IN THE COURT OF APPEALS OF IOWA

No. 8-567 / 97-2250

IN THE MATTER OF THE ESTATE OF MERVEL E. HULLINGER, Deceased,

BRENDA D. SHIELDS, BEVERLY D. HULLINGER, CHERLYN K. MARTIN, and BENJAMIN C. HULLINGER,

Plaintiffs-Appellees,

vs.

ESTATE OF MERVEL E. HULLINGER, Deceased, JUDY C. LANDRUM, Executor of the Estate of Mervel E. Hullinger, Deceased, and DONNA J. SOLIDAY,

Defendants-Appellants.

FILED
DEC 28 1998

Appeal from the Iowa District Court for Decatur County, David L. Christensen, Judge.

Defendants appeal a district court judgment, following a jury trial, which nullified a codicil to the deceased's will that provided for only a $1000 bequest for each of the children of the decedent's deceased son. **REVERSED; CODICIL REINSTATED.**

Keith E. Uhl of the Uhl Law Firm, Des Moines, for appellants.

Shauna Shields and Lawrence P. Van Werden of Reynoldson, Van Werden, Lloyd & Reynoldson, L.L.P., Osceola, for appellees.

Heard by Sackett, C.J., Huitink, J., and McCartney, S.J.* Streit, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SACKETT, C.J.

Plaintiffs-appellees Brenda D. Shields, Beverly D. Hullinger, Cherlyn K. Martin, and Benjamin C. Hullinger, the children of Dennis, the deceased son of Mervel E. Hullinger, filed this action contesting an August 23, 1994 codicil to Mervel's April 5, 1991 will. Appellants filed a motion for summary judgment, which was overruled. A jury found at the time the codicil was signed Mervel lacked testamentary capacity and he was unduly influenced. The jury further found the codicil not validly executed. The district court voided the codicil. In this appeal Mervel's two other children, appellant Judy C. Landrum, the executor of the estate, and appellant Donna J. Soliday, challenge the findings as not supported by substantial evidence. They also contend the jury was erroneously instructed. We reverse.

On appeal to an action to contest a will, the court will review for correction of errors at law. Iowa R. App. P. 4. The standard of review in an action to set aside a will is for errors at law. *In re Estate of Baessler*, 561 N.W.2d 88, 93 (Iowa App. 1997). Findings of fact in a law action are binding upon the reviewing court if supported by sufficient evidence. Iowa R. App. P. 14(f)(1). Will contest cases are reviewable as to the sufficiency of the evidence to support the verdict. *In re Austin's Estate*, 194 Iowa 1217, 1218-19, 191 N.W. 73, 73 (1922). The law is slow to deny a person the right to dispose of property as he or she sees fit. *In re Estate of Sinift*, 233 Iowa 800, 810, 10 N.W.2d 550, 554 (1943).

Mervel executed his will in 1991; his wife had died in 1987, but his three children were living. The 1991 will basically gave all of Mervel's property to his

three children and provided should a child not survive him, then that child's children should take the share Mervel's child would have taken.

Plaintiffs' father, Dennis, died in early 1994. The challenged codicil, signed five months after Dennis's death, amended Mervel's will to give plaintiffs, Dennis's four children, $1000 and divided the balance of his estate between appellants, Mervel's two surviving daughters. The codicil was found in Mervel's safety deposit box after his death. Mervel's estate was inventoried at approximately $400,000. Mervel was living alone when he was found unconscious in the field near his tractor. He died a short time later in a hospital.

Appellants contend the challenged codicil was properly executed and there was not substantial evidence to support the jury's finding to the contrary. They further contend the district court erred in instructing the jury on the requirements for properly executing a will.

For a codicil, like a will, to be valid in Iowa, it must be executed in accordance with the requirements of Iowa Code section 633.279(1).[1] *See In re Estate of Henrich*, 389 N.W.2d 78, 81 (Iowa App. 1986). The proponent of a codicil bears the burden

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[1] Iowa Code section 633.279(1) provides, in applicable part:

> 1. *Formal Execution.* All wills and codicils, except as provided in § 633.283, to be valid, must be in writing, signed by the testator, or by some person in the testator's presence and by the testator's express direction writing the testator's name thereto, and declared by the testator to be the testator's will, and witnessed at the testator's request, by two competent persons who signed as witnesses in the presence of the testator and in the presence of each other; provided, however, that the validity of the execution of any will or instrument which was executed prior to January 1, 1964, shall be determined by the law in effect immediately prior to said date.

