

IN THE COURT OF APPEALS OF IOWA

No. 9-889 / 07-0422
Filed February 10, 2010

**IN THE MATTER OF THE ESTATE OF
LOUIE NELSON, Deceased.**

**DONALD E. NELSON, RICHARD E.
NELSON, and MARY MARGARET NELSON,**
Plaintiffs-Appellees/Cross-Appellants,

vs.

**WARREN VARLEY, as Executor of the
Estate of LOUIE NELSON,**
Defendant-Appellee,

SCOTT LEWIS and PATRICIA E. LEWIS,
Defendants-Appellants/Cross-Appellees.

SCOTT LEWIS, as Trustee of the Scott Lewis Trust,
Plaintiff-Appellant,

vs.

**DONALD E. NELSON, RICHARD E. NELSON,
and MARY MARGARET NELSON,**
Defendants-Appellees/Cross-Appellants,

PATRICIA E. LEWIS,
Defendant-Appellant/Cross-Appellee,

**WARREN VARLEY, as Executor of the
Estate of Louis Nelson, IOWA SAVINGS BANK,
and MAXINE NELSON,**
Indispensable Parties-Appellees,

SCOTT LEWIS, Individually,
Indispensable Party-Appellant.

Appeal from the Iowa District Court for Adair County, Darrell J. Goodhue, Judge.

Appellants appeal the district court's order setting aside a real estate transaction, awarding attorney fees, and ordering partition. **AFFIRMED IN PART, REVERSED IN PART.**

Matthew J. Hemphill, Adel, and Michael D. Ensley, Des Moines, for appellant Scott Lewis.

Doyle D. Sanders of Beving, Swanson & Forrest, P.C., Des Moines, and Mark C. Feldmann, Des Moines, for appellees/cross-appellants Donald E. Nelson, Richard E. Nelson, and Mary Margaret Nelson.

Joan M. Fletcher, Des Moines, for appellee, Iowa Savings Bank.

Orville W. Bloethe, Victor, and David L. Charles, Billings, Montana, for appellee Warren A. Varley.

James W. Mailander, Anita, for appellee Maxine Nelson.

Heard by Vogel, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Scott Lewis, individually, and as trustee of the Scott Lewis Trust,¹ along with his mother, Patricia Lewis, appeal the district court's order setting aside a real estate transaction, awarding attorney fees against them, and ordering a partition. Patricia asserts the district court erred in (1) ordering the real estate contract be set aside based on a finding of undue influence, (2) ordering the partition of the property after the notice of appeal was filed and, (3) awarding attorney fees against her and in favor of the estate and of the other litigants.² Scott joins in Patricia's first two arguments, and also contends attorney fees should not have been awarded against him. Donald, Richard, and Mary Margaret Nelson (the Nelsons) cross-appeal, claiming the district court erred in (1) failing to find a violation of the settlement agreement in setting aside the real estate contract, (2) failing to specifically address their fraud claim, and (3) finding they are precluded from seeking recovery on their claims in probate.

This case was a consolidation of three lawsuits: (1) a partition action, brought by Scott Lewis as a trustee of the Scott Lewis Trust; (2) a petition by the Nelsons for breach of contract and alleging fraud against Scott and Patricia, and seeking damages from Warren Varley, as executor of the Louie Nelson estate;

¹ The Scott Lewis Trust was a trust created for the benefit of the family of Patricia Lewis and her family.

² The testimony was difficult to follow in the appendix, as each witness's name was not designated at the top of each page where the witness's testimony appears. Although not applicable to this appeal, effective January 1, 2009, the rules of appellate procedure require the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c).

and (3) a suit by the Nelsons challenging Louie's will, which was dismissed with prejudice prior to trial.

I. Background Facts and Proceedings

Louie and Audrey Nelson were married and had three children, Richard, Donald, and Patricia. Richard had one child, Mary Margaret; Donald had no children; and Patricia had three children, Scott, Shannon, and Tricia. Following Audrey's death in 1990, multiple legal actions among the family members led to a family settlement on May 14, 2001, which was entered into an order on October 9, 2001, while Louie was still living.³ The genesis of the lawsuits was a struggle among family members to reach Audrey's assets and interfere with Louie's estate planning, and resulted in ten different lawsuits. The October 9, 2001 order stated,

If after May 14, 2001, any of the parties materially violate any provision of the agreement or undertakes to interfere with the agreement which underlies it, that party shall have waived and forfeited his or her right to receive any property of any kind or description from Louie Nelson. . . . For the remainder of his life, Louie Nelson shall have exclusive control over all the farmland involved in the various matters, as described below, as well as full and unrestricted rights to all of the income generated therefrom. Any interference or attempted interference, after May 14, 2001, with this provision shall constitute a material breach of the agreement of May 14, 2001, and this Order.

