff cross-appeals
from the order setting aside deeds to property owned by the
decedent. **AFFIRMED.**

George Cosson of Cosson & Miller, Des Moines, for
appellants.

Loren A. Nalean of Nalean & Nalean, Boone, for
appellee.

Considered by Donielson, P.J., and Cady, J., and Keefe,
S.J.*

*Senior judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

KEEFE, S.J.

This case presents the request of the estate of Frank Stetzel to set aside certain deeds to farm and residential property Frank made shortly before his death. The district court determined the deeds were the result of undue influence and declared the deeds void. We affirm.

Frank had four children: Lois Carfrey, Maxine Stetzel, Norma Stetzel, and Roy Stetzel. Frank was divorced from the children's mother. During the times applicable to this action, Lois and Roy lived in Guthrie Center, where Frank lived. Maxine lived in Michigan and Norma lived in California.

Frank owned four parcels of real estate. He owned two residential properties in Guthrie Center, one at 100 Main Street and one at 502 State Street. Frank resided at the house on State Street and the other property was rented. Frank also had two eighty-acre farms. The north eighty acres was referred to as the Masters farm and the south eighty acres was referred to as the Downing farm. Frank's net equity in the Downing farm was relatively small because the farm was subject to a large mortgage.

As Frank became older, he became less able to care for himself. Roy performed errands for Frank, helped clean his house, and assisted Frank with his finances. Roy intermingled Frank's money with his own. However, he kept records of money he received or paid on behalf of Frank.

On July 8, 1988, Frank was discovered lying on the floor of his home in a semi-conscious state, apparently due to a heart attack. He was taken to the hospital. Medical records from his hospital stay show his mental condition was dull and sluggish. After about a week, Frank was placed in the New Homestead Nursing Home. His mental condition improved while he was in the nursing home.

After Frank was hospitalized, Norma became more interested in his finances. She did not consult with Roy, but made inquiries at various businesses. Although she had no actual proof, Norma became suspicious of Roy's business dealings with Frank. Norma shared her concerns with Maxine. Norma also began to visit Frank much more often. From later events, it is apparent Norma told Frank of her suspicions about Roy.

On August 9, 1988, Maxine filed an involuntary petition for appointment of conservator for Frank. Maxine proposed she and Barry Stetzel, a distant relative, be named co-conservators. Roy had no objections to a conservatorship, but did not want Maxine named as a conservator. On September 28, 1988, Roy and an attorney, Bev Wild, went to visit Frank to explain the conservatorship proceedings. Frank indicated he had talked to Norma about it and was relying on her judgment.

The conservatorship hearing was held on October 10, 1988. Prior to the hearing, all of the siblings held a meeting at the courthouse. At that time, Norma, Maxine,

and Roy all had doubts about Frank's mental and physical capacity to manage his affairs. However, they could not agree who should be named as conservator. Maxine voluntarily dismissed the petition. She told Norma, "You know what I want," and left.

Lois, Norma, and Roy then met at the office of attorney Wild. They discussed selling Frank's property in order to generate money to pay for his future expenses at the nursing home. Roy wanted to purchase the farm property, but was concerned about whether he would be able to obtain financing. They left the meeting with the understanding Norma would obtain appraisals for the property and Roy would attempt to obtain financing, and they would meet again in the near future.

On the morning of October 13, 1988, Norma and Maxine went to the office of attorney Dwight Dinkla. They brought work papers with them which contained the legal descriptions of Frank's property and estimated values for the properties. However, according to Norma, they did not request prepared deeds, but only blank deed forms. She stated they were surprised when they returned later that same morning and Dinkla had prepared the deeds naming Frank as the grantor and she and Maxine as the grantees. At the same time papers, were prepared to give Norma and Maxine power of attorney for Frank.

Norma and Maxine took the legal papers to Frank at the nursing home. Norma stated she was again surprised when

Frank told them he wanted her and Maxine to have all of his property and that he did not want to be paid for it. Frank then signed deeds granting the property at 100 Main Street to Norma and the property at 502 State Street to Maxine. He also granted the Masters farm to Norma and Maxine as tenants in common. In addition, Frank signed the power of attorney form. Norma stated Frank told them Roy could buy the Downing farm if he acted within a week.

Norma and Maxine went back to Dinkla's office and then to the county courthouse where they recorded the deeds. The deeds were recorded by 11:55 a.m. on October 13, 1988. Norma and Maxine then went to their mother's house and packed because they had flights out of Iowa that same day. Roy confronted them at their mother's house and asked what was going on. Norma and Maxine did not reveal their activities of that morning. As she and Maxine left town, Norma told Roy, "Little brother, you move too slow."

The next day Roy discovered the recorded deeds and power of attorney. Norma contacted him about buying the Downing farm. On October 18, 1988, Maxine, by means of the power of attorney, executed a warranty deed conveying the Downing farm to Norma and Frank in joint tenancy. This deed was not recorded and was not revealed to Roy or Lois until much later.

By November 5, 1988, Norma had placed a total of \$17,500 in Frank's bank account. The deeds signed by Frank recited consideration of \$5,000 for the property at 100

Main Street and \$25,000 for the Masters farm. Norma's share of the consideration for the Masters farm plus the residential property would be \$17,500. However, she claimed these payments were not in consideration for the deeds, and that the deeds were a gift.

Frank died intestate on November 9, 1988. Roy was appointed as administrator of his estate. The estate brought this suit seeking to set aside the deeds discussed above. Maxine did not appear for trial, but was represented. The district court found Norma's testimony was not credible. The court determined Norma and Maxine entered into a confidential relationship with Frank in the period prior to the signing of the deeds. The court concluded the deeds were the result of undue influence and should be declared void. The estate was ordered to pay Norma \$17,500.

