FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ARLYNE V. GASAWAY, as Administrator of the Estate of Leonard W. Jackson, Deceased,

Plaintiff-Appellee,

vs.

ETHEL E. MOORE,

Defendant-Appellant.

Filed August 29, 1985

5-293
84-1307

Appeal from the Iowa District Court for Clay County - James H. Andreasen, Judge.

Defendant appeals from judgment for plaintiff in a declaratory judgment action, asserting the evidence that she exerted undue influence was insufficient to support the findings of the trial court. AFFIRMED.

Michael L. Zenor of Zenor & Carr, Spencer, for defendant-appellant.

Richard N. Tompkins, Jr., Mason City, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

Defendant appeals from a judgment for the plaintiff in a declaratory judgment action, asserting that the evidence that she exerted undue influence was insufficient to support the findings of the trial court. We affirm.

Leonard Jackson was 88 years old and suffering from health problems when he moved into the home of his niece, Ethel Moore. Various medical problems, including senility, were diagnosed during a hospital stay between March 29 and April 2, 1982. On April 6, 1982, at the personal direction of Ethel, United Central Bank of Spencer issued a certificate of deposit in the amount of $10,500.00. The certificate of deposit was made payable to "Leonard W. Jackson in trust for Ethel Moore."

Leonard died on September 30, 1982. Just over a month after his death, plaintiff administrator sought a declaratory judgment that the estate was the owner of the certificate of deposit. Conflicting evidence was presented concerning decedent's competency. The trial court found that a confidential relationship existed between decedent and his niece and that she failed to carry her burden of showing freedom from undue influence. Ethel, the defendant in this action, has appealed from this determination.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings, however, we are not bound by them. Iowa R. App. P. 14(f)(7).

Initially we consider the trial court's conclusion that a confidential relationship existed between the decedent and Mrs. Moore. In Oehler v. Hoffman, 253 Iowa 631, 635, 113 N.W.2d 254, 256 (1962), the supreme court set forth characteristics of a confidential relationship:

> We have been slow to define the precise limits of a confidential relationship. It is clear it may exist although there is no fiduciary relation. It exists when one person has gained the confidence of another and purports to act or advise with the other's interest in mind. It does not arise

> solely from blood relationship. The gist of the doctrine of confidential relationship is the presence of a dominant influence under which the act is presumed to have been done. Purpose of the doctrine is to defeat and correct betrayals of trust and abuses of confidence.

(emphasis added).

Upon examination of the record, we conclude that a confidential relationship existed. At the time the certificate of deposit was issued, Leonard's mental and physical condition had deteriorated considerably. He depended upon Ethel for care, transportation, and trusted her to handle his finances without seeking any independent advice. We agree with the trial court that the dependence and trust evidenced in the record would preclude the existence of an arm's length transaction.

We also believe a finding of undue influence is appropriate since the defendant has failed to demonstrate the fairness of the transaction. The effect of a confidential relationship is "to raise the presumption of fraud and undue influence and shift the burden to the party seeking to uphold the transaction . . . to establish by clear and convincing evidence that the transaction was entered into voluntarily." Punelli v. Punelli, 364 N.W.2d 259, 261 (Iowa Ct. App. 1984). The elements of undue influence are 1) susceptibility; 2) opportunity to exercise such influence to effect the wrongful purpose; 3) disposition to influence unduly for the purpose of procuring an improper favor; and 4) a result clearly the effect of undue influence. After examining the record, we conclude that these elements have been met.

Leonard's age, senility, and health problems clearly show that he was susceptible to influence. Furthermore, defendant concedes that there was an opportunity to exercise undue influence. With respect to the third element, defendant states that she did, on occasion, "attempt to persuade decedent to do certain things which she saw as being in his best interest." The facts, however, shed some doubt on whether she was acting in his interests or her own. Ethel placed Leonard's funds in a trust certificate naming herself as beneficiary; she did not talk to the decedent or explain to him the effect of placing the funds in a trust, claiming that she assumed he was knowledgeable. In fact, Leonard did not have any independent advice concerning this transaction. In such a situation, it would be difficult to say that Ethel was not disposed to procuring a wrongful result. As the trial court indicated, "it is a rare case where the dominant individual in a fiduciary relation can sustain a gift to himself by the one who is dependant upon him." (Quoting Johnson v. Johnson, 196 Iowa 343, 348, 191 N.W. 353, 355 (1923)) Finally, we believe the result of the transaction would indicate undue influence; approximately half of Leonard's money went to Ethel, money which ordinarily would have been distributed to his children.

In light of the facts of this case, we see no reason to disturb the trial court's determination. Defendant complains that the burden of proof in cases involving confidential relationships imposes an undue hardship. She asks us to reconsider our existing case law on this. We are not inclined to do so. We see little reason to consider a departure from well-established law and impose a lesser burden, especially when defendant does not present this court with any alternative.

AFFIRMED.