This family settlement was reached in part because of the tension and disagreement in this family. While Louie was a good businessman, it was commonly known that he was unable to stand up to his children. Prior to the family settlement, Patricia asserted Louie had health issues and was not mentally

³ The family settlement agreement is also referred to as the "global agreement" by the district court.

competent, facts which Richard and Donald used to their advantage to exert undue influence over him. On March 1, 2001, Stephen Eckley, Louie's lawyer, wrote to Louie's children asking them to cease contact with their father, in order to keep him isolated from their influence while he represented him. Donald and Richard minimized their contact with Louie, but Patricia stepped up her contact, and became the primary source of influence over Louie.

Louie remarried on June 30, 2001.⁴ On that same day, Patricia approached Louie and succeeded in obtaining his signature on an agreement that elevated her position in the family settlement agreement, including, "\$200,000 to compensate her for the dismissal of the lawsuits she dismissed" and allowing Scott and/or her husband, Arnold, "to handle future farming arrangements." The Nelsons did not know of this "side agreement" nor did the district court, when the family settlement agreement was incorporated into the October 9, 2001 order.

On September 16, 2004, Louie entered into a real estate contract with Scott as trustee for the Scott Lewis Trust, which conveyed all of Louie's interest in the farmland described in the family settlement agreement to the Scott Lewis Trust. The principle terms of the transaction was setting the sale price at \$405,000, payable in annual installments of \$32,000 beginning March 1, 2005, with Scott to make a \$100 down payment, and upon Louie's death, "all unpaid amounts, whether or not yet due, are forgiven. . . ." This real estate contract was the central focus of the litigation in the district court.

⁴ His wife, Maxine, is not a party to this action; she declined to take under Louie's last will and testament.

The court found a confidential relationship existed between Patricia and Louie, which unduly influenced him, leading to the sale of his land. The court therefore set aside the September 16, 2004 contract as a product of undue influence. Attorney fees in the amount of \$108,763.74 were awarded to the estate of Louie Nelson, and \$76,157 to the Nelsons, to be withheld from any distribution from the estate in favor of Patricia Lewis, Scott Lewis, and the Scott Lewis Trust. Patricia and Scott Lewis, individually, and as trustee of Scott Lewis Trust appeal. The Nelsons cross-appeal.

The parties agree the case was tried in equity and our review is de novo. Iowa Code § 633.33 (2008); Iowa R. App. P. 6.907; *Jackson v. Schrader*, 676 N.W.2d 599, 603 (Iowa 2003).

II. Undue Influence

Patricia asserts, and Scott joins this argument, that the court erred in setting aside the real estate contract based upon undue influence stemming from a confidential 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. The purpose of the doctrine is to defeat and correct betrayals of trust and abuses of confidence.” *Matter of Estate of Clark*, 357 N.W.2d 34, 37 (Iowa Ct. App. 1984). Undue influence is the result of overpowering the will of someone or preventing them from acting intelligently, understandingly, and voluntarily—such influence as destroys the free agency of the grantor and substitutes the will of another person for his own.” *Mendenhall v. Judy*, 671 N.W.2d 452, 454 (Iowa 2003). The district court found a “confidential relationship between Patricia and Louie has been established as a matter of fact. Patricia’s

propensity and commitment to influence Louie for her own benefit is clear beyond a reasonable doubt from the record.”

Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefited party to prove by clear, satisfactory, and convincing evidence “that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily.” *Jackson*, 676 N.W.2d at 604.

Since that [confidential] relationship existed between [Louie] and [Patricia], the burden was upon [Patricia] to rebut the presumption of overreaching on [her] part, and to affirmatively establish that in [her] acquisition of property, in the transaction in controversy, [s]he took no advantage of [Louie] by reason of their relationship, but that he acted voluntarily with freedom, intelligence and a full knowledge of all of the facts.

Id. (quoting *Merritt v. Easterly*, 226 Iowa 514, 284 N.W. 397, 405 (1939)).

The record is replete with evidence of Patricia’s influence over Louie. The district court found that following the May 2001 settlement agreement, “Patricia has been on what has been termed and what can accurately be described as a campaign to regain what she agreed to give up in the global [family] settlement.” The court found that Patricia’s influence over Louie could hardly be questioned or challenged, and the court documented previous litigation in which Patricia “mismanaged, plundered, and dealt with personally much to her advantage and much to the detriment of the trust.”⁵ Stephen Eckley testified that he was unable to work with Louie when Patricia was present because Louie refused to speak up in Patricia’s presence.

⁵ This was a prior trust instrument.

