FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROSEANNE BARGER and WILLIAM G. FACHES, Executors of the Estate of AGNES K. BARGER, Deceased,	)	Filed October 19, 1978
Appellants.	)	
vs.	)	
KENNETH BARGER, MARY CORTEZ and RAYMOND CORTEZ,	)	575 2-60518
Appellees.	)	

Appeal from Linn District Court - Clinton E. Schaeffer, Judge.

Plaintiffs appeal from judgment for defendants in an action to set aside a deed conveying certain real property to defendants. Affirmed.

Mr. Robert F. Wilson, of Cedar Rapids, counsel for appellants.

Ms. Martha L. Quint, of Cedar Rapids, counsel for appellees.

Submitted to Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.

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DONIELSON, Acting C. J.

This is an action in equity by Roseanne Barger, a legatee under the will of Agnes Barger, deceased, and Willaim G. Faches, executor of the estate of Agnes Barger, to set aside a warranty deed to defendants Kenneth Barger, Mary Cortez and Raymond Cortez. Roseanne Barger is the granddaughter of Agnes Barger. Kenneth Barger is the son of Agnes Barger; Mary Cortez is the daughter of Kenneth and Raymond Cortez is her husband. The plaintiffs assert on appeal that the deed to the property located at 925 Center Point Road NE in Cedar Rapids is invalid upon four grounds: 1) the signature of Agnes Barger on the deed is a forgery; 2) a confidential relationship existed between Agnes Barger and defendant Kenneth Barger; 3) Agnes Barger lacked capacity to acknowledge her signature on the deed and the conveyance was procured by undue influence; and 4) the deed was not effectively delivered.

The principal question presented by this appeal is whether at the time the deed was acknowledged on May 12, 1976 a confidential or fiduciary relationship existed between Agnes Barger and her son Kenneth. Such a relationship may be said to exist when one person has gained the confidence of another and purports to act or advise with the other's interest in mind. Kunz v. Kunz, 255 Iowa 1087, 1096, 125 N.W.2d 226 (1963). Plaintiffs had the burden to show by clear proof the existence of the confidential relationship claimed by them. **Kunz,** supra at 1090; Oehler v. Hoffman, 253 Iowa 631, 634, 113 N.W.2d 254 (1962).

The trial court found that plaintiffs had not met this burden. Our review is **de novo,** although we give weight to the trial court's findings, for it saw and heard the witnesses. **Kunz,** supra at 1089; Groves v. Groves, 248 Iowa 682, 692, 82 N.W.2d 124, 131 (1957). To determine whether the evidence clearly shows a confidential relationship existed at the time the deed was acknowledged, we must review the record.

Roseanne Barger lived with her grandmother, Agnes Barger, at 925 Center Point Road NE from her birth, and was reared by her grandmother after the death of her mother, Agnes' daughter Margaret, in 1961. In 1968, Roseanne began attending college at the University of Iowa in Iowa City, but continued to spend weekends and vacations with her grandmother in Cedar Rapids throughout college, the two years she spent teaching in Council Bluffs, and after she entered Creighton Univeristy Law School in Omaha,

Nebraska. The evidence indicated that after the death of Margaret, the relationship between Agnes and Roseanne became more like that between mother and daughter.

Kenneth Barger lived with his family in Cedar Rapids and saw his mother Agnes frequently and sometimes daily. Since Agnes was unable to drive, Kenneth and another sister, Kathryn Bell, either took Agnes places or ran errands for her as she requested. After the death of Agnes' son Harold in 1969, Kenneth began cashing checks and paying bills for his mother at her request and upon her specific orders. Kenneth testified that Agnes retained all money, passbooks and bills and gave them to him when she wanted something done. Agnes had joint accounts with Kenneth, Kathryn and Roseanne in the Morris Plan and would direct Kenneth into which account a deposit should be made.

In the summer of 1974, $5000 was withdrawn from the Morris Plan and deposited in a certificate of deposit at Perpetual Savings. Kenneth testified he did this on his suggestion but at the request of his mother to get a higher interest rate and a free gift. Roseanne testified that Agnes did not remember asking Kenneth to do this and was upset when Roseanne informed her the money had been transferred. The withdrawal was discovered when Agnes gave Roseanne the passbooks to the Morris Plan accounts and requested that she have the interest brought up-to-date.

In part because of this misunderstanding, Agnes saw an attorney and executed a will on August 20, 1976. This will gave the property in question to Roseanne, "provided, however, that in the event at the time of my death, I do not own said real estate, I give one-fourth (1/4) of my gross estate" to her. The residue of the estate was to be divided in equal parts between Kenneth, Kathryn and the children of Harold. There was testimony that at least some family members were aware that Agnes had always intended Roseanne to have the house; Kenneth and Kathryn deny any knowledge of this intention.

The attorney who prepared this will testified that he did so at Agnes' direction and after discussions with her concerning the extent of her property and her family situation. Roseanne took Agnes to the attorney but was not present during these discussions. Kenneth knew nothing about the preparation or execution of this will.

By 1975, Agnes' glaucoma, from which she had suffered since 1968, had worsened so that light bothered her and she was reluctant to leave her house. Agnes was 84,

suffered from arteriosclerosis and was sometimes weak and often forgetful. She did not always recognize some family members, especially those she did not see on a daily basis. Until her final illness, Agnes saw no doctor and no expert medical testimony was offered at trial concerning Agnes' physical condition.

