20130217
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 9, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CASE NO. 20130217

Curtis L. Erickson, Appellee, vs. Dean Olsen, Susan Olsen, Bobby Olsen, Clee Raye Olsen, Marion Bergquist and the Estate of Clarence Erickson, Appellants.	)	**APPELLANTS' BRIEF**

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, CASE NO. 08-2011-CV-2612

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STATEMENT OF THE ISSUES

[¶1] 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 THE CASE

[¶2] This is an appeal of a civil action in which Curtis L. Erickson ("Curtis") petitioned the District Court to invalidate prior transactions between the decedent, Clarence Erickson ("Clarence"), and respondents Dean and Susan Olsen, and Bobby and Clee Raye Olsen. (App. at 5-7). Curtis alleged that Clarence was incompetent, and that the transactions in question were the result of undue influence, duress, or misrepresentation. (Id.) Curtis also petitioned to invalidate Clarence's last will and testament, alleging that Clarence lacked testamentary capacity. (Id.)

[¶3] A trial was held before the District Court of the South Central Judicial District, Burleigh County, on January 31, 2013, with the Honorable Cynthia Feland presiding. (App. at 107). The Court issued its *Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment* on March 12, 2013, finding in favor of Curtis and against the Respondents. (App. at 107-126). The District Court entered *Judgment* in this matter on March 14, 2013, invalidating Clarence's will, along with the transfers of real and personal property at issue in this case. (App. at 127). On April 12, 2013, the Respondents filed a *Motion to Amend Findings and Judgment* in accordance with N.D.R.Civ.P. 52(b) requesting that the Court amend its findings and order on the

grounds of insufficient evidence to support the Court's findings and decision. (Docket No. 44). This motion was denied by the Court on May 13, 2013. (App. at 129-130).

[¶4] On July 11, 2013, the Respondents filed a *Motion to Correct Judgment* under N.D.R.Civ.P. 60(a), requesting that the Court correct the judgment to account for the payment of the purchase prices paid by the Respondents for the real property transfers invalidated by the Court. (Docket No. 53). On July 12, 2013, the Respondents filed their *Notice of Appeal*. (App. at 131). The Respondents are appealing the judgment entered by the District Court on March 14, 2013, and the Order on Rule 52(b) Motion to Amend Findings and Judgment entered by the District Court on May 31, 2013. (Id.)

[¶5] After considering Respondents' *Motion for Remand*, on September 3, 2013, this Court temporarily remanded the case back to the District Court for the limited purpose of consideration and disposition of Respondents' *Motion to Correct Judgment*. (App. at 132-133, 136). Upon hearing of the motion, the District Court entered an *Amended Judgment* on November 5, 2013, ordering reimbursement of the purchase prices paid by respondents Dean and Susan Olsen and Bobby and Clee Raye Olsen, for the real property transfers invalidated by the Court. (App. at 139-140).

STATEMENT OF THE FACTS

[¶6] Clarence Erickson ("Clarence") died on December 27, 2010. (App. at 108). During his lifetime, Clarence had been married twice and had four (4) children from his first marriage: Curtis Erickson, Carol Wolf, Craig Erickson, and Colin Erickson. (Id.) Clarence and his first wife were divorced in 1976. (Id.) Clarence married his second wife, Clara Olsen ("Clara"), in 1981, and remained married to Clara until her death in September, 2009. (Tr. 10 at 8-12). Clara had six (6) children from a previous marriage:

Ardis Menager, Marion ("Punky") Bergquist, Larry Olsen, Martin Olsen, Jr., Dean Olsen ("Dean"), and Bobby Olsen ("Bobby"). (Tr. 9 at 9-11). Bobby Olsen testified that he saw Clarence and Clara nearly every day; Dean and Sue Olsen saw Clarence on a daily basis. (Tr. 11 at 11-12; 29 at 2-4). All of the respondents that testified at trial agreed that they saw no deterioration in Clarence's mental health prior to his death. (Tr. 12 at 2-5; 29 at 13-15; 46 at 1-3). The petitioner, Curtis Erickson, testified that he saw his father once or twice a year prior to Clara's death. (Tr. 89 at 6-22).

