

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

HUBERT MOREE,) C/ A NO. 03A01-9509-CH-00309
)
Plaintiff - Appellant,) ROANE CHANCERY
)
v.) HON. FRANK V. WILLIAMS, III,
) CHANCELLOR
CAROL BRYANT and ROGER MOREE,)
) AFFIRMED AND
Defendants - Appellees.) REMANDED

FILED

February 14, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

FLOYD E. HUTCHERSON, Rockwood, for Plaintiff - Appellant.

JOHN D. AGEE, COOLEY, COOLEY & AGEE, Kingston, for Defendants - Appellees.

O P I N I O N

Franks. J.

In this action, grantor's father sought to set aside a deed to his children. The Trial Court refused to grant relief and the father has appealed.

The father, on appeal, insists that his daughter had a confidential relationship with him and pressured him in a weakened state, to sign the deed. Also, he should have had independent advice regarding the transaction, and there was no consideration for the contract, no delivery of the deed, and an oral declaration of trust was made which gave him a life

estate and a \$50,000 consideration.

The doctrine of undue influence is applicable when a confidential relationship puts one party in a position to exercise undue influence over the mind and will of another. *Bright v. Bright*, 729 S.W2d 106 (Tenn.App. 1986). The necessary elements are:

dominion and control by the stronger over the weaker, or there must be a showing of senility or physical or mental deterioration of the donor or that fraud or duress was involved, or other conditions which would tend to establish that the free agency of the donor was destroyed and the will of the donee was substituted therefor.

Kelly v. Allen, 558 S.W2d 845, 848 (Tenn.1977).

A parent-child relationship does not per se create a confidential relationship or raise a presumption that a gift is invalid. *Id.* The party seeking to rescind a conveyance because of undue influence has the burden of proof.

Williams v. Upchurch, 768 S.W2d 265 (Tenn.App. 1988). The question thus becomes whether the weaker party's decision was a free and independent one or whether it was induced by the dominant party. *Id.*

A review of the evidence fails to show that a confidential relationship existed or that the daughter exercised undue influence over her father. The father was in his 70's at the time the property was deeded to his children. He had a sixth grade education and was essentially illiterate. He had problems with and underwent surgery for clogged arteries in his neck, which he said made him dizzy.¹ His

¹ At the time of the conveyance, the father had not yet experienced the later health problems that were raised in testimony, such as being treated for diabetes or undergoing foot surgery.

business affairs were handled by his wife and after his wife's death by his daughter. These women paid the bills, wrote the checks, maintained bank accounts, and filed tax returns for plaintiff. The daughter, a bank teller, had more education and business knowledge than her father, and she contacted the attorney who prepared the deed, conveying the property to her and her brother.

While these circumstances show that the father was subject to the daughter's advice, it does not follow that her assistance constituted "dominion and control" that eclipsed the father's ability to think for himself. *Kelly*. The record shows that despite his illiteracy and health problems, the father was able to arrange financing to purchase a car, sell land to his son and have loan instruments drawn up, refinance a loan, change his life insurance and retirement benefits to name his new wife as beneficiary, and represent himself at an administrative hearing where he successfully argued that the county owed him unemployment benefits. Despite the influence allegedly wielded by his daughter, he went against her wishes in purchasing a car, manufacturing illegal whiskey, and seemingly in his choice of a new wife.

The question of whether a confidential relationship existed between family members is a question of fact. *Matlock v. Simpson*, 902 S.W2d 384 (Tenn. 1995). The standard of review is *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. T.R.A.P. Rule 13(d). Any conflict in testimony requiring a determination of the credibility of witnesses is for the trial judge and is binding on review, unless other real evidence

compels a contrary conclusion. *Brown v. Weik*, 725 S.W2d 938 (Tenn. App. 1983).

The proof is not sufficient to establish the existence of a confidential relationship or the undue influence, and under the presumption of correctness standard, the evidence does not preponderate against the findings of the trial court, which we affirm

The father argues that he was to be paid \$50,000.00 at the rate of \$10,000.00 a year, and was to receive a life estate in the property. However, the lawyer who prepared the deed testified that he specifically advised the father that there was no provision for a life estate in the deed. The daughter denied that such an agreement existed and his sister testified that her understanding was that the father had given the property to his children and had not kept a life estate for himself.

Courts are most reluctant to add to the terms of an oral trust where a deed is absolute on its face. *Bright*. The proof required must be clear and convincing. *Tansil v. Tansil*, 673 S.W2d 131 (Tenn.1984). In light of the credibility assessment by the trial court that there was no agreement for a life estate or monetary payment, and due to the dearth of evidence supporting the father's argument, the clear and convincing standard required to establish an oral trust has not been met.

As to the issue of consideration for the deed, the father and his daughter's testimony conflicts regarding whose idea it was to deed the property. It was acknowledged by all, however, that the purpose of the transaction was to protect

the house from being taken by Medicaid in the event the father entered a nursing home. The Trial Court found that this purpose was the consideration for the contract and the record supports this finding.² Providing an intangible benefit may be adequate consideration. *Robinson v. Kenney*, 526 S.W2d 115 (Tenn.App. 1973). Accordingly, we find consideration for the deed to the property.

Next, the father argues there was no delivery of the deed. The delivery of a deed is a matter of intention which may be inferred from the circumstances. *Estate of Atkinson v. Allied Fence*, 746 S.W2d 709 (Tenn.App. 1988). Possession is prima facie evidence of delivery, absent opposing circumstances. *Id.* Here, the record establishes that the father signed the deed, left it at the lawyer's office, and at some point the deed was recorded. He does not demonstrate any circumstances showing that the deed was taken from him involuntarily, and the presumption of delivery has not been overcome by the evidence.

Finally, the father argues that the Court should have required an accounting between the parties. An equitable accounting may be required where a mutual account has been kept. 1A C.J.S. *Accounting* §21 (1985). The record shows that the daughter withdrew checks in the amounts of \$36,148, \$10,364, and \$5,943. However, her testimony addressed the uses of these funds, and the Trial Court found her explanations were sufficient, and found no evidence that her

²In this connection see 42 U.S.C.A. §1396p. Text (b)(2)(B)(ii), Text (c)(1)(B)(i).

expenditures were improper. The evidence does not preponderate against his findings and the Trial Court did not abuse his discretion in refusing to order an accounting between the parties.

We affirm the judgment of the Trial Court and remand at appellant's cost.

Herschel P. Franks, J.

CONCUR:

Don T. Murray, J.

William H. Inman, Sr. J.