FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 417

VERGIL LAVERTY,

Plaintiff-Appellant,

vs.

GEORGE LAVERTY, GEORGE LAVERTY as Executor of the Estate of Laurel Butterfield, Larry Laverty, Jan Laverty and Ken Laverty,

Defendants-Appellees.

Filed August 26, 1980

0-200
2-63523

Appeal from Warren District Court - Thomas S. Bown, Judge.

Contestant in a will contest action appeals from judgment entered following directed verdict for proponents. REVERSED AND REMANDED.

Charles S. Crook, III, of Beving, Swanson & Forest, Des Moines; and Darrell Goodhue of Wilson, Goodhue & Fowler, Indianola; attorneys for plaintiff-appellant.

Richard B. Clogg of Elgin, Hoyman & Clogg, Indianola; and Gary D. Ordway of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines; attorneys for defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CARTER, J.

Contestant in a will contest action appeals from judgment entered following directed verdict for proponents. The issues presented for review are: (1) Were certain tape recordings of conversations with the testator improperly excluded from evidence? (2) Was certain deposition testimony improperly excluded from evidence? (3) Was a jury issue presented as to whether the will was duly executed in conformity with the statutory requirements? and (4) Was a jury issue presented as to undue influence, fraud or mistake? We consider these issues separately.

I. Admissibility of Tape Recordings. Evidence at trial revealed that when contestant learned inadvertently that the testator had signed some legal papers while in a nursing home, he sought to engage her in conversation as to this transaction and tape record her statements. This was done. The tapes were offered as evidence at trial but objections thereto were sustained by the trial court.

In reviewing this evidentiary issue we do not find it necessary to consider the reasons relied upon by the trial court for excluding this evidence. A clearly proper objection was made by proponents of the will based upon section 622.4, The Code. Although the trial court did not place its ruling on this ground, we may sustain the lower court's result for the proper reason. The incompetency of a witness to testify to a conversation with a decedent under section 622.4 may not be obviated by the expediency of recording the conversation and offering the tape as independent evidence of its contents. The tapes were properly excluded.

II. Admissibility of Deposition Testimony. The trial court also excluded from evidence, upon objection of the proponents of the will, certain deposition testimony of Claude McDannel. This testimony concerned conversations with the testator subsequent to the purported time of execution of the will. It is undisputed that McDannel, for health reasons, was unable to testify personally at the trial so it may be assumed that the deposition is admissible to the extent not excluded by applicable rules of evidence, if any. The conversations with the testator were offered to show a state of mind inconsistent with having made a will. The basis relied upon by the trial court for excluding this evidence was that other independent evidence of undue influence or fraud had to be introduced before the conversation showing a state of mind would be admissible. For a decision involving the application of this rule see In Re Estate of Hadley, 241 Iowa 1280, 45 N.W.2d 140 (1950).

We believe this ruling of the trial court was erroneous for two reasons: First, we find sufficient independent evidence of deception to satisfy the requirements which the trial court deemed necessary; second, we find that mistake (as discussed in Division IV of this decision) was an independent ground upon which a trier of fact might have invalidated the will and that such state of mind was relevant and material on the issue of mistake. The pertinent portion of the McDannel deposition should have been admitted.

III. Evidence of Execution. Contestant asserts that a jury issue was presented as to whether proponents failed to satisfy the burden of proving due execution of the will in accordance with statutory requirements. Christiana Andrews, one of the witnesses to the will, testified as follows:

> Q. Did Mrs. Butterfield tell you it was her will?
>
> A. No. No, she didn't tell me. I think I just assumed that they had a legal paper, and I assumed it was her will.
>
> Q. It was an assumption rather than anybody telling you it was a will?
>
> A. Yes.

We believe this testimony raised a jury issue as to the statutory requirement that the instrument be "declared by the testator to be his will." Failure to satisfy this requirement would serve to invalidate the will for failure to comply with section 633.279, The Code.

