

FILED

JUN 29 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**195****IN THE MATTER OF THE ESTATE OF)
FLORENCE WALKER, Deceased.)****REXFORD A. WALKER, CHARLOTTE)
SMITH, CHARLES T. WALKER, MILO D.)
DAILEY IV, MARGARET REBECCA)
THURSTON, and MICHAEL DAILEY,)**

Filed June 29, 1982

Plaintiffs-Appellees,)**vs.)****BENFORD M. WALKER, Individually;)
BENFORD M. WALKER, as Executor of)
the Estate of Florence E. Walker,)
Deceased, and GLENN D. WALKER a/k/a)
GLEN D. WALKER,)**2-72
2-65949**Defendants-Appellants.)**

Appeal from Polk District Court - James W. Brown, Judge.

Defendants appeal from the trial court's judgment setting aside the probate of decedent's will. Defendants contend that the trial court erred in overruling defendants' motions for directed verdict, asserting that there was insufficient evidence presented at trial to show that decedent lacked testamentary capacity to make the will, that there was insufficient evidence to show that decedent's last will was the product of undue influence, and that there was insufficient evidence that decedent's last will was not properly executed. The defendants also claim that the trial court erred in refusing to instruct the jury that the presumption that the legal requirements as to due execution were met must be rebutted by clear and convincing evidence. **AFFIRMED.**

John P. Dollar of Seery & Dollar, Des Moines, and Allen Andersen, Ankeny, for defendants-appellants.

David L. Phipps and Kenneth W. Biermacher of Whitfield, Musgrave, Kelly & Eddy, Des Moines, for plaintiffs-appellees.

Douglas R. Smalley of Riemenschneider, Hanes & Smalley, Des Moines, for amicus curiae Iowa Catholic Rural Life Conference.

Heard en banc.

PER CURIAM

The defendants appeal from the trial court's judgment setting aside the probate of the decedent's will. The defendants contend that the trial court erred in overruling defendants' motions for directed verdict, asserting that there was insufficient evidence presented at trial to show that decedent lacked testamentary capacity to make the will, that there was insufficient evidence to show that decedent's last will was the product of undue influence, and that there was insufficient evidence that decedent's last will was not properly executed. The defendants also claim that the trial court erred in refusing to instruct the jury that the presumption that the legal requirements as to due execution were met must be rebutted by clear and convincing evidence. We affirm.

Our scope of review concerning an action to set aside a will is at law. Therefore, our review is not de novo but rather for errors at law pursuant to Iowa R. App. P. 4.

I.

The testatrix left five living children upon her death on April 17, 1978. The defendants/appellants are two brothers from this family, while the plaintiffs/appellees make up the three remaining members. Their mother, testatrix, left a sizeable estate containing a farm of approximately 240 acres near Elkhart, Iowa. Under the provisions of the will in question, testatrix devised most of the estate including the farm to the defendants. Plaintiffs claimed that their mother was of unsound mind and under undue influence at the time she executed the will due to such things as arteriosclerosis which had affected her mental ability. The plaintiffs had also contended that the will was not properly executed in accordance with Section 633.279(1), Code of Iowa 1979.

II.

Defendants contend that the trial court erred in overruling their motion for

a directed verdict made on the grounds that there was insufficient evidence to find that testatrix lacked mental capacity. At trial, the burden of proof to demonstrate the absence of testamentary capacity was upon the contestants/plaintiffs. They were required to show that the testator lacked one of the following essentials of testamentary capacity at the exact time of the making of the will: 1) to understand the nature of the instrument then being executed; 2) to understand and know the nature and extent of her property; 3) to be able to identify and recall the natural objects of her bounty; 4) to realize and know the distribution she desires to make of her property In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973).

The contestants presented the following evidence relevant to mental capacity at the exact time the will was signed pursuant to Gruis, Id. One of the subscribing witnesses, upon observing the mental characteristics of testatrix, Mrs. Walker, testified that she doubted whether the testatrix was able to grasp everything that was going on and whether she understood why the witnesses were present. Contestants also presented the testimony of two general practitioners and a psychiatrist to demonstrate Mrs. Walker's medical history. Dr. Reed, one of the general practitioners, described Mrs. Walker's symptoms as those of senility, chronic brain syndrom or senile dementia which probably rendered her incompetent to make any decisions other than decisions relating to her very basic personal care. Testatrix was 82 years old at the time she executed the purported Last Will and Testament. She had to be hospitalized on several occasions between 1969 and 1972. Furthermore, Dr. Reed explained that based upon testatrix's overall pattern she would not have been capable of making a sound judgment with respect to her property since she could not fully comprehend its value, or what was happening to it, even though she might be able to describe it physically. Further evidence was presented from family members which described Mrs.

