FILED
APR 27 1982
CLERK, SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MATTER OF THE ESTATE OF KENNETH S. VOGT, DECEASED.

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JAMES K. VOGT,

Plaintiff-Appellant,

vs.

VERA CAROL VOGT, Executor, ROBERT C. VOGT and DENNIS M. VOGT,

Defendants-Appellees.

Filed April 27, 1982

2-01
2-65507

Appeal from Poweshiek District Court - Dick R. Schlegel, Judge.

Plaintiff appeals from trial court's decree which 1) upheld a sale of real property by defendant-executor to decedent's son, pursuant to an option agreement between decedent and his son; and 2) failed to remove the executor for mismanagement and improper accounting. AFFIRMED.

Larry P. Walshire, Ely, Iowa, for plaintiff-appellant.

Robert N. Downer of Meardon, Sueppel, Downer & Hayes, Iowa City, Iowa, for defendant-appellee Vera Carol Vogt.

C. M. Manly and Charles M. Manly III, Grinnell, Iowa, for defendants-appellees Robert C. and Dennis M. Vogt.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, James K. Vogt, appeals from trial court's decree which: 1) upheld a sale of real property by defendant-executor to decedent's son, defendant Robert C. Vogt, pursuant to an option agreement between decedent and his son; and 2) failed to remove the executor for mismanagement and improper accounting. He asserts that the option to purchase the property, and the contract of sale pursuant thereto, should be set aside either because of lack of consideration, because it was a bargain sale brought about by undue influence, or because it involved an incomplete promise to make a gift. Plaintiff also contends that trial court abused its discretion in failing to remove the executor and in approving the executor's final report. We affirm.

Decedent, Kenneth Vogt, died testate on October 21, 1975. For many years prior to his death, he had engaged in a farming enterprise in partnership with his son, Robert. Robert and he farmed several parecels of land, including one owned solely by decedent, two owned jointly by decedent and Robert as tenants in common, and one rented by the partnership. The written partnership agreement between decedent and Robert provided for an equal sharing of the profit and loss with equal contribution of capital. The benefit of the use of decedent's solely owned property was contributed to the partnership for its life without any extra compensation. The partnership, however, was to pay for the property taxes and other attendant expenses on the property. This property was also subject to an option to purchase by Robert, which was agreed upon by decedent, decedent's wife (defendant-executor) and Robert on July 20, 1973. Testimony at hearing tended to show that the reason for decedent's grant of this option was his desire to assure Robert's continuing participation in the farming partnership. The stated consideration was $1, but nothing was transferred to decedent for the option. The option provided for the sale of the property to Robert for a total price of $88,000 with a ten percent down payment, the balance to be paid in annual installments of

$2,000 plus six percent interest. It was unassignable and conditioned upon the existence of the partnership between the decedent and Robert. The option also provided that it would continue until March 1, 1980, or for a period not to exceed six months after the decedent's death, whichever event occurred first.

Pursuant to decedent's last will and testament, his wife, Vera Vogt, was appointed executor of his estate. The will devised and bequeathed to decedent's wife certain real property and 50% of the adjusted gross estate, after its appraisal for federal estate tax purposes. The residue of the estate was left to his three sons, James, Robert, and Dennis, "share and share alike." The will also made reference to the option previously granted to Robert. In the event Robert exercised the option, decedent's wife was directed to accept the balance due as part of the bequest of 50% of the estate.

After decedent's death, Robert and Dennis entered into a partnership to continue farming the land previously farmed by Robert and his father. The executor rented the estate's interest in the farms for a cash rent of $9,000 a year for both farms. In addition, Robert and his father had rented another farm for $4,000 for the crop year 1975. The lease was transferred to the brothers' partnership on March 1, 1976 under the same terms. Decedent's interest in the personal property of the father/son partnership was sold by the executor to Dennis on March 1, 1976, for the purchase price of $89,892.18. Although Dennis received physical possession of the property on March 1, 1976, no money was received by the executor until July 21, 1978. At that time $60,000 was placed in the estate's checking account and the entire amount was applied to the purchase price. Dennis also gave the executor an unsecured promissory note for the balance of the purchase price. The note carried an 8-1/2% interest rate, but failed to state the named payee or a due date.

