IN THE COURT OF APPEALS OF IOWA

No. 3-364 / 92-1465

FILED
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CLERK SUPREME COURT

HOME TRUST & SAVINGS BANK, Conservator of Lillie B. Riley,

Plaintiff-Appellant,

vs.

MILDRED M. MULLENBACH and HAROLD W. MULLENBACH,

Defendants-Appellees.

Appeal from the Iowa District Court for Mitchell County, Jon Stuart Scoles, Judge.

The plaintiff appeals from the district court's order refusing to set aside a deed executed by its ward. **AFFIRMED.**

James F. Smith of Noah & Smith, Charles City, for appellant.

Brian R. McPhail of Gross & McPhail, Osage, for appellees.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

This case centers around the transfer of real property from Lillie B. Riley to Mildred and Harold Mullenbach. Mildred is Lillie's niece.

In late 1990, Lillie's husband, Eugene Riley, became very ill with cancer. On November 30, 1990, attorney Keith McKinley was called to meet the Rileys at Eugene's hospital room. Eugene stated that they wanted to transfer their house to Mildred, subject to a life estate to Lillie. Eugene also stated that they wanted Mildred to have power of attorney for Lillie. McKinley agreed to draw up the necessary documents. Lillie was present during these discussions. Eugene died on December 4, 1990, before the documents were signed.

On December 7, 1990, Lillie and Mildred came to McKinley's office and Lillie signed the document to give Mildred power of attorney. Lillie then asked McKinley to prepare new documents for the transfer of the house. The original documents had needed Eugene's signature. She also asked him to draw up a will leaving all of her assets to Mildred. These documents were executed on December 11, 1990.

On January 7, 1991, Mildred and Lillie went to the Metropolitan Federal Bank. Lillie closed out a savings account and transferred the funds into a certificate of deposit (CD) in joint ownership with Mildred. On January 8, 1991, Mildred and Lillie went to the Home Trust and

Savings Bank. Lillie transferred her CDs with the bank into joint ownership with Mildred.

On June 24, 1991, Lillie came to McKinley's office with her sister-in-law, Bessie Buchholtz. Lillie stated she had no recollection of what she had done with her finances. She asked McKinley to help her get her property back. McKinley drew up documents to revoke the power of attorney and the will. On June 25, 1991, Lillie executed a new power of attorney to Home Trust. Home Trust transferred the CDs held by them solely to Lillie. Mildred refused to give Lillie the Metropolitan CD or a deed to the house.

On July 3, 1991, Lillie came to McKinley's office to execute a new will. McKinley asked Lillie if she knew why she was there. She indicated she did not. He felt she would be unable to execute the will and did not present it to her.

Lillie was examined by Dr. Ron Larsen, a psychiatrist, on October 10, 1991. He determined Lillie had senile dementia, otherwise known as Alzheimer's disease. Dr. Larsen rendered an opinion that her memory was sufficiently impaired and she could not make financial decisions. He believed she was suffering from this illness in the latter part of 1990. Metz Drew, a neighbor, testified Lillie was somewhat forgetful even before Eugene died.

Another neighbor, Verna Turnmire testified Lillie became more forgetful during the summer of 1991, but observed no problems in December 1990. Lillie told her she

had given some property to Mildred, and did not seem concerned about the gift. Lucille Jones, another neighbor, testified she noticed no changes in Lillie until after December 1990. Lillie told her she had given the house to Mildred because Mildred had done so much for her, and that she would be able to live in the house as long as she lived.

Home Trust is Lillie's conservator. Lillie resides in a nursing home in Riceville. Home Trust initiated the present proceedings to set aside the transfer of the Metropolitan CD and the deed to the house. It alleged Lillie and Mildred had a confidential relationship and that Mildred exercised undue influence over Lillie.

The district court found that a confidential relationship did not exist between Lillie and Mildred prior to the execution of the power of attorney on December 7, 1990. The court determined that the agreement to transfer the property to Mildred arose while Eugene was still alive, and that there was no evidence of a confidential relationship between Eugene and Mildred. To the contrary, the evidence showed Eugene was fully able to manage his own affairs. The court found, however, that the transfer of the CD into joint ownership with Mildred occurred after the confidential relationship arose. The court determined Mildred had the burden to show the transfer was not the result of undue influence, and concluded she failed to meet her burden. Mildred was ordered to return the CD.

Home Trust has appealed. It contends Lillie was not mentally competent to execute the deed to her house, and the transfer of the deed should be set aside.

