IN THE COURT OF APPEALS OF IOWA

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In the Matter of the Estate of Lloyd Barclay, Deceased.	)	
VIRGIL BARCLAY,	)	
Plaintiff-Appellant/ Cross-Appellee,	)	
vs.	)	
JOE A. BARCLAY, Executor of the Estate of Lloyd Barclay, Deceased, JOE A. BARCLAY, Individually, and IRENE BARCLAY,	)	6-314 / 85-1282
Defendants-Appellees/ Cross-Appellants.	)	

Appeal from the Iowa District Court for Muscatine County (2833-98) - Robert K. Stohr, Judge.

Plaintiff appeals and defendants cross-appeal an order granting a new trial in an action seeking to set aside both a will and a deed. **AFFIRMED.**

Bradley Norton and Donald B. Clark of Norton & Freese, Clarence, Iowa, for plaintiff-appellant.

Marie Prince-Cohen and Jerome W. Conway of Conway & Prince-Cohen, Muscatine, Iowa, for defendants/cross-appellants.

Heard by Oxberger, C.J., Donielson, and Sackett, JJ., but considered en banc.

SCHLEGEL, J. 9

Plaintiff appeals and defendants cross-appeal an order granting a new trial in an action seeking to set aside both a will and a deed. We affirm.

Lloyd and Anna Barclay were joint owners of a Cedar County farm and Lloyd owned a Muscatine County farm in his own name. Following Anna's death in 1976 Lloyd was the owner of two-thirds of the Cedar County farm with a one-sixth share owned by each of their two sons, Joe and Virgil. In 1976 Lloyd gave Joe a power of attorney and thereafter Joe handled some business transactions for Lloyd. After his wife's death Lloyd lived with Joe and his wife through April 1980 when he was placed in a nursing home where he remained until his death in 1982 at the age of ninety-five.

In 1975 Lloyd and Anna discussed with their attorney the possibility of giving the Muscatine County farm to Joe but did not pursue the matter. In 1976 Lloyd executed a will leaving his estate in equal shares to Joe and Virgil, with Joe as executor. On November 8, 1977, he executed a new will leaving his estate to Joe with the exception of a $500 bequest to Virgil. On the same day he executed a deed conveying the Muscatine County farm to Joe and Irene, who paid no money down and were to pay $80,000 over a period of eighty years at a rate of $1,000 per year subject to interest of six percent. The property was appraised at a value of $123,740 for inheritance tax purposes. After Lloyd's death Virgil commenced an action seeking to set aside both the deed and the 1977 will. The validity of the will was a question ultimately submitted to the jury on theories of testamentary incapacity and undue influence. The trial court reserved for its own later determination the equitable issue of whether the deed should be set aside.

Lloyd had experienced periods of hospitalization in 1974, 1976, and 1979 for various medical problems. Plaintiff was permitted to introduce the testimony of a doctor who opined that he had suffered from a progressively worsening mental disorder and that, on November 8, 1977, he lacked testamentary capacity and was susceptible to undue influence. The doctor had never examined Lloyd and his opinion was based on his examination of medical records. Lay witnesses, including the attorney who drafted the 1977 will and the witnesses to its execution, testified that at relevant times Lloyd appeared normal and aware of what he was doing. Evidence was also presented concerning a family dispute, arising in 1976, in which Virgil took issue with the terms upon which the Cedar County farm was being rented to Joe's daughter and son-in-law.

The jury returned a verdict for plaintiff, finding that Lloyd lacked testamentary capacity at the time that the 1977 will was executed and it had been procured by undue influence. Defendants filed a combined motion for judgment notwithstanding the verdict and for new trial. The motion for new trial raised the following issues: the the evidence was not sufficient; that the jury verdict was influenced by passion, sympathy, and prejudice; that the doctor who testified for plaintiff was permitted to respond to a hypothetical question assuming facts that were unsupported by the evidence; and that the court erred in failing to give requested instructions designed to tailor principles of law concerning testamentary capacity and undue influence more closely to the evidence presented at trial.

The trial court denied defendants' request for judgment n.o.v., finding that a fact question existed on the issue of undue influence. The trial court sustained the motion for new trial. The trial court also denied Virgil's request that Joe be removed as executor of the estate and a temporary administrator appointed. The request was based on an allegation of mismanagement relating to Joe's failure to terminate an existing lease of the Cedar County farm to his daughter and son-in-law and his use of estate funds, without court approval, to pay attorney fees incurred in connection with the will contest.