Contrary to Louie's attorney's admonition to cease contact, Patricia approached Louie in June 2001, and gained his signature on a "side agreement" to the family settlement, which substantially improved her position in relation to the other family members. In addition, Louie loaned Patricia \$20,000 in 2001, and another \$25,000 in 2002; in December 2002 she reduced these loans to an agreement whereby Louie would forgive the \$45,000 debt in exchange for services she provided him. In March 2002, Patricia obtained another \$15,000 from Louie for her husband Arnold. In December 2002, Louie wrote a check for \$26,000 for the purchase of a car for Patricia.

Patricia's influence over Louie was further demonstrated by her obtaining Louie's signature on the disputed September 2004 real estate contract, thereby conveying Louie's farmland to the Scott Lewis Trust. Orville W. Bloethe, the attorney who drafted Louie's will, testified that Louie did not want to proceed with the sale of his land to Patricia in September 2004, and therefore Bloethe did not draw up the contract.⁶ He did not know of its creation and hence the conveyance of land until well after the fact. Undeterred by Bloethe's refusal to cooperate with her desires, Patricia took Louie to her own attorney, David Leitner, to have him prepare the contract. Executor Varley testified that shortly thereafter, Louie became very agitated, uncertain of what he had signed. He then shared with Varley that the sale of the land was Patricia's idea, not his, and she wanted it "real bad."

⁶ The will was dated February 2, 2002, with codicils dated October 25, 2002, and November 17, 2004.

The September 2004 real estate contract placed a value of \$405,000 on Louie's land. The district court opined that this value was based upon a letter from a previous partition action, authored by the Nelsons' lawyer, Roy Irish, discussing a sale price of \$578,400. Bloethe further opined that if Louie's land was sold, a thirty percent discount might be appropriate because of anticipated litigation, fractional interests, and the litigious nature of the family. This \$578,400 amount was based upon a 1994 appraisal, and the district court found the discount was already embedded within it. Patricia presumably took an additional thirty percent discount to reach the \$405,000 figure. In his June 30, 2001 prenuptial agreement, Louie assigned a value of \$876,000 to his land. When Louie passed away in December 2004, his land was appraised at \$814,888.

It is clear the sale price Patricia and Scott chose to use for the September 2004 real estate contract did not represent the fair market value of the property, and was chosen for her and Scott's benefit. We agree with the district court that it seems "unfair to give a discount to a party predicated in part on their own litigious inclinations."

The district court succinctly summarized Patricia's influence over Louie,

Patricia's influence over Louie can hardly be challenged. Lawyers who undertook to represent him generally reported that Louie would say nothing or very little as long as Patricia was in the office with him. Previous litigation within the family found that Louie in "complete reliance" on Patricia had set up a trust which she had mismanaged, plundered, and dealt with personally much to her advantage and much to the detriment of the trust. Early on she had a power of attorney over Louie's affairs. . . . Her testimony was intended to convey why Louie would have wanted to especially benefit her and her children, but it also established a very close and dependent relationship. She obviously had the power to influence Louie and had previously displayed her ability and propensity to do

so. She was relentless in her pursuit of Louie's assets, and her will and desires became his.

Apart from Patricia's own self-serving testimony, there was little evidence to rebut the presumption of Patricia's undue influence over Louie. The district court correctly found Patricia did not demonstrate by clear, satisfactory, and convincing evidence that Louie was free from her undue influence, and the court properly set aside the September 2004 real estate contract.

III. Attorneys Fees

Patricia and Scott, both individually, and Scott as trustee for the Scott Lewis Trust, argue that the court erred in awarding attorney fees in favor of the estate of Louie Nelson in the amount of \$108,763.74 and \$76,157 to the Nelsons, to be withheld from any distribution from the estate in favor of Patricia Lewis, Scott Lewis, and the Scott Lewis Trust.⁷ Patricia argues the evidence does not support an award of attorney fees; Scott asserts that the district court incorrectly attributed Patricia's actions to include him, as he claims to have known very little about the real estate transaction at issue.

Generally, attorney fees are not allowed unless provided for by statute, unless the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another. Iowa Code § 668A.1. Such conduct must rise to the level of oppression or connivance to harass or injure another. *Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co.*, 510 N.W.2d 153, 159 (Iowa 1993). Thus, merely objectionable

⁷ Patricia asserts the Nelsons failed to request attorney fees, thus the award was improper. The Nelsons requested attorney fees and punitive damages in their original petition. Further, Patricia failed to correctly reference the appendix page being cited. Iowa R. App P. 6.14(7).

conduct is insufficient to meet the standards. *Id.* at 159. To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts. *Id.*

The district court's order (on the Nelsons' motion to enlarge) found:

The conduct of Patricia Lewis and Scott Lewis, acting individually and through the Scott Lewis Trust, in obtaining the contract from Louie and then attempting to enforce its terms, was so outrageous and conniving that they should bear the major portion of the costs of this litigation, whether it is classified as a sanction, actual damages, common law attorney fees, or punitive damages. Not only was the contract the product of unmitigated and unrelenting undue influence, but it violated the tenor of the October 9th order and the agreement that it memorialized. . . . The Court concludes that the disputed contract had no legitimacy; and, therefore, this lawsuit was completely unnecessary and unwarranted, and the parties responsible should bear a greater portion of the cost."

