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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JACQUELINE ANN REHDER and **ROBERT WENSEL,**	)	
Plaintiffs-Appellants,	)	Filed April 8, 1983
vs.	)	
EDWARD J. SWANSON,	)	2-400 2-68206
Defendant-Appellee.	)	

Appeal from Woodbury District Court, Donald M. Pendleton, Judge.

Plaintiffs appeal the trial court's judgment dismissing their petition seeking the establishment of a constructive trust on monies passing to defendant from joint tenancy banking accounts with Lowell Wensel, the testator of a will in which the parties were the legatees. AFFIRMED.

Wilford M. Forker, Mayer Kanter, Wil L. Forker, Sioux City, for plaintiffs-Appellants.

Edward Keane of Margolin, Ryan, Gildemeister & Willia, for defendant-appellee.

Heard en banc.

PER CURIAM

Plaintiffs appeal the trial court's judgment dismissing their petition seeking the establishment of a constructive trust on monies passing to defendant from joint tenancy banking accounts with Lowell Wensel, the testator of a will in which the parties were the legatees. We affirm the decision of the lower court.

Lowell Wensel died on August 25, 1977. Under his will he left equal shares of his property to his four children, two of whom are plaintiffs, and the defendant. Prior to Wensel's death, his checking accounts were transferred from his name to the names of Lowell Wensel and defendant as joint tenants with right of survivorship. The three accounts involved had a total value of $16,767.65. Wensel became ill in June of 1977 and was diagnosed as having cancer. He was hospitalized off and on until July 17. From July 17 until August 19 defendant cared for him at defendant's home. Subsequently, he was admitted to a rest home where he died.

Wensel and his children did not have a particularly close relationship. However, Wensel and the defendant, who was his nephew, were extremely close. Wensel had raised the defendant from the time he was fourteen, and defendant had come to regard Wensel as a father.

Defendant was named executor under Wensel's will. Defendant listed the bank accounts as joint tenancy property in the probate inventory. At least one of the plaintiffs knew that defendant was including the bank accounts as joint tenancy property rather than property passing according to the will. Said plaintiff considered contesting the placement of these accounts as joint tenancy property, but did not. She, along with the other plaintiffs, signed a receipt and waiver which stated that: "The undersigned has received from the fiduciary in the above-entitled matter all money and property to which entitled."

On April 21, 1980, plaintiffs filed a petition which sought to have the funds which defendant obtained from the joint tenancy accounts placed in a constructive trust. They alleged that the transfer of funds of Lowell Wensel to the joint tenancy accounts was obtained by undue influence and fraud on the part of defendant. At the trial, evidence was entered concerning the close relationship between Wensel and defendant. Evidence was also introduced that Wensel was fiercely independent, and that he was mentally competent during his illness.

On November 3, 1981, the trial court entered judgment for defendant, finding that the plaintiffs' failure to set aside or successfully explain the receipts bars them from recovery in this case. The court noted, however, that were it not for the waivers, it would have concluded that there was undue influnce. Plaintiffs filed an application for expanded finding of fact and conclusions of law and brief, seeking to have the judgment amended to find that there was undue influence. The trial court entered a supplemental decree denying the application.

Plaintiffs raise one issue on appeal. Did the trial court err in ruling that the signing of receipts and waivers in the probate of the estate barred plaintiffs from recovering from the executor of the estate for his actions prior to his appointment? Because our determination on this issue is not dispositive, we must also address the issue as to whether or not plaintiffs proved their allegations of undue influence.

Since this is an action in equity, our review is de novo. Iowa R. App. P. 4.

Section 633.487 of the Code of Iowa provides as follows:

> No person, having been served with notice of the hearing upon the final report and accounting of a personal representative or having waived such notice, shall, after the entry of the final order approving the same and discharging the said personal representative, have any right to contest, in any proceeding, other than by appeal, the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal

> representative, or the list of heirs set forth in the final report of the personal representative, provided, however, that nothing contained in this section shall prohibit any action against the personal representative and his bondsman under the provisions of section 633.186 on account of any fraud committed by the personal representative.