I. Motions Submitted With Appeal. By order of Justice Larson, the court upon submission of the appeal is to consider issues raised in motions filed by plaintiff-appellant. The first motion asserts that the cross-appeal should be dismissed due to an alleged failure to state issues and authority adequately. The second asserts that the court should determine the extent to which the judgment in question is final for purposes of appeal.

Plaintiff filed notice of appeal on September 13, 1985. Defendants filed their notice of cross-appeal on September 20, 1985. On April 4, 1986, defendants filed an application for a waiver of filing a reply brief stating that the issues relating to the cross-appeal were adequately dealt with in defendants' original brief. This motion was granted. On May 23, 1986, plaintiff filed a motion to dismiss the cross-appeal asserting that Iowa Rules of Appellate Procedure 14(a)(3) and 14(i) were violated. Plaintiff argued that the failure to argue or cite authority in appellees' brief in support of the issues raised on cross-appeal requires a dismissal of the cross-appeal. Defendants resisted this motion to dismiss the cross-appeal, citing specific pages in their brief which argued and cited authority for the issues raised in the cross-appeal.

We have closely examined the appellants' brief and find that even though the issues on cross-appeal are not as clearly distinguished as we might like to see from the issues relating to appellees' response to appellants' brief, the issues involved in the cross-appeal are identifiable and supported with authority. We therefore deny the plaintiff's motion to dismiss the cross-appeal.

The plaintiff also has filed a motion requesting a determination of the finality of the district court's decision to postpone ruling on the deed issue involved in this appeal. Pursuant to Iowa Rule of Appellate Procedure 1, plaintiff has argued that the ruling on the deed issue was final and therefore should be addressed on appeal. If not final, plaintiff asks this court to remand the deed issue to the district court for specific proceedings prior to our determination as provided by Iowa Rule of Appellate Procedure 12(g).

At the time the district court granted defendants' motion for a new trial, it ruled that a new trial was appropriate on the issues relating to the deed and the will, since both instruments involved allegations of testamentary capacity and undue influence. The court said that since it was possible new evidence would be introduced at the retrial which would affect the ruling on the deed, no action would be taken on the deed issue prior to a new trial.

Iowa Rule of Appellate Procedure 1 provides that an order granting a new trial shall be deemed a final decision. In this case, the court granted a new trial on all issues affecting the will and the deed. The granting of a new trial on the deed issue was a final judgment. We have jurisdiction to review the granting of a new trial as to this issue. We agree that a new trial should address all the issues, including the deed issue. We do not remand the issue to the district court for specific proceedings relating to the validity of the deed.

II. Plaintiff first argues that the district court erred in granting the defendants' motion for a new trial on the issues of testamentary capacity and undue influence since the jury verdict was supported by substantial evidence. Defendants claim that the trial court based its ruling on a new trial on its conviction that the verdict as to both testamentary capacity and undue influence was not supported by sufficient evidence. The trial court's own rationale for granting a new trial was somewhat ambiguous. The court said:

> This Court would first sustain Defendant's motion for new trial.
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> At the close of the Plaintiff's case in chief Defendant made a motion for a directed verdict on both counts, testamentary capacity and undue influence. The Court overruled the motion letting the case go to the jury so that in event of an appeal, the entire case could be considered and decided on appeal.

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> This Court was satisfied at that time that the decedent had testamentary capacity to make the will. There was a factual question of undue influence.
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> However, the jury found that decedent lacked testamentary capacity and that he was unduly influenced.
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> This leads this Court to the conclusion that the jury was confused. All of the witnesses testified that the decedent met all of the requirements under instruction number 12 to make a valid will. If confused on testamentary capacity then the Court can reasonably conclude that they were also confused on undue influence. It is assumed that they determined that it was necessary to find both elements had been proved by Plaintiff.
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> This Court would then conclude that in the interest of justice that Defendant is entitled to a new trial. This places the case back to where it was prior to the commencement of the trial.

