IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Curtis L. Erickson, Plaintiff/Appellee, vs. Dean Olsen, Susan Olsen, Bobby Olsen, Clee Raye Olsen, Marion Bergquist and the Estate of Clarence Erickson, Defendant/Appellant.	**Supreme Court No. 20130217** **(Burleigh County Case No. 08-2011-CV-2612)**

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT AND
ORDER ON RULE 52(B) MOTION TO AMEND FINDINGS AND JUDGMENT
ENTERED BY THE HONORABLE JUDGE CYNTHIA FELAND,
SOUTH CENTRAL DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I. Did the District Court err in concluding that undue influence was exerted over Clarence Erickson when executing his Will, and while transferring the subject real and personal property to the respondents?

II. Did the District Court err in concluding that Clarence Erickson lacked capacity to transfer real and personal property on the dates in question?

III. Did the District Court err in concluding that Clarence Erickson lacked testamentary capacity to execute a Will on September 16, 2010?

STATEMENT OF CASE

The appellee, Curtis L. Erickson, petitioned the district court alleging that various transactions between the decedent, Clarence Erickson ("Clarence") and the appellants should be vacated as a result of undue influence, duress, and/or misrepresentation. The appellee further sought to have the last will and testament of Clarence invalidated.

A trial was conducted on January 31, 2013 before the Honorable Cynthia Feland and the parties each submitted post-trial briefs to the court. A "Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment" was issued by the court on March 12, 2013. Judgment was entered on March 14, 2013 invalidating Clarence's Will as well as the transfers of real and personal property.

The respondents (appellants) filed a "Motion to Amend Findings and Judgment" under N.D.R.Civ.P. 52(b) requesting that the court amend its findings and order. (Docket No. 44). This motion was denied by the court in an Order dated May 13, 2013. (App. At 129-130).

The respondents filed a "Motion to Correct Judgment" pursuant to N.D.R.Civ.P. 60(a) requesting that the court correct the judgment to account for the payment of the purchase prices of the real property transferred to the respondents. On July 12, 2013 the respondents filed their Notice of Appeal (App. At 131).

STATEMENT OF FACTS

Clarence Erickson passed away on December 27, 2010. (App.108). Clarence was the father to 4 children from this first marriage: Curtis Erickson, Carol Wolf, Craig Erickson, and Colin Erickson. Clarence and his first wife divorced in 1976. (Id.) In 1981 Clarence married his second wife, Clara Olsen. (Tr. 10 at 8-12). Clara was the mother of six children from a previous marriage. (Tr. 9 at 9-11). Clara passed away in 2009. (Tr. 10 at 16-18).

Clarence Erickson owned real property and a home approximately 20 miles southwest of Bowman ND. (Tr. 10 at 5). Clarence was born and raised on the farmstead. (Tr. 88 at 5-10). Clarence retired from farming in 1985. (Tr. 17 at 1-17). In the 1990's Clarence began selling down his cattle. (Id.)

Bobby Olsen lived around 2.5 miles from Clarence's home. (Tr. 10 at 19-21). He would stop by every other day to see Clara and Clarence. (Tr. 11 at 11-12). Dean lived approximately 3 miles from Clarence's home and would also stop by at least every other day. (Tr. 10 at 24-25 and Tr. 46 at 7-8).

Sue Olsen would see Clara and Clarence on a nearly daily basis. (Tr. 29 at 2-4). Sue wrote all of Clarence's checks. (Tr. 32 at 8-12). When Sue wrote checks to herself and to Dean no one else was present. (Tr. 32 at 20-23). Clarence was not someone who gave large gifts. (Tr. 34 at 7-1 and 19 at 2-4).

In November of 2009 Curtis became concerned that his dad should not be living alone. (Tr. 93 and 94). Since 2006 Curtis had noticed that Clarence was have difficulties with his mental functioning. (Tr. 91 at 4-91). By 2009 the mental difficulties were becoming more pronounced. (Tr. 93 and 94). Curtis specifically notices a surprising lack of response by Clarence at Clara's funeral. (Tr. 92 at 8-13).