Iowa Code § 633.279(1) (1993).

of proving the codicil was signed and witnessed as required by law. *See In re Estate of Palmer*, 255 Iowa 428, 434, 122 N.W.2d 920, 924 (1963).

The attestation clause of the challenged codicil recited the statutory requirements were observed; consequently, there is a presumption the codicil was properly executed. *See In re Estate of MacVicar*, 251 Iowa 1139, 1143, 104 N.W.2d 594, 598 (1960). The presumption can be rebutted where there is positive testimony of facts and circumstances surrounding the signing of the codicil which are contrary. *See id.* Our inquiry, therefore, is whether there is substantial evidence in the record to support a finding the presumption was rebutted. In examining this challenge, we look at the evidence in the light most favorable to plaintiffs.

The challenged codicil was written by Robert McGowen. McGowen, a CPA for twenty-seven years, started preparing Mervel's income tax returns in 1987 or 1988. In 1993, McGowen helped Mervel with estate planning. McGowen testified Mervel called him on June 10, 1994, and again on June 15, 1994. Then, Mervel sent McGowen his 1991 will. They talked on the telephone after that. McGowen said Mervel wanted to change his will because he was disappointed with how things were going in settling Dennis's estate between he and Dennis's widow. At the time of Dennis's death, Dennis had been in a farm partnership with Mervel. McGowen said Mervel related it would make more sense to change his existing will rather than have a dispute over settling with Dennis's estate for Dennis's share of the farm equipment and cattle. McGowen said Mervel indicated he wanted to leave the rest of his estate to his remaining living children and give minimal amounts to Dennis's children and

nothing to Dennis's widow. McGowen said Mervel knew who his family members were.

McGowen talked to Mervel on August 23, 1994, for about forty-five minutes and he prepared what he termed a "sample codicil" and sent it to Mervel with instructions to have his attorney review it. McGowen did not know who may have been with Mervel when he called.

McGowen further said when he talked to Mervel he found him opinionated and in control of what he was doing, how he was doing, and understanding what he was doing. The conversations between Mervel and McGowen concerning the codicil were over the telephone. McGowen said in his association with Mervel he did not appear to be under the influence of any other party.

Judy brought the challenged codicil, then unsigned, to Mervel while he was working on his farm driving a tractor and helping put up silage. Judy held a piece of paper over the distribution part of the codicil when the witnesses signed it. Steve and Dale Beavers, who signed as witnesses to the codicil, both testified Mervel asked them to witness his signature, but did not tell them what they were signing. Steve, who prior to trial signed a testimony of subscribing witness, testified at the time Mervel was in fairly good health, knew what he was doing, was not forgetful, and knew who everyone was. Dale testified Mervel was of sound mind at the time and did not appear to be under any influence.

The jury was instructed as follows:

INSTRUCTION NO. 13

The Plaintiffs assert that Mervel E. Hullinger's Codicil is invalid because it does not comply with Iowa law relative to formal execution of a Codicil. You are instructed that the burden rests upon the Defendants to prove that Mervel E. Hullinger's Codicil was executed in conformity with Iowa law.

Iowa law requires the following elements be proven in order for the instrument to be a valid Codicil:

1. Mervel E. Hullinger's Codicil was in writing.

2. Mervel E. Hullinger signed the Codicil.

3. Mervel E. Hullinger declared the instrument to be his Codicil.

4. Mervel E. Hullinger requested two persons to witness the execution of his Codicil.

5. The two witnesses signed as witnesses in the presence of Mervel E. Hullinger and in the presence of each other.

If Defendants have failed to prove one or more of these propositions, your verdict will be for the Plaintiffs.

