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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-408 / 91-1821

IN THE MATTER OF THE ESTATE OF ANNA KROEPEL, Deceased,

MELVIN KROEPEL, Beneficiary,

Appellant.

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Appeal from the Iowa District Court for Plymouth County, Michael S. Walsh, Judge.

Melvin Kroepel appeals the district court order refusing to set aside a real estate contract and gift on the ground of undue influence. **AFFIRMED.**

Patrick N. Murphy of Murphy & Dull, LeMars, for appellant.

Richard L. McCoy, Sioux City, until his withdrawal, and then Robert Rehan, Sioux City, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

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HABHAB, J.

This case involves the estate of Anna Kroepel, who died testate on October 23, 1989. The appellant, Melvin Kroepel, is one of decedent's surviving sons and a beneficiary under her will.

The appellant challenges certain transactions that took place during the lifetime of the decedent. He filed an application in which he seeks an "Order to Set Aside Real Estate Contract and to Correct Inventory and Make Accounting." For the most part, the trial court held adverse to appellant. On appeal, we affirm.

The appellant first challenges the sale of the family farm by the decedent to her son, Russell. The farm was sold under contract and is dated November 10, 1988, and involves some seventy acres of farmland. The contract sale price was $500 an acre and calls for seven equal annual installment payments of $5,000. The contract did not require a down payment nor did the unpaid balance draw interest.

The contract of sale was prepared by Anna's attorney, William Sturges. He testified the terms thereof were in accordance with the instructions given him by Anna. To avoid the implication of inheritance tax and future estate proceedings, no provision was made in the contract that Anna would remain in the farm house for the rest of her life. Instead, Russell orally agreed to allow Anna to

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remain in the farm house. She lived there until her stroke in August of 1989.

I.

As previously noted, the decedent, on November 10, 1988, sold her seventy-acre farm to her son, Russell. On March 1, 1989, when the first $5,000 payment was due, Russell presented Anna with a check. Russell testified Anna told him she did not want any money for the farm. Russell then obtained a $5,000 certificate of deposit (CD) and placed both his name and Anna's on it. Anna accepted the CD and placed it in her cupboard.

Anna had a stroke in August 1989. She remained hospitalized after that time until her death on October 23, 1989. Russell was appointed as the executor of her estate.[1] Her estate was valued at $29,130.

After Anna's death, Russell obtained the $5,000 CD and cashed it in when it came due. The $5,000 was not included in the probate report. Russell has made the subsequent annual payments required by the contract to Anna's estate.

On March 15, 1990, Melvin filed an application to set aside the real estate contract, correct the inventory, and

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1. Anna's will was dated February 27, 1981. Under her will, her estate was bequeathed one-fourth each to her then-living children, Melvin, Harvey, and Russell, and one-twelfth each to her deceased son's, Alfred's, three children. Harvey was nominated executor. Harvey died in 1984, leaving two children. Anna, on June 22, 1984, executed a codicil that named Russell as the executor of her estate.

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make an accounting. He stated he is also representing the children of Alfred and Harvey, although they are not named as parties. As it relates to the real estate contract, he alleges it was the result of undue influence by Russell. He also claimed that because Russell had not actually paid the first $5,000 payment, the contract should be set aside for failure or lack of consideration.

The district court concluded that Anna voluntarily entered into the real estate contract. The court stated:

> Everyone who had contact with Anna at these material times testified that she was a stubborn lady who knew exactly what she wanted and who understood what she was doing and could not be influenced against her will. There is virtually no evidence to indicate that Anna was influenced in any way by anyone with regard to her decision to sell the farm to Russell.

The court did require the executor to make an accounting.

II.

We determine the present action was filed in equity, and our review is de novo. See Iowa R. App. P. 4. We give weight to the fact-findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

The procedure employed by the applicant to set aside the real estate contract was not challenged. We deem the issue to have been tried by consent of the parties. Since the procedure was not challenged, we do not decide whether it is proper, at least insofar as the setting aside of the real estate contract is concerned.