[¶7] After Clara's death in 2009, Clarence continued to reside on the farm near Bowman where the couple had lived. (App. at 109). Susan Olsen ("Susan"), the wife of Dean Olsen ("Dean"), would visit Clarence nearly every day. (Id.) Because of Clarence's macular degeneration, Susan would assist Clarence with various tasks including transporting and accompanying him to medical appointments and assisting Clarence with his finances by writing checks to pay his bills. (Tr. 32 at 8-19; Tr. 42 at 2-11; Tr. 49 at 6-14; Tr. 61 at 13-25; Tr. 62 at 1-13). Susan also assisted Clarence with these matters before Clara's death. (Tr. 61 at 13-25; Tr. 62 at 1-13).

[¶8] On June 3, 2009 and June 22, 2009, Clarence and Clara began making monetary gifts to Dean and Sue. (App. 27-28; 109). Sue testified that she was surprised by these gifts and that Clarence was giving them money for all of the work that they did for Clarence. (Tr. 34 at 7-8, Tr. 33 at 19-22). Prior to these checks, Clarence and Clara had cashed in a CD and gifted the proceeds, totaling $42,776.81, to Dean so he could pay for a hip surgery. (Tr. 30 at 12-25; 51 at 2-4). Dean and Susan did not have health insurance and had previously indicated to Clarence and Clara that a hip replacement would cost upwards of $50,000. (Tr. 64 at 10-20.) This monetary gift from Clarence and Clara was

issued in the form of a cashier's check and the funds were used to pay for Dean's surgery. (App. at 64, 109); (Tr. 36 at 12-25; Tr. 38 at 9-23; Tr. 44 at 4-11; Tr. 52 at 5-16).

[¶9] In November of 2009, following the death of Clara, Clarence moved in with Dean and Susan. (App. at 110); (Tr. 29 at 23-25; Tr. 30 at 1-4, 11-16; Tr. 59 at 14-24). Clarence expressed a clear preference to his son Curtis that he would rather live with Dean and Sue and not move to Bismarck. (Tr. 93 at 8-20). During this time period Clarence continued writing checks to Dean and Sue. Check No. 6170 was dated November 22, 2009. (App. 26). Check Nos. 6169 and 6168 were dated January 15, 2010, and February 22, 2010, respectively. (App. 24-25). Sue testified that she did not have access Clarence's checkbook or bank statements and that Clarence made these gifts to the Dean and Sue and asked that they not disclose the gifts to anyone else. (Tr. 35 at 12; 42 at 24-25 and 43 at 1-3; 34 at 17-22). At trial, Curtis admitted that he was unaware of anything that would have prevented Clarence from giving these types of monetary gifts to Dean and Sue and that he was unaware of any information to refute Dean and Sue's testimony that the checks were anything accept gifts from Clarence (and Clara) to Dean and Sue. (Tr. 188 at 9-12; Tr. 119 at 3-7). No information was presented to the Court regarding Clarence's competence at the time any of these checks were written.

[¶10] On March 16, 2010, Clarence sold his land, located in Bowman County, North Dakota, to Dean and Susan Olsen, and Bobby and Clee Raye Olsen. (App. at 111). Dean and Susan Olsen purchased 160 acres of land that included Clarence's family homestead. (App. at 63); (Tr. 46 at 21-25; Tr. 47 at 1-11). Bobby and Clee Raye Olsen purchased

520 acres consisting of both farm and pasture land.[1] (App. at 62); (Tr. 14 at 8-12). These land sales were initiated by Clarence and Clarence made all of the arrangements for the documents to be drafted and recorded and paid all expenses associated with their preparation. (Tr. 16 at 8-10; Tr. 57 at 1-6).

[¶11] With regard to the purchase price paid by both Dean and Susan Olsen, and Bobby and Clee Raye Olsen, Clarence set the value at what he believed to be one-half (1/2) the fair market value and rationalized that he would treat half of the land as belonging to Clara (Dean and Bobby's mother). (Tr. 14 at 17-25; Tr. 15 at 1-7, 18-22; Tr. 46 at 21-25; Tr. 47 at 1-11). Clarence did not feel that Dean and Bobby should have to pay for what he felt was Clara's half of the land. (Id.) Furthermore, Clarence had previously attempted to gift the 160 acres to Dean in 1995, but Dean had refused. (Tr. 54 at 23-25; Tr. 55 at 1-4). When Clarence subsequently approached Dean about purchasing the 160 acres, Dean delayed the purchase because it did not fit into his farming plans at the time. (Tr. 55 at 22-25; Tr. 56 at 1-2). Curtis became aware of these land conveyances in June 2010, but did nothing to challenge or further investigate these transactions at that time. (Tr. 95 at 15-18). Curtis also testified that he had no personal knowledge of Clarence's mental capacity at the time these deeds were executed. (Tr. 115 at 9-16).