Iowa Rule of Civil Procedure 244 provides the grounds on which an aggrieved party may have an adverse verdict vacated and a new trial granted. The trial court has broad discretion in passing on motions for new trial, and only when there is a clear abuse of that discretion will appellate courts interfere with a ruling upon such a motion. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa Ct. App. 1983). Motions for new trials can be granted pursuant to Iowa Rule of Civil Procedure 244(f) if a jury verdict is not sustained by sufficient evidence. In addition to the grounds stated in Rule 244, a trial court can grant a new trial when the verdict fails to effectuate substantial justice. Iowa R. App. P. 14(f)(3); Thompson v. Rozeboom, 272 N.W.2d 444, 446-47 (Iowa 1978). The court is slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4); Id. We must, therefore, examine the record in this case to determine whether the trial court abused its discretion in sustaining defendants' motion for a new trial.

We believe the record shows that the district court concluded, after the jury verdict was returned and after the hearing on the posttrial motion, that the defendants were entitled to a directed verdict on the issue of testamentary capacity. The court indicated that at the time the case went to the jury the court was satisfied that the decedent had testamentary capacity to make the will. The clear inference from this statement and from the following statement (i.e., "There was a factual question of undue influence.") is that the court thought there was insufficient evidence on the lack of testamentary capacity to generate a jury question. The trial court had previously stated in the hearing on the directed verdict motion that it was aware of the rule that in a will contest case the evidence must disclose more than a scintilla of evidence to justify the trial court in submitting a case to the jury. In re Estate of Tomin, 260 Iowa 1129, 1137, 152 N.W.2d 286, 291 (1967). Apparently, the court decided that the submission of the issue of testamentary capacity to the jury along with the issue of undue influence tainted or "confused" the jury's deliberation process. The court concluded that substantial justice was not effectuated when the verdict was based on such "confusion." (". . . [I]n the interest of justice . . . Defendant is entitled to a new trial.")

If a court decides that a movant was entitled to have a verdict directed for him at the close of all evidence, and the movant so moved, and the jury did not return such a verdict, the court may either grant a new trial or enter judgment as though it had directed verdict for movant. Iowa R. Civ. P. 243(b); Dutcher v. Lewis, 221 N.W.2d 755, 759. The purpose of this rule is to afford the trial court an opportunity to correct its error in failing to sustain a motion for directed verdict where the movant was entitled to a directed verdict at the close of all evidence and moved therefor and the jury did not return such verdict. Id. at 759-60; Dobson v. Jewell, 189 N.W.2d 547, 555 (Iowa 1971).

We cannot agree that there was any abuse of discretion in granting defendants a new trial. It does not appear that the verdict was set aside simply because the court would have reached a different conclusion. See Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 98 (Iowa Ct. App. 1984). The plaintiff had the burden of proving by a preponderance of the evidence that one or more of the following elements were present when the will was drawn:

> 1. The testator did not understand the nature of the instrument being executed;
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> 2. The testator did not understand and know the nature and extent of his property;
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> 3. The testator was not able to identify and recall the natural objects of his bounty; and
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> 4. The testator did not realize and know the distribution he desired to make of his property.

In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973); In re Estate of Secrist, 186 N.W.2d 665, 667 (Iowa 1971). If the court finds that the record evidence does not establish the incompetency of the testator through any of the above criteria, the court is permitted to direct a verdict. In re Gruis Estate, 207 N.W.2d at 573. And, as discussed above, if the court does not direct a verdict to which it later finds a party is entitled to, it may either grant a judgment notwithstanding a verdict or grant a new trial. See Iowa R. Civ. P. 243(b). The court, in this case, granted a new trial on all the issues since it felt that substantial justice so demanded. We do not find that the granting of a new trial, in these circumstances, was an abuse of the discretion of the trial court.

