

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2004 Session

IN RE: ESTATE OF AGIE BUNDREN

**Appeal from the Probate Court for Claiborne County
No. P-1735 Herbert M. Bacon, Judge**

No. E2003-02746-COA-R3-CV - FILED NOVEMBER 23, 2004

The two primary issues in this case are: whether deeds that are executed by a father to his various children, but retained by his wife in a lockbox in his home and not delivered to his children until after his death, are invalid due to lack of delivery; and whether deeds executed by a father to his son are invalid due to the son's alleged undue influence over the father where the father and son had a close personal and business relationship, but where the father retained his independence despite his deteriorating physical health. Agie Bundren executed twelve deeds conveying tracts of his real property to his children- ten of the deeds were retained in a lockbox in Agie Bundren's home and two were delivered to a son with whom Agie Bundren had a close business and personal relationship. We hold that the deeds retained in the lockbox and not delivered to Agie Bundren's children until after his death are ineffective gifts due to failure of delivery and that the evidence preponderates against the trial court's finding that the two deeds delivered prior to Agie Bundren's death were procured by the son due to undue influence. Accordingly, we affirm the trial court's judgment as to deeds retained in the lockbox and reverse as to the deeds delivered to the son prior to Agie Bundren's death.

**Tenn.R.Civ.P. 3 Appeal as of Right; Judgment of the Probate Court
Affirmed in Part and Reversed in Part; Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR. and D. MICHAEL SWINEY, JJ., joined.

David H. Stanifer, Tazewell, Tennessee, for Appellant Jerry Bundren.

David L. Bacon, Knoxville, Tennessee, for Appellees William Albert Bundren, Helen Johnson, Leonard Bundren, Thelma Bundren, Larry Bundren, and David Bundren.

OPINION

I. Factual Background

Agie Bundren (“Decedent”) owned a farm in Claiborne County, Tennessee consisting of approximately one thousand contiguous acres. When he died on August 15, 2000, Decedent was survived by his wife and seven children. On August 30, 2000, Decedent’s last will and testament was admitted to probate. On December 18, 2000, Petitioners, who were six of his seven children, filed a petition in Claiborne County Probate Court against their brother, Jerry Bundren (“Respondent”). The pleading was styled “Petition to Set Aside Fraudulent Conveyances” and requested that the trial court set aside twelve deeds purporting to convey certain tracts of real estate owned by Decedent. Five of the deeds conveyed property to the Respondent. The remaining deeds conveyed property to Petitioners. The petition alleged that “the Respondent and the Deceased had a close personal and working relationship for several years prior to the death of the Deceased, such that there was great opportunity for undue influence and improper dealing” by Respondent, and that Respondent had unduly influenced his father to execute the deeds.

The case was heard without a jury on May 29, 2003. At the conclusion of the presentation of the evidence, the trial court, acting on its own accord and motion, raised the issue of whether there had been a failure of delivery of the deeds that remained in the Decedent’s lockbox until after his death. The trial court provided the parties an opportunity to brief and put on further proof regarding the delivery issue. The deposition of Decedent’s wife, Jean Bundren, was taken and apparently filed with the court, although it is not part of the record on appeal.

The trial court subsequently held that those deeds which had remained in Decedent’s lockbox until after his death were invalid due to lack of delivery. The trial court also held that those deeds that had been executed by Decedent and delivered to Respondent were invalid because Respondent had procured them through undue influence. The trial court ordered that Decedent’s real property should pass to Petitioners and Respondent according to the terms of Decedent’s will.

II. Issues

Respondent appeals the judgment of the trial court and raises the following issues for our review:

1. Whether the trial court erred in holding that all necessary and indispensable parties were before the court when the petition included only the names of Decedent’s children and not their spouses’ names.
2. Whether the trial court erred in holding that Respondent exercised undue influence on Decedent by inducing him to execute the deeds granting Respondent certain real estate tracts.

3. Whether the trial court erred in holding that the deeds in Decedent's lockbox were invalid due to lack of delivery.

III. Standard of Review

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations which we must honor unless the evidence preponderates against those findings. Tenn. R.App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn.1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn.1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn.1993).

