ORIGINAL

IN THE

SUPREME COURT OF NORTH DAKOTA

SUPREME COURT CASE NO. 98-0286

980286

William Kuntz and Jeff Kuntz,

Plaintiffs/Appellees

-Vs-

John Kuntz, Personal Representative
of George Kuntz Estate,

Defendant/Appellant

BRIEF OF APPELLEES

Appeal from a Judgment of the District Court

of McHenry County, North Dakota

Michael S. McIntee ID03326
MCINTEE LAW FIRM
PO Box 90
Towner, ND 58788-0090
701-537-5425
Attorney for Appellees

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STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

The Appellees do not dispute the Appellant's Statement of the Case except that the contract for the sale of the property was not "purported" but a contract agreed upon by the parties. Such discrepancy will be discussed in the Brief.

B. STATEMENT OF THE FACTS;

Because the Appellant's Statement of Facts is extremely sanitized and incomplete, it will be necessary for a true recitation of the facts to be presented.

George Kuntz [George] and Engelbert Kuntz [Bert] Kuntz were brothers. Both were engaged in a farming and ranching operation near Towner in McHenry County. Bert married Violet Kuntz about 30 years ago and had eight children. Two of their children are William Kuntz [Bill] and Jeff Kuntz [Jeff]. George never married and had no children. Bert and George had other brothers and a sister, Bernice Huber [Bernice] who lives in Florida.

Bert and George lived across a county road from each other and each had their own homes. Both had their own real estate and cattle, however, they owned some machinery together and farmed and ranched together. Their business was entwined to a point where everything was bought by one or the other brother, and then in the fall, they would divide up the costs and proceeds of the prior year. Although their business was together,

George was a strong willed person who was at times difficult to get along with. George never had a hired man, but relied upon Bert and Bert's children to do the haying, feeding, farming and other ranch work for George. George's brothers and sister would rarely come and see him and George lived as a member of Bert and Violet's family. Whenever there was a holiday or family gathering, George would be part of Bert's family celebrations. Bernice saw George three times in the 10+ years prior to George's death in 1997.

George was at best, a difficult taskmaster. He was not pleasant to Bert's children although they did most of his farm work. George also never paid any of the children for doing his work except he gave one boy a calf with a broken leg. [Tr. 92] Bert asked George to give the children something for helping him, even just some warm clothes when the children worked for George in the winter. George refused to give them anything. [Tr. 9]

In the spring of 1997, it was discovered that George had cancer. Bert suggested that he and George draw up a document to set out their respective ownership interests in the jointly owned machinery. [Tr. 14] George and Bert went to see Attorney Bill Hartl to prepare the document. At that time, George stated that he wanted to sell his farm and that he wanted to give Bert's boys the first option to purchase the farm. He also wanted to give the boys a good deal on the sale. [Tr. 16] Those facts were conveyed to Bert's sons and two sons, Bill and Jeff elected to make an offer to George. Bill, who worked at a local bank, prepared a written offer for the land, machinery and cattle. Jeff had never owned

land or cattle before, but Bill had purchased pasture several years previously and had leased that pasture land to Bert and George. Bill presented a written offer to George and George agreed with the terms except that he wanted $5,000 more for the machinery than the first offer because he and Bert had just purchased a new piece of equipment in 1996. Except for the one change, George said that he did not want anything else changed in the sales terms. [Tr. 98] Bill, on behalf of himself and his brother Jeff. agreed to the raise. [Tr. 96] A second written proposal was typed and presented to George. [Appellant's Appendix pg. 28] This was shown to George and he agreed to the terms.

Shortly thereafter, there was a meeting with Al Steinke, an accountant and tax preparer. Steinke had prepared tax returns for George, Bert and Bill for several years. At the meeting, it was discussed by Steinke that there had to be a change in the offer. Not the amount of the purchase price, but the fact that the cattle and machinery agreement would have to be shortened due to IRS regulations. Steinke explained the change to all of the parties and they agreed with the change. Steinke then asked George several times if he agreed to the terms of the sale and George answered in the affirmative.[Tr. 71-73]

The meeting concluded with the agreement that George would provide the abstracts for updating and Steinke was to give the information to Attorney Hartl for the preparation of the Contract for Deed for the real estate and the Purchase Agreement for the cattle and machinery.