[¶12] Also in March of 2010, when Dean and Susan Olsen became busy calving, Clarence decided that he would move to Bismarck and live with Marion Bergquist ("Marion") who lived in a ground level apartment unit and worked as a nurse's aid. (Tr. 40 at 14-25; Tr. 41 at 1-8; Tr. 59 at 25; Tr. 60 at 1-21; Tr. 72 at 10-25; Tr. 73 at 1-5; Tr.

[1]The District Court's *Memorandum Opinion* incorrectly states the acreage received by Bob as 160 acres and Dean as 520 acres. (App. at 111). The 160 acre parcel was conveyed to Dean and the 520 acre parcel was conveyed to Bobby. (App. at 62-63).

75 at 7-15,).

[¶13] On September 16, 2010, Clarence executed his Last Will and Testament. (App. at 20-23). Bobby testified that Clarence requested that Bob call Tim Sadowsky, Clarence's attorney in Bowman, to set up a time to prepare the will as early as March or February of 2010. (Tr. 16-22). The will was ultimately prepared by Sadowsky and was witnessed by Mr. Sadowsky and Jan Stebbins on September 16, 2010. (App. at 20-23). None of the respondents were present when the will was signed. (Tr. 22 at 15-17; 74 at 21-25). Both witnesses signed the will declaring, pursuant to the language of the document, that "the Testator signed and executed the instrument as his Last Will and Testament and that he . . . executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the Testator, signed the will as witness and that to the best of their knowledge the Testator was at the time an adult, of sound mind and under no constraint or undue influence." (App. at 22). Marion had driven Clarence to Bowman in order to meet with Mr. Sadowsky so that he could execute his will. (Tr. 73 at 24-25; Tr. 74 at 1-2, 7-23). Marion waited in the lobby while Clarence executed this document. (Id.) Curtis did not become aware of the will until two days after Clarence's death. (Tr. 103 at 8-11). Curtis also testified that he did not have any personal knowledge that Clarence lacked the mental capacity to execute his will in September 2010. (Tr. 112 at 13-19).

[¶14] Curtis sought and was subsequently granted a temporary guardianship of Clarence on October 18, 2010. (App. at 113). Once Curtis was issued Letters of Temporary Guardianship on October 20, 2010, he forcefully removed Clarence from Marion's residence against his will. (Tr. 80 at 21-25; Tr. 81 at 1-4; Tr. 128 at 9-21). A permanent

guardianship hearing was scheduled for January 2011. (App. at 113). In preparation of this hearing, Clarence underwent an outpatient neuropsychological evaluation on November 2, 2010, by Dr. David Brooks of St. Alexius Mental Health Services. (App. at 11-19, 113-114). This examination and report took place years and months after Clarence gifted money to Dean and Sue, months after executing the deeds transferring the Bowman County real properties to Bob and Dean, and several weeks after executing his Last Will and Testament on September 16, 2010. In December 2010, Clarence was moved into Missouri Slope Lutheran Care Facility where he continued to reside until his death on December 27, 2010. (App. at 114). The Olsen family was excluded from Clarence's funeral. (Tr. 127 at 8-24).

[¶15] After Clarence's death, Curtis petitioned the District Court to invalidate prior transactions between Clarence and Appellants alleging that Clarence had been incompetent to make such transfers and that these transactions were the result of undue influence, duress, or misrepresentation. (App. at 5-7). Curtis also sought to invalidate Clarence's will, alleging that Clarence had lacked testamentary capacity in September 2010. (Id.). Curtis testified that he never spoke with Clarence's attorney, Tim Sadowsky, nor did he speak with Jan Stebbins, who witnessed Clarence's will and the March 2010 deeds to Dean and Bob, nor did he speak with Steve Wild, a Bowman attorney that notarized the deeds and will. (Tr. 11 at 7-16; 141 at 12-25). When pressed by the Court, Curtis explained that they attorneys were from a "small town" and he didn't know if he could believe them. (Tr. 142 at 1-4).