IV. Necessary and Indispensable Parties

Respondent argues that this court should invalidate the trial court's judgment because all necessary and indispensable parties were not named in the proceeding. We quote from his brief his argument in this regard:

The [Petitioners] filed their complaint only listing themselves as petitioners and Jerry Bundren as the respondent. The petitioners did not list those persons who were also listed on the deeds along with them. For instance, the [Petitioners] did not list Brenda Bundren (wife of Larry Bundren), Marianne Bundren (wife of William Bundren) or Sandy Bundren (wife of Leonard Bundren) as parties to the suit even though their names accompanied the parties' names on the deeds. Furthermore, the [Petitioners] did not name Barbara Bundren as a respondent even though her name accompanied that of Jerry Bundren's on each of Jerry Bundren's deeds.

This issue is without merit. It was not raised before the trial court. Although Respondent's counsel briefly mentioned it in passing in remarks to the trial court after close of proof, it was not included in Respondent's "Statement of Issues" filed with the trial court before the hearing. As Petitioners have noted, either Respondent Jerry Bundren or his wife Barbara Bundren could have filed a motion with the trial court to add Mrs. Bundren as a proper party to the lawsuit, if they had a concern that her interests were not adequately represented by Respondent. As stated in *Brewer v. Lawson*, 569 S.W.2d 856 (Tenn. App.1978),

A proper party is not the same as a necessary or indispensable party.

Only a party who will be directly affected by a decree *and whose interest is not represented by any other party to the litigation* is an indispensable or necessary party, that is, one without which no valid

decree may be entered settling the rights between the parties that are before the Court.

Brewer, 569 S.W.2d 856 at 858 (emphasis added).

V. Delivery of the Deeds

The trial court held that certain of the deeds requested to be set aside by Petitioners failed due to lack of delivery by Decedent. The challenged deeds or copies thereof, are not included in the record before us. According to the petition, the deeds executed by Decedent to his children were as follows: five deeds to Respondent Jerry Bundren; two deeds to Petitioner Larry Bundren and his wife Brenda; one deed to Petitioner David Bundren; one deed to Petitioner Bill Bundren and wife Marianne; one deed to Petitioner Helen Johnson; one deed to Petitioner Leonard Bundren and wife Sandy; and one deed to Petitioner Thelma Bundren. The deeds apparently were executed at various times between 1996 and 2000.

The deeds were prepared by Respondent at Decedent's request. All but two of the deeds were given by Respondent to Decedent, who placed them in his lockbox. Respondent Jerry Bundren testified that he received two of the deeds; one he duly recorded on March 11, 1996, and the other he received on September 10, 1998, but did not record because "Daddy [Decedent] didn't want me to record it."

Regarding the deeds placed and kept in the lockbox, there is no indication in the evidence that any of Petitioners were aware of their existence prior to Decedent's death. Petitioners Helen Johnson, Thelma Bundren, and Leonard Bundren each testified that they did not know the deeds existed until after their father's death and the lockbox was opened. Shortly after Decedent's death (the record is unclear as to exactly when) the lockbox was opened at a family meeting. As the trial court found in its memorandum opinion, "some of these deeds were subsequently recorded . . . and some were not. Thelma Bundren testified none sought legal advice as whether to record [the] deeds, but those who recorded did so for fear they would end up with nothing if they didn't record the deeds."

As already noted, Respondent appeals the trial court's ruling that the deeds which remained in the lockbox until after Decedent's death were invalid for lack of delivery. The delivery of a deed is essential to its validity. *Cox v. McCartney*, 236 S.W.2d 736 (Tenn. App.1950). The *Cox* court stated as follows regarding the delivery requirement:

An undelivered deed passes no title and is of no effect. A deed does not become operative until it has been delivered with the intention that it shall become effective as a conveyance. Delivery is a matter of intention manifested by conduct, words, and acts of the grantor; and it is to be inferred from all the circumstances appearing.

* * *

The test of delivery is the power of the grantor of a deed to recall it. Has he parted with dominion or control over it? If so, there has been delivery. But if he retains the right to control or reclaim the deed, there is no delivery even though the grantor never undertook to exercise such right.

* * *

The rule is well settled in Tennessee that it is the intention of the grantor of a deed that determines whether delivery of the instrument is absolute or conditional, even though such delivery be made to the grantee of the deed.

Cox, 236 S.W.2d 736, 738 (Tenn.App.1950)(citations omitted).