On or about December 26, 1975, decedent's son, Robert, exercised the option. On October 27, 1975, decedent's wife elected to take under the will and to receive the contract payment accordingly. On May 16, 1977, plaintiff James K. Vogt, decedent's son and residuary beneficiary under the will, filed a petition to set aside the option permitting Robert to buy the specified real estate. He alleged that the purchase price of $88,000 was far below the market value for the property and that Robert had used undue influence to obtain the option. On September 5, 1978, plaintiff filed a petition for removal of the executor, asserting that the executor had mismanaged the property and had failed to make a full and complete accounting. On December 12, 1978, plaintiff filed an amendment to the petition for removal, alleging additional acts of mismanagement on the part of the executor. On January 12, 1979, plaintiff filed an amended and substituted petition to set aside the exercise of the option, reasserting the invalidity of the option itself, and asserting that the contract for sale of land was invalid. The matters were consolidated for trial on November 20, 1979.

In its findings of fact and conclusions of law, entered May 23, 1980, trial court found that the option was given for adequate consideration, that it was not granted for the reason of unfair advantage or undue influence, and that plaintiff had not proven that the sale was a bargain sale. The court further concluded that the sale of personal property by the executor to Dennis was not in the best interest of the estate and modified the note given in connection with the sale. The court also disallowed various expenditures by the executor from estate funds. However, the court ruled that any improper act by the executor failed to demonstrate that she should be removed as executor. With appropriate amendments, trial court indicated that the final report should be approved. On June 2, 1981, plaintiff filed a motion for new trial and a motion to amend and enlarge findings and conclusions, which trial court denied. Thereupon, plaintiff appealed.

I. Scope of Review. Since this is an action in equity, our review is **de novo.** Iowa R. App. P. 4. We "review the facts and law to determine anew from the credible evidence all properly presented and preserved contentions . . . ." Miller v. American Woodlands, Inc., 275 N.W.2d 399, 402 (Iowa 1979), citing In re Marriage of Winegard, 257 N.W.2d 609, 613 (Iowa 1977). Issues not raised in the trial court may not be raised for the first time upon appeal. Id.; see also B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 497, 139 N.W.2d 399, 404 (Iowa 1966). While we give weight to the findings of trial court, especially where credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Option Agreement. Plaintiff argues that the option agreement between decedent and Robert is unenforceable because of a lack of consideration, or should be set aside because of undue influence. Trial court found that the option was given for adequate consideration, and not granted by reason of unfair advantage or undue influence on the part of Robert. We agree with trial court's conclusions.

It is hornbook law that legal detriment, that is, performance of, or a promise to perform, that which one is not legally obligated to do, is sufficient consideration to support a contract. Our review of Iowa case law reveals no deviation from this basic principle. "Either benefit to the promissor or detriment to the promissee constitutes consideration." Doggett v. Heritage Concepts, Inc., 298 N.W.2d 310, 311 (Iowa 1980). "A consideration consists of some benefit or advantage accruing to one party to a contract or some loss or disadvantage incurred by the other. In other words, any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charged upon, the person to whom it is made." Bankers Trust Co. v. Economy Coal Co., 224 Iowa 36, 42, 276 N.W. 16, 20 (1937).

In this case, the option granted to Robert, by its terms, terminated in the event the farm partnership, existing from the date of the option between decedent

and Robert, also terminated. Robert thus had the benefit of an option in return for doing something that he was not otherwise legally obligated to do, that is, continue in the farming partnership. The option agreement is thus clearly supported by consideration. We find plaintiff's argument, that there existed no detriment because Robert was economically benefited by the farming enterprise, wholly specious. First, as a general rule, it is well settled that any detriment, no matter how economically inadequate, will support a promise. State ex rel v. American Bond & Casualty Co., 213 Iowa 200, 206, 238 N.W. 726, 728 (1931). "Each party to a contract may, ordinarily, exercise his own discretion, as to the adequacy of the consideration; and if the agreement is made bona fide, it matters not how insignificant the benefit may apparently be to the promissor, or how slight the inconvenience or damage appear to be to the promisee, provided it is susceptible of legal estimation." Blake v. Blake, 7 Iowa (Clarke) 46, 51 (1858). Thus, the fact that the farming enterprise was economically beneficial to Robert has no effect on the fact that he did something he was not otherwise obligated to do. We note further that Robert's failure to pay the recited consideration of one dollar does not invalidate a contract where the remaining consideration will support it. See Wright v. Iowa So. Util. Co., 230 Iowa 838, 842, 298 N.W. 790, 793 (1941).