Curtis described Clarence's inability to recognize people he had known his whole life, such as his own sisters, Edith and Cora. (Tr. 105 at 5-25). Curtis discussed with

Clarence the possibility of retiring early and relocating to the farm. (Tr. 93 at 16-18).

Clarence moved in with Dean and Sue Olsen in November of 2009. (Tr. 30 at 2-4). While in their care, Clarence received 24-hour supervision. (Tr. 30 at 17-19). While in the care of Dean and Sue Olsen (3) additional checks were issued to them from Clarence's account. (Tr. 32-33 and trial exhibit 4). None of the issued checks were recorded in the check registry. (Trial Exhibit 11 and Tr. 35 at 17-25 and Tr. 51 at 7-11). Sue indicated that she only wrote the checks and did not record them in the registry. (Id.).

In February or March of 2010 Bobby Olsen took Clarence to a law office in Bowman to have a Will drafted. (Tr. 17 at 16-22). Clarence had repeatedly expressed to Curtis that he did not have a desire to create a Will and intended to let his children decide what to do with his property after his death. (Tr. 103 at 2-7).

On March 16, 2012 Clarence signed two warranty deeds transferring all his real property. One parcel with transferred to Bobby and the other to Dean. (Trial Exhibits 7 and 8). The parcel transferred to Dean consisted of a quarter section and included the homestead. The parcel transferred to Bobby consisted of around 520 acres of both farm and pasture land. (Id.). Dean and Bobby paid $200/acre for the real property. (Tr. 14 at 11-12 and 46 at 21-25). The real property included mineral rights. (Tr. 16 at 16-18). An appraisal of the real property at the time of the transfer reflected a fair market value of $450.00/acre. (Tr. 14 at 13-16). There was no purchase agreement for the sale of the property. (16 at 10-12).

Within days of the real property being transferred to Dean and Bobby, Clarence was moved to Bismarck to live with Marion. (Tr. 18 at 20-23). During the time Clarence was under the care of Marion he was again under 24-hour supervision. When Marion would go to work her son would come over to be with Clarence. (Tr. 75 at 21-25, and 76 at 1-4). While living with Marion, Clarence transferred title to his pickup to her. (Tr. 76 at 9-15).

On September 18, 2010, Marion drove Clarence from Bismarck to Bowman for the purpose of closing his accounts at Wells Fargo Bank and opening accounts at Dakota Community Bank. (Tr. 146 at 17-25 and 147 at 1-17). Dakota Community Bank was the bank used by Bobby. (Id.) That same day Clarence was taken to a law office in Bowman to sign a Will. (Tr. 73 at 24-25 and 74 at 1-2). Clarence did not have a meal with Bobby, Dean, or Sue and was not taken to see his farmstead. (Tr. 150 at 23-25). After the transactions were completed he was returned straight to Bismarck. (Tr. 147 at 16-17).

Based on his concerns regarding his father's mental health, and following discussions with his siblings, Curtis sought and was given a temporary guardianship of his father on October 18, 2010. (Tr. 95-96). Marion was extremely agitated and called the police when Clarence was removed from her home. (Tr. 96-97).

It was only after the temporary guardianship was put in place that Curtis become away of the transactions which are the subject of this litigation. (Tr. 100 at 15-25 and 101 at 1-21). Clarence was unable to provide an explanation for the transactions and had no clear memory of the events or details surrounding the transactions. (Tr. 101 at 24-25 and 102 at 1-12).

While living with Curtis it was clear that Clarence had not been involved in any socializing activities. (Tr. 97 at 17-23). Clarence would get very confused and had difficulties sleeping through the night. (Tr 99 at 5-17).