The court found that there was a factual question on undue influence for the jury to decide. In order to prove undue influence, the plaintiff must show, by a preponderance of the evidence, the following elements:

> 1. That at the time the instrument was executed, the person executing it was susceptible to undue influence;

2. That the person alleged to have exercised undue influence had the opportunity to exercise such influence and to effect a wrongful purpose;

3. That the person alleged to have exercised undue influence has the disposition to unduly influence for the purpose of procuring an improper favor; and

4. That the result contested was clearly the effect of undue influence.

Matter of Herm's Estate, 284 N.W.2d 191, 201 (Iowa 1979). The jury found that the evidence presented at trial supported a showing of undue influence. The jury is entitled to look at all the facts and decide if the elements of undue influence are present. Frazier v. State Central Savings Bank, 217 N.W.2d 238, 244 (Iowa 1974). The trial court granted a new trial on this issue as well as one the other issues. Again, a trial court has wide discretion in granting a new trial, and only where there has been a clear abuse of that discretion will an appellate court interfere with a ruling on a motion for a new trial. Houvenagle v. Wright, 340 N.W.2d at 785. The court determined that the jury was confused on testamentary capacity and this confusion may reasonably have affected the jury's findings on the undue influence issue. It is the duty of the district court to review the entire proceedings and the verdict returned and to order a new trial if for any reason it concludes that justice requires one. In re Primary Road No. 141, 256 Iowa 380, 385, 127 N.W.2d 566, 569 (1964). We see no abuse of discretion in the trial court's ordering of a new trial on all the issues.

III. Plaintiff next contends that the trial court erred in failing to set aside the deed of November 8, 1977, and in granting a new trial on this issue. We have already addressed this issue in our ruling on plaintiff's motion for a determination of judgment and applicability of Iowa Rule of Appellate Procedure 12(g). It is true that our review of equitable matters is de novo, as plaintiff points out. However, since we have decided that the decision of the trial court, which included the deed issue in its order for a new trial, was a final judgment, we will not here rule on the deed issue. We would be acting contrary to our function as a court of review if we were to decide issues not decided by the district court. See Iowa-Illinois Gas & Electric Co. v. Iowa State Commerce Commission, 347 N.W.2d 423, 427 (Iowa 1984). Where the district court has refused to decide an issue and has reserved it for later disposition, our ruling on the issue would be contrary to our function as a court of review. Iowa Gateway v. Interstate Power Co., 350 N.W.2d 141, 148 (Iowa 1984).

IV. The plaintiff also contends that in its ruling on combined motions, the district court erred in failing to remove the defendant Joe Barclay as executor of Lloyd Barclay's estate and in denying plaintiff's request for the appointment of a temporary administrator.

Iowa Code section 633.63(b) (1985) provides that the court may determine if a person is unsuitable to be a probate fiduciary. Iowa Code section 633.65 (1985) provides that the court may remove a fiduciary when the fiduciary has mismanaged the estate or has failed to perform any duty imposed by law. The trial court has wide discretion under this statute relating to the removal of an executor and is not obliged to remove an executor absent a tangible reason to believe that damage would otherwise accrue to the estate. In re Arduser's Estate, 226 Iowa 103, 104, 283 N.W. 879 (1939). On the issue of removing Joe Barclay as executor of the estate the district court concluded:

> The Court finds that there was no evidence of mismanagement of the estate by Joe A. Barclay as executor. The dispute as to rental fee cash or crop share could, and here did, cause a dispute but there is nothing in the record to show mismanagement. All the work in the estate has been completed as far as it can go without this case being decided.

> The Court has been informed that the present farm lease on the two farms has been cancelled and new leases based upon recommendations of Plaintiff will be executed. On proper application to the Court a proper leases [sic] will be approved.
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> The outcome of the retrial may require Joe A. Barclay to pay a reasonable rent for the house he now occupies.
>
> Since there will be a retrial, subject to appellate review, the situation remains as before trial. No temporary administrator is needed. As to the expense of appeal, the appeal will no doubt be filed by Plaintiff.

Plaintiff claims this conclusion is incorrect for three reasons: (1) Joe has mismanaged the estate; (2) Joe was not entitled to pay attorney fees out of estate funds; and (3) Joe has a conflict of interest with the estate.

Plaintiff bases his claim of mismanagement on Joe's failure to either terminate all leases which decedent had at the time of death or seek a court order to continue to lease the real estate involved. Iowa Code section 633.351 (1985) provides that the personal representative of an estate shall take possession of real estate where, inter alia, there is a lease of such real estate outstanding. Iowa Code section 633.352 (1985) suggests that the purpose of permitting the personal representative to take possession of real estate is to generally administer the estate and collect income from the property. Our case law does not appear to require that executors terminate existing leases on real estate as long as the executor is able to step into the shoes of the decedent lessor, administer the estate, and collect the income from the property for the estate. See Colthurst v. Colthurst, 265 N.W.2d 590, 595 (Iowa 1978); Matter of Estate of Franzkowiak, 290 N.W.2d 1, 5 (Iowa 1980). Executor-defendant Joe Barclay apparently was performing these required functions. Therefore, we do not believe that the district court abused its discretion in permitting Joe to remain as an executor of Lloyd Barclay's estate.