Kenneth was bringing her meals and began paying bills on a regular monthly basis. He arranged for the rental of a small house on the property in question and rent checks were made payable to him. From November of 1975, Kenneth deposited Agnes' income into his own checking account and often paid her bills with his own money, although he kept separate records concerning transactions for his mother.

In March of 1976, Agnes no longer wished to live alone and Kenneth suggested that she move into his home, to which she agreed. Apparently this caused some strain in that household, and Kenneth arranged to have his daughter Mary and her husband, Raymond Cortez, move back from California and reside with and care for Agnes in her house at 925 Center Point Road NE. Kenneth testified that he had talked to Agnes about putting the house in his name and Mary's name because of this, that it was agreeable to her and that she thought it a good idea.

Agnes had signed a blank deed to the property in 1966 in the presence of her sons Kenneth and Harold, and had retained this deed. On May 12, 1976, Kenneth typed in his name and the names of Mary and Raymond Cortez as grantees and the correct legal description of the property. He testified he did this at the direction of his mother as her means of compensating Kenneth and Mary. He and his mother then appeared before a notary public, where Agnes acknowledged her signature. While the deed was not read to her, the notary testified that she appeared normal and mentally competent, and responded affirmatively to his questions whether she understood it was a deed to her property and whether it was her signature. Agnes apparently had no difficulty in signing a water certificate that was notarized at the same time, and the notary public charged her a reduced rate because she was a senior citizen.

On May 24, 1976, Agnes died. The death certificate listed as cause of death chronic congestive heart failure, arteriosclerotic heart disease, and generalized arteriosclerosis. That same day, Kenneth recorded the deed to the property. On June 7, 1976 plaintiffs filed Agnes' 1974 will for probate and instituted this action. The battle was on.

Although there is some evidence Kenneth was the dominant person in a confidential relationship with his mother at the time Agnes verified her signature and the deed was acknowledged, the showing is not sufficiently clear to justify a reversal of the trial court's decision on this quesiton. See **Oehler**, supra at 637; Barber v. Powell, 248 Iowa 785, 792, 82 N.W.2d 665, 669 (1957). There was close family feeling between Agnes and Kenneth, but a confidential relationship does not arise solely from a blood or family relationship. While assumptions are permissible in cases where a parent is old, feeble, physically handicapped or mentally weak, transactions are not considered fraudulent, or induced by duress merely because they are between parent and child. **Kunz**, supra at 1096; Burns v. Nemo, 252 Iowa 306, 312, 105 N.W.2d 217 (1960). Both Kenneth and Kathryn testified that Agnes was not the type of person to be dominated by anyone, and was not so dominated. While she relied heavily on Kenneth to transact her business, she also directed Kathryn and Roseanne to assist her. She saw an attorney and executed a will without seeking the advice of Kenneth; in fact, she didn't inform him of the existence of the will. Marvin Benischek, the notary public to whom she verified her signature, testified that when she was in his office, he transacted business with her, not Kenneth.

Kind and considerate treatment, particularly of a child for an elderly parent, raises no presumption of confidential relationship. **Kunz**, supra at 1096; **Groves**, supra at 692. It is reasonable to conclude that Agnes intended to compensate Kenneth for his past services and Mary for her anticipated services by conveying the property to them. Her will contemplates the possibility that she would no longer own the property at death by providing an alternative bequest to Roseanne. On this issue, we affirm the trial court.

In the absence of a clear showing there was a confidential relationship between Agnes and Kenneth, in which he was the dominant person, giving rise to a presumption that the deed was obtained by fraud or undue influence, there is insufficient evidence of actual fraud or undue influence to warrant setting it aside on that ground. **Groves**, supra, at 694. Upon the whole record, plaintiffs have failed to show by clear, satisfactory and convincing evidence that Agnes was so mentally incompetent that at the time she verified her signature, she did not understand in any reasonable manner the

nature of what she was doing and the consequences and effects upon her rights and interests. **Oehler**, supra at 640; Else v. Fremont Methodist Church, 247 Iowa 127, 148, 73 N.W.2d 50 (1955).

The testimony disclosed Agnes had weakness of mind and body associated with the frailties of old age. But mental weakness due to physical infirmity does not constitute mental unsoundness, nor is it conclusive of mental unsoundness that one may fail to recognize persons or appear to be unable to converse as to one's condition or affairs. Stephenson v. Stephenson, 247 Iowa 785, 792, 74 N.W.2d 679 (1956); **Else**, supra at 148. We agree with the trial court that at the time Agnes Barger verified her signature on the deed, she was possessed of such mental capacity as enabled her, in law, to effect the transactions. On this issue we affirm the trial court.

Plaintiffs also assert that the signature on the deed was not that of Agnes Barger but a forgery, and the trial court erred in failing to so find. They cite no legal authority to support this assignment of error. We could, therefore, determine this issue waived. Olson v. Olson, 180 N.W.2d 427 (Iowa 1970); Alphen v. Chapman, 179 N.W.2d 585 (Iowa 1970). However, we have studied plaintiffs' position and find it without merit. The law is clear that if the grantor acknowledges the instrument before a notary public, it is immaterial whether the name was put to it by the grantors own hand or by the hand of another. **Stephenson**, supra at 792; Gribben v. Clement, 141 Iowa 144, 119 N.W. 596 (1909).

Finally, plaintiffs argue that there was no delivery of the deed shown, but as this issue was not raised below either in the pleadings or arguments, we cannot consider it now for the first time. **Stephenson**, supra at 799.

Affirmed.