Based upon George's statements that he agreed to the sale, Jeff leased additional

pasture from another landowner to provide the additional acreage needed to feed the cattle that the boys had purchased from George. Jeff used the written proposal to obtain a loan for the $6,800 pasture rent. [Tr. 58-59]

From the date of the meeting with Steinke, to date, Bill and Jeff paid for all of the farming expenses on the farm purchased from George. Except for one gas check, George did not pay for any expenses on the farm. After his death, George's estate did not pay any farm expenses. [Tr. 80] From the date of the meeting forward, George did not do any type of farm work on the farm he had sold to the boys. Bert and George did not rent Bill's pasture as they had done in prior years because Bill and Jeff needed that pasture for their own cattle that they had purchased from George.

For about six weeks, Bill repeatedly contacted Attorney Hartl to see if the documents were ready to sign. The abstracts had been updated by the estate. Bill had also asked Attorney Hartl to do the examination and prepare the title opinions on the abstracts. Hartl was asked about the sales documents and he replied that he was working on them. that George understood them and that George agreed with the terms. [Tr.103] Hartl also said that he had prepared the documents and George had signed them, but Hartl had forgotten an 80 acre parcel but that he would re-do the sales documents and have George again sign the correct documents. [Tr. 106]

During the month after the Steinke meeting, George had a chance meeting with

Fred Schell, a neighbor rancher. George told Schell that he had sold the farm to Bert's boys and that he had given them a little better deal. George joked with Schell that he did not need the money anyway because he would be dying soon. [Tr. 86]

In July, Bernice arrived from Florida. She had moved George from the farm and lived with him in Rugby at another brother's home. In late July, Bernice called Bill and told him that she had conducted a family meeting with George and that they were going to change the terms of the sale of the farm. Bill then contacted Hartl to see about the sales documents. Hartl at that time indicated that he was not releasing the documents. It was learned at trial that during this time frame, Bernice had a meeting with Hartl and told him that if he completed the sale to Bill and Jeff on the terms originally agreed to by George, that she would hold Hartl personally responsible. [Tr. 163]

Bernice then called a second family meeting at which time George and Bill were both present. George did not say very much, apparently there was quite a heated argument between Bernice and other family members. George never told Bill or anyone else at any time that he was canceling the sale or was rescinding the agreement. His only comment was that it was done wrong. This statement came through Bernice who said that she had received an anonymous telephone call that the sale had been done wrong. Bernice also testified that she had, upon arriving in North Dakota, screened all of George's telephone calls and did not permit access to George without her being present.

All of the witnesses agreed that there had been an agreement between George and

the boys. All of the witnesses agreed that George never told them or either of the boys that he was canceling the sale.

Based upon the statements from Bernice that she was canceling the sale to the boys and also because Hartl now indicated that he would not release the signed documents from his files, the boys began a lawsuit to complete the sale. Counsel for Bill and Jeff attempted to take George's deposition which was blocked by Bernice and Hartl for approximately two weeks. The deposition was finally scheduled by Court order but George was too weak to testify. George died two days after the deposition. The personal representative was substituted for George for the trial.

At the conclusion of the trial, the District Court determined that there was a valid oral contact, that there was partial performance by the brothers substantially to their detriment and the oral contact was not barred by the Statute of Frauds. The Court also found that there was no evidence of undue influence by Bill, Jeff, Bert or Violet as claimed by Bernice. The Court ordered the enforcement of the proposal as a binding contract with the changes indicated by Steinke.

This appeal followed.