Given the circumstances of the existing lease situation and in light of the fact that the court was informed that the present farm leases had been cancelled and new leases were being executed, the trial court did not think it was evidence of mismanagement for Joe not to have terminated the leases or not to have sought a court order to continue it. We do not disturb this finding on appeal.

Plaintiffs also argue that the expenditure of estate funds for attorney fees by Joe Barclay incurred in connection with defending the will contest was a reason to remove him as executor. No positive or dogmatic pronouncement is possible upon the question as to when a nominated executor may legally obligate the estate for attorney fees in an effort to probate or sustain a will. In re Barnes' Estate, 256 Iowa 1043, 1058, 128 N.W.2d 188, 196 (1964). The extent of the executor's duty depends upon the peculiar circumstances of the particular case. Id. Generally, the trial court's sound discretion will be upheld. Id. A reasonable effort to sustain the provisions of the will is the duty imposed by law upon the executor. Id. The trial court did not determine that the executor had improperly used estate funds for promotion of his personal interests. See In re Estate of Law, 253 Iowa 599, 602, 113 N.W.2d 233, 235 (1962). We find no abuse of discretion in this conclusion.

Plaintiff finally contends that Joe Barclay should have been removed as the executor because he had a conflict of interest with the estate that precluded any possibility of his effectively serving as executor of the estate. A person can serve as both executor and heir to an estate. See In re French's Estate, 242 Iowa 113, 121, 44 N.W.2d 706, 711 (1950). When the executor has violated any of his responsibilities, he may be removed by the court. Iowa Code § 633.65 (1985). An executor must observe a degree of prudence and diligence which a person of ordinary judgment would be expected to bestow upon his own affairs, but when assets come into the fiduciary's hands, there is the additional burden to act more cautiously than would be expected in the management of one's own property. Matter of Estate of Wiese, 257 N.W.2d 1, 6 (Iowa 1977). The district court did not think that the evidence proved Joe was violating his duties as an executor. We do not disturb that conclusion on appeal.

V. We have already dealt with most of the issues raised in defendants' cross-appeal. Defendants never argue that the trial court abused its discretion in granting a new trial. On the contrary, defendants ask us to affirm the district court's ruling on the motion for a new trial and they agree that the district court acted within its discretion in granting the new trial. As mentioned above, if the court finds that the movant for a judgment notwithstanding the verdict was entitled to have the verdict directed for him at close of all evidence and moved therefor and if the jury did not return such verdict, the court may either grant a new trial or enter judgment as though it had directed a verdict. Dobson v. Jewell, 189 N.W.2d 547, 555 (Iowa 1971); Dutcher v. Lewis, 221 N.W.2d 755, 759-60 (Iowa 1974); Meeker v. City of Clinton, 259 N.W.2d 822, 827 (Iowa 1977). The court chose to grant a new trial on all the issues. It acted well within its discretion in so doing.

Defendants assert that plaintiff's action to set aside the deed is barred by the operation of laches. Defendants contend that plaintiffs unreasonably neglected to attempt to set aside the conveyance of the farm in question from the time defendants knew of the conveyance until Lloyd Barclay's death. Since we have affirmed the district court's conclusion that all issues presented at trial be retried, we do not here rule on the laches issue raised by defendants. Similarly, we do not reach the issues relating to the various court instructions and the expert witness's opinions based on the use of hypothetical questions.

On appeal, defendants agreed that the district court's rulings on these issues were themselves grounds for a new trial. Since we have affirmed the district court's granting of a new trial to defendants, we need not decide these issues.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

The majority is concerned with the procedural aspects of this case. They have missed the real issue. What must be determined is whether there is substantial evidence in the record decedent lacked testamentary capacity when the will was drawn and or whether there is substantial evidence in the record undue influence was exercised on decedent when the will was drawn. I fail to find substantial evidence in the record on either issue. I therefore would find for defendants on their cross-appeal and reverse the trial court's refusal to direct a verdict for the defendants on both of these issues.

