IN THE COURT OF APPEALS OF IOWA

No. 8-241 / 07-1115
Filed June 25, 2008

IN THE MATTER OF THE ESTATE AND TRUST OF ELSIE OTTEROS, Deceased,

CLESINE CARUTH,
Plaintiff,

vs.

MARTIN A. OTTEROS, Individually and as Trustee to the Amendment to the Elsie Otteros Trust, and as Executor to the Last Will and Testament of Elsie Otteros,
Defendant-Appellee,

MARTIN A. OTTEROS,
Plaintiff-Appellee,

vs.

KIRBY C. OTTEROS and CANDACE K. TWEDT,
Defendants-Appellants,

CLESINE CARUTH, MARTINA M. DERICKSON, and ANGELA R. TONSI,
Defendants.

Appeal from the Iowa District Court for Wright County, David R. Danilson, Judge.

Appellants challenge the district court ruling denying a petition to set aside decedent's inter vivos transfer of assets. **AFFIRMED.**

Robert J. Cowie, Jr. and Laura J. Parrish Maki of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C., Decorah, for appellant.

Larry E. Ivers, Eagle Grove, and David R. Johnson of Brinton, Bordwell, & Johnson, Clarion, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

I. Background Facts and Prior Proceedings

Elsie Otteros, the decedent, was born in 1902. She graduated with a business degree from Wartburg College and married Alfred Otteros in 1921. Alfred and Elsie had two children: Clesine and Fred. Clesine married Andy Caruth and had one son. Fred also married, and he and his wife Betty had four children. Three of these children—Martin Otteros, Kirby Otteros, and Candace Twedt—are parties in this action. The fourth child is deceased, but her two children—Martina Derickson and Angelina Tonsi—were also parties in the underlying action.

Alfred died in 1968. After Alfred's death, Elsie ran the family farming business. She kept her own business books, wrote her own checks, and sold her own grain until the final months of her life. No family member was privy to her income tax information or her tax returns. Elsie owned two farms. One farm, named the "Home Place," consisted of 160 acres, and the other farm, named the "North Place," consisted of eighty acres. Fred, and later Martin,[1] leased the Home Place and the North Place from Elsie through a crop-share lease. Elsie also had a life estate in a third farm, called the "South Farm." Clesine's son, Alan, leased the South Farm from Elsie.

Fred and Clesine owned a piece of property called the "Double O Place." Fred owned a three-fourths interest in the Double O Place, and Clesine owned

[1] Martin worked for Fred until 1994 when Fred stopped farming. Then Martin took over his father's farming operation, which covered more land than the property at issue in this case.

the remaining one-fourth interest. Fred, with the help of Martin, farmed the Double O Place.

Elsie lived on her own in a house on the Home Place. Fred and Betty lived approximately 300 yards away from Elsie's home. Martin, his wife Debra, and their children lived approximately 100 yards away from Elsie in their mobile home. Because his mobile home was also located on the Home Place, Martin shared a mailbox with his grandmother Elsie.

In 1995, at the age of ninety-three, Elsie decided to change her estate plans. Elsie spoke with Fred and Betty about coordinating their estate plans to achieve common goals. Elsie, Fred, and Betty hired Lee Poppen to be their attorney. Poppen had done some previous legal work for Martin, a guardianship and conservatorship for a great uncle and a will for his wife.

Elsie directed Poppen to create a revocable trust whereby she would be appointed as trustee. According to the terms of this trust, upon her death Fred would receive the Home Place and Clesine would receive the North Place.

Fred and Betty also directed Poppen to create a revocable trust. In this trust, Fred and Betty gave their interest in the Home Place, which they did not yet own, to their sons Martin and Kirby. The trust also directed that their interest in the Double O Place would be divided between Candace, Martina, and Angelina. The trust also specified that Martin would have a farm tenancy at the Double O Place for ten years after their deaths for the full average cash rent for similar farm ground.