III.

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In the application to set aside the sale, Melvin asserts: "The consideration recited in said real estate contract is far below fair market value as of November 10, 1988, the time of the sale, is without down payment or interest, is without valid consideration, and may be the product of undue influence and should therefore be set aside."

Melvin states that the contract was not beneficial to Anna because she had been renting the farm for $4,900 per year, while under the contract she received only $100 more and would not receive any payments after seven years. He also claimed the sale price of $500 per acre was less than the fair market value for the land.

Generally, a contract may be set aside where it is based upon undue influence. Stetzel v. Dickenson, 174 N.W.2d 438, 443 (Iowa 1970). The same rule applies to gifts. See Jeager v. Elliott, 257 Iowa 897, 910, 134 N.W.2d 560, 566 (1965). Undue influence has been defined as:

> any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely.

Stetzel, 174 N.W.2d at 443; Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 185 (Iowa App. 1986).

Where a confidential relationship exists between the parties, the burden of proof shifts to the party seeking to

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uphold the validity of the transaction to establish by clear and convincing evidence the transaction was entered into voluntarily. Peoples, 392 N.W.2d at 185. Melvin had the burden to show by clear proof the existence of a confidential relationship. See In re Estate of Clark, 357 N.W.2d 34, 37 (Iowa App. 1984).

In a confidential relationship, one party has a dominating influence over another by reason of the affection, trust, and confidence of the latter in the former. In re Estate of Herm, 284 N.W.2d 191, 200 (Iowa 1979). The gist of the doctrine of confidential relationship is the presence of a dominating influence. Clark, 357 N.W.2d at 37. A confidential relationship does not arise solely from blood relationship, as between a parent and a child. Id.

As it relates to the sale of the farm, we find Melvin has failed to show by clear evidence a confidential relationship existed between Anna and Russell. While there was a relationship of affection and trust between them, there was no evidence Russell had a dominating influence.[2]

2. During these events, Melvin was living in Arizona. He came back to Iowa to attend his parent's fiftieth wedding anniversary in 1975. He also attended Alfred's funeral in 1979 and Harvey's funeral in 1984. However, Harvey's funeral in 1984 was the last time he spoke to his mother, Anna.

Russell lived in Shenandoah, Iowa, from 1977 to 1986. During this time, he stated he visited Anna at least once a month. In 1986, Russell moved to Onawa. Anna was then about eighty-four years old, and Russell began to visit more often in order to help her on the farm.

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In fact, Sturges testified Anna was a very strong-minded woman and that she dictated the terms of the real estate contract. The mental strength of the person who has allegedly been dominated is a factor for us to consider. See Herm, 284 N.W.2d at 200.

Thus, because we have found there was not a confidential relationship between Anna and Russell, Melvin maintains the burden of proof to show the real estate contract was the result of undue influence.

The elements necessary to establish a finding of undue influence are:

> (1) Susceptibility to undue influence;
> (2) Opportunity to exercise such influence and effect the wrongful purpose;
> (3) Disposition to influence unduly for the purpose of procuring an improper favor; and
> (4) Result clearly the effect of undue influence.

In re Estate of Davenport, 346 N.W.2d 530, 532 (Iowa 1984).

The general rule is that motive and opportunity alone are insufficient to support an inference of undue influence. Id. at 532-533. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence; there must be a solid foundation of established facts upon which to rest an inference of its existence. Id. at 533.

We conclude Melvin has not produced sufficient evidence to show undue influence. As noted above, the evidence showed Anna was strong-minded and therefore would not be very susceptible to undue influence. Also, in regard to

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the real estate contract, Anna received independent advice from attorney Sturges. In determining whether undue influence has occurred, the question of whether a person has received independent advice is an important consideration. See First National Bank v. Curran, 206 N.W.2d 317, 323 (Iowa 1973).

We affirm the district court's refusal to set aside the real estate contract based on claims of undue influence.

IV.

