20130217
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 27, 2014
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.	)	**BRIEF IN REPLY TO APPELLEE'S 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 FACTS

[¶1] The Appellants incorporate by reference the statement of the facts contained in *Appellant's Brief* (¶¶ 6-16) previously filed with the Court.

LAW AND ARGUMENT

[¶2] I. THE EVIDENCE DOES NOT SUPPORT THE DISTRICT COURT'S FINDINGS OF UNDUE INFLUENCE.

[¶3] Appellee Curtis L. Erickson ("Curtis") claims the real property conveyances and monetary gifts made to the Respondents are surrounded by numerous "strange circumstances." ***See*** *Appellee's Brief* at 7. However, this is insufficient to establish undue influence; the evidence presented by Curtis in support of his undue influence claims (and relied upon by the District Court in its findings) indicates nothing more than Curtis's mere suspicion and opportunity for its exercise.

[¶4] "A 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). 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) (emphasis added). 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. ***See*** Lee v. Lee, 70 N.D. 79, 292 N.W. 124, 128 (N.D. 1940).

[¶5] With regard to the real property conveyances and monetary gifts made by Clarence, Curtis asserts the presence of undue influence based on the secretive nature of these transactions and that Respondents were in a position and had the opportunity to exercise influence over Clarence given his living arrangements, relationships, and alleged

diminishing mental capacity. ***See*** *Appellee's Brief* at 8. However, the evidence in the record clearly indicates that Clarence independently hired the attorney that drafted the warranty deeds and signed these documents without any evidence of pressure or influence in any way. (Tr. 16 at 8-9). Bobby Olsen explained how Clarence set the price of the land transfers and that Clarence sold the land to Bobby and Dean Olsen with the rationale that one half of the land should have been owned by his late wife, Clara, the mother of Bobby and Dean. (Tr. 14 at 19-25 and 15 at 1-2). Curtis introduced no evidence at trial to refute the testimony of the Respondents that the conveyances of real and monetary gifts by Clarence 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 and also admitted at trial that he had no personal knowledge that the checks written to Dean and Sue were anything but gifts. (Tr. 119 at 11-14). The fact that Curtis was unaware of transactions at the time of the occurrence is consistent with the testimony at trial that Curtis was in infrequent contact with Clarence and Bobby and Dean visited and cared for Clarence on a daily basis. Accordingly, the evidence presented by Curtis in support of his undue influence claims (and relied upon by the District Court in its findings) indicate nothing more than mere suspicion and opportunity for its exercise.

[¶6] Although Curtis identifies the correct legal standard with regard to undue influence in the context of wills, his legal argument regarding undue influence is limited to the real property conveyances and monetary gifts. ***See*** *Appellee's Brief* at 6-10. In response to this lack of legal analysis, the Appellants hereby incorporate by reference the

argument contained in paragraphs nineteen through twenty-five (¶¶ 19-25) of the *Appellant's Brief* with regard to undue influence in the context of Clarence's will.

[¶7] The evidence does not support the District Court's findings of undue influence. Based on the entire record, the Court erred as its findings are not supported by the evidence and were induced by an erroneous view of the law. Accordingly, the District Court's findings of undue influence are clearly erroneous.

[¶8] **II. THE EVIDENCE DOES NOT SUPPORT THE DISTRICT COURT'S FINDINGS THAT CLARENCE ERICKSON LACKED CAPACITY TO MAKE REAL PROPERTY CONVEYANCES AND MONETARY GIFTS ON THE DATES IN QUESTION.**

[¶9] Curtis argues that Dr. Brooks's testimony indicates that Clarence was "probably pretty impaired up to November of 2009, one year prior to his evaluation." ***See*** *Appellee's Brief* at 12. However, Dr. Brooks clearly restricts his testimony and asserts that Clarence was incompetent at the date of test and probably a month or two before, but would not go further than that. (App. 97 at 18-23). Dr. Brooks clearly indicated he would have no opinion as to Clarence's competence more than six months prior. (App. 104 at 19-23). All real property conveyances and monetary gifts at issue in this case took place before this timeframe.

[¶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." ***See*** Slorby v. Johnson, 530 N.W.2d 307, 310 (N.D. 1995) (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." Id. at 309.