The trial court found that at some point, Decedent gave his wife, Jean Bundren, the lockbox for safekeeping and “requested her to be sure Jerry and Leonard were present when the box was opened.” The trial court reviewed Mrs. Jean Bundren’s deposition testimony, and cited it in its memorandum opinion. The transcript of Mrs. Bundren’s deposition is not included in the record before us. The trial court further found as follows:

Testator’s wife followed his wishes; and hid the metal box in various places, and in the beginning Testator knew where the box was hidden and had access to said box from time to time until he became seriously ill. Thereafter Testator’s wife hid the box and [neither] Testator nor anyone else other than Testator’s wife knew where the box was hidden. Said box remained in possession of Testator’s wife until she presented same to Testator’s [children].

On cross-examination Testator’s wife was asked whether Testator had instructed wife to not disclose to Testator the hiding

place of the box. Her response was he had not. Then wife was asked if Testator had requested wife to return the box to him would she have done so. Wife's answer was "yes, I would have if he'd have ask[ed] for it. But, he did not ask for it."

* * *

The Court finds after Jerry Bundren prepared these deeds to the siblings and/or their spouses and the same were notarized, Defendant Jerry Bundren turned over to the possession of Testator all of the deeds which were subsequently found in the metal box after Testator's death. The Court further finds that Testator retained possession and control of said deeds until after Testator's death. Even though Testator requested wife to hold the metal box for safe-keeping he continued to maintain control over it because the wife stated she would have returned the box to him if he had asked for it.

Respondent testified that Decedent kept and maintained possession of the deeds until his death. Respondent testified that Testator "retained possession of them until his death," and that "nobody else had any possession of them." Our review of the record persuades us that the evidence does not preponderate against the trial court's conclusion that, under the specific facts of this case, Decedent did not part with dominion and control of the deeds that remained in his lockbox, and therefore, the deeds are invalid due to lack of delivery.

VI. Undue Influence

Two of the challenged deeds were delivered to Respondent and he had possession of them at the time of Decedent's death. The first deed, recorded by Respondent on March 11, 1996, granted Respondent a 155-acre tract of real estate. Respondent testified as follows regarding the second deed:

Q: Then you had another deed that you recorded the day before – the day of the lock box opening, just before they opened up the lock box?

A: Yes sir.

Q: And how long had you had that deed?

A: Since 9/10/98.

Q: Since September 10, 1998?

A: Yes.

Q: But you didn't record that deed?

A: That's right.

Q: You didn't want these others to know that you had that deed?

A: Daddy didn't want me to record it.

Q: He didn't want the others –

A: He didn't want it recorded.

The trial court held that the deeds were invalid because they were procured as a result of Respondent's undue influence over Decedent. A claim of undue influence requires a showing of a confidential relationship, which has been recently discussed by the Supreme Court as follows:

In Tennessee, for example, where there is a "confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction." *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn.1995) (citations omitted). A confidential relationship is any relationship which gives one person dominion and control over another. *See Mitchell v. Smith*, 779 S.W.2d 384, 389 (Tenn.Ct.App.1989).

The burden of proof regarding a confidential relationship rests upon the party claiming the existence of such a relationship. *See Brown v. Weik*, 725 S.W.2d 938, 945 (Tenn.Ct.App.1983).

Childress v. Currie, 74 S.W.3d 324, 328 (Tenn.2002). It is clear that a parent-child relationship is not a *per se* confidential relationship. *Matlock v. Simpson*, 902 S.W.2d 384, 385 (Tenn.1995). In *Kelly v. Allen*, 558 S.W.2d 845 (Tenn.1977), the Supreme Court stated as follows in this regard:

[T]he normal relationship between a mentally competent parent and an adult child is not *per se* a confidential relationship and raises no presumption of the invalidity of a gift from one to the other. In order for such a presumption to arise there must be a showing that there were present the elements of dominion and control by the stronger over the weaker, or there must be a showing of senility or physical and mental deterioration of the donor or that fraud or duress was involved, or other conditions which would tend to establish that the free agency of the donor was destroyed and the will of the donee was substituted therefor.

Kelly, 558 S.W.2d at 848.