[¶16] Trial was held in this matter before the District Court of the South Central Judicial District, Burleigh County, on January 31, 2013. (App. at 107). The Court issued its

Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment on March 12, 2013, finding in favor of Curtis and against the Respondents. (App. at 125-126). The District Court entered *Judgment* in this matter invalidating Clarence's will, along with the transfers of real and personal property at issue in this case. (App. at 127-128, 139-140).

LAW AND ARGUMENT

[¶17] **I. THE DISTRICT COURT ERRED IN CONCLUDING THAT UNDUE INFLUENCE WAS EXERTED OVER CLARENCE ERICKSON WHEN EXECUTING HIS WILL AND TRANSFERRING REAL AND PERSONAL PROPERTY AT ISSUE IN THIS CASE.**

A. Standard of Review

[¶18] The determination of whether undue influence exists is a question of fact. ***See*** In re Estate of Howser, 2002 ND 33, ¶ 9, 639 N.W.2d 485 (citing Matter of Estate of Robinson, 2000 ND 90, ¶ 10-11, 609 N.W.2d 745). This Court sets aside a trial court's factual findings when they are "clearly erroneous." Id. (citing Moen v. Thomas, 2001 ND 95, ¶ 19-20, 627 N.W.2d 146). 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. The District Court's findings of undue influence are clearly erroneous.

[¶19] In order 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. ***See*** Johnson v. Johnson, 85 N.W.2d 211, 221 (N.D. 1957). The degree of persuasion which amounts to undue influence is that which dominates the mind of the person being

persuaded to enter into a transaction to the extent that the agreement made is not the result of freely exercised judgment. ***See*** Ireland v. Charlesworth, 98 N.W.2d 224, 236 (N.D. 1959).

[¶20] North Dakota recognizes the possibility of undue influence in different scenarios. With regard to establishing undue influence sufficient to invalidate a transaction or deed, this Court has delineated the following three factors: (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. ***See*** Kronebusch v. Lettenmaier, 311 N.W.2d 32, 35 (N.D. 1981). In the context of establishing undue influence sufficient to invalidate a will, this Court has identified that the person challenging the will must prove the following four factors: (1) a testator subject to undue influence; (2) the existence of the opportunity to exercise undue influence; (3) a disposition to exercise undue influence; and (4) a result that appears to be the effect of undue influence. ***See*** In re Estate of Vestre, 2011 ND 144, ¶ 21, 799 N.W.2d 379.

[¶21] The mere fact that some are favored in a transaction to the exclusion of others does not give rise to a presumption of undue influence or fraud. ***See*** Lee v. Lee, 70 N.D. 79, 292 N.W. 124, 128 (N.D. 1940). That the grantor may have executed a transfer of property by motives of affection and gratitude does not establish undue influence, nor can undue influence be predicated on mere suspicion and opportunity for its exercise. ***See*** Hendricks v. Porter, 110 N.W.2d 421, 430 (N.D. 1961). Furthermore, "mere suspicion of undue influence is not sufficient . . . to sustain a verdict." ***See*** Mehus v. Thompson, 266 N.W.2d 920, 926 (N.D. 1978).

[¶22] The District Court ordered Clarence's will, along with the transfers of real and

personal property (i.e. the warranty deeds and monetary gifts at issue in this case) to Respondents, be invalidated as a result of undue influence. (App. at 120, 125-126). With regard to the warranty deeds and monetary gifts, the Court relied heavily on evidence that beginning in November of 2009: Clarence lived with respondents Dean and Susan Olsen and had not driven a vehicle since 2006; that Dean and Susan provided for Clarence's well-being and did not leave him unattended; and that Susan assisted Clarence with writing checks during this time. (App. at 119-120). With regard to Clarence's will, the Court relied on this same general evidence, noting that the stepchildren with whom Clarence had the greatest contact received the greatest benefits. (App. at 123-125).

[¶23] However, as discussed above, the mere fact that the Respondents were favored over Curtis in these transactions cannot give rise to a presumption of undue influence. ***See*** Lee, 70 N.D. 79, 292 N.W. at 128. Nor can the fact that Clarence may have been acting by motives of affection and gratitude toward the Respondents establish undue influence. ***See*** Hendricks, 110 N.W.2d at 430. Clarence simply preferred the Olsen family, whom he saw daily and who he trusted and who cared for him. Susan Olsen took Clarence to the doctor, to shop for groceries and assisted him in his finances when his vision was poor. The entirety of Curtis's allegations of undue influence is predicated on his mere suspicions and opportunity for its exercise. At trial Curtis introduced no evidence to refute the testimony of the Respondents that Clarence's will, and the transfers of real and personal property, were executed voluntarily, competently, and legally. Curtis admitted that he was not present at the time any of the documents were executed or gifts were made. Curtis also admitted that he had no personal knowledge that the checks written to Dean and Sue were anything except gifts.