In reaching its decision, the lower court ruled that section 633.487 applies to the facts in this case. We do not agree. Section 633.487 does not apply to acts of the executor committed prior to his appointment as executor. This is true even where a determination of impropriety in his actions prior to appointment would necessitate altering subsequent actions undertaken by him in the capacity of executor.

This court dealt with the same issue in Liska v. First National Bank of Sioux City, 310 N.W.2d 531 (Iowa Ct. App. 1981). In Liska, defendant bank was accused of negligence and fraud in the administration of several trusts and the estate of plaintiff's husband. One of plaintiff's allegations was that defendant had caused property owned solely by plaintiff to be placed in her husband's inter vivos trust and included in his estate. Defendant pleaded section 633.487 as a bar to plaintiffs' action. We reversed a summary judgment for defendant based on section 633.487 insofar as it related to defendant's actions as trustee for the inter vivos trusts on the ground that such actions "were not placed in issue or otherwise before the court as part of tne administration of the E. J. Liska Estate." Id. at 535.

Because the statute does not operate to bar claims against the defendant for acts committed by him prior to his appointment as executor, we hold that the trial court erred in applying it to bar plaintiffs' action in the present case.

If plaintiffs are to prevail on the merits, they must demonstrate that defendant exerted undue influence over Lowell Wensel regarding the transfer of money into the joint-tenancy accounts. In order for influence to be "undue," it

must be so strong that it deprived the party subjected to it of his independent will. It must amount to coercion, and nearly duress. Mere suggestion is not undue influence. Neitner is earnest entreaty, even when yielded to, unless the influence was irresistible and free agency destroyed. See Hamilton v. Smitn, 10 N.W. 276, 57 Iowa 15 (1881). Influence arising from gratitude, affection, kindness or care is not undue influence. See In re Behrend's Will, 10 N.W.2d 651, 233 Iowa 812 (1943).

Generally the burden of proving undue influence resides with the party alleging it. However, if the party alleging undue influence can demonstrate the existence of a fiduciary relationship between the decedent and the opposing party, the burden shifts and the opposing party must show that the decedent acted freely and without coercion. This is a basic trust doctrine. One in whom confidence is reposed cannot retain the advantage of a transaction with the cestui que trust unless he can prove that the transaction was undertaken freely by the cestui. It must be reiterated that this doctrine only applies where the existence of a fiduciary relationship has been demonstrated.

> Before the doctrine can be applied, however, the existence of the confidential relationship or the facts giving rise to it must be proved. The relationship must be such as to enable the one charged with having abused it to have exercised it to his advantage. It must appear expressly or by implication that trust or confidence was reposed. The supposed trustee must be shown to have been in a position of advantage or superiority such as to imply a dominating influence over the cestui. Utterback v. Hollingsworth, 208 Iowa 300, 302-03 (1929).

It is this court's opinion that no such relationship existed between Wensel and defendant. All of the credible testimony indicates that Wensel conducted all of his own business affairs, that he was not in the habit of consulting with anyone concerning his financial affairs, and that defendant was not in a position to exercise dominance or superiority over him. The fact that Wensel and defendant were very close, and that defendant did numerous favors for Wensel is not sufficient to establish that they had a fiduciary relationship. Neither is the fact

that defendant's wife helped Wensel make out two checks. The primary issue is whether Wensel exercised independent judgment in the conduct of his financial affairs. We believe that he did.

Since no fiduciary relationship has been shown to have existed between Wensel and defendant, the burden of proof is on plaintiffs to demonstrate that there was undue influence. Plaintiffs have failed to meet that burden. The evidence introduced at trial indicated, without contradiction, that Wensel was a stubborn man with a mind of his own, and that he was mentally competent until the time of his death. The evidence also indicated that, apart from the natural influence arising from the affection between the two, defendant did not exercise any sort of control over Wensel. Although we are troubled by the fact that the third account was transferred a scant two days prior to Wensel's death, in the absence of any evidence of coercion, we hold that all of the transfers were made freely.

We therefore come to the same result as the trial court, albeit for opposite reasons. While we hold that the signing of receipts and waivers in the probate of an estate does not bar plaintiffs from recoverying from the executor of the estate if his preappointment acts are improper, we also hold that these plaintiffs did not provide a sufficient showing of undue influence on the part of defendant.

AFFIRMED.