In the present case, Petitioners point out that Respondent was not only Decedent's son, but also his business partner in their hog farming operation. Respondent readily admitted that he spent a lot of time with Decedent and thereby had the opportunity to influence him. We agree with Petitioners that the business relationship between Decedent and Petitioner is a factor to be properly considered in determining whether a confidential relationship existed, but not necessarily or automatically a determinant factor. In undue influence cases, our courts have consistently looked for evidence tending to show domination and control. *Kelly, supra*; *Childress v. Currie*, 74 S.W.2d at 329 ("The core definition of a confidential relationship requires proof of dominion and control."). In the present case, we are of the opinion that the great weight of the evidence demonstrates that while Decedent's physical health gradually deteriorated prior to his death, he remained a strong-willed person who was not susceptible to mental domination.

All of the parties who testified at trial were in general agreement that Decedent was an independent, strong-willed individual who was not easily influenced. Petitioner Helen Johnson testified about Decedent's gradually-declining physical health. She testified that Decedent "always had stomach problems and bowel problems," and in July of 1996 he had his gallbladder removed. She stated that "after his gallbladder surgery his health was not as good as it had been previously. I observed that he was not doing as much farm work. He would not want to get out and ride the tractor, that sort of thing. He would end up spending more time at the Senior Citizen's Center playing cards, that sort of thing, because he didn't feel as good." In October of 1998, Decedent underwent surgery for an abdominal aneurysm.

Ms. Johnson testified as follows about Decedent's condition after the 1998 surgery:

Q: And after the – did he have a full recovery from the surgery in ‘98?

A: Well he never seemed to be back to where he was before he had the aneurysm surgery. I mean, sure he got stronger. He got stronger. But, he never seemed to be his self, his old self again.

Q: Okay. Well, when you say that, can you give us any specific examples that you observed, things that you know of your own knowledge?

A: He would just always seem weaker and not have as much energy. He didn’t seem to do as much around the farm.

In April of 2000, Decedent was diagnosed with stage four cancer, and he died on August 15, 2000. When asked by the court if Decedent relied more on the Respondent after 1996 than he had before, Ms. Johnson stated, “I can’t really testify to that, Your Honor.”

The only non-party to testify at trial was Mr. Kestle Eldridge, who stated that he knew Decedent as a friend and in a professional relationship for approximately twenty years. Mr. Eldridge testified in relevant part as follows:

Mr. Bundren was a – he was a forceful man. He done his own thinking and he made his own decisions. He was always really rational about the way he approached his business and his decisions.

* * *

Q: From seventeen years ago in the nines [sic], ‘91, ‘95, ‘96, ‘99; did you see any change in Agie Bundren’s mental state as to whether or not he called the shots, or someone else influenced him, or what was your observation?

A: It was my observation that he didn’t change any. As a matter of fact he called me to his bedside about two weeks prior to his death.

Q: You went to his home?

A: He requested by telephone that I come by and see him, that he wanted to talk to me.

Q: All right.

A: And I went and talked to him. He wanted to discuss the lease of that bull that I was leasing from him. And he laid out what he wanted done to me. He said, "if that's acceptable to you." And I said, "Well, it's acceptable." And then he called Jerry [Respondent] into the room. When he called him into the room, Jerry wanted to alter some of the things that he and I had discussed. And Mr. Bundren told him, "No, we're not changing any of this. This is the way I want this. And this is the way it's to be carried out, period." There's no changing his mind. There was no discussion about it. He was not going to say well we'll do this or this, or this or this. He said, "This is the way it's going to be."

Q: Was Jerry able to influence him in changing his decision on two weeks before he died?

A: No.

Based on our review of all the evidence in the record before us, we are of the opinion that the evidence preponderates in favor of the conclusion that Petitioners have failed to carry their burden of proving a confidential relationship between Decedent and Respondent. Accordingly, the judgment of the trial court holding the two deeds that had been delivered to Respondent prior to Decedent's death invalid because of undue influence is reversed.

The trial court's judgment in all other respects is affirmed. The real property described in the deeds invalidated for failure of delivery is to be divided as directed by Decedent's last will and testament. The case is remanded to the trial court for such further action as may be necessary, consistent with this opinion. Costs on appeal are assessed one-half to the Respondent-Appellant, Jerry Bundren, and one-half to the Petitioners-Appellees, William Albert Bundren, Helen Johnson, Leonard Bundren, Thelma Bundren, Larry Bundren, and David Bundren, for which execution may issue, if necessary.

SHARON G. LEE, JUDGE