ARGUMENT

1. **WAS IT NECESSARY THAT THERE BE A WRITTEN DOCUMENT TO HAVE A BINDING AGREEMENT FOR THE SALE OF THE FARM ASSETS?**

A contract is basically an agreement between parties to do or not do a certain thing. NDCC 9-01-01 (1). In order for a contract to exist. there needs to be four things: (1) parties capable of contracting (2) consent of the parties (3) lawful object, and (4) sufficient cause or consideration. NDCC 9-01-02. All of such elements exist in this case except that the estate claims that there was no consent, or if there was consent, it was withdrawn or if not withdrawn, it was obtained by undue influence.

It is acknowledged that the agreement between George and the boys was not reduced to writing and signed by all parties. However, the boys have claimed that there was an oral agreement, based upon a written document which did indicate all of the relevant terms; that there was consent to that oral agreement and that based upon that consent they acted in conformity with the terms of the agreement. That as a result of the consent, they have acted substantially to their detriment if the agreement is now revoked.

George's estate now claims that there needed to be a written agreement because of the nature of the agreement. The claim is that the nature of the oral agreement was such that it contemplated a written agreement and that in absence of the later contemplated written agreement, the oral agreement could not be completed and thus not binding. The

estate relies upon Bjornson v Five Star Manufacturing Co. 61 NW2d 913 (ND 1953) The estate claims that this case stands for the premise that if the parties intended to have a final written agreement, oral agreements are irrelevant. [Appellants Brief pg. 5] The estate has misquoted or misapplied the Bjornson case. The Bjornson case dealt with an oral agreement between two parties over a patent device. The Court decided the case on the sole issue of whether or not there was sufficient evidence to give the case to the jury. In that case the Defendant claimed that the oral agreement contemplated a later written agreement. There was a meeting of the parties at which an oral agreement was reached. The Court held that "it is evident that all parties were satisfied that an agreement had been reached to the principal provisions which were to be incorporated into a written contract in the event that the parties decided to go ahead with the transaction." Ibid. at 914. There were later letters between the parties and at the conclusion, one party sent a letter stating that negotiations were terminated. The Plaintiff sued to enforce the oral contract. The Supreme Court held that " A determination of whether informal oral agreements as to provisions which are to be incorporated into a written contract, in themselves constitute a contract depends upon the intentions of the parties as shown by the circumstances of the case." Ibid. at 915. In that case, there was a later communication by one party to the other that negotiations had terminated and the offer had been withdrawn. In addition, the party who wished to enforce the oral contract had *not* taken any action or done anything contemplated in the contract.

Bjornson has a different set of facts than this case now before the Court. George never communicated to the boys that he intended to withdraw or cancel the contract either before or after they boys leased additional land or began to financially and physically operate the farm. Bjornson's ruling, however, that you must look at each set of facts in each case does apply. In the matter now before the Court, the parties clearly contemplated that the boys would operate the farm as their own in spite of the fact that the formal written documents had not been signed by all parties. [Remember, George had signed the documents, there was no evidence presented that he had ever been told that the boys had not signed them; in fact, he acknowledged that the sale had been completed] The boys did operate the farm and George acknowledged the fact that he had sold the farm to the boys when he talked to Fred Schell. Each of these facts clearly indicate to the fact finder that the parties contemplated the sale and operation of the farm under the sale in spite of the fact that the written contracts had not been signed by the boys. *See Also* Severson v Elberon Elevator, Inc. 250 NW2d 417 (Iowa 1977) when terms of agreement are fixed so that nothing remains to reduce them to writing, oral contract will be upheld unless parties intend not to be bound until agreement was reduced to writing. Scholnick's Importers-Clothiers, Inc. v Lent, 343 NW2d 249 (Mich. 1983) where parties have expressed agreement on all essential terms of a contract, mere fact that parties manifest an intention to prepare a written memorial of their agreement does not render oral contract unenforceable; Boyd v Benkelman Public Housing Authority 195 NW2d 230 (Neb. 1972) mutual

manifestations of assent which are in themselves sufficient to make a contract will not be prevented from so operating by mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof.