Norma and Maxine appealed. The estate has filed a cross-appeal.

This case was heard in equity and our review is de novo. Iowa R. App. P. 4. We will give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Appellants contend the district court should not have found there was a confidential relationship between them and Frank. They claim there is insufficient evidence to support such a finding. They also claim there was a confidential relationship between Frank and Roy, and this

precludes a finding that Frank had a confidential relationship with anyone else.

A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another. In re Estate of Herm, 284 N.W.2d 191, 199 (Iowa 1979) (citing Dibel v. Meredith, 233 Iowa 545, 549, 10 N.W.2d 28, 30 (1943)). It has been said that all the variety of relations in which dominion may be exercised by one person fall within the general term "confidential relationship." Pence v. Rawlings, 453 N.W.2d 249, 252 (Iowa App. 1990). A confidential relationship may arise where one of the parties has a dominating influence over the other by reason of affection, trust, and confidence of the latter in the former. Herm, 284 N.W.2d at 200.

Whether or not Frank had a confidential relationship with Roy at one time, any such relationship was eclipsed when Norma and Maxine became interested in Frank's financial affairs. By intermingling his money with Frank's, Roy created the appearance of impropriety, even though he was able to later satisfactorily account for Frank's money. As the district court pointed out, Norma was able to use this appearance of impropriety to make Frank distrustful of Roy. In turn, she gained influence with Frank and convinced him to rely on her judgment. This is exemplified by attorney Wild's statement that Frank told

her he was relying on Norma's judgment in regard to the conservatorship proceedings.

Furthermore, it was at Norma's instigation that Frank began to place more trust in Maxine. Maxine's statement to Norma before she left the meeting on October 10, 1988, "You know what I want," shows she was leaving Norma to represent her interests and that the two sisters were acting in concert.

We conclude there is sufficient evidence to show Frank had a confidential relationship with Norma and Maxine.

II. Appellants contend the estate failed to sufficiently prove that the deeds were procured by undue influence, and that therefore, the deeds should not have been set aside. They state Frank knew his own mind and was not susceptible to undue influence. Norma and Maxine also claim they did not have the disposition to influence Frank. Furthermore, they believe the district court overvalued the property, which led to the conclusion that appellants had not given sufficient consideration for the property.

Once there has been a finding of a confidential relationship, the burden shifts to the grantee to negate a charge of undue influence. Pence, 453 N.W.2d at 252. The finding of a confidential relationship places the burden upon the grantee to produce clear, satisfactory, and convincing evidence to prove entire good faith on his or her part, and free, voluntary, and intelligent action on

the part of the grantor. First National Bank v. Curran, 206 N.W.2d 317, 322 (Iowa 1973).

An important factor in considering whether the grantor acted voluntarily is whether the grantor received independent advice. Id. at 323. "Independent advice" in this connection means the showing that the donor had the benefit of conferring fully and privately upon the subject of the intended gift with a person who was not only competent to inform the donor correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise the donor impartially and confidentially as to the consequences of the gift. Id. The question is not whether the donor had advice available, but whether he received advice. Id.

Here, we have already concluded Norma and Maxine had a confidential relationship with Frank. The appellants then have the burden to show by clear and convincing evidence they acted with good faith. Although Norma claimed they acted in good faith, we determine the evidence shows otherwise. The preparation and recording of the deeds was done quickly and secretly on the morning before the two women left town. Their quickness left no time for anyone to interfere with their acts, as Norma pointed out to Roy by stating, "Little brother, you move too slow." Also, even after the event, Norma and Maxine were secretive about their actions on the morning of October 13, 1988.

Furthermore, we find appellants have failed to show by clear and convincing evidence that Frank's action in signing the deeds was free, voluntary, and intelligent. Frank did not receive any independent advice before he signed the deeds. Therefore, he received no counsel concerning the consequences of his action. The intelligence of the transfers is questionable because Frank was left with no assets of value with which to pay his accumulating nursing home bills.

We determine Norma and Maxine have failed to meet their burden of proof to show the deeds were not the product of undue influence. We affirm the decision of the district court finding the deeds were the result of undue influence.

III. Appellants raise an argument concerning whether the deeds were void for lack of consideration. Appellants did not claim at trial that they had paid sufficient consideration for the land. They claimed the deeds were a gift from Frank. Questions not presented to and not passed on by the trial court cannot be raised or reviewed upon appeal. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). We determine this argument was not raised before the district court, and we may not consider it on appeal.

IV. Norma and Maxine claim the district court should not have voided the deeds. They believe they should be made tenants in common with the estate and given the opportunity to collect rental payments from the land. They agree to provide an accounting to the estate.

A transaction which is the product of undue influence is presumptively fraudulent and voidable. See Herm, 284 N.W.2d at 200. Here, Norma and Maxine seek to keep the benefit of their fraudulent actions. We affirm the district court decision setting aside the deeds.

V. In its cross-appeal, the estate claims that the district court should not have found Frank was of sufficient mental competence to execute the deeds on October 13, 1988. Because of our disposition of the appeal, we need not address the cross-appeal.

VI. After this case was pending on appeal, Norma filed pro se motions seeking restoration of the deeds to her and income from the rental houses. We find these motions were improperly filed in this case and we do not consider them.

We affirm the decision of the district court. Costs of this appeal are assessed to appellants.

AFFIRMED.