We agree with the district court that Patricia and Scott flagrantly used their influence to gain advantage over Louie. While Scott asserts he had no involvement in the drafting of the September 2004 contract, and therefore should not be assessed attorney's fees, the district court specifically found that "Patricia Lewis and Scott Lewis were both involved in the conniving activity, and the Scott Lewis Trust was the beneficiary." Scott wrote the check for the down payment from his personal checking account. He went to Leitner's office to sign the contract. Further, the Scott Lewis Trust was not created until December 2004, three months after the contract was signed, further illustrating Scott's complicity to take on the role of trustee for the benefit of carrying out the real estate transaction. The district court found that the Scott Lewis Trust was a trust created by Scott Lewis for the benefit of Patricia Lewis, which would in turn

benefit her whole family, including Scott. The district court appropriately awarded attorney's fees, and we affirm.

IV. Cross- Appeal

A. Settlement Order

The Nelsons cross-appeal asserting the district court erred in not finding the September 2004 real estate contract between Louie and the Scott Lewis trust was a violation of the family settlement order. The court found that there was no proviso in the May family settlement agreement or the October 2001 order incorporating the agreement, which affected or controlled Louie's right to dispose of his property. The court reasoned Louie's "control implies a right to sell." The Nelsons agree that Louie had a right to sell his property, and could have done so to a third party in an arm's-length transaction. However, they contend the very purpose of the settlement agreement was to keep any family member from overreaching, to the detriment of the remaining members.

The district court found the September 16, 2004 real estate contract had no legitimacy and was null and void due to the unrelenting influence of Patricia and Scott Lewis, for the benefit of the Scott Lewis Trust. The Nelsons assert it is inconsistent to find that a contract found to have been obtained by undue influence was not a violation of the family settlement agreement. We agree. The family settlement agreement held that if after May 14, 2001, any party materially violated any provision of the agreement, that party forfeited his or her right to receive any property of any kind from the Louie Nelson estate. The September 2004 agreement between Louie and the Scott Lewis Trust was a clear violation of these terms. Louie did not know what he had signed.

While we agree with the district court that “control implies the right to sell,” the very finding that the transaction was a result of Patricia’s undue influence over Louie, necessitates a finding that Louie did not “control” the sale. We conclude Patricia’s securing Louie’s signature on the real estate contract, and Scott’s complicity, was a material violation of the family settlement agreement, triggering the forfeiture provision of the agreement.⁸ We therefore reverse on this finding of the district court.⁹

B. Fraud

The Nelsons assert the district court erred in failing to more specifically address their fraud claim. The district court set aside the September 2004 real estate contract, awarded attorneys fees to both the Nelsons and the Estate, and stated, “[T]o the extent any other modification or amendment to the decree is requested, it is denied.” We find the court sufficiently addressed the claim, and made the appropriate finding that the contract was a product of undue influence.

⁸ Patricia also asserts, and Scott joins this argument, that the district court did not have the authority to order the partition of land after the notice of appeal had been filed. The only parties at interest in the partition action were the Nelsons and the executor of the Estate. As a beneficiary to the Louie Nelson Estate, Patricia may have had an interest in the outcome of the partition action at the time she filed her appeal, but because we find the forfeiture provision of the family settlement agreement was triggered, it is no longer necessary for us to reach this issue on appeal. Nevertheless, had we reached this issue, we would find the district court properly reserved jurisdiction and had authority to rule on the partition action. *Matter of Tollefsrud's Estate*, 275 N.W.2d 412, 418 (Iowa 1979) (stating that a trial court retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal). Further, as the district court set aside the contract conveying Louie’s interest in the land to the Scott Lewis Trust, the remaining one-half interest was an asset of the Louie Nelson estate, and therefore the partition order was an outgrowth of the court’s prior ruling.

⁹ Because we find the forfeiture provision of the family settlement agreement is triggered by Patricia and Scott, we need not address the Nelsons’ assertion that the district court erred in precluding them from proceeding on their other claims in probate.

We have expanded that finding to include a material violation of the family settlement agreement, but, while a close issue, we decline to also make a finding of fraud. Therefore we affirm the district court on this issue.

AFFIRMED IN PART, REVERSED IN PART.