In preparation for the guardianship hearing, Clarence was evaluated by Dr. David Brooks on November 1, 2010. Dr. Brooks found Clarence to have very poor insight into his limitations and was extremely slow to react. Dr. Brooks determined that Clarence suffered from moderate to severe neurological impairment, was not competent to make decisions, and required 24-hour supervision. (Trial Exhibit 1)

Dr. Brooks indicated that for at least 2-3 months prior to the evaluation Clarence would have been impaired. (App. 98-99). Given the high level of impairment, Dr.

Brooks recommended placement in a skilled nursing home care or memory unit. (Trial Exhibit 1).

In December of 2010 Clarence was moved into Missouri Slope Lutheran Care Facility. Clarence lived at the facility until he passed away on December 27, 2010. (Tr. 100 at 6-14).

Neither Curtis nor his siblings were aware that a Will existed until he was making arrangements for Clarence's memorial service. (Tr. 103 at 8-9). Numerous irregularities exist in the purported Will. There were numerous misspellings of names and two step-children were omitted. (Tr. 104 at 1-22).

All of the respondents claimed to have seen no signs of Clarence's diminished capacity at any time. (Tr. 12 at 9-12, 29 at 13-19, 46 at 4-6, and 73 at 6-11).

LAW AND ARGUMENT

I. The District Court did not err in concluding that undue influence was exerted over Clarence Erickson when executing his will, and while transferring the subject real and personal property to the respondents.

A. Standard of Review

The appellee agrees with the appellant that the determination of whether undue influence exists is a question of fact. A District Court's factual findings can only be set aside upon the finding that they are "clearly erroneous." In re Estate of Howser, 2002 ND 33, ¶ 9, 639 N.W.2d 485 (citing Matter of Estate of Robinson, 200 ND 90, ¶ 10-11, 609 N.W.2d 745). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it or if, on the entire record, this Court is left with a definite and firm conviction that a mistake has been made. Id.

B. Law and Argument

The appellee is in agreement with the appellant as to the applicable law in regard to undue influence in this matter. The appellant correctly identifies that this Court has recognizes different scenarios in analyzing whether undue influence has occurred.

To render a transaction voidable on grounds of undue influence, it must appear that improper influence was exercised over the grantor to such extent as to destroy his free agency or his voluntary action by substituting for his will the will of another. Johnson v. Johnson, 85 N.W.2d 211(ND 1957). To establish undue influence in this context a three part test is used: (1) A person who can be influenced; (2) The fact of improper influence exerted; and (3) Submission to the overmastering effect of such unlawful conduct. All three must be present. Hendricks v. Porter, 110 N.W.2d 421, 429-30 (N.D. 1961).

The elements of Undue Influence in the context of execution of a Will are: (1)

The testator was subject to such influence; (2)The opportunity to exercise undue influence existed; (3)There was a disposition to exercise undue influence; (4) The result appears to be the effect of such influence. Okken v. Okken, 348 N.W.2d 447, 450 (ND 1984); Matter of Estate of Herr, 460 N.W.2d 699, 702 (ND1990); Estate of Robinson, 2000 ND 90.

The trial court correctly identified and applied both of these standards in its March 12, 2013 "Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment." (App. 118-119 and 123). There is no argument from the appellant that the proper law was not applied in this matter.

Undue influence cases are frequently built upon circumstantial evidence. Undue influence is not proclaimed from the housetops and direct proof is difficult, if not impossible, to obtain. Dobbens v. Hupp, 562S.W.2d 736, 741 (Mo. Ct. App. 1978).

There are numerous strange circumstances surrounding the real property and the checks. All of these transactions were entirely secretive. Nobody was present, nothing was discussed, and nobody was told a thing about these transactions. Given the number of children involved in this situation, Clarence's mental and physical condition, and the size of the "gifts," this does not pass the smell tests. The respondents indicated that Clarence had never given any cash gifts in the past. In a normal circumstance there would have been some conversations concerning these extremely unusual and out of character transactions.