The law recognizes and respects the right of older persons to control and dispose of their own property and determine to whom they wish to extend their bounty. In re Sinift's Estate, 233 Iowa 800, 810, 10 N.W.2d 550, 554 (1943):

> It is elementary that capacity to exercise such right is not inconsistent with a very considerable degree of mental weakness, and it survives the capacity to buy and sell property and do business generally, so long as there remains the capacity to understand the nature and extent of one's estate and the effect thereon of his act, and the claims, if any, which others may have on one's remembrance in its distribution. (citations omitted.) In short, mere senile weakness, the normal and to be expected incident to advanced age, does not imply incapacity to make a valid gift, or other disposition of property.

The only facts in the majority's review of the evidence is their finding the elderly decedent was hospitalized and their conclusion that a doctor's testimony, based only on medical records, stated decedent lacked testamentary capacity and was susceptible to undue influence. I cannot find that the majority's conclusions regarding the doctor's testimony is supported by the evidence. Looking carefully at the doctor's testimony, I find the doctor holds a psychology license in Iowa. He is board certified in clinical neuropsychology and specializes in clinical neuropsychology. He never met decedent nor visited with his relatives. He reviewed medical records of decedent focusing on the period from 1974 to 1979. He determined decedent had a degenerative senile demensia which he defined as a steady decline in which decedent was gradually losing his capacity to remember, remain oriented and function as an independent human being.

From the records he ascertained decedent had periods in 1974 when his memory was impaired and periods when it was intact. From 1976 on decedent was referred to in medical records as a poor historian. The doctor interpreted that to mean decedent's memory was poor enough decedent could not be relied upon to give a complete medical history and while hospitalized during that period decedent's level of orientation fluctuated a good deal. The doctor determined by 1979 decedent was very senile and in retrospect he determined there was zero chance he was in completely sound mind in 1977. The doctor testified decedent probably knew he was signing a will on November 8, 1977, and probably knew his sons and what his land was. On cross-examination he was asked:

> Q. ...I said, would he have sufficient capacity in order to determine how he wanted to leave his property?
>
> A. Dubious. He would have an opinion.

The record shows decedent was born in 1887, and in 1909 married Anna, the mother of his two children, Virgil and Joe. Anna died intestate on January 20, 1976. During the marriage decedent acquired two pieces of real estate, a 120-acre farm held in his name alone, and a 99-acre farm owned by him as a tenant in common with Anna. When Anna died Virgil and Joe each became owners of an undivided 1/6th interest in the 99-acre tract with Lloyd owning the balance. In May, 1976, decedent drew his first will dividing his estate equally between Joe and Virgil.

In June, 1976, Virgil, who had had some problems with his father earlier, began to complain about the rent his father was charging for the 99 acres in which he had an undivided 1/6th interest. In August, 1976, Virgil's attorney wrote a letter to decedent telling him that Virgil intended to hold him liable as administrator of Anna's estate for failure to terminate the lease on the 99-acre farm. At the same time Virgil served a notice of termination on the current farm tenant. On June 8, 1977, decedent's attorney, by letter to Virgil's attorney, warned that Virgil was alienating his father. In August, 1977, Virgil served a second notice of termination on the farm tenant. In October, 1977, decedent moved in with his son, Joe, and daughter-in-law, Irene. He stayed there until he entered a nursing home in April, 1980.

On November 1, 1977, Joe drove decedent to Durant where decedent consulted attorney J. David McFerron. McFerron has practiced law since about 1952. He officed four days a week in Davenport and came to Durant one day a week. He first became acquainted with Lloyd and Anna in the summer of 1975, when they twice sought his legal advice on estate planning and selling or giving a farm to Joe. He next saw Lloyd several weeks after Anna's death concerning probating her estate. McFerron handled the probate of Anna's estate and had office visits with Lloyd while the estate was probated. McFerron had drawn Lloyd's first will. Lloyd directed McFerron to prepare the second will. McFerron had the will typed in his Davenport office. He returned to Durant with the will on November 8, 1977, and Lloyd came in and the will was executed in McFerron's office. After signature McFerron kept the original will. McFerron testified very articulately about his conversations with Lloyd exploring the impact of the will and the strong directions Lloyd gave him.

