STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0692

Helga V. Gillie,
Respondent,

vs.

Gillie Grain, et al.,
Appellants.

Filed April 15, 2008
Affirmed in part, reversed in part, and remanded
Klaphake, Judge

Kittson County District Court
File No. 35-C9-04-000095

Delray L. Sparby, 312 North Main Avenue, P.O. Box 574, Thief River Falls, MN 56701 (for respondent)

Michael L. Jorgenson, Charlson & Jorgenson, P.A., 119 West Second Street, P.O. Box 506, Thief River Falls, MN 56701 (for appellants)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Respondent Helga V. Gillie brought this action to enforce payment on a December 2, 1999 promissory note and a February 2, 2000 agreement against appellants Gillie Grain, a partnership, Keith Gillie, and Theresia Gillie. The district court concluded that

the transaction on which the promissory note was based was a gift, but that the agreement was an enforceable loan. Appellants argue that the district court erred by finding the loan agreement valid, despite lack of consideration, and by awarding interest, despite respondent's waiver of her claim for interest at trial. Respondent, by notice of review, asserts that the district court erred by finding the promissory note to be a gift rather than a loan, by refusing to award attorney fees under the terms of the promissory note, and by failing to order appellants to assign to respondent the rights to an insurance policy acquired to secure payment of the agreement.

Because the district court's findings are not clearly erroneous and because there was consideration for the agreement, we affirm the district court's judgment concluding that the promissory note represented a gift to appellants and that the agreement was an enforceable loan. But because the district court's order as to assignment of the life insurance policy is unclear, we reverse the district court's decision relating to the insurance policy and remand for further proceedings consistent with this opinion.

D E C I S I O N

February 2, 2000 Agreement

Consideration is a basic and necessary element of contract formation. *S O Designs USA, Inc. v. Rollerblade, Inc.*, 620 N.W.2d 48, 53 (Minn. App. 2000), *review denied* (Minn. Feb. 21, 2001). This court determines whether there is sufficient consideration for an agreement as a matter of law. *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999). Consideration must exist in order to form an enforceable contract, but the reviewing court does not examine the

adequacy of the consideration, so long as "as something of value has passed between the parties." *C & D Investments v. Beaudoin*, 364 N.W.2d 850, 853 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). "Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party." *Id.* Consideration may also be found when one party voluntarily assumes an obligation on condition that the other party act or forbear to act. *Chalmers v. Kanawyer*, 544 N.W.2d 795, 798 (Minn. App. 1996).

Consideration is not required if the contract is still executory and there has been no breach of the contract; in that case, the original consideration is sufficient. *Brooksbank*, 586 N.W.2d at 793. Past consideration cannot be used for a new contract. *See Sheehy v. Bodin*, 349 N.W.2d 353, 354 (Minn. App. 1984). But reducing an oral obligation to pay to a written agreement does not change the essence of the contract; as long as the agreement to pay is not "a gratuitous promise," it is enforceable. *Aesoph v. Golden*, 367 N.W.2d 639, 641 (Minn. App. 1985).

The February 2, 2000 agreement is based on an enforceable oral contract made in 1998 between respondent and Gerald Gillie, who was a member of appellant partnership in 1998. Gerald Gillie was also the adverse trustee of an irrevocable trust created by respondent and her late husband in 1992; under the terms of the trust, Gerald Gillie had broad powers as trustee and could use the trust assets for any purpose except for respondent's support. In 1992, appellant partnership borrowed money from the Greenbush State Bank; respondent's husband assigned two certificates of deposit worth about $100,000 as collateral for the loans. These certificates of deposit were held by the

irrevocable trust. When the certificates matured in 1998, Gerald Gillie used the proceeds to pay in full the approximately $100,000 outstanding balance on the partnership loan. Based on this action, Gerald Gillie entered into an oral agreement on behalf of the partnership with respondent, promising to pay her $100,000 at six percent annual interest. Respondent agreed not to attempt to collect the entire loan so long as the annual interest payments were made. The February 2 agreement contains these same basic terms. We agree with the district court that the parties reduced an oral contract to writing by signing the February 2 agreement and therefore conclude that the district court did not err by finding it to be an enforceable loan agreement.