Two years later, in the spring of 1997, Fred and Betty died. Candace, Martina, and Angelina received Fred and Betty's three-quarter interest in the Double O Place. Because Elsie was still alive and still owned the Home Place, neither Martin nor Kirby received any interest in the Home Place. Martin continued to rent the Double O place pursuant to the ten-year farm tenancy created by Fred and Betty's trust.

Shorty after Fred and Betty died, Elsie once again met with Poppen and amended her trust so that Martin and Kirby would each receive one-half of the Home Place upon her death.

Elsie continued to live on her own in a house on the Home Place. As they had done for many years, Martin and Debra visited Elise every day. They prepared some meals for her and drove her wherever she wanted to go, including most of her trips to Poppen's law office.

Relationships between Martin, his siblings, and Clesine were strained prior to the death of Fred and Betty. The relationship became much worse after Fred and Betty died. Members of the family did not agree with Fred and Betty's decision to award Martin a ten-year lease on the Double O Place. Clesine and Candace were upset about the amount of rent they were receiving on the farmland. In the fall of 1997, Candace contacted Poppen and a separate attorney and made an unsuccessful attempt to try and set aside or break Fred and Betty's trust. Candace also told Elsie about her concerns about the trust. This conversation made Elsie upset.

In February 1998 Elsie met with Poppen and told him she wanted to amend her revocable trust so Martin would have the option to purchase Kirby's one-half of the Home Place at eighty percent of its value at the time of her death. Because of Elsie's age and the fact that he believed some of her beneficiaries would be dissatisfied and might try to challenge her estate plan, Poppen asked Elsie to visit her family physician for his opinion regarding her mental capacity. Elsie's physician determined her mental capacity was "excellent," so Poppen prepared the appropriate documents to amend the trust. Elsie changed her mind and changed the percentage to one hundred percent of the property's value at the time of death. She signed this trust document, but then went back to Poppen one week later and had him amend the trust so that the option price was eighty percent. Per Elsie's directions, Martin was involved in some of the meetings between Elsie and Poppen.

In 2000 Elsie broke her hip and became less mobile. Martin and Debra began to take a much more active role in caring for her daily needs. In the winter of 2002, Elsie wanted to change her estate plan once again. By this time, Poppen had moved to Missouri, so she contacted Dwayne Knoshaug, Poppen's former law partner. Knoshaug, who was not representing Martin in any capacity, helped Elsie amend her trust and draft a will so that Martin would receive the North Place instead of Clesine. Knoshaug also completed documents appointing Martin as her attorney in fact under a general power of attorney.

Elsie's health began to fail in early 2005. Martin and Debra provided her with constant care until the fall of 2005 when she was placed in an assisted living

facility. Some family members did not approve of Martin's decision to place Elsie in the assisted living facility, but none of the other family members were willing or able to help Martin and Debra provide Elsie with the continuous care she required.

Elsie died on March 15, 2006. On March 29, Martin filed a petition to probate her will and trust. On June 6, 2006, Clesine filed a petition asking that the court (1) set aside any inter vivos transfers made for the benefit of Martin, (2) remove Martin as the executor, (3) set aside Elsie's will, and (4) set aside the trust. In doing so, Clesine claimed Martin had a confidential relationship with Elise, he exerted undue influence over her, and he profited unduly as a result of the relationship.

On June 16, 2006, Martin filed a petition for declaratory judgment and other relief. In this petition, Martin stated that Clesine's will and trust contest placed a cloud on the title of the Home Place property. Therefore, he asked that the court declare that his option to purchase Kirby's one-half of the Home Place property would not lapse until six months from the date of the settlement of the will contest dispute. The district court combined the three petitions into one proceeding.

On March 23, 2007, after a lengthy trial, the court entered an oral ruling dismissing all of the claims set forth in Clesine's petition. In doing so, the court concluded there was not a confidential relationship between Martin and Elsie in 1998 when Elsie amended the trust to provide Martin with the opportunity to buy

Kirby's portion of the farm.[2] The court also found Elsie had independent counsel in 1998 and the transfers made by Elsie in 1998 were not the result of undue influence. The court gave Martin until September 1, 2007, to exercise his option to purchase Kirby's portion of the Home Place.