[¶24] The facts clearly indicate that Clarence independently hired the attorney who drafted his will and the warranty deeds and signed these documents without any evidence of pressure or influence in any way. Bobby explained how Clarence set the price of the land transfers and that Clarence sold the land to Bobby and Dean with the rationale that one half of the land should have been owned by his late wife, Clara, their mother. No evidence was presented that the respondents subjected Clarence to undue influence and no evidence was presented that displayed that the checks, land transfers, or will were the product of undue influence.

[¶25] For these reasons, the evidence presented by Curtis does not support the District Court's findings of undue influence. The District Court's findings are induced by an erroneous view of the law and, based on the entire record, the Court has sufficient grounds to determine that the trial court erred. Accordingly, the District Court's findings of undue influence are clearly erroneous.

[¶26] II. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLARENCE ERICKSON LACKED CAPACITY TO TRANSFER REAL AND PERSONAL PROPERTY ON THE DATES IN QUESTION.

A. Standard of Review

[¶27] A trial court's findings concerning capacity and competency are questions of fact. ***See*** Slorby v. Johnson, 530 N.W.2d 307, 310 (N.D.1995) (citing Matter of Bo, 365 N.W.2d 847, 850 (N.D.1985)). Under N.D.R.Civ.P. 52(a), this Court sets aside a trial court's factual findings when they are "clearly erroneous." Id. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, has a definite and firm

conviction that the trial court has made a mistake." Id. (citing Ludwig v. Burchill, 514 N.W.2d 674, 675 (N.D.1994)).

B. The District Court's finding that Clarence lacked capacity to transfer real property on March 16, 2010 is clearly erroneous.

[¶28] Regarding the competency of an individual to execute a deed for real property, this Court has held that a deed may be declared invalid if the grantor's mind and memory were in such a situation at the time of the execution of the deed as to render him *wholly incompetent* to judge his rights and interests in relation to the transaction. ***See*** Lee v. Lee, 70 N.D. 79, 292 N.W. 124, 126 (1940) (emphasis added). "[O]ld age alone does not render a person incompetent, even though the mind may be weak and impaired compared with what it had been, and even though the capacity to transact general business may be lacking." ***See*** Slorby v. Johnson, 530 N.W.2d 307, 309 (N.D. 1995). "Impairment of faculties by disease or old age will not invalidate a deed, if the grantor fully comprehended its meaning and effect and was able to exercise his or her will in executing it." Id. In setting forth this standard, this Court reasoned:

> [A]bsolute ownership implies the right of arbitrary disposition of property of a capable and uninfluenced person. It is a corollary of absolute ownership. It is often true in connection with deeds or wills that the disposition of property indicates disregard of some, preference for others, partialities and caprice of the party disposing of the property. But if the party owns the property and has the mental capacity to know what he is doing and is uninfluenced the law does not concern itself with these matters.

Id. at 309-10. "Before a court may set aside a conveyance on the ground of mental incompetency of the grantor, the party attacking the validity of the deed must show that the grantor, at the time of the execution of the instrument, was so weak mentally as not to

be able to comprehend and understand the nature and effect of the transaction involved." Id. at 310.

[¶29] The District Court ordered that transfers of real property between Clarence and Dean and Sue Olsen and Bobby and Clee Raye Olsen be invalidated, and the warranty deeds (dated March 16, 2010) declared void, due to its finding that Clarence lacked capacity to transfer real property on March 16, 2010. (App. at 116-117, 125-126). In support of its findings, the District Court again relied heavily upon the testimony of Dr. Brooks who testified that, in November of 2010, Clarence suffered from neurological impairment. (App. at 116). However, for the same reasons as previously discussed, Dr. Brooks makes no specific observation that Clarence lacked capacity to execute these warranty deeds on March 16, 2010, which is the critical inquiry with regard to this issue. Dr. Brooks' examination of Clarence took place on November 1, 2010, nearly eight (8) months after Clarence transferred the real property at issue to Dean and Sue Olsen and Bobby and Clee Raye Olsen. (App. at 11). Dr. Brooks indicated the timeframe during which he believed Clarence could be incompetent during his deposition by stating:

> Well, I'd say very likely a week and very likely a month or two. I mean, I'd say that's highly probable. And maybe a few months. Beyond that, it's really hard because it's not – it's not a constant curve. It's kind of – you know, if you grab at an average, it doesn't help much, because every individual can be quite different.