Plaintiff next argues that the option was procured by undue influence and unfair advantage. We find this claim wholly without merit. "Undue influence is 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 forebear an act which he would not do or would do if left to act freely.' " Stetzel v. Dickenson, 174 N.W.2d 438, 443 (Iowa 1970), quoting Black's Law Dictionary (rev. 4th ed.). " 'Generally, in order to invalidate a contract, undue influence must operate to deprive a party of his free agency or will.' " Id., quoting 17 Am. Jur. 2d Contracts, § 154, p. 505 (1964). ". . . Influence to be 'undue' must be such as to

deprive one person of his freedom of choice and to substitute the will of another in its place." Stetzel, 174 N.W.2d at 443, and cases cited therein.

Defendant produced three witnesses who testified decedent was at all times competent. The fact decedent recognized that, in light of his age and health, it was desirable to ensure his son's participation in the partnership does not support a finding of undue influence. In summary, we find no evidence to support a finding that the decedent executed the option as a result of undue influence.

Finally, we find no merit to plaintiff's argument that the purchase price of the land was so inadequate that the sale should be set aside. As we stated above, the rule is well settled that:

> '. . . consideration is not insufficient merely because it is inadequate. The legal sufficiency of a consideration for a promise does not depend upon the comparative economic value of the consideration and of what is promised in return. In other words, the relative values of a promise and the consideration for it do not affect the sufficiency of the consideration, and whatever consideration a promissor assents to as the price of his promise is legally sufficient.'

Hart v. Hart, 160 N.W.2d 438, 444 (Iowa 1968), quoting 17 Am. Jur. 2d, Contracts, § 102, p. 445-46 (1964). Moreover, the question of whether an option contract should be enforced in equity "is to be determined not as of the date when it was finally exercised, but upon the situation as it existed when the contract was entered into." Imperial Refinery Corp. v. Morrissey, 254 Iowa 934, 945, 119 N.W.2d 872, 879 (1963). In light of the benefit decedent intended to acquire from his son's continuation in the farming partnership, we find no significant desparity between the agreed upon price of $88,000 and the fair market value of $120,000 at the time of the inception of the option.

III. Executor's Removal. Plaintiff next argues that trial court abused its discretion in failing to remove the executor when trial court had specifically found acts of malfeasance. He also argues trial court erred in accepting the executor's final report. We find no error.

Neither trial court, nor this court, is obliged to remove a fiduciary unless there is some tangible reason to believe that damage will otherwise accrue to the estate. In re Estate of Arduser, 226 Iowa 103, 106, 283 N.W. 879, 881 (1939). Here trial court efficiently and adequately remedied the errors it found in the executor's handling of the estate. Since the executor's final report and accounting are presently before the court, there remains no further action for proper administration of the estate unless other acts of malfeasance by the executor require disapproval of the final report and a continuation of the estate. We thus must determine whether such evidence of malfeasance exists.

Plaintiff first argues that the invalidity of the option and land sale requires continuation of the estate. Since we have concluded that the option and land sale contract are valid and enforceable, the executor has no remaining duties with regard to that transaction.

Plaintiff also claims that the estate was damaged by improper liquidation of the farming partnership assets. First, he asserts that no accounting and evaluation of decedent's interest in the partnership was made. We find, however, that such an evaluation and accounting was made in the first amendment to the final report. Second, plaintiff argues that certain improprieties or errors in liquidation were made and consequently damaged the estate. We have reviewed these contentions and find trial court's action appropriate. We concur in the equal division of the partnership assets in accordance with the agreement. We further find trial court's remedy to the executor's errors in liquidating the estate's interest in the partnership personal property (requirement of a commercially reasonable rate of interest from March 1, 1976 (date of sale) and requirement of a reasonable due date) to be satisfactory. We also conclude that the liquidation is equitable in all other respects.

We are not persuaded by plaintiff's remaining assignments of error. We find no malfeasance in the executor's failure to require liquidation of the

partnership's leasehold interest in certain property. The partnership was in no position to farm the leased land and the agreement represented a liability for a fixed cash rental payment, an amount for which the estate was half liable. We believe that elimination of this liability was a prudent action by the executor.

We find no malfeasance in the executor's rental fee for property held jointly with Robert. We conclude the evidence indicates that the property was rented for a fair market value.

There is no merit to plaintiff's contention that co-mingling of partnership and estate transactions require a new and full accounting. Trial court properly found that a detailed accounting of the estate and partnership assets, which was attached to the first amendment to the final report, was adequate.

Finally, there is no merit to plaintiff's claim that the value of the estate was improperly calculated. We note further that the increase in estate tax valuation was due, in part, to plaintiff's action.

We thus conclude trial court correctly accepted the final report of the estate. Finding no error in trial court's judgment, we affirm that judgment.

AFFIRMED.