The checks dated 2/22/10, 1/15/10, and 11/22/09 were all cashed while Clarence was living with Dean and Susan Olsen. These three checks' numbers are 6168 (2/22/10), 6169 (1/15/10), and 6170 (11/22/09). All the other checks from this and the surrounding check books go in chronological order. (Trial exhibits 4 and 11). All the other checks written by Clarence were recorded in his check registry. (Trial exhibit 11). There was no plausible explanation as to why only these checks would be out of order, backwards,

and not recorded. It isn't a stretch to conclude that these transactions were trying to be hidden. Clarence would have no reason to hide any of these transactions.

It is extremely convenient that nobody else has any information about these alleged gifts. If the gifts were actually given by Clarence the checks would have been in order and would have been recorded. Just looking at the time line indicates that something is amiss with these transactions.

This is little doubt that Clarence, given his living arrangements, relationships, his emotional state after losing his wife, and his diminishing capacity, was subject to influence. Given the same factors, the respondents were in a position, and had the opportunity to exercise such influence.

The disposition is shown through the actions and testimony. All the respondents denied seeing any mental diminishment. It is next to impossible to believe this claim given the heightened level of incapacity thoroughly documented by Dr. Brooks. Clarence was relocated to Bismarck days afer he signed his land away. Clarence, as a mentally deficient 91 year old man, was hauled across the state to draft a will. Clarence's accounts were being transferred to a different bank for no viable reason. The respondents clearly wished for all the transactions to not be known by anyone. The resulting transactions are completely consistent with the influence exerted.

The facts of this case warrant the determination that a confidential relationship existed between Clarence and the respondents. In such a situation the burden shifts to the respondents to establish that no undue influence occurred. Given the secretive nature of the transactions this burden cannot be met.

The appellant finds it extremely unusual that all of the respondents testified that they saw absolutely no signs of mental deterioration in Clarence. This is incredibly difficult to believe considering the profound findings of Dr. Brooks. This is contradicted in that all the respondents kept a near 24 hour watch on Clarence. This is consistent with

a knowledge that Clarence was unable to manage for himself.

The trial court specifically found and stated numerous facts and conclusions which support the determinations:

- Clarence suffered from moderate to severe neurological impairment, was incompetent to make decisions and required 24-hour supervision." (App. 116)
- Clarence was noted to have a flat affect, exhibited more than mere difficulty remembering names, and did not even know who his sister was. (App. 116)
- Clarence exhibited difficulties performing basic math computations involving computations which Clarence had previously been able to do regularly with ease. (App 116).
- Clarence was receiving 24-hour supervision from November 2009. (App. 116).
- Clarence "sold" the real property for well below market value with no logical explanation. (App. 117)
- Almost immediately after Clarence's real property was transferred to Bobby and Dean, Clarence was moved to Bismarck. (App. 117)
- The sale did not reflect Clarence's prior expressed intentions to the parties. (App. 117).
- The sale contradicted Clarence's historical statements about his desires regarding the farm land. (App. 117)
- The checks at issue did not coincide with any particular events. (App. 117).
- There was no assertion that the checks were for payment for any caregiver services. (App. 117).
- No explanation was given as to why three of the checks were made payable to Sue and two of the checks were made payable to Dean. (App. 118).
- None of the checks were listed in the check registry. (App 118).
- The checks were out of sequence. (App. 118)

- Sue was the only person present when the checks were issues, and no checks were issued to any of Clarence's other children or stepchildren. (App. 118).

The trial court went through each of the individual transactions, wrote a thorough opinion, and came to the proper determination. All of the statements from the trial court's opinion are supported by the record.

The uncontroverted evidence is that Clarence was incompetent on November 2, 2010, the date of Dr. Brooks' evaluation. The trial court worked backwards from this date and considered the evidence that Clarence was suffering significant diminishment for some time prior to the exam.

