FILED
JUN 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

132

JAMES R. SMITH,

Plaintiff-Appellee,

vs.

VICTORIA PEWICK,

Defendant-Appellant.

POLK COUNTY, CITY OF DES MOINES and IOWA DES MOINES NATIONAL BANK,

Defendant.

Filed June 29, 1982

VICTORIA PEWICK,

Counterclaimant-Appellant,

vs.

JAMES R. SMITH,

Defendant to Counterclaim-Appellee.

2-159
2-66998

VICTORIA PEWICK,

Cross-Petitioner,

vs.

IOWA DES MOINES NATIONAL BANK, as Executor of the Estate of Bertha Howand,

Defendant to Cross-Petition.

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Defendant appeals from the trial court's judgment partitioning certain real estate as requested by the plaintiff. The defendant contends that the deed under

which the plaintiff was claiming his interest should have been set aside, asserting that plaintiff's mother unduly influenced the grantor to execute the deed, that plaintiff's mother had a confidential relationship with the grantor raising the presumption that the deed was the product of the undue influence, and that the grantor did not have sufficient mental capacity to validly execute the deed. AFFIRMED.

William J. Hornbostel of James & Galligan, Des Moines, for defendant-appellant.

Patricia Kelley Knoedel of Beving, Swanson & Forrest, Des Moines, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Johnson, JJ.

DONIELSON, J.

Defendant appeals from the trial court's judgment partitioning certain real estate as requested by the plaintiff. The defendant contends that the deed under which the plaintiff was claiming his interest should have been set aside, asserting that plaintiff's mother unduly influenced the grantor to execute the deed, that plaintiff's mother had a confidential relationship with the grantor raising the presumption that the deed was the product of the undue influence, and that the grantor did not have sufficient mental capacity to validly execute the deed. We affirm.

Since the action was tried in equity, our scope of review is de novo pursuant to Iowa R. App. P. 4.

I.

Defendant accuses plaintiff's mother of using undue influence within a confidential relationship to obtain the deed which plaintiff relied upon for the partition. We believe the defendant failed to demonstrate the requisite proof to establish either undue influence or a confidential relationship. In order to establish an undue influence, the defendant is required to show proof that the following four elements exist: 1) the testator must have been susceptible to undue influence; 2) the person alleged to have exercised undue influence must have held the opportunity to exercise it; 3) such persons must have had the disposition to influence the testator unduly for the purpose of procuring an improper favor; and 4) the result must clearly appear to be the effect of undue influence. In re Estate of Adams, 234 N.W.2d 125, 128 (Iowa 1975). To show the existence of a confidential relationship, defendant must demonstrate that the plaintiff's mother was relied upon and trusted by Bertha in her important affairs. In re Estate of Herm, 284 N.W.2d 191, 199 (Iowa 1979). Although our review is de novo, we do give deference to the trial court's findings.

The record reveals that Bertha, the testatrix, performed her own vital business functions such as writing checks, paying bills, banking, etc. When she turned to someone for assistance in other business areas, she relied upon her brother, Albert, not plaintiff's mother. Albert also recommended the attorney who drew up the deed that severed the joint tenancy.

We find there is not sufficient evidence to establish the existence of a confidential relationship. The plaintiff's mother, in simply providing transportation for Bertha, did not take part in any business transactions including the creation of the deed. Plaintiff's mother has not displayed any dominating behavior over Bertha; on the contrary, it appears she was really subservient to Bertha in performing her different errands. Plaintiff's mother occupied the role of friend, companion, and chauffeur to Bertha, not that of a financial advisor in a confidential relationship. The relationship plaintiff's mother had with Bertha was similar, if not identical to the relationship defendant had shared with Bertha several years earlier when defendant acquired her interest in the same land.

Our de novo review also indicates that defendant has failed to establish the elements of undue influence. Furthermore, defendant only questions the creation of the deed which transformed the joint tenancy to a tenancy in common, not the creation of the will which left the land to the plaintiff. When the deed was executed, title to the land remained with Bertha Howland and was not given to the plaintiff or any third party. If title were given to the plaintiff at that time, there might be an implication or inference that the deed resulted from some undue influence; however, the testatrix, Bertha, had kept title to the property for seven years prior to her death. Within this period, she was free to transfer any interest she had. By not doing so and by leaving it to the plaintiff upon her death, the defendant cannot now claim this act was a result of undue influence by the plaintiff's mother.

II.

Defendant's final contention goes to the mental capacity of the grantor to validly execute the deed in question. Our review of the record persuades us that defendant did not prove by clear and convincing evidence that Bertha Howland lacked mental capacity to create the deed. Bertha should be allowed the usual presumption of sanity. The burden of proof is upon the defendant to overcome this presumption and apply it to the time the deed was executed. Wilson v. Wilson, 34 N.W.2d 911, 914 (Iowa 1948). The defendant did not present testimony which related to the time period around or on the day the deed was executed. The only evidence relating to that was from the attorney who executed the deed. He claimed that Bertha knew what she was doing and was capable to execute the deed. She knew the nature and extent of her property and knew the nature of the act she was performing when she signed the deed. In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973). Further, her attorney claimed that Bertha was motivated by ill feelings she had toward the defendant following several quarrels and arguments. These quarrels resulted in the defendant moving out of the home. This action, along with her attorney's testimony, clearly shows that Bertha did not lack mental capacity when the deed was executed. Defendant's evidence falls short of overcoming the presumption of sanity as well as the oppositional evidence.

Defendant's attempt to set aside the plaintiff's deed has failed to establish undue influence, a confidential relationship, or a lack of mental capacity. Therefore, we affirm the decision of the trial court.

AFFIRMED.