It is quite clear from both North Dakota law, and other states, that if the parties intend to have the oral agreement operate absent the written documentation, the lack of the written documentation will not make the oral agreement unenforceable.

The Court did not err.

2. DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT THERE WAS MUTUAL ASSENT TO THE TERMS OF THE CONTRACT?

This is a fact question. Without listing the numerous cases, this Court has held that absent a showing that the trial court did not have adequate evidence upon which to support such finding, a finding of fact will not be overturned.

In this case, there is more than adequate evidence to support the Court's determination. George told Helen Kuntz that he had sold the boys the farm. [See Helen Kuntz deposition. admitted at trial as exhibit] and George told Fred Schell that he had sold the farm to the boys and that he had given them a "good deal". What is most compelling however is the fact that Steinke had gone over each of the terms of the proposal with George and that George had agreed to each of the terms and conditions.

The estate argues that George did not give mutual consent to the same terms in the

same sense. The estate does not however, point out any evidence presented at trial which would support this claim. All evidence indicates that George consented verbally to several people that he agreed with the terms of the proposal as the contract terms.

Of further importance is the actions of George and the estate after the meeting with Steinke. "Consent can be communicated with effect only by some act or omission [of an act] of the party contracting by which he intends to communicate it, or which necessarily tends to such communication". NDCC 9-03-10. [Emphasis added] This means that a person may communicate his or her consent by an act or an omission of an act that they would normally do. In this case, George orally consented to the boys, to Fred Schell and to Al Steinke. He acted positively in affirmation of the consent by delivering the abstracts to be updated and apparently signing a contract or other document at Hartl's office. He further consented by omissions of acts by his failure to pay for the rental use of the Bill's pasture which he had rented in the past, and also by his failure to take any action to operate his farm and ranch or pay any bills. The estate personally assented or consented to the sale when they paid for the abstract updating; failed to pay any farm operating bills and failed to take any steps to personally operate the farm.

Each of these actions or inaction by George and then by his estate clearly and unequivocally indicate that George consented to and intended to consent to the sale on the terms offered.

The Court did not err when it determined that there was mutual consent to the

contract and its terms.

3. **DID THE TRIAL COURT ERR WHEN IT DETERMINED THERE WAS PARTIAL PERFORMANCE TO TAKE THE ORAL AGREEMENT OUT OF THE STATUTE OF FRAUDS?**

This matter has been settled in North Dakota. In Williston Coop Credit Union v Fossum 459 NW2d 548 (ND 1990) the Supreme Court has held that the general rule is that contracts for the sale of real property and transfers of real property interests must be made by an instrument in writing. However, part performance of an oral contract which is consistent only with the existence of the alleged contract removes it from the statute of frauds.

In this case, any and all actions taken by the parties to the contract were consistent with the contract. Jeff rented the additional land. George did not pay for the pasture land that he had rented from Bill in the past. George did not operate the farm after June 15th. George did not pay for any expenses on the farm after that date. [there is the issue of the one gas check discussed in Helen's deposition. Because the boys did not have a gas tax identification number, they would not be reimbursed for such tax. Bert had testified that George was to pay the one gas expense and he would be reimbursed. The estate and Bert are at odds over the farm expenses that he and George incurred prior to George's death and that issue will be resolved in a hearing in the estate]

The Trial Court, in it's Memorandum considered Parceluk v Knudtson, 139

NW2d 864 (ND 1966) in which the North Dakota Supreme Court considered other North Dakota cases. When there has been a partial performance of the oral contract for the sale of real estate, to void the agreement would be a fraud on one party if there has been substantial reliance to the detriment to that party. The trial court considered the facts presented and found that all of the actions taken by both parties were consistent with the existence of the contract and the fact that the boys had taken substantial financial steps consistent only with the contract would make the contract binding and outside the limitations of the Statute of Frauds. In Green v Gustafson, 482 NW2d 842 (ND 1992) the Court determined that although the seller had not cashed the purchasers check, the fact that the purchasers had taken possession and made substantial improvements in reliance on the contract, would preclude a bar for specific performance of the sale.

