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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

520

IN THE MATTER OF THE ESTATE OF JOHN J. POLITO, Deceased

SOPHIA MARY POLITO,

Claimant-Appellee,

vs.

SUZAN M. POLITO,

Administrator-Appellant.

9-165
88-918

Appeal from the Iowa District Court for Polk County (22237), Ray Fenton, Judge.

The administrator appeals order approving claim against the estate. **REVERSED.**

Earl W. Sutton, Des Moines, for administrator-appellant.

Robert D. Hall, Ankeny, for claimant-appellee.

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

OXBERGER, C.J. 521

Suzan M. Polito appeals from a district court order approving Sophia's claim against the estate of John J. Polito for $60,000. We reverse.

The money award was in lieu of returning to Sophia the property she had deeded to John Polito. Suzan contends that the district court erred by: (1) finding an oral agreement between John Polito and his father that the father's business would be turned over to John if John would take care of his mother, Sophia, over her lifetime; (2) determining that John's death breached the oral agreement; and (3) failing to offset the money award to Sophia by an amount contributed by John to his mother after the oral agreement.

Suzan first asserts that the evidence at trial was insufficient to sustain the finding that there was an oral contract that John took over the family business in exchange for a promise to care for Sophia for her life. The alleged oral contract was between two men who are now deceased, naming Sophia as an intended third-party beneficiary of their contract. Sophia asserts that John's death acted as a breach of contract, entitling her to the return of the business property. Because the contracting parties are dead and therefore cannot testify to the terms or to any modifications, the trial court relied on the testimony of parties interested in the settlement of the estate of Sophia's son, Suzan's husband, John. Chapter

252A, The Code, imposes a duty on Sophia's children to support her if needed. The only physical evidence presented was a letter written by John's brother when he gave a quit claim deed to Sophia, checks made out to Sophia, the deed, and tax returns. Sophia testified that she and her son John never had a discussion of what would happen if John didn't outlive her. She said children are supposed to bury parents, not parents bury children.

We find the burden of proof required to enforce an action for breach of contract against the estate of a decedent has not been met. See Brandt v. Schucha, 96 N.W.2d 179, 186 (Iowa 1959). In Vanston v. Rupe, 57 N.W.2d 546, 551 (Iowa 1953), the court said:

> It is well settled that specific performance of an oral contract to convey realty will not be decreed unless proof of the agreement is clear, satisfactory and convincing . . . . Requirements of this high degree of proof are not confined to cases where the alleged vendor is dead although there is added reason for the rule, and it is sometimes applied with greater strictness in such cases. (Citations omitted.)

In Lindsley v. Anderson, 383 N.W.2d 530, 532 (Iowa 1986), the court said:

> To specifically enforce oral agreement for the sale of real estate, at least a 'bare bones' contract must be established . . . . Here the evidence does not provide even the barest essentials. For example, how much was Lindsley to pay the Andersons for his half, how was it to be paid, in cash or by installment contract, if by contract, how long was it to run, what interest would be payable and would Lindsley get credit for the amounts he had paid under the first contract between them . . . . This oral agreement was notable in its total lack of such details . . . . We conclude, as did the district

> court, that the alleged oral agreement was so lacking in essential details as to be unenforceable. (Citations omitted.)

In the case at bar the alleged agreement too is lacking in the bare essentials. No one testified that John agreed to pay a specified total price, a monthly or annual payment, what interest rate was to be charged, and whether payments should be a charge against his estate. No disinterested person testified. This alleged oral agreement is so lacking in essential details as to be unenforceable.

Full performance of the alleged contract can only be accomplished at the death of the mother. However, the son substantially performed a purchase agreement to take over the business by paying off the debt on the building, and sharing his income with his mother during the course of his life. This performance was recognized by the execution of a deed by the mother to the son. It is unjust to charge his estate with what would amount to a double payment for the business.

Sophia claims that Timberman v. Timberman, 229 Iowa 835, 295 N.W. 158 (1940) is controlling. In that case the court said:

> [G]eneral rule, in reference to deeds is well established that a mere failure to perform covenants or promises forming the consideration, such as care or support of grantor is not ground for cancellation of the deed. However, appellants concede that courts of equity have made an exception to the general rule and it is now the well-settled doctrine in a majority of states that, where the consideration for a conveyance is an agreement to care for or support

> the grantor and there has been a substantial breach of such agreement, this amounts to a failure of consideration and relief is granted on the theory that no other remedy is adequate.

229 Iowa at 841, 295 N.W. at 161.

We do not find Timberman applicable to the case at bar. There are a number of significant differences. The grantee in Timberman was still alive and refused to perform the service whereas here the grantee is deceased and therefore not able to perform any additional services. 229 Iowa at 842, 295 N.W. at 161. In Timberman, the grantor paid all the purchase price of the property. Here John, the grantee, paid most of the purchase price. In Timberman the grantor was without other funds than the property. Here, Sophia has her home free and clear and social security monthly income. In Timberman, disinterested witnesses testified to the agreement. In this case no disinterested witnesses testified.

We find that the equities in the case at bar do not merit making an exception to the general rule as stated in Barbar v. Powell, 82 N.W.2d 665, 670 (Iowa 1957). "Want of consideration is a ground for avoidance of an executory contract but not, as between the parties thereto, of an executed conveyance."

Love and devotion owed to the mother and the alleged oral promise to a father, now deceased, expired with the death of the promisor, John. See Fairall v. Arnold, 226 Iowa 977, 285 N.W. 664 (1939). Because we find no

enforceable contract against John's estate, there is no breach. Nor is it necessary to offset the contributions of John during his lifetime against the estate's obligation to Sophia. The estate is not obligated to Sophia.

The judgment of the trial court must be reversed.

REVERSED.

Schlegel, J. concurs; Habhab, J. dissents.

HABHAB, J. (dissenting)

I respectfully dissent. Like the trial court I am able to find that an oral agreement existed which provided, in essential part, that if Sophia transferred the body shop property to John, John in turn would care for Sophia during her lifetime.

I agree that the part of the agreement as to what constitutes care is not certain, but I cannot agree that the uncertainty is of such dimension that it should defeat the agreement. In this respect it cannot go unnoticed that Sophia and John (during his lifetime) had no problem as to the meaning of their agreement for John, after the delivery of the deed to him in December of 1983 until shortly before his death, continued to make monthly payments to his mother. The monthly payments, even as testified to by Suzan, equaled as much as $500.

The problem here, at least as I see it, is not so much whether an agreement existed, for I believe that one did, but it is what remedy should equity fashion to meet the circumstances caused by John's death.

John, prior to his death, paid substantial sums of money to his mother as payment for her care. In light of those payments, it would be inequitable to order the retransfer of the property to Sophia, even if such property was titled in such manner that this could be accomplished. To do so would be a windfall for Sophia for she has

received substantial payments for her care in accordance with their agreement.

It is clearly the law in this state that where an immediate remedy is not available, courts of equity have the inherent power to devise an equitable remedy to meet the circumstances. The trial court found that Sophia had elected to proceed under her claim in an action of rescission. Since rescission is the action, equity, particularly under the facts and circumstances of this case, requires that restoration be taken into consideration. I would allow Sophia judgment in an amount equal to the difference between the market value of the property in dispute as it existed at the time of John's death (decreased by the market value of improvements and equipment made and owned by John) and the amounts paid by John during his lifetime to Sophia for her care.