It should be noted that Clarence was a man of limited education who was not someone who dealt in real estate or other legal matters. The issues in question are not topics in which Clarence was well versed, and not issues to which Clarence was comfortable. As indicated in Lee v. Lee, 1940, 70 N.D. 79, 292 N.W. 124, a court must be satisfied that the grantor was not in a situation to transact that particular business rationally. The trial courts' findings that Clarence was not in a position to conduct these particular business transactions rationally is wholly supported by the record.

The above described issues were thoroughly considered and weighed by the District Court. The above facts and testimony support the District Court's conclusions when applied to the correct legal standard. There is ample evidence to support the District Court's conclusions. The District Court's findings and conclusions were not clearly erroneous.

II. The District Court did not err in concluding that Clarence Erickson lacked capacity to transfer real and personal property on the dates in question.

A. Standard of Review.

The appellee agrees with the appellant that findings concerning capacity and competency are questions of fact. A District Court's factual findings can only be set

aside upon the finding that they are "clearly erroneous." In re Estate of Howser, 2002 ND 33, ¶ 9, 639 N.W.2d 485 (citing Matter of Estate of Robinson, 200 ND 90, ¶ 10-11, 609 NW.2d 745). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it or if, on the entire record, this Court is left with a definite and firm conviction that a mistake has been made. Id.

B. Law and Argument

The appellee is in agreement with the appellant as to the applicable law in regard to capacity and competency in this matter.

In determining whether a deed is invalid on ground of incapacity of the grantor, a court must be satisfied that the grantor was not in a situation to transact that particular business rationally. Lee v. Lee, 1940, 70 N.D. 79, 292 N.W. 124 (ND 1940)

N.D.C.C §14-01-02 - Partial incapacity--Contracts--Rescission states:

"A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the person's incapacity has been determined judicially upon application for the appointment of a guardian is subject to rescission as provided by the laws of this state."

In North Dakota, all persons are capable of contracting except minors and persons of unsound mind. N.D.C.C § 9-02-01.

The trial court correctly identified and applied the correct standard in its March 12, 2013 "Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment." (App. 115). There is no argument from the appellant that the proper law was not applied in this matter.

During the brief time that Clarence lived with respondents Dean and Susan Olsen there were three large checks issued to them, and two deeds prepared which transferred real property to Dean and Susan Olsen and Bobby and Clee Ray Olsen.

Curtis Erickson testified to the concerns he and his family had regarding Clarence,

and the diminished capacity he observed. Further, Dr. Brooks testimony still indicates that Clarence was probably pretty impaired up to November of 2009, one year prior to his evaluation. The land transfers occurred on March 16, 2010.

There is not a dispute that the land was sold for well below market. The Respondents claim that this was essentially a gift. There is no indication that any gifts were claimed or reported for tax purposes.

The facts relied upon, and the conclusions drawn therefrom, by the trial court are states in the above argument concerning the first issue. As the issues raised by the appellee are all interwoven the argument from issue one (1) above is thereby incorporated by reference.

The above described issues were thoroughly considered and weighed by the District Court. The above facts and testimony support the District Court's conclusions when applied to the correct legal standard. There is ample evidence to support the District Court's conclusions. The District Court's findings and conclusions were not clearly erroneous.

III. The District Court did not err in concluding that Clarence Erickson lacked testamentary capacity to execute a will on September 16, 2010

A. Standard of Review

The appellee agrees with the appellant that testamentary capacity, or lack thereof, is a question of fact. A District Court's factual findings can only be set aside upon the finding that they are "clearly erroneous." In re Estate of Howser, 2002 ND 33, ¶ 9, 639 N.W.2d 485 (citing Matter of Estate of Robinson, 200 ND 90, ¶ 10-11, 609 NW.2d 745). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it or if, on the entire record, this Court is left with a definite and firm conviction that a mistake has been made. Id.

B. Law and Argument

The appellee is in agreement with the appellant as to the applicable law in regard to testamentary capacity in this matter.