TESTAMENTARY CAPACITY

I find Virgil has the burden of proving one or more of the following elements were present when the will was drawn:

1. The testator did not understand the nature of the instrument being executed;
2. The testator did not understand and know the nature and extent of his property;
3. The testator was not able to identify and recall the natural objects of his bounty; and
4. The testator did not realize and know the distribution he desired to make of his property.

See In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973); In re Estate of Secrist, 186 N.W.2d 665, 667 (Iowa 1971).

Virgil contends there is substantial evidence to support a finding decedent did not realize and know the distribution he desired to make of his property. Once it has been shown a will was duly executed, it is presumed that the party in question possessed mental capacity. Walters v. Heaton, 223 Iowa 405, 409, 271 N.W. 310, 312 (1937). The testator's acquaintance with the provisions of the will is also presumed at that point. In re Estate of Klein, 241 Iowa 1103, 1110, 42 N.W.2d 593, 597 (1950). The law is slow to deny the right of any person to dispose of his or her property by will as he or she sees fit. In re Estate of Ruedy, 245 Iowa 1307, 1316, 66 N.W.2d 387, 392 (1954); In re Sinift's Estate, 233 Iowa 800, 810, 10 N.W.2d 550, 554 (1943); Perkins v. Perkins, 116 Iowa 253, 259-60, 90 N. W. 55, 57 (1902); Hart v. Lundby, 258 Iowa 46, 55, 137 N.W.2d 642 (1965). A will executed under the formalities of law by one mentally capable of executing it should not be set aside upon a bare suspicion of wrongdoing. Some significant factual basis is needed to support the claim and defeat the otherwise obvious intent of the testator. See Matter of Estate of Davenport, 346 N.W.2d 530, 533 (Iowa 1984).

Virgil contends all the circumstances of the case, including demeanor of the witnesses, the manifest injustice of the will, Lloyd's age, the declining nature of Lloyd's mentality and health and alleged overreaching by Joe and Irene provide substantial evidence to support a finding Lloyd did not know the disposition he desired to make of his property on November 8, 1977.

While the issue of undue influence in a will contest cannot be separated from that of testamentary capacity, this does not mean the issue of lack of competency to make a will must be submitted to the jury whenever undue influence is submitted. Cory, 169 N.W.2d at 843. Conduct which might be held insufficient to influence unduly a person of normal mental strengths might be sufficient to operate on a failing mind. In re Estate of Ensminger, 230 Iowa 80, 82, 296 N.W. 814, 815 (1941).

It is not enough to establish mental weakness due to disease unless the disease has progressed to the point at which the power of intelligent comprehension and action have been destroyed. Ruedy, 245 Iowa at 1314, 66 N.W.2d at 391. Mere old age or some deterioration in mental powers, childishness and eccentricities alone are not sufficient to generate a jury question. Id. Nor is it essential for mental capacity to make a will that the decedent was able to make contracts or to carry on business generally. Ruedy, 245 Iowa at 1315, 66 N.W.2d at 391. See also Bishop v. Scharf, 214 Iowa 644, 241 N.W. 3 (1932).

With these principles I view the evidence most favorable to Virgil. The only evidence of what happened when directions were given to draw the will comes from attorney McFerron. The only evidence of what happened when the will was executed comes from McFerron and one of the witnesses to the will. The only inference from the evidence of McFerron and the witness is decedent had testamentary capacity and was not influenced. The evidence of mental capacity must refer to the exact time of the making of the will. Gruis, 207 N.W.2d at 573. However, evidence of the condition of the mind of the testator at other times may be received if there is a reasonable basis for the conclusion that it throws light on his mental competence at the time the will was made. Id. See also Host v. Lundby, 258 Iowa 46, 56, 137 N.W.2d 642, 647 (1965). I therefore look beyond the time of the execution of the will to see if there is substantial evidence to support a finding decedent lacked mental capacity when the will was drawn. I find the following:

1. Decedent was about 90 years of age.
2. Decedent was living in the same home as Joe and Irene and they assisted him with his business and provided food and transportation. Joe wrote some of decedent's checks and made deposits. Joe made phone calls for decedent and assisted him with his tax accounting.
3. Decedent suffered serious physical problems.
4. Joe drove decedent to decedent's attorney's office to both give instructions for and later to sign the will.