Clesine, Kirby, Candace, Martina, and Angelina filed a motion to enlarge and amend requesting the court find there was a confidential relationship between Martin and Elsie beginning in 1997 and that Martin exercised undue influence on Elsie thereafter. The last paragraph of the motion also stated:

> [I]f the Court declines to Order Martin Otteros to exercise the option immediately, there should be a showing by Martin Otteros as to the fair market value rent paid to the Elsie Otteros Trust since he would remain tenant on the property.

On May 24, 2007, the district court entered an order denying the balance[3] of the motion to enlarge and amend. In doing so, the court stated:

> [A]n additional extension to exercise the option to purchase real estate by Martin Otteros from Kirby Otteros, may be granted, if an appeal is filed as the Court agrees that merchantable title cannot be passed if an appeal pends. Additionally, depending upon when the transaction is closed, rent may be due as suggested in the Motion . . . however, such rent, if any, cannot be determined until the transaction has been closed.

Kirby and Candace (hereinafter appellants) appeal, claiming the court erred in not distinguishing between the theories of confidential relationship and undue influence. They claim there was a confidential relationship between Martin and Elise beginning, at the latest, in the fall of 1997 which required the court to set aside the amendments made to the inter vivos trust in 1998. They

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[2] Specifically, the court found there was not sufficient evidence to prove there was a confidential relationship between Martin and Elsie prior to 2000.

[3] The court also made minor, non-substantive changes to some of the statements made in its previous oral ruling.

also claim the court erred when it determined Elsie was afforded independent legal advice in 1998. Finally, they claim the court erred in granting Martin's petition for declaratory judgment and also "erred in not determining the obligation of rent to be paid concerning the property bequeathed to Kirby Otteros."

II. Merits

The appellants only appeal the issues related to the 1998 inter vivos transfers relating to Elsie's trust. They do not appeal any issues related to the will contest. Because the issues pertaining to the inter vivos transfers and the motion for declaratory judgment were tried in equity, our review is de novo. Iowa R. App. P. 6.4 ("Review in equity cases shall be de novo."); *see also* Iowa Code § 633.33 (2007) ("All other matters triable in probate shall be tried by the probate court as a proceeding in equity."); *In re Estate of Todd*, 585 N.W.2d 273, 275 (Iowa 1998). We give weight to the district court's factual findings, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

A. Confidential Relationship

The appellants claim Elsie's 1998 amendments to her revocable trust stemmed from her confidential relationship with Martin. They claim the district court applied an incorrect standard of law and did not distinguish between a confidential relationship and undue influence when dealing with capacity issues and the issue of setting aside the inter vivos transfers. Specifically, they claim the court should have concluded there was a confidential relationship between Martin and Elsie commencing, at the latest, in the fall of 1997.

The appellants concede that Elsie's capacity to execute a will or her "capacity generally" during this timeframe was not in dispute; however, they argue the following "facts and factors" demonstrate there was a confidential relationship beginning in the fall of 1997:

> 1. Proximity of houses and that they share the same mailbox.
> 2. Elsie relied on Martin and Debra Otteros for transportation, all chores, meals cooked, household events, etc.
> 3. At least daily contacts in Elsie's house.
> 4. Farming was Elsie's only business and Martin controlled the farming operation as tenants.
> 5. The traumatic deaths of Fred and Betty Otteros within a few weeks of each other in 1997.
> 6. Elsie only went to one attorney and that was Martin's attorney in 1997/1998.
> 7. The changes made in the trust in 1998 favored only Martin Otteros. The negative information concerning the other members of the family that was supplied to Poppen and Elsie was likely from Martin Otteros.
> 8. Elsie was a strong willed woman who inexplicably made changes in her trust and then made an additional change within a week in 1998.
> 9. The 1998 changes were done in secret; only the attorney, Poppen, Elsie and Martin knew of the changes. Before this everyone knew what Elsie's estate planning consisted of.

