IN THE COURT OF APPEALS OF IOWA

No. 0-486 / 99-1526
Filed February 7, 2001

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CLERK SUPREME COURT

THERESA BROWN, Executor of the Estate of PAUL W. JORDAN, Deceased,
Plaintiff-Appellant,

vs.

MAE DRAY,
Defendant-Appellee.

Appeal from the Iowa District Court for Appanoose County, Daniel P. Wilson, Judge.

The plaintiff appeals a district court ruling on her petition seeking to void various monetary transfers to the defendant by the decedent. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

Bradley M. Grothe of Rosborn, Bauerle & Milani, L.L.P., Centerville, for appellant.

Richard L. Ambelang of the Shelton Law Firm, Chariton, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Theresa Brown appeals a district court ruling on her petition seeking to void various monetary transfers to Mae Dray by Brown's father, Paul Jordan. Brown contends the district court erred in: (1) failing to find Jordan was incompetent at the time of the transfers and the transfers were void; (2) failing to find a confidential relationship existed between Dray and Jordan; and (3) failing to conclude Dray acquired the property received from Jordan through fraudulent practices as a constructive trustee. We affirm in part and reverse and remand in part.

I. Factual Background and Proceedings. Brown, as the executor of Jordan's estate, challenges various inter vivos transfers of money made by Jordan to Dray in the years preceding his death. Jordan died on April 6, 1998, at the age of eighty-five years. His wife predeceased him in 1979 and Brown is their only child. Jordan and Dray began a friendship in 1987 based on a shared enjoyment of going to antique and estate sales. They usually traveled to sales on three or four days a week during the daytime. They spoke daily on the telephone and Dray often helped Jordan with various house cleaning tasks. Their relationship was a caring and intimate one, however Dray testified the relationship was never sexual in nature because "they were too old for that." Beginning in 1992 and until August of 1997, Jordan transferred to Dray gifts totaling $90,198.55, mostly in the form of cash. He assisted her in the purchase of two automobiles and a home.

Brown testified she was unaware of Jordan's relationship with Dray until December 16, 1995, when she received a phone call from Dray notifying her

Jordan was in the hospital. Jordan fell on the basement steps in his home and suffered a concussion. He was soon released from the hospital and was generally in good health. He returned to his regular daily schedule, living in his own home and traveling several times a week with Dray.

On June 29, 1997, Jordan was attending church with Brown. On his way into the church, he fell on the steps. When the family started to leave the church, they discovered Jordan could not walk on his own and was very confused and disoriented. Brown took him to the hospital, where he was admitted and remained until July 2, 1997. At this time, his primary care physician, Dr. M. G. Parks, diagnosed him with Alzheimer's disease or multi-infarct dementia and recommended long-term care in a nursing home facility. Jordan was released from the hospital and returned to his home. However, his declining medical condition necessitated care in a nursing home until his death on April 6, 1998.

Brown brought this action alleging: (1) substantial sums of money were gifted to Dray by Jordan at a time when Jordan lacked sufficient mental capacity to competently make such transfers; (2) Dray exercised undue influence over Jordan resulting in the transfers, and (3) a confidential relationship existed between Dray and Jordan, which Dray breached to her benefit. Both parties presented several witnesses at trial. Dr. Parks was Jordan's primary care physician for twenty-five years. He testified he saw Jordan in his office nine times from January of 1996 until April of 1997 and did not see any signs of dementia during these visits. Dr. Parks also cared for Jordan during his hospital stay in the summer of 1997 and diagnosed him with Alzheimer's disease or

dementia at that time. He determined Jordan would not have been competent to make decisions on his own as of July 2, 1997.

After Jordan was admitted to the nursing home, Dr. Teresa Rosales, an adult and geriatric psychiatrist, examined Jordan on August 6, 1997. Her diagnosis of him was dementia, senile with agitation. Dr. Rosales explained dementia is a global impairment of the intellect, marked by indifference, loss of memory, and impaired judgment. The disease progresses through seven stages with stage one being normal functioning and stage seven being severe dementia. Dr. Rosales testified when she first observed Jordan in August of 1997, he was suffering from stage five or six dementia which would have been included symptoms such as loss of memory, lack of concentration, inability to perform complex tasks, agitation, anger, sleep disturbances, and violence. She indicated in order for Jordan to have reached stage five or six, he would have been suffering from dementia for approximately ten years. However, she was reluctant to make an affirmative declaration regarding the time of onset because she had not been his physician at the time and stated Dr. Parks would be more knowledgeable regarding the onset of Jordan's symptoms. She concluded as of August 6, 1997, Jordan was not competent to make any rational decisions about his care or treatment and he would not have had sufficient ability to understand the concept of a gift.

Joyce Bowen, a teller at Jordan's bank, testified he was usually very exact regarding his financial matters. She noted in the few years before his death, he had become confused regarding his banking and needed extra help understanding various documents. Another teller at the bank, Clydene Hindley,

testified in his later years, Jordan become more forgetful during her transactions with him. Glen Howe was Jordan's neighbor for thirty-four years and also noticed Jordan became more forgetful in his later years. Howe indicated Jordan's usually neat physical appearance became more disheveled in the last year of his life.

In contrast, Jordan's accountant for almost twenty years, Delores Westcott, testified he always had all of his tax documents in order. The last time she prepared his tax returns was for the 1996 year in early 1997. She testified Jordan was somewhat more confused than he had been in past years, but indicated he did get the information she needed to prepare the return. Vera Stafford, a friend who often traveled with Jordan and Dray when they went to sales, testified Jordan was a strong-minded person who made more decisions about their relationship than Dray did. In addition, Dray and her daughter testified Jordan was the more dominant personality in their relationship and he had never asked for financial advice from her. Dray further indicated he was not dependant on her and they never discussed his finances.