(App. at 97:5-11).

[¶30] Dr. Brooks never opines that Clarence was incompetent to transfer the real property in March 2010, and his testimony regarding incompetence prior to the date of his examination on November 1, 2010 is supposition and must be weighed against the contrary facts. There is no medical evidence that supports a conclusion that Clarence

lacked the capacity to make transfers of real property on March 16, 2010, the date when the warranty deeds were executed.

[¶31] The District Court also notes in passing that Clarence had exhibited "a flat effect . . . more than mere difficulty remembering names" and that Clarence had problems with basic math computations and was receiving care as of November, 2009. (App. at 116). However, such evidence is insufficient to support a finding that Clarence lacked the capacity to make transfers of real property in March of 2010, and can be attributed to old age. As discussed above, "old age alone does not render a person incompetent, even though the mind may be weak and impaired compared with what it had been, and even though the capacity to transact general business may be lacking." ***See*** Slorby, 530 N.W.2d at 309.

[¶32] At trial, Curtis failed to provide evidence sufficient to meet his requisite burden to support his claim that Clarence was incompetent at the time he transferred the real property at issue to Dean and Sue Olsen and Bobby and Clee Raye Olsen. Curtis relied solely on mere personal speculation. (Tr. 115 at 9-16; Tr. 116 at 24-25; Tr. 117 at 1-5). The Respondents testified about their discussions with Clarence regarding the land sales and that they were arms-length transactions initiated by Clarence. (Tr. 16 at 8-10; Tr. 57 at 1-6). Clarence set the price, hired the attorneys to prepare the documents, and executed the deeds. (Id.) The timing of the transactions was slightly set by Bob and Dean to permit them to incorporate the real property into the farming plans. (Tr. 55 at 22-25; Tr. 56 at 1-2). The Respondents also testified as to why Clarence sold them this property at less than market-value. (Tr. 14 at 17-25; Tr. 15 at 1-7, 18-22; Tr. 46 at 21-25; Tr. 47 at 1-11). Clarence had indicated to that he would treat half of this real property as

belonging to their mother, Clara. (Id.) Therefore, Clarence treated the property as such by selling it to Respondents for approximately one-half its market value. (Id.) Curtis has even admitted he has no personal knowledge that Clarence lacked capacity to execute the deeds in March of 2010. (Tr. 115 at 9-16; Tr. 116 at 24-25; Tr. 117 at 1-5).

[¶33] For these reasons, the evidence presented by Curtis does not support the District Court's finding that Clarence lacked capacity to transfer real property on March 16, 2010. The District Court's finding is induced by an erroneous view of the law and, based on the entire record, the Court has sufficient grounds to determine that the trial court erred. Accordingly, the District Court's finding that Clarence lacked capacity to transfer real property on March 16, 2010, is clearly erroneous.

C. The District Court's finding that Clarence lacked capacity to make monetary gifts to Respondents is clearly erroneous.

[¶34] Regarding the competency of an individual to convey or dispose of personal property, this Court has determined that "[i]f a grantor understands the meaning and effect of a transaction disposing of her property, [he or she] may do so at her pleasure." ***See*** Estate of Wenzel-Mosset by Gaukler v. Nickels, 1998 ND 16, ¶ 13, 575 N.W.2d 425, 429. "Before a court may set aside a transaction on the ground of mental incapacity, the party attacking the validity of the transaction has the burden to prove the grantor was unable to comprehend the nature and effect of the transaction." Id. (citing Matter of Estate of Nelson, 553 N.W.2d 771, 773 (N.D.1996). As with transfer of real property, "[o]ld age alone does not render a person incompetent, even if the mind is weak or impaired or even if capacity to transact general business may be lacking. Id. (citing Slorby v. Johnson, 530 N.W.2d 307, 309 (N.D. 1995)).