Persons seeking to set aside inter vivos transfers bear the burden to establish, by clear, convincing, and satisfactory evidence, that the transfers were a product of undue influence. *Mendenhall v. Judy*, 671 N.W.2d 452, 454 (Iowa 2003). Evidence is clear, convincing, and satisfactory when "there is no serious or substantial uncertainty about the conclusion to be drawn from it." *Id.*

In order to establish undue influence, the person challenging the transfer has to prove that, at the time the transfer was made, (1) the grantor was susceptible to undue influence, (2) the grantee had the opportunity to exercise such influence and effect the wrongful purpose, (3) the grantee was disposed to

unduly influence the grantor for the purpose of procuring an improper favor, and (4) the transfer clearly appeared to be the effect of undue influence. *See id.*

However, if the person challenging the transfer can demonstrate by clear and convincing evidence the existence of a confidential relationship, *King v. King*, 291 N.W.2d 22, 24 (Iowa 1980), then a presumption of undue influence arises, and the burden shifts to the grantee to rebut the presumption. *Jackson v. Schrader*, 676 N.W.2d 599, 605 (Iowa 2003). To rebut the presumption, the grantee would have to demonstrate, by clear, satisfactory, and convincing evidence, "that [he] acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily." *Id.* Also, as noted in *Estate of Herm v. Henderson*, 284 N.W.2d 191, 200 (Iowa 1979), the "mental strength" of the person being dominated—in this case Elsie—has a "direct bearing on the issue of undue influence."

Upon our de novo review of the evidence and these nine alleged "facts and factors," we conclude the district court properly determined there was no confidential relationship between Elsie and Martin during 1997 or 1998.

Our supreme court has defined a confidential relationship as follows:

> any 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."

Estate of Herm, 284 N.W.2d at 199 (citations omitted).

There is no doubt Martin and his wife Debra had a close relationship with Elsie. However, we find no reason to conclude this relationship rose to the level of a confidential relationship because there is little evidence to suggest that, before Elsie broke her hip in 2000, she was in a position in life where she relied on and trusted Martin and Debra in her important affairs or that Martin was somehow "duty bound" to act with the utmost good faith for her benefit. *See id.*

First, the evidence clearly demonstrates that Elsie was a very intelligent, strong-willed woman who kept a firm grip on her finances, business dealings, taxes, and investments at the time in dispute. Witnesses from both parties described her as the matriarch of the family, stubborn, "kind of bull-headed," and not someone you could push around. Her family doctor testified that her mental capacity in 1998 was excellent and she was capable of managing her own affairs even in 2002.

We find the record does not support appellants' claim that there was a confidential relationship because Martin "controlled" Elsie's farming operation. Elsie generated much of her income through crop-share leases with two of her grandsons: Martin and Clesine's son, Al. Al testified that Elsie was "very" much on top of her business affairs, and Martin testified that Elsie remained "very interested" in how he farmed the land. She kept her own business books, sold her own grain, and handled her own taxes. We do not find that Martin controlled Elsie's farming operation merely because he admitted that, pursuant to their crop-share agreement, he had the ultimate decision as to what crops and fertilizer would be used on the land.

We also find that the appellants overstate Elsie's overall reliance on Martin and Debra prior to her hip injury in 2000. Martin and Debra provided her with some meals and most of her transportation, but the record does not indicate she relied on them for *all* of her transportation, meals, or chores prior to 2000. Clesine's son Al, a witness called on the appellants' behalf, testified that in 1999, "[a]s far as her household duties and so forth, [Elsie] was pretty much on her own" and "self-sufficient." Also, while Debra testified that she visited Elsie daily, there is no reason to suggest these daily visits meant Elsie relied and trusted Debra in her important affairs. Elsie had many visitors into her home, including the appellants in this case. She routinely spoke with her visitors alone, without any interference from Martin or Debra.