Walker as being forgetful, disorientated, and hallucinatory. Based upon these facts, the jury found Mrs. Walker lacked the mental capacity required to execute a will. We find there is sufficient evidence to support the district court's findings and, therefore, affirm on this issue.

III.

Defendants' second contention is that evidence was insufficient to support an undue influence claim. If supported by substantial evidence, we are held bound by the jury's verdict. Iowa R. App. P. 14(f)(1). To sustain a finding of undue influence in the execution of the will, we must find the four requisite elements set forth in In re Estate of Herm, 284 N.W.2d 191, 201 (Iowa 1979). They are: 1) the person must be susceptible to undue influence; 2) opportunity to exercise such influence and effect the wrongful purpose must exist; 3) a disposition to influence unduly for the purpose of procuring an improper favor must be present; and 4) the result must clearly appear to be the effect of undue influence. These elements can be shown by circumstantial evidence since undue influence can rarely be proven by direct observation. Frazier v. State Central Savings Bank, 217 N.W.2d 238, 244 (Iowa 1974). The first element requires Mrs. Walker to be vulnerable to undue influence. The Iowa Supreme Court held in In re Telsrow's Estate, 22 N.W.2d 792, 796 (Iowa 1946), that one who is mentally weak and aged is more susceptible to influence than one who is not. Dr. Heaney stated, in the case at bar, that persons having weakened mental capacities are more susceptible to suggestions and directions of other persons around them. We concluded in the foregoing issue that Mrs. Walker's mental capacity was extremely diminished, making the testatrix quite vulnerable to undue influence. Therefore, the first element is met.

The record indicates that appellants had governed or dominated their mother during most of her latter years. Mrs. Walker would trust in what the appellants

told her as evidenced by a letter she wrote reprimanding her daughter after one of the appellants told testatrix during the hearing for conservatorship that her daughter was only interested in taking her farm and money away from her. Thus, the opportunity for appellants to exercise undue influence did exist.

A suspicion arises when a dominant party involved in a confidential relationship participates in either the preparation or execution of the contested will. In re Estate of Herm, 284 N.W.2d 191, 201 (Iowa 1979). The record reveals that the appellants were considerably involved with the will, including the making of arrangements for its execution and in the use of a friend as a witness. We believe this evidence supports a finding of the second and third elements.

The final element to be determined is whether the will is a result of undue influence. The purported last will and testament in question here would leave the appellants nearly all of the testatrix's estate, including the family farm. This seems to illustrate a prima facie product of undue influence. In considering the sufficiency of the evidence, the law is well settled that the evidence must be viewed in the light most favorable to the contestants, giving them the benefit of all possible inferences. Id. The record discloses substantial evidence to support the trial court's findings.

IV.

Defendants finally contend that the trial court erred in overruling their motions for directed verdict made on the grounds that there was insufficient evidence presented at trial to show that the last will and testament was not properly executed. Also, defendants argue that the trial court erred in refusing to instruct the jury that evidence presented to show improper execution must be clear and convincing evidence. Our review of whether the will in question was properly executed in accordance with § 633.279(1), Code of Iowa 1979, is also controlled by Rule 14F(1)(2), Iowa R. App. P.

In the handling of a will there is a presumption of due execution. In re Palmer's Estate, 122 N.W.2d 920, 925 (Iowa 1963). The presumption need not be rebutted by clear and convincing evidence but rather by testimony of facts and circumstances, to the contrary, surrounding the signing of the instrument. Id. We found in the case at bar that most of the evidence presented to the jury consisted of testimony from witnesses to the will. Contestants claimed that the testatrix did not declare the will to be her own, did not request the presence of the witnesses, and did not observe the witnesses signing the will. The jury, after listening to the testimony, agreed that the will was not executed in accordance with statutory provisions. We find nothing in the record or appellants' brief to question its finding.

While the purpose of this court is not to approve whatever action the jury may take, we are bound to its finding of fact when supported by substantial evidence. We believe the evidence presented fully substantiates the jury's findings on all counts. Hence, we must affirm the decision.

AFFIRMED.