You are further instructed that Mervel E. Hullinger's Codicil contains an attestation clause complying with Iowa law. The existence of the attestation clause creates a presumption that the legal requirements as to due execution of the Codicil were met. Such presumption may be rebutted, however, by evidence that one or more of the propositions set forth above was not, in fact, observed.

Appellants contend the instruction was in error because it stated Mervel had to declare the instrument to be his codicil. Appellants contend the Iowa Supreme Court has specifically interpreted the appropriate section of the Iowa Code as not requiring such a formal declaration. Appellants rely on *In re Estate of Bearbower*, 426 N.W.2d 392 (Iowa 1988), and *In re Estate of Graham*, 295 N.W.2d 414 (Iowa 1980), in support of their contention.

Plaintiffs contend the cases cited are distinguishable. They also point out section 633.279(1) was amended by the Iowa legislature for the execution of wills and codicils executed after January 1, 1964, to add a declaration requirement. They contend the amendment requires the formal declaration.

In *Bearbower*, a witness to decedent's will testified she did not specifically remember decedent expressly stating to those present he was signing a will or asking she or the other witness to witness the signing of his will. *Bearbower*, 426 N.W.2d at 394. The court in *Bearbower* said, "[I]t would appear that the purpose of adding the requirement was merely to ensure that the testator realize the testamentary significance of his actions." *Id.* at 395 (citing *Graham*, 295 N.W.2d at 417). In both *Bearbower* and *Graham*, the court rejected claims an oral declaration or request for witnesses was necessary to validate the wills.

We agree with appellants Instruction No. 13 did not conform to the dictates of *Graham* and *Bearbower* in that, contrary to these cases, the instruction specified Mervel needed both to declare the instrument to be his last will and testament and to request the two persons to witness its execution. The case does not need to be retried, however, as we reverse on other grounds. We further agree with appellants there was not such positive testimony of facts and circumstances surrounding the execution of the codicil so as to rebut the presumption it was properly executed. *See MacVicar*, 251 Iowa at 1143, 104 N.W.2d at 598. We reverse the trial court on this issue.

Appellants next contend the record does not support a finding Mervel lacked testamentary capacity when he signed the codicil.

Testamentary capacity requires the person making the will at the time of the making (1) understands the nature of the instrument, (2) knows and understands the nature and the extent of his property, (3) knows the natural objects of his bounty, and

(4) knows the disposition he desires to make. *See In re Estate of Adams*, 234 N.W.2d 125, 127 (Iowa 1975).

Plaintiffs advance there is substantial evidence to support the findings. Plaintiffs rely on evidence Mervel, when he signed the codicil, was diabetic and on medication. Plaintiffs also point to testimony Mervel was not the old Mervel and his thinking process had deteriorated or was not what it used to be. Plaintiffs claim there is further support in evidence Mervel forgot things, he was concerned about events he would not have been concerned about in his younger age, and he backed out of a farm sale.

Mervel had surgery in early 1995, some four or five months after the codicil was signed. Lucy Baxter, a public health nurse, saw him one to two times a week from then until May of 1996. Baxter testified Mervel was insulin dependent. He gave himself injections twice a day, though Judy pre-filled the syringes because his eyesight was poor and it had to be mixed. Baxter further testified Mervel was an independent person and fairly decisive. Mervel did his own personal hygiene, dressed himself, and prepared his own meals with some assistance. Baxter said Judy helped with housekeeping and food preparation, and Judy stayed with Mervel when he first came home from the hospital and was supposed to be off his feet.

Baxter was asked:

> Q. Who seemed to be the more dominant of the two [as to Judy]? A. Mervel was a very independent person. And I would say that he probably had the last say in things, would be my observation.
> Q. So he was the one that was basically running things; is that correct? A. Yes.

. . . .

Q. Was his mind in the current time? A. Yes, he was always oriented to time.

Q. His memory seemed to be reasonable? A. Yes, it was reasonable [for a person of that age].

Baxter related Mervel monitored his blood sugar levels and recorded them. She testified any time she saw him, he was very competent and knew exactly what he was doing and what he wanted. Baxter further said Mervel is not the type of person who could be dominated.