We also do not agree with the appellants' claim that the 1998 amendments were done in "secret" because, "[b]efore this, everyone knew what Elsie's estate planning consisted of." At trial Clesine testified that she had never seen Elsie's pre-1995 will. She also did not know Elsie was speaking with an attorney about her estate planning in 1995 or know that she was coordinating her estate planning with Fred and Betty. Upon our review of the evidence, we find Elsie tried to avoid conflicts within her family and therefore did not discuss her estate plans with certain members of her family.

We, like the district court, also find that Elsie was provided with independent legal advice to handle her affairs. Elsie made her own appointments with her attorney and informed him how she wanted her affairs to be handled. She also personally wrote the checks to pay for her attorney. At

most, the appellants infer that this attorney was not independent because he had done some legal work for Martin. While there may be some basis for an inference that this would make the attorney something less than independent, it is far from clear and convincing evidence of a confidential relationship. We find the remaining factors listed by the appellants likewise constitute insufficient proof of a confidential relationship. For example, while Elsie and Martin shared a mailbox, there was nothing in the record to suggest that Martin intercepted or opened Elsie's mail.

In light of the foregoing and the vast evidence describing Elsie's strong will and sharp mind prior (and subsequent) to the date of the disputed transfers, we agree with the district court that the appellants not only failed to present clear, convincing, and satisfactory proof of a confidential relationship during the relevant time period, but also failed to prove Elsie was subject to undue influence from Martin. Accordingly, we affirm the district court's ruling dismissing the petition to set aside Elsie's 1998 inter vivos amendments to her trust.

B. Rent

After the court entered its decision in the case, the appellants, in a motion to enlarge and amend, stated "if the Court declines to Order Martin Otteros to exercise the option [on the Home Place] immediately, there should be a showing by Martin Otteros as to the fair market value rent paid to the Elsie Otteros Trust since he would remain tenant on the property." The district court addressed this new claim in its ruling on the motion to enlarge and amend by stating "depending upon when the transaction is closed, rent may be due as suggested in the

Motion . . . however, such rent, if any, cannot be determined until the transaction has been closed."

Now, on appeal, the appellants broaden their claim to state that Martin has failed to account for the rent on the Home Place since Elsie's death. They claim the court erred when it did not determine the amount of rent Martin should have paid to Kirby through the trust. Martin resists this claim, contending this issue was not preserved for our review because it was not raised in the petition challenging the trust and was never requested as a remedy.

After reviewing the arguments presented, we conclude this argument was only raised after the case was submitted to the court for its decision. Likewise, we also find it is an impermissible amplification of the vague argument actually raised in the motion to enlarge and amend. *See Boham v. City of Sioux City*, 567 N.W.2d 431, 438 (Iowa 1997) ("A party may not amplify or change an objection on appeal."). The district court simply did not address, nor was it apparently asked to address, the amounts of rent that should have been paid to the trust subsequent to Elsie's death. Accordingly, we will not address this argument now, for the first time, on appeal. *Cf. Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396, 405 (Iowa 1974) (stating that an argument, made for the first time as part of movant's after-the-verdict motion for new trial, came too late for consideration on appeal).

C. Six-Month Extension to the Option

The appellants also claim the district court abused its discretion because it granted Martin additional time to exercise his option to purchase Kirby's one-half

of the Home Place. They contend neither party sought additional time to complete the transaction, so the court was wrong to order the six-month extension. We disagree. In his "Petition for Declaratory Judgment and Other Relief" Martin specifically requested an additional six months from the date of any settlement or decision of the court to exercise his option. Because the thrust of this lawsuit challenges Martin's right to exercise his option to purchase Kirby's portion of the Home Place, we find no fault in the district court's decision granting Martin additional time to exercise his option.

III. Conclusion

Having considered all issues raised on appeal, whether or not specifically addressed in this decision, we affirm the decision of the district court.

AFFIRMED.