Even if we were to consider that the written agreement differed so significantly from the oral agreement that a new contract was formed, we conclude that there was consideration for the written agreement. An agreement to forbear from exercising a legal right provides sufficient consideration to create an enforceable contract. *Baker v. Citizens State Bank*, 349 N.W.2d 552, 558 (Minn. 1984). When there is no express promise of forbearance, one can be inferred from circumstances, such as actual forbearance extended for a reasonable period of time. *Id.* at 558-59. Here, Helga Gillie presumably had the right to demand immediate payment, but instead waited an additional ten months before doing so.

Nor do we agree with appellants that respondent has waived her right to collect interest under the terms of the contract. "Waiver is the voluntary and intentional relinquishment of a known right." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d

792, 798 (Minn. 2004). The party asserting waiver must prove that the waiving party both knew of the right in question and intended to waive the right. *Id.*

At the time she testified, Helga Gillie was 91 years old and had suffered a stroke. Although she had not been declared incompetent, it is clear from her testimony that her memory was impaired and that she may not have understood all of the aspects of the claim. It is not apparent from the transcript that Helga Gillie understood that she had a right to interest on the contract and knowingly waived that right. The district court did not err by concluding that the agreement was enforceable and by awarding interest on the contract.

Life Insurance Policy

Under the terms of the February 2, 2000 agreement, appellant Gillie Grain agreed to insure respondent and appellant Keith Gillie under a "first-to-die" life insurance policy and to assign the policy to respondent until the loan was repaid in full. "Assignments of insurance policies as collateral securing the policyholder's debts to the assignee are not uncommon." *Luxton v. United States*, 340 F.3d 659, 662 (8th Cir. 2003) (interpreting Minnesota law).

The district court's amended order states:

> 6. That the one hundred thousand dollar ($100,000.00) first-to-die policy which insured the lives of [Helga Gillie] and [appellant] Keith Gillie was taken out by [appellants] for the purpose of repaying [respondent] any debts owed by [appellants];
>
> 7. That the one hundred thousand dollar ($100,000.00) first-to-die life insurance policy which insured the lives of [respondent and Keith Gillie] may be used

> towards satisfaction of any debt owed by [appellants] to [respondent].

This language stops short of an actual assignment. We therefore reverse and remand with instructions to amend paragraph seven of the district court's amended order as follows: "That the proceeds of the one hundred thousand dollar ($100,000.00) first-to-die life insurance policy that insures the lives of Helga Gillie and Keith Gillie must be used to satisfy any outstanding balance owed to Helga Gillie under the February 2, 2000 agreement."

December 2, 1999, Promissory Note

The district court concluded that the December 2, 1999 promissory note signed by appellants in favor of respondent was in fact evidence of a gift or gifts from respondent and her late husband. The district court reasoned that the transactions fit the definition of gift, including the elements of (1) delivery; (2) donative intent; and (3) absolute disposition. *See Oehler v. Falstrom*, 273 Minn. 453, 456-57, 142 N.W.2d 581, 585 (1966). Donative intent is a question of fact. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997).

The district court found that respondent and her husband, George, delivered the money to appellants by check, and further concluded that because there were no apparent conditions, Helga and George Gillie made an absolute disposition of the money to appellants. As to donative intent, there is virtually no evidence about the $500 purportedly given by George Gillie in 1993, and nothing to establish if it was a loan or a gift. The $3,000 check from Helga Gillie, dated February 2, 1998, does have "loan"

written in the memorandum line, but again, there were no conditions or terms for repayment. According to the record, there were no promises to pay or terms of repayment until the parties signed the December 2, 1999 promissory note. Unlike the February 2, 2000 agreement, this was not a reduction of a prior oral agreement to writing; there is no evidence of a prior oral agreement.

Based on this record, we conclude that the district court did not clearly err by finding that the transactions underlying the promissory note were gifts, and we therefore affirm.

Affirmed in part, reversed in part, and remanded.