

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 8, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE ESTATE OF EUGENE W. FLISS, DECEASED:

**EUGENE J. FLISS,
MARY ANN TURK and
JOHN FLISS,**

Appellants,

v.

CORRINE T. FLISS,

Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN F. FOLEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Eugene J. Fliss, Mary Ann Turk, and John Fliss (the Fliss heirs), appeal from an order denying their motion to: (1) declare that the real and personal property transferred *inter vivos* from their decedent father, Eugene W. Fliss, to Corrine T. Fliss is property of his estate; (2) order Corrine to

turn over such property to the special administrator of the estate; and (3) order Corrine to file Eugene W. Fliss's will. The trial court concluded that the Fliss heirs failed to meet their burden of showing that Eugene W. Fliss's *inter vivos* transfer of all his property to Corrine was the result of any undue influence on the part of Corrine. The trial court also concluded that it was unnecessary to impose a constructive trust on all the property validly transferred to Corrine. The Fliss heirs challenge both determinations. We conclude that the trial court's finding that there was no undue influence is not contrary to the great weight and clear preponderance of the evidence and that the trial court validly exercised its discretion in refusing to impose a constructive trust. Accordingly, we affirm the trial court's order.

I. BACKGROUND.

Eugene W. Fliss died, leaving his four adult children (the Fliss heirs and Corrine) as heirs and equal beneficiaries under his will. Prior to his death, however, Fliss transferred all of his property to his daughter Corrine. On June 3, 1992, with advice and aid of Attorney Henry Fons, he granted Corrine a durable power of attorney. Also with Attorney Fons's assistance, he quit-claimed two parcels of real property to Corrine, but retained a life estate in both properties. He also transferred all of his bank accounts into joint or payment on demand accounts with Corrine. Finally, in October 1992, he named Corrine as beneficiary to both his retirement fund and his life insurance policy. Fliss died on December 28, 1992. No property remained in his estate.

In February 1993, Eugene J. Fliss filed a petition for special administration of the estate because his father's will had not been filed, nor had any proceeding to administer the estate commenced. The trial court appointed a special administrator to the estate and directed him to collect all estate assets and to investigate the circumstances surrounding the disposition of any property before or after the decedent's death.

The Fliss heirs then filed the motion that is the subject of this appeal. After a hearing, the trial court issued a memorandum decision rejecting the Fliss heirs' argument that Corrine had unduly influenced their father into transferring his property to her. Further, the trial court declined to impose a

constructive trust on all of the estate property transferred to Corrine. This appeal follows.

II. ANALYSIS.

The Fliss heirs first challenge the trial court's conclusion that there was "no basis" in the record from which to conclude that "any undue influence was exerted upon the testator" by Corrine. We reject the Fliss heirs' challenge.

"Undue influence must be proved by clear, satisfactory and convincing evidence and a finding by the trial court on the issue will not be upset on appeal unless it is against the great weight and clear preponderance of the evidence." *Hamm v. Jenkins*, 67 Wis.2d 279, 282, 227 N.W.2d 34, 35 (1975); see *Noll v. Dimiceli's*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983) (stating "great weight and clear preponderance" test and "clearly erroneous" test are equivalent). Thus, on appeal we examine the record "for facts to support the finding the trial court did make." *Id.*

The Fliss heirs premise their argument on one of two legal theories of undue influence; that is, that there was a confidential relationship between Eugene W. Fliss and Corrine, and that there were suspicious circumstances. See *id.* at 283, 227 N.W.2d at 35. The Fliss heirs argue that both of these factors are present and that this creates a presumption of undue influence. See *Malnar v. Stimac*, 73 Wis.2d 192, 202, 243 N.W.2d 435, 440-41 (1976). The trial court, however, determined that the record did not support such a conclusion.

In reaching this conclusion, the trial court focused on the testimony of Attorney Fons as particularly persuasive. Fons, who prepared the quit-claim deeds and the durable power of attorney papers, testified that he never saw any evidence of undue influence on the part of Corrine with respect to either of these matters. He also testified that Eugene W. Fliss wanted him to draft the documents "as a vehicle to avoid probate," and that he was aware that Corrine could "keep [the property] herself and do with it as she [saw] fit." Additionally, the testimony of Eugene W. Fliss's brother-in-law corroborated Fons's conclusion. Leon Milonczyk testified that the decedent told him that he transferred everything to Corrine and that he "could only trust her and not the others."

Based on this testimony, the trial court found that Eugene W. Fliss validly transferred all of his property to Corrine and, further, that he “did so of his own free will.” In support of the conclusion, the trial court made the following findings of fact: (1) that the decedent “placed great faith and trust in ... Corrine [and] that he had little faith and ... lacked trust in his other children”; (2) that the decedent quit-claimed his real estate and transferred an interest in his personal property to his daughter so he could avoid probate; and (3) that the decedent felt “he could rely on the discretion of ... Corrine, to divide the property as she saw fit.”

The Fliss heirs provide nothing in their argument before this court that establishes that these findings were clearly erroneous. Indeed, their argument on this issue is nothing but a re-hash of their arguments to the trial court. We acknowledge that the Fliss heirs point to some questionable actions on the part of Corrine shortly after her father's death, but the trial court, in rejecting the Fliss heirs' argument, determined that these were adequately explained. Hence, we conclude that the trial court's finding that there was no undue influence was not contrary to the great weight and clear preponderance of the evidence.

The Fliss heirs next argue that the trial court erroneously exercised its discretion when it failed to impose a constructive trust on the property transferred to Corrine. We disagree.

The question of whether to impose a constructive trust sounds in equity. *Singer v. Jones*, 173 Wis.2d 191, 194, 496 N.W.2d 156, 158 (Ct. App. 1992). “A constructive trust is an equitable device utilized to prevent unjust enrichment.” *M&I First Nat. Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 512, 536 N.W.2d 175, 188 (Ct. App. 1995). Whether to impose a constructive trust is a discretionary decision that we will not reverse absent an erroneous exercise of the trial court's discretion. *Id.* at 513, 536 N.W.2d at 188.

One seeking to impose a constructive trust must establish: (1) that the legal title to the property is “held by someone who in equity and good conscience should not be entitled to beneficial enjoyment”; and (2) that the title was obtained “by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by any form of

unconscionable conduct.” *Wilharms v. Wilharms*, 93 Wis.2d 671, 679, 287 N.W.2d 779, 783 (1980).

Here, the trial court found that all of Eugene W. Fliss's property was validly transferred to Corrine, and for this reason, it was unnecessary to impose a constructive trust on that property. We agree. Further, the Fliss heirs present nothing in their appeal from which we conclude that the trial court erroneously exercised its discretion. In short, we reject the Fliss heirs' arguments and affirm the trial court order.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.