The estate argues that the operation of the farm by the boys in 1997 was consistent with the farming practices of George, Bert and the boys prior to that time and thus, their farming could point to considerations other than consistency with a sales agreement. It is true that when the boys were younger, they did work on their fathers farm and also for George. Bill is now in a Bank and did not farm prior to this contract. He had not worked for George for some time. Jeff, prior to the contract, was working for other individuals, not George or Bert. George, prior to the contract, worked with the farm and paid for farm expenses. After the contract, George did not pay for farm expenses and did not do any farm work, even limited supervision, he did nothing on the farm. Before the con

tract, George rented additional lands; after the contract, George did not rent the additional land and in fact Jeff had to rent even other additional land. All of these facts point directly to the conclusion that the actions of all parties after the contract were only consistent with there being a contract. All performances were performances consistent with the contract.

The Trial Court did not err.

4. **DID THE TRIAL COURT ERR WHEN IT ORDERED SPECIFIC PERFORMANCE UNDER THE TERMS OF THE WRITTEN PROPOSAL?**

The estate claims that the Trial Court should not have ordered specific performance because the terms of the written proposal were not sufficiently certain to allow specific performance. The estate complains that the terms in the proposal are not of sufficient specificity to enable the Court to order the sale and also, the terms are not reasonable to George.

Specific performance is an equitable action, the purpose of which is to compel parties to agreements to perform what they have contracted to do. Larson v Larson, 129 NW2d 566. (ND 1964) A grant of specific performance rests in the sound discretion of the trial Court. The findings of fact of the trial Court will not be set aside unless clearly erroneous and due regard must be given to the trial court's opportunity to judge the credibility of the witnesses. Sand v Red River National Bank and Trust Company of Grand Forks, 224 NW2d 375, 378. (ND 1974) *See Also* Harrington v Harrington, 365

NW2d 552 (ND 1985).

The proposal is set forth at Appendix 28. That document indicates that the boys are purchasing 1055 acres, 125 cows with calves, 5 bulls and the complete line of machinery, equipment, trucks, tools, etc. The terms are clear as to what is being purchased. It is agreed that the exact real estate description is not set forth, however, an examination of the evidence indicates that George intended to sell the entire farm. It is a simple task to check the real estate records to obtain the descriptions. In Crawford v Carter, 52 NW2d 302 (SD 1952) that court held that the lack of an accurate description in a contract for the sale of real estate would not void the contract when the seller permitted the purchaser to take possession of the land. In another case, Bellevue College v Greater Omaha Realty Co., 348 NW2d 837 (Neb. 1984) the Court held that while the description of the real estate should ideally be in the contract, if there is sufficient writing so that external standards if used, the description can be made certain, it will satisfy the requirements of specific performance. In addition, attorney Hartl knew the descriptions because he had prepared the original documents but had forgotten 80 acres. The issue of the real estate description is without basis.

The document further indicates the total purchase price, the down payment, the fact that the balance will be paid by a contract for deed, the number of years of the contract and the yearly payment amount. It further gives the dates the payments are due. It is clear that the information necessary to formulate the appropriate contract for the real es-

tate as well as the purchase agreement were in this document. The estate can speculate as to numerous other terms that could or could not be included in the sales agreement. The fact remains that the important details, sufficient for the sale were in the document.

When the parties met with Steinke, the accountant indicated that the purchase agreement for the cattle and machinery would have to be changed to a seven year contract for IRS purposes. The payments would be the same, but the payments would first apply to the purchase of the personal property and thereafter to the real estate. These facts were made known to the parties, including George, and they agreed to that change. [Tr. 72 et. seq.] When the Court ordered that the sale be consummated with the change recommended by the accountant, it was the statement by Steinke that the Court was referring to.