This case was tried in equity, and our review is de novo. Iowa R. App. P. 4. In equity, we give weight to the findings of fact of the trial court, but are not bound by them. Pence v. Rawlings, 453 N.W.2d 249, 251 (Iowa App. 1990). This rule applies to our review of the finding of a confidential and fiduciary relationship. Id.

Home Trust, as the party alleging lack of mental capacity sufficient to execute a deed, has the burden of proving by clear, convincing, and satisfactory evidence that the grantor, Lillie, did not possess sufficient consciousness or mentality to understand the import of her acts when the deed was executed. See Daughton v. Parson, 423 N.W.2d 894, 898 (Iowa App. 1988). In making this determination, the court considers: (1) the grantor's physical condition; (2) the adequacy of consideration; (3) whether or not the conveyance was improvident; (4) the relation of trust and confidence between the parties to the conveyance; and (5) the weakness of mind of the grantor as judged by her other acts within a reasonable time prior and subsequent to the act sought to be impeached. Id. (citing Brewster v. Brewster, 194 Iowa 803, 807, 188 N.W. 672, 674 (1922)).

Home Trust has not raised any argument on appeal concerning elements one, two or three. We then turn to the

fourth element, whether there was a confidential relationship between the parties.

A confidential relationship arises whenever a continuous trust is placed by one person in the skill and integrity of another, so 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." 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)).

Where a confidential relationship exists, a transaction by which the one having the advantage profits at the expense of the other is presumptively fraudulent and voidable. Id. at 200. The burden of proceeding with the evidence shifts to the grantee to produce clear, satisfactory, and convincing evidence of 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).

We find the evidence supports a confidential relationship between Mildred and Lillie, but not until after the house was transferred to Mildred. Accordingly, the burden of proof did not shift to Mildred to negate the claim of undue influence in the transfer of the house.

A written power of attorney creates a principal-agent relationship. Maritime Ventures Int. v. Caribbean Trading & Fid., 689 F.Supp. 1340, 1353 (S.D.N.Y. 1988). An agency

relationship is confidential and fiduciary in nature. Miller v. Berkoski, 297 N.W.2d 334, 339 (Iowa 1980). In this case, however, the decision to convey the home to Mildred and to establish a power of attorney were discussed and made by Eugene and Lillie in their lawyer's presence at the same time. The power of attorney was executed a few days before the documents conveying the home were signed only because it was necessary to change the language in the deeds following Eugene's death. The decision to convey the home was made with Lillie's input and acquiescence. Mildred did not participate as an agent and Lillie executed the deeds in her own name. Lillie was simply following through with her earlier decision, independent of the power of attorney. As the weeks and months passed following the execution of the power of attorney, the evidence supports the existence of a confidential relationship between Lillie and Mildred. At the time of the conveyance of the house, it did not. See Herm, 284 N.W.2d at 200 (confidential relationship arose at least on and following the date of execution of the power of attorney).

We next turn to the fifth element, the weakness of mind of the grantor. Home Trust alleges that even if there was no confidential relationship at the time the agreement was made to transfer the house, there is sufficient evidence of Lillie's mental incompetence to set aside the deed. We note that a higher degree of mental competence is required for the transaction of ordinary business and the making of

contracts than is necessary for testamentary disposition of property. Daughton, 423 N.W.2d at 989. Also, a finding that the grantor was not mentally competent is dispositive without regard to other theories. Id.

We determine there is insufficient evidence to show Lillie was mentally incompetent when the agreement was made to transfer the deed to Mildred. We recognize that Dr. Larsen gave the opinion Lillie was suffering from Alzheimer's disease in the latter part of 1990. However, he examined her about nine months after the transaction in question. Drew's testimony showed only that Lillie was somewhat forgetful by December 1990, not that she was mentally incompetent.

Attorney McKinley testified that he was not concerned about Lillie when he drew up the deed in December 1990, and it was not until June 1991 that he had concerns about her mental competence. This follows the evidence of the two neighbors, Turnmire and Jones, who testified that Lillie seemed fine in December 1990, but her mental condition changed by the summer of 1991. Also, Lillie was able to remember that she had transferred the house to Mildred for some period of time and discussed this with Turnmire and Jones. However, by June 1991, she told McKinley that she did not remember what she had done with her property.

We conclude Home Trust has not met its burden of proving by clear, convincing, and satisfactory evidence that Lillie did not possess sufficient consciousness or

mentality to understand the import of her acts when the deed was executed. We find insufficient grounds to set aside the deed. We affirm the decision of the district court on all issues. Costs of this appeal are assessed to plaintiff.

AFFIRMED.