[¶35] "A gift is a transfer of personal property made voluntarily and without consideration." ***See*** Doeden v. Stubstad, 2008 ND 165, ¶ 12, 755 N.W.2d 859; ***see also*** N.D.C.C. § 47-11-06. This Court has said that "a valid gift requires an intention by the donor to give property to the donee, coupled with an actual or constructive delivery of the property to the donee and acceptance of the property by the done." ***See*** Doeden, at ¶ 12.

[¶36] The District Court ordered that monetary gifts (i.e. checks issued to Susan and Dean Olsen) be invalidated due to its finding that decedent was not capable of understanding the nature and effect of these transfers. (App. at 118, 126). In support of this finding, the Court relied on the same general evidence as it did with regard to the real property transfers. (App. at 118). For the same reasons as discussed above, there is no evidence supporting the conclusion that Clarence lacked the mental capacity to comprehend the meaning and effect of these gifts on the dates in question (June 3, 2009; June 22, 2009; November 22, 2009; January 15, 2010; and February 15, 2010).

[¶37] In addition, this Court found the transfer of $42,776.81, gifted to Dean and Susan on April 18, 2008, to be valid; the District Court found that there was insufficient evidence to invalidate this transfer. (App. at 120). This gift was made by Clarence in order to help Dean pay for a hip replacement and establishes a history of gift-giving by Clarence to Dean and Susan and shows that he was capable of understanding the nature and effect of such transfers. (App. at 64, 109).

[¶38] At trial, Curtis introduced no evidence sufficient to show that the personal property and funds transferred to Respondents were not gifts from Clarence. According to the testimony provided by Respondents, the transfers of personal property at issue in this case were made voluntarily by Clarence and without consideration. (Tr. 33 at 19-22;

Tr. 39 at 7-13; Tr. 54 at 2-3). Clarence intended to give this property to the Respondents, actually or constructively delivered the property to the Respondents, and the Respondents accepted the property recognizing them as gifts from Clarence. (Id.) Specifically with regard to the five checks made out to respondents Dean and Susan Olsen, both testified that these amounts were gifts from Clarence. (Id.) Curtis admitted that he had no direct evidence to refute that the checks to Dean and Susan were gifts. (Tr. 119 at 3-14). Dean testified that Clarence had gifted them various amounts in his efforts to cut down the amount of money in his bank account. (Tr. 49 at 19-25). Therefore, Curtis was unable to provide any evidence at trial proving that these transfers were anything except gifts from Clarence to the Respondents.

[¶39] For these reasons, the evidence presented by Curtis does not support the District Court's finding that Clarence lacked the capacity to make monetary gifts to Respondents on the dates in question. The District Court's finding is induced by an erroneous view of the law and, based on the entire record; the Court has sufficient grounds to determine that the trial court erred. Accordingly, the District Court's finding that Clarence lacked capacity to make monetary gifts to Respondents is clearly erroneous.

[¶40] III. THE DISTRICT COURT ERRED IN CONCLUDING THAT CLARENCE ERICKSON LACKED TESTAMENTARY CAPACITY TO EXECUTE HIS WILL ON SEPTEMBER 16, 2010.

A. Standard of Review

[¶41] "A determination of testamentary capacity, or the lack of it, is a question of fact." ***See*** Matter of Estate of Wagner, 551 N.W.2d 292, 295 (N.D.1996) (citing Matter of Estate of Mickelson, 477 N.W.2d 247, 251 (N.D.1991)). Under N.D.R.Civ.P. 52(a), this Court sets aside a trial court's factual findings when they are "clearly erroneous." Id.

(citing Matter of Estate of Zimbleman, 539 N.W.2d 67, 72 (N.D.1995)). 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. (citing Mahoney v. Mahoney, 538 N.W.2d 189, 192 (N.D.1995)).

B. The District Court's finding that Clarence lacked testamentary capacity on September 16, 2010 is clearly erroneous.

[¶42] In order for an individual to execute a valid will, he or she must be of "sound mind." ***See*** N.D.C.C. § 30.1-08-01. Testamentary capacity refers to the required mental condition of the testator *at the time of execution*. ***See*** Matter of Estate of Wagner, 551 N.W.2d 292, 295 (N.D. 1996) (emphasis added). This Court has often quoted the following passage from Stormon v. Weiss, 65 N.W.2d 475, 504-05 (N.D.1954), when explaining testamentary capacity:

> 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. 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.