The specific terms of the contract were sufficient for the Court to order the sale. Specific performance of an obligation may be compelled. NDCC 32-04-07. In this case, the terms of the contract are sufficiently set forth in the written documents and the amendment by Steinke. George agreed to both terms and the Court did not err.

The second part of the estate's claim is that the terms are not just to George. The estate does not indicate how the terms are not just and reasonable. It is agreed that the amount of money for the cattle is at a price that is reasonable given the current cattle market. What apparently the estate complains about is the price of the machinery and the price of the land. The evidence indicates that George requested that the price be raised by $5,000 for the machinery and the boys agreed. George set the price and it is his determi-

nation as to what is reasonable.

The boys will not claim that the price of the land is not possibly lower than the open market, however, no evidence was presented at trial which would indicate that the price was substantially higher, or just a little higher than the contract price. For the estate to now speculate on the amount of the real estate on the open market is speculation and without evidence. Mere inadequacy of consideration does not justify a denial of specific performance in absence of unfairness or overreaching; generally, specific performance will be denied only when inadequacy or consideration is such as to demonstrate some gross imposition, undue influence or shock the conscience. Harrington *supra* at 558.

In this case, George knew he was selling the farm at less than market value. He told that to Fred Schell. There is no evidence that such fact was hidden from George. The estate appears to claim that there is no reason for George to give the boys a better price than others. The fact is that these boys were George's family. When ever there was a family gathering, a holiday, a celebration, George was with Bert's boys. It was also these boys who did the work for George for many years. George knew that he was to die shortly and he did not have any need of money. It is clear that George intended to give the boys a break in the sales price because of the fact that they were his family and they had earned some consideration.

There is no evidence that the consideration was unfair to George. The Court did not err.

5. WAS THERE EVIDENCE OF UNDUE INFLUENCE WHICH AFFECTED GEORGE'S ACTIONS IN THE CREATION OF THE CONTRACT?

The estate also claims that Bert and/or the boys exerted undue influence on George which affected the creation of the contract. The existence of undue influence precluding a grant of specific performance is a question of fact depending on the circumstances of a particular case. In order to deny specific performance of a contract on the ground of undue influence, it must be found that the person against whom the contract is sought to be enforced was a person who could be influenced, that improper influence was exerted and that there was submission to the overmastering effect of such conduct. Sand v Red River National Bank *supra* at 378. *See also* Seaborn v Kaiser 117 NW2d 863 (ND 1962). The Court also considered Matter of Estate of Wagner, 265 NW2d 459, 464 (ND 1978) when it determined that the law does not condemn all influence, only undue influence.

There is absolutely no evidence of such alleged undue influence. It was George who brought up the idea to his attorney and Bert to sell the farm to the boys. George was a difficult person and did not succumb to suggestions easily. When Bert asked him to provide clothing for the children because of cold weather, George refused. George handled his own financial affairs and his own taxes. Prior to his illness and before he became quite weak he took care of his own matters and no one was able to convince him otherwise. However, in the last stages of his illness, it is very possible that undue influence

was exerted on him. At this time he was under the close supervision of Bernice. The record indicates that it was Bernice who dealt with George's attorney [who apparently also became Bernice's attorney and later the estate's attorney]; who called all of the family meetings; who had received or reported the anonymous phone calls; and who listened in on all of George's telephone conversations. If there was any undue influence in the end, it was from Bernice, not these Appellees.

The Court did not err when it determined that the boys did not exert undue influence on George.

CONCLUSION

The Trial Court did not err when it determined that there was a valid binding contract that was entered into by the parties without any undue influence. The Court did not err when it was able to determine the terms of the contract and direct that the parties complete the agreement as contemplated.

The appeal should be DENIED..

Respectfully submitted this 11th day of December, 1998.

Michael S. McIntee ID03326
MCINTEE LAW FIRM
207 S. Main, PO Box 90
Towner, ND 58788-0090
701-537-5425
Attorney for Appellees