In determining whether an adult is of sound mind to make a will, the Court has explained testamentary capacity as:

> [The t]estator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them. He must have sufficient mind and memory to understand all of these facts; .... He must also be able to appreciate the relations of these factors to one another, and to recollect the decision which he has formed.

Stormon v. Weiss, 65 N.W.2d 475, 504-05 (N.D.1954)

The trial court correctly identified and applied this standard in its March 12, 2013 "Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment." (App. 118-119 and). There is no argument from the appellant that the proper law was not applied in this matter.

The facts and applicable standard for this issue are substantially similar to the two issues discussed above. For this reason the Appellant incorporates the arguments presented above into the analysis of this issue.

The only expert testimony was provided by Dr. David Brooks, Ph.D., a licensed Clinical Neuropsychologist. (App 66-106) Dr. Brooks conducted a thorough examination of Clarence on November 1, 2010 and issued a comprehensive report on November 2, 2010 (Trial Exhibit 1). Dr. Brooks concluded that Clarence was not competent to make decisions and needed 24 hour supervision consistent with skilled nursing home care or memory unit placement. Dr. Brooks' conclusions were supported by the comprehensive series of tests performed on Clarence. Dr. Brooks indicated that he had no hesitation in determining that Mr. Erickson was incompetent to make decisions. (App. 92)

Dr. Brooks indicated that it is extremely difficult to make a conclusion about an individual's mental health without conducting formal testing (App. 21 at 10 to App. 22

line 19.) Dr. Brooks. stated that he would likely be unable to determine an individual's mental health from a brief interaction, as in sitting next to someone on an airplane or having a brief conversation. This is telling as Dr. Brooks is a trained professional and is still unable to make such a determination with limited testing/information. This is consistent with the facts of this case. According to the only expert's testimony, the individuals who witnessed the execution of the will were in no position to offer an opinion as to Clarence's mental deficiencies.

The Will in this matter was executed on September 16, 2010. Dr. Brooks states that Clarence was most likely, "pretty darn impaired two to three months before he came in," and that it is reasonable to take his diagnosis back to "September or something like that or August, mid-August of something." (App. 34-35) Dr. Brooks further indicated that Clarence, "probably would have been pretty impaired a year ago..." (App. 97 at 5-17) This statement was qualified because the dementia progression is not always the same.

There can be no question that on November 1, 2010 (the date of Dr. Brook's examination) that Clarence was not of the mental capacity to execute a Last Will and Testament. From there we must extrapolate backward and look to other circumstantial evidence to fill in the blanks. Even with an uncertain speed of progression, Dr. Brooks was extremely confident in stating that in August of 2010 that Clarence was not competent to make decisions.

There is no indication that anyone present at the Will signing had any training in identifying an individual with diminished capacity. There is nothing to indicate any testing done on the decedent at the time the Will was executed. The facts are that Mr. Erickson spelled two (2) of his four (4) children's names incorrectly, and called one of his son's by a name he never used. (Tr. 104 at 107-122). This is not indicative of someone coherent, and is directly in line with the standard to invalidate a will under Stormon v. Weiss, 65 N.W.2d 475, 504-05 (N.D.1954). The issues with the Will itself coupled with

Dr. Brooks' firm testimony dictates that Clarence was not of sufficient capacity to execute the Will.

"The testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them." Matter of Estate of Stanton, 472 N.W.2d 741, 746 (ND. 1991). Based on the record, the testator did not have sufficient mental capacity to execute a valid Will.

The above described issues were thoroughly considered and weighed by the District Court. The above facts and testimony support the District Court's conclusions when applied to the correct legal standard. There is ample evidence to support the District Court's conclusions.

The District Court's findings and conclusions were not clearly erroneous.

CONCLUSION

For the foregoing reasons, Mr. Erickson respectfully requests that the Orders and Judgment be affirmed.

Respectfully submitted this 8th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January, 2014, the Brief of Appellee was served by first-class mail with postage prepaid, facsimile transmission or by electronic mail to all parties as follows:

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