[¶43] The critical inquiry in determining testamentary capacity is directed to the condition of the testator's mind *at the time of the execution of the will*. Id. at 483; ***see also*** Matter of Estate of Wagner, 551 N.W.2d at 296 ("For testamentary capacity, the trial court must assess the condition of the testator's mind at the very time the testator signed the [will]"). Testamentary capacity of the testator is presumed; the burden is on the

contestant to show a lack of testamentary capacity. ***See*** Stormon, 65 N.W.2d at 504; s***ee also*** N.D.C.C. §30.1-15.07. "Mental weakness due to disease does not deprive one of testamentary capacity until it has progressed to the extent that the power of intelligent action has been destroyed." ***See*** Stormon, at 508. "Mere forgetfulness and enfeeblement of the body are not alone sufficient to disqualify one from making a will." Id.

[¶44] The District Court ordered that Clarence's will be invalidated due to its finding that decedent lacked testamentary capacity when executing his will on September 16, 2010. (App. at 122, 126). In support of its findings, the District Court relied almost exclusively on the testimony of Dr. Brooks who testified that, in November of 2010, Clarence suffered from neurological impairment. (App. at 121-122). However, Dr. Brooks' examination of Clarence took place on November 1, 2010; this was six (6) weeks after Clarence executed his will. (App. at 11). Although Dr. Brooks indicated that Clarence probably suffered from Alzheimer's dementia, he indicated this disease has an insidious onset, meaning it cannot be determined when it started. (App. at 72:11-20).

[¶45] Again, Dr. Brooks' testimony was based upon his examination on November 1, 2010, and he was not provided with any of Clarence's medical records. (App. at 74:10-25). Dr. Brooks deferred to Clarence's prior physicians regarding Clarence's mental state prior to the November 1, 2010 examination; all witnesses who accompanied Clarence to medical appointments do not indicate concerns by Clarence's prior physicians. (App. at 104:13-25; 105:1-6); (Tr. 37 at 15-22). Therefore, Dr. Brooks makes no specific observation that Clarence lacked testamentary capacity to execute a will on September 16, 2010, which is the critical inquiry with regard to this issue. Dr. Brooks's testimony regarding incompetence prior to the date of his examination is supposition and must be

weighed against the contrary facts as there is no medical evidence prior to the execution of the will that supports a conclusion that Clarence lacked testamentary capacity on September 16, 2010.

[¶46] At trial, Curtis failed to provide evidence sufficient to meet his requisite burden regarding Clarence's mental state on September 16, 2010, the date Clarence executed his will and the precise date on which the trial court must assess the condition of Clarence's mind. Tim Sadowsky, who was in the room with Clarence when executing his will on September 16, 2010, attested that Clarence was of sound mind. (App. at 22). Marion Bergquist, with whom Clarence was living, testified that she did not have concerns with Clarence's mental state, and that she drove Clarence from her home in Bismarck to Tim Sadowsky's law office in Bowman at Clarence's own request so that he could sign his will. (Tr. 73 at 24-25; Tr. 74 at 1-2, 7-23). Marion did not accompany Clarence into the room where Clarence executed his will, but remained in the lobby/reception area. (Id.) None of the respondents had any concerns with Clarence's mental state in September 2010. (Tr. 12 at 2-12; Tr. 19 at 12-14; Tr. 29 at 13-19; Tr. 37 at 2-5; Tr. 42 at 15-22; Tr. 46 at 1-6; Tr. 51 at 21-24; Tr. 73 at 9-11). Curtis also admitted he has no personal knowledge that Clarence was not competent when executing his will in September 2010. (Tr. 111 at 17-25; Tr. 112 at 1-25; Tr. 113 at 1-3).

[¶47] For these reasons, the evidence presented by Curtis does not support the District Court's finding that Clarence lacked testamentary capacity when executing his will on September 16, 2010. The District Court's finding is induced by an erroneous view of the law and, based on the entire record; the Court has sufficient grounds to determine that the

trial court erred. Accordingly, the District Court's finding that Clarence lacked testamentary capacity on September 16, 2010 is clearly erroneous.

CONCLUSION

[¶48] For the reasons discussed herein, Respondents respectfully request that the Court find that the District Court's findings were clearly erroneous and that the Judgment of the District Court be reversed and remanded.

Dated this 9th day of December, 2013.

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CERTIFICATE OF SERVICE

[¶49] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 9th day of December and e-mailed to the following:

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