The proof of mental deficiency must be applicable to the time of making the will. *In re Springer's Estate*, 252 Iowa 1220, 1225, 110 N.W.2d 380, 383 (1961). There is not substantial evidence to support the jury's finding Mervel was not competent at the time the codicil was executed.

Appellants also contend the finding Mervel was under undue influence when he signed the codicil is not supported by substantial evidence.

To show undue influence, plaintiffs were required to prove four things: (1) Mervel must have been susceptible to undue influence, (2) Judy, who it was claimed exercised the influence, had an opportunity to exercise it, (3) Judy had a disposition to influence Mervel unduly for the purpose of procuring an improper favor, and (4) the result must clearly appear to be the effect of undue influence. *See Estate of Adams*, 234 N.W.2d at 128. More than a scintilla of evidence is required to show undue influence. *See In re Estate of Davenport*, 346 N.W.2d 530, 532 (Iowa 1984).

There was evidence Judy was close to her father. She lived on his farm and cared for him after his wife's death, and she helped him with the family business. The mere fact Judy had a close and loving relationship with her father is not sufficient proof the distribution in his codicil was the result of her influence, although she was provided with an opportunity to exert influence.

The strongest evidence for plaintiffs came through the testimony of Mervel's long-time attorney, G. F. Hoffman II. Hoffman testified in early June of 1994 Judy came into his office alone and told him Mervel wished to change his will. Hoffman testified he told Judy he could not draft a new will for Mervel unless Mervel himself talked to Hoffman. Hoffman went on to relate on June 15, 1994, Judy and Mervel came to Hoffman's office and they sat before Hoffman's desk. Judy told Hoffman, "Dad wants to change his will. Dennis is gone."

Hoffman said he got the will and told Mervel he did not need a new will. Hoffman told Mervel Dennis's share would go to his children and not to Dennis's wife. Hoffman testified Judy said, "Well, he wants to make a new will. He wants to leave everything to myself and to Donna." Hoffman said he asked Mervel if that is what he wanted to do and Mervel did not say he wanted to change his will. Hoffman said Judy turned to her father and said, "You know Dennis's children have a bar . . . and they are selling liquor and you know how the church feels about that."[2]

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[2] Mervel and Judy both claimed to be born-again Christians. There was evidence Mervel strongly disapproved of the use of alcohol.

Hoffman said he told Judy she should not be there if Mervel wished to change his will, and he told Mervel to go home and sleep on it and come back and he would write a will the way Mervel told him. Hoffman said he felt Judy was trying to influence her father. Hoffman said Judy told him her dad wanted his will. They picked it up after Hoffman asked Mervel if that was right and Mervel either said yes or nodded his head.

Hoffman was asked:

> Q. Did you ever attempt or do you feel like you ever intimidated Mervel Hullinger prior to that time [referring to the day he came in seeking to change his will]. A. I didn't do it then either, no. I thought he would be the hardest person to intimidate when he was feeling all right.
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> . . . .
>
> Q. I take it you just indicated he was competent to make a will [referring to the same day]. A. My feeling was -- my gut feeling was yes.

To support a claim of undue influence, there needs to be more than circumstantial evidence that raises the possibility of influence. *Davenport*, 346 N.W.2d at 532. It is not sufficient persuasion alone was asserted against the testator, and we recognize certain influences from family duties that may have some tangential effect on receiving a testamentary benefit. *See id.* Yet, to show sufficient evidence to meet the burden of invalidating a will, the influence must dominate the motives of the testator and be such a continuing and persistent influence as to destroy the testator's free will. *See id.* Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence; there must be a solid foundation of established facts. *See id.* at 533.

The fact Mervel made minimal provisions for plaintiffs-grandchildren, who were heirs at law, is generally a proper circumstance to consider as tending to support a claim of undue influence. *See Frazier v. State Central Sav. Bank*, 217 N.W.2d 238, 243-44 (Iowa 1974). We find that reason not substantial here where there is evidence of Mervel's dissatisfaction with the division of partnership property made following the death of Dennis, plaintiffs' father. *See Davenport*, 346 N.W.2d at 532, where the court affirmed summary judgment against decedent's disinherited son considering his claim of an unnatural disposition unpersuasive where he