The district court issued its findings of fact, conclusions of law, judgment, and decree on August 30, 1999. In the decree, the court found a confidential relationship did not exist between Dray and Jordan and Dray did not exercise undue influence over Jordan as it concerned the monetary transfers. The court further found the evidence did not establish Jordan was incompetent prior to July 2, 1997. The district court dismissed Brown's petition in its entirety. Brown appeals.

II. Standard of Review. This action was tried in equity and therefore our review is de novo. Iowa R. App. P. 4. We give weight to the fact-findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *In re Estate of Welch,* 534 N.W.2d 109, 111 (Iowa Ct. App. 1995).

III. Jordan's Mental Competency and Legitimacy of Transfers. Brown contends Jordan lacked the mental competency to make any of the transfers to Dray after January 1, 1994. The party alleging a lack of mental capacity sufficient to support an inter vivos transfer of personal property has the burden of proving by clear, convincing, and satisfactory evidence the grantor did not possess sufficient consciousness or mentality to understand the import of his acts at the time the transfer. *See In re Estate of Todd,* 585 N.W.2d 273, 276-77 (Iowa 1998). On the issue of mental capacity, the court is entitled to take into consideration:

> [the grantor's] physical condition; the adequacy of consideration; whether or not the conveyance was improvident; the relation and trust and confidence between the parties to the conveyance; and the weakness of mind of the grantor as judged by his other acts within a reasonable time prior and subsequent to the act sought to be impeached.

Daughton v. Parson, 423 N.W.2d 894, 896 (Iowa Ct. App. 1988) (quoting *Brewster v. Brewster,* 194 Iowa 803, 807, 188 N.W. 672, 674 (1922)). The evidence is clear Jordan's mental and physical health declined in the years immediately before his death. Until his hospitalization in July of 1997, Jordan was in fairly good physical condition. He experienced several ailments associated with his advanced age, but was still able to get around on his own, maintain his own home, take care of his daily business, go to church with his

family, and travel with Dray during the week. Several witnesses testified he had become forgetful, confused as to some of his banking transactions, and more physically unkempt than he had been in earlier years. However, Dr. Parks was Jordan's primary care physician for twenty-five years and testified, during nine visits in the eighteen months before Jordan was hospitalized, he saw no indications Jordan was suffering from dementia. The district court placed great weight on the testimony and documents from Dr. Parks due to the long-standing physician-patient relationship. We agree with this assessment. In addition, like the district court, we place less weight on Dr. Rosales's testimony, as she did not treat Jordan until August 6, 1997 and had no prior knowledge of his mental capacity.

The record does not indicate the transfers from Jordan to Dray were improvident or lacked adequate consideration. Jordan cared deeply for Dray and they had a long-term friendship. Dray testified Jordan asked her marry him several times but she declined. He gave her gifts as an expression of their relationship and close friendship. Testimony at trial indicated Jordan was concerned about Dray's safety and helped her purchase two cars and a house. In exchange, Dray cared for Jordan and often performed house cleaning, cooking, yard work, and laundry for him. In the later years of their relationship, Dray did most of the driving when they traveled to sales, although Jordan would often decide where they were going. In addition, there was testimony at trial that Jordan was a very strong-willed individual who was able to make his own decisions.

We conclude the record contains clear and convincing evidence supporting the district court's finding Jordan was competent until July 2, 1997. We also affirm the district court's determination all transfers made by Jordan to Dray before July 2, 1997, were valid. However, consistent with the testimony of Dr. Parks, we find Jordan was incompetent to make transfers after that date. Jordan gave Dray $4000 between the dates of July 3 and August 5, 1997. Accordingly, we reverse the district court's decree and remand for entry of judgment in the amount of $4000 in favor of Brown against Dray.

IV. Confidential Relationship Between Dray and Jordan. Brown next contends the district court erred by finding there was no confidential relationship between Dray and Jordan. A confidential relationship is broadly defined as:

> [A]ny relation existing between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. In its broadest connotation the phrase embraces those multiform positions in life wherein one comes to rely on and trust another in his important affairs.
>
> A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another, and 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 relation."

In re Herm's Estate, 284 N.W.2d 191, 199 (Iowa 1979). Where such a confidential relationship exists, a transaction by which the one having the advantage profits at the expense of the other will be held presumptively fraudulent and voidable. *Id.* at 200.

The district court found Dray and Jordan had a "close, trusting and long-term relationship." However, it declined to find the existence of a confidential relationship because Dray did not exercise dominance or control over Jordan. We agree. The evidence indicates Jordan was the more controlling and

dominant member of the relationship. He most often chose where the two would travel during the week. In addition, Jordan and Dray rarely discussed financial matters. On one occasion, Jordan asked Dray which brand of washer and dryer he should purchase. The record indicates she had no other input into his financial decisions. Clear and convincing evidence in the record supports the district court's determination there was not a confidential relationship between Jordan and Dray and Dray did not exercise dominance over Jordan. Therefore, the transfers between Jordan and Dray are not presumptively fraudulent or voidable. We affirm the district court on this issue.

V. Constructive Trust Arising From Fraud. Brown alleges Dray fraudulently acquired her home and automobiles through monetary transfers from Jordan and she now holds this property as a constructive trustee for his estate. Brown failed to raise this issue before the district court and, consequently, the district court did not rule on it. Issues must be raised and decided by the district court before they may be raised and decided on appeal. *Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 25 (Iowa 1999). This issue has not been preserved for our review and therefore, we do not consider it on appeal.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.