As an alternative argument, Melvin contends the real estate contract should be set aside due to failure or lack of consideration. He claims Russell made no payments under the contract until March 1990 and that Anna did not receive any benefits under the contract during her lifetime.

There is a difference between lack of consideration and failure of consideration. Johnson v. Dodgen, 451 N.W.2d 168, 172 (Iowa 1990). A lack of consideration means no contract is ever formed. Id. Where a contract contains mutual promises as consideration, generally the court will not inquire further into the adequacy of the consideration given. Kristerin Development Co. v. Granson Investment, 394 N.W.2d 325, 332 (Iowa 1986).

In contrast, a failure of consideration means the contract is valid when formed, but becomes unenforceable because the performance bargained for has not been rendered. Johnson, 451 N.W.2d at 172. To constitute a

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complete defense to a breach of contract claim, the alleged failure of consideration must be total. Id. A total failure of consideration occurs when a party has failed or refused to perform a substantial part of what the party agreed to do. Id.

We find the contract between Anna and Russell was supported by consideration. Anna promised to sell the farm to Russell and Russell promised to pay $35,000. There was not a lack of consideration nor was there a failure of consideration. Russell paid Anna on March 1, 1989, with a CD worth $5,000. Anna accepted the CD and kept it.

We affirm the district court's conclusion that Melvin failed to show a lack or failure of consideration.

V.

Melvin filed a motion to enlarge the findings of fact, pursuant to Iowa Rule of Civil Procedure 179(b), and a motion for a new trial, pursuant to rule 244. Melvin pointed out that the court had not addressed the issue of the disposition of $40,000 of CDs and the $5,000 CD that was given as the first payment on the real estate contract.

Melvin claims the jointly-owned $5,000 CD should be included in the probate inventory. We agree, but in doing so we note the trial court did order the executor to identify and describe that CD in the probate inventory. It should be listed on the schedule under jointly-owned property.

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Turning to the facts, as it relates to the $40,000 in CDs, in July 1988, Russell went with Anna to her bank and helped her empty her safe deposit box. Anna had two CDs in the box, one for $10,000 and one for $30,000. Russell testified Anna gave him the CDs and said, "I want you to have it." When the CDs came due in early 1989, Russell used a previously-acquired power of attorney to cash the CDs. The bank issued its draft in the designated amount made payable to Russell alone, who in turn purchased CDs solely in his name.

The appellant asserts the trial court in its ruling did not take proper action insofar as the two CDs and the $5,000 CD is concerned. As to this contention, we turn to the application itself, the allegations therein set forth, and the relief prayed for. His application is denoted as an "Application for Order to Set Aside Real Estate Contract and to Correct Inventory and Make an Accounting." It is clear the thrust of appellant's application is to set aside the real estate contract and to correct the inventory. The court declined to set aside the real estate contract, but, at least as to those matters over which it had jurisdiction, it ordered the inventory to be corrected.

We have no way of knowing whether the two CDs have been listed in the probate inventory, nor do we form an opinion as to whether they, in fact, should be. We do note from the record that Russell has had the CDs totaling $40,000 since July of 1988 and that he surrendered them in January

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1989. The record reveals the decedent died in October 1989.

We do not believe the issue of setting aside those two CDs, along with the creation of a constructive trust, was ever before the trial court; nor do we believe the issue of setting aside the $5,000 CD was properly before the trial court. We form no opinion as to whether such action, since it involves personal property, can be maintained by a beneficiary of the estate or whether it rightfully belongs to the executor. See In re Estate of Acken, 144 Iowa 519, 525, 123 N.W. 187, 193 (1909). That issue is not before us nor was the question placed before the trial court.

Needless to say, if the action belongs to the executor, then Russell will have to step aside and a fiduciary be appointed in his place. The procedure for such an eventuality is set forth in the probate code along with the duties and obligations of a fiduciary.

We have considered all of the arguments raised by the parties and affirm the decision of the district court. Costs of this appeal are assessed to Melvin Kroepel.

AFFIRMED.