Additionally, I have considered the testimony of the psychologist discussed earlier.

Without considering the strong evidence to the contrary, I fail to find substantial evidence to support a finding Lloyd did not have testamentary capacity and determined the trial court erred in failing to direct a verdict on this issue. I would reverse on this issue.

UNDUE INFLUENCE

I next address defendants' claim there was not substantial evidence of undue influence. Again I view the facts in the light most favorable to Virgil.

In Davenport the court said:

> Undue influence must be such as to substitute the will of the person exercising the influence for that of the testator, thereby making the writing express, not the purpose and intent of the testator, but that of the person exercising the influence. It must operate at the very time the will is executed and must be the dominating factor. (citations omitted).
> [1] The elements necessary to establish a finding of undue influence are:
> (1) Susceptibility to undue influence,
> (2) Opportunity to exercise such influence and effect the wrongful purpose,
> (3) Disposition to influence unduly for the purpose of procuring an improper favor, and

> (4) Result clearly the effect of undue influence. (citations omitted). More than a "scintilla" of evidence is required.

Davenport, 346 N.W.2d at 531.

Undue influence must operate at the time will is executed and must be dominating factor. Cory, 169 N.W.2d at 842. One who is infirm and mentally weak is more susceptible to influence than one who is not. Id. at 843.

Inopportunity, request and persuasion that do not go to the point of controlling the will of the testator do not constitute such undue influence as will invalidate a will. Johnston v. Johnston, 190 N.W.2d 421, 426 (Iowa 1971). The contestant must show a continuing and persistent effort to unduly influence the testator which destroys the testator's free will. Matter of Estate of Henrich, 389 N.W.2d 78, 83 (Iowa App. 1986).

The fact a will is unnatural, unjust or unreasonable is a proper circumstance to be considered as tending to confirm the claim of undue influence. Davenport, 346 N.W.2d at 532; Frazier v. State Central Savings Bank, 217 N.W.2d 238, 243 (Iowa 1974). However, it is not sufficient for the contestant to merely show inequality of distribution under the will. Davenport, 346 N.W.2d at 532. In addressing testamentary capacity, I enumerated five areas of proof. I again consider that proof on this issue.

I reviewed cases where the Iowa courts have found evidence supported a finding of undue influence. See Frazier v. State Central Savings Bank, 217 N.W.2d 238 (Iowa 1974) (Decedent who had a longtime relationship with his own attorney had will drawn by proponent's attorney and proponent remained in room with testator and attorney while will discussed); Matter of Estate of Herm, 284 N.W.2d 191 (Iowa 1979) (The two proponents visited decedent in her sister's apartment on the day the will was drawn and one of the proponents, an internal revenue agent, typed the will); In re Telsrow's Estate, 237 Iowa

672, 22 N.W. 2 792 (1946) (Proponents took decedent from sister's home in their car to an attorney decedent did not know to draw the will); Estate of Ensminger, 230 Iowa 80, 296 N.W.2d 814 (1941) (Evidence showed incident after incident where proponent dealt with testator in a dominating way); In re Estate of Cory, 169 N.W.2d 837 (Iowa 1969) (Will for decedent, age 83, was prepared in California by an attorney decedent had never met. The attorney had been employed by decedent's wife of two months and his son from a prior marriage. Decedent had no close contact with the son for 47 years. The will was executed in said son's home).

Applying those cases to the instant case, I find there is no evidence of any domination or control of decedent by Joe or Irene predating or at the time the will was prepared and executed. In fact, uncontroverted evidence indicated Virgil's own actions after his mother's death triggered his father's wrath.

There is no evidence to show a continuing and persistent effort to unduly influence the testator which destroys the testator's free will. Davenport, 346 N.W.2d at 532. The proof merely shows Joe and Irene offered decedent love, kindness and assistance. They had been the persons most attuned to decedent and his wife's needs in their later years. I fail to find substantial evidence decedent was unduly influenced when he made his will. While admittedly, this fact may have caused decedent to feel more kindly to Joe and Irene than Virgil, normal family love, affection and attention, absent some degree of dominant control or influence, are not sufficient to show undue influence. Matter of Estate of Clark, 357 N.W.2d 34, 38 (Iowa App. 1984). I would reverse the trial court on this issue.