In holding that this issue should have been submitted to the jury, we reject the proponents' contention that the statutory requirement of declaration was satisfied as a matter of law by the reading of the attestation clause in the presence of the testator. While this was a matter for the jury to consider under proper instruction as to the effect of such reading, the jury was not required to believe the testimony that this had occurred. Similarly, any presumption of regularity in execution which arises from the execution of the attestation clause by the witnesses to the will only serves to make a prima facie case as to the statutory requirements for formalities of execution. See In Re Estate of Olson, 239 Iowa 1149, 34 N.W.2d 207 (1948). Such evidence of regularity should have been weighed by the trier of fact together with Christiana Andrews' testimony that no declaration by the testator took place, and all other material facts and circumstances as shown by the evidence and a determination thus made if the statutory formalities had been satisfied.

IV. Propriety of Directed Verdict on Other Issues. Contestant alleged as grounds for invalidating the will that it was the result of undue influence, fraud, and mistake. The trial court directed a verdict against all of these claims. In In Re Estate of Hollis, 234 Iowa 761, 770, 12 N.W.2d 576, 581 (1944), the court stated:

> Like many other courts, we have been slow to recognize fraud, as distinguished from undue influence, as a ground for contesting a will. James v. Falcall, 168 Iowa 427, 441, 148 N.W. 1029; Worth v. Pierson, 208 Iowa 353, 360, 223 N.W. 752. Some well considered cases, however, recognize the distinction between fraud and undue influence. In general, fraud deceives the testator's mind; undue influence overpowers it--usually by a course of conduct. In most of the cases, fraud is but a part of a systematic attempt to deceive and overpower the testator and is treated as undue influence.

While the court in Hollis does not expressly recognize that a will may be invalidated when procured by means of deception, and no other Iowa cases have been found which deal with the issue, we believe that such a doctrine should be recognized as applicable in this state. 94 C.J.S. Wills, § 222 at 1061 (1956); Thompson, Law of Wills, § 139 at 219 (1947). In addition, we conclude that even where there is no deliberate deception practiced, a testator's unilateral mistake as to the identity of the instrument which he or she executes renders the will invalid. See Thompson at 213, 94 C.J.S. Wills, § 223 at 1063 (1956); In Re Goeffel's Will, 184 Misc. 155, 55 N.Y.S.2d 61 (1944).

In the present case there was evidence that the testator had always disliked wills and had never planned to make one; that she consistently intended for her property to be divided equally between her two sons; and that the lawyer who prepared the will did so without receiving directions from the testator and acting solely on information procured by one of these sons, George Laverty, whose family would receive four-fifths of the testator's property under the challenged will. In addition, the document offered for probate as testator's will does not contain the word "will" in any place therein. The attorney who prepared it testified that he had prepared between one and two thousand wills and that this, to the best of his recollection, was the only occasion wherein he had failed to use the word "will" anywhere in the instrument. He stated that his reason for omitting to use this word in the present case was the abhorrance of the testator to the word "will". He further testified that his last meeting with the testator had been many years before and that his recollection thereof was somewhat less than clear. He stated that his knowledge as to testator's abhorrence to the word "will" came from conversations with George. The alleged will was witnessed by two long-time employees of George Laverty. The attorney who drafted the will took no part in the execution

thereof, and never sent a bill to anyone for preparation of the alleged will. The testator suffered from diminished vision, hyperthyroidism, and glaucoma at the time the alleged will was executed.

We believe that the jury could have found from the foregoing evidence that the knowledge of the attorney who drafted the will as to testator's predilection came not from prior experience with testator but rather from conversations with her son, George. It could infer that the reason the word "will" was not included in the instrument was not based upon George's notions as to a semantic preference of testator but rather upon her known abhorrance to making a will. Under such circumstances the rather unusual language employed is suggestive of an intent to deceive her as to what the instrument was. In the alternative, the jury could infer that even if no deception was intended the testator was in fact deceived with respect to the instrument which she executed. We conclude that a jury issue was presented on the theory of deception, mistake or both and that the trial court erred in directing a verdict for the proponents. The judgment of the trial court is reversed and the matter is remanded to the district court for a new trial on all issues.

REVERSED AND REMANDED.