[¶11] Dr. Brooks's examination of Clarence took place on November 1, 2010, nearly eight (8) months after real property conveyances at issue here. (App. at 11). Again, it is clear from the record that Dr. Brooks's timeframe during which he believed Clarence could have been experiencing neurological impairment was not more than one or two months prior to his examination of Clarence on November 1, 2010. (App. at 97:5-11). Dr. Brooks never opines that Clarence was incompetent to make real property conveyances in March 2010. The Respondents testified that these land sales 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). Furthermore, Curtis admitted at trial he has no personal knowledge that Clarence lacked capacity to execute these deeds in March of 2010. (Tr. 115 at 9-16; Tr. 116 at 24-25; Tr. 117 at 1-5). Simply put, the record is devoid of any facts indicating that Clarence was incompetent at the time he executed the deeds to the Respondents and therefore, the District Court's decision is not supported by the record and is clearly erroneous.

[¶12] Similarly, with regard to the monetary gifts at issue, 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). Curtis introduced no evidence at trial sufficient to show that the funds transferred to Respondents were not gifts from Clarence. The monetary gifts at issue 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.) Respondents Dean and Susan Olsen both testified that these transfers were gifts from Clarence. (Id.) Dean testified that Clarence gifted them various amounts in his efforts to cut down the amount of money in his bank account. (Tr. 49 at 19-25). Furthermore, Curtis admitted that he had no direct evidence to refute that the checks to Dean and Susan were gifts. (Tr. 119 at 3-14). Curtis was unable to provide any evidence at trial proving that these transfers were anything but gifts from Clarence to the Respondents.

[¶13] The evidence does not support the District Court's finding that Clarence lacked capacity to make real property conveyances and monetary gifts on the dates in question. Based on the entire record, the Court erred as its findings are not supported by the evidence and were induced by an erroneous view of the law. Accordingly, the District Court's findings that Clarence lacked capacity to make real property conveyances and monetary gifts on the dates in question are clearly erroneous.

[¶14] III. THE EVIDENCE DOES NOT SUPPORT THE DISTRICT COURT'S FINDING THAT CLARENCE ERICKSON LACKED TESTAMENTARY CAPACITY ON SEPTEMBER 16, 2010.

[¶15] Curtis argues that Clarence lacked testamentary capacity on September 16, 2010, the day Clarence executed his will. ***See*** *Appellee's Brief* at 15. Based on Dr. Brooks'

testimony, Curtis claims the individuals who witnessed Clarence execute his will are in "no position to offer an opinion" as to Clarence's mental state, and Clarence was not competent to make decisions in August 2010. Id. at 14. But Dr. Brooks makes no specific observation that Clarence lacked testamentary capacity on September 16, 2010. All of the evidence surrounding Clarence's mental capacity in September 2010 must be considered, particularly the personal opinions of those present at the time Clarence executed his will.

[¶16] 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). "For testamentary capacity, the trial court must assess the condition of the testator's mind at the very time the testator signed the [will]." Id. at 296. Because testamentary capacity is presumed, the burden is on Curtis to prove that Clarence lacked testamentary capacity on September 16, 2010. ***See*** Stormon v. Weiss, 65 N.W.2d 475, 504 (N.D. 1954); ***see also*** N.D.C.C. §30.1-15-07.

[¶17] Again, Dr. Brooks's testimony was based upon his examination of Clarence on November 1, 2010. (App. at 74:10-25). He was not provided with any of Clarence's medical records. (Id.) Dr. Brooks deferred to Clarence's prior physicians regarding Clarence's mental state prior to the November 1, 2010 examination; none of witnesses who accompanied Clarence to medical appointments indicated concerns by Clarence's prior physicians. (App. at 104:13-25; 105:1-6); (Tr. 37 at 15-22). The attestation of Tim Sadowsky indicates that Clarence was of sound mind. (App. at 22). 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). Finally, Curtis admits he has no personal knowledge that Clarence lacked capacity in September 2010. (Tr. 111 at 17-25; Tr. 112 at 1-25; Tr. 113 at 1-3).

[¶18] The evidence does not support the District Court's finding that Clarence lacked testamentary capacity on September 16, 2010. The District Court erred as its findings are not supported by the evidence and were induced by an erroneous view of the law. Accordingly, the District Court's finding that Clarence lacked testamentary capacity when executing his will on September 16, 2010 is clearly erroneous.

CONCLUSION

[¶19] For the reasons discussed above and contained in the Appellant's principal brief, the Respondents respectfully request the Court hold the District Court's findings to be clearly erroneous and that the Judgment of the District Court be reversed and remanded.

Dated this 27th day of January, 2014.

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CERTIFICATE OF SERVICE

[¶20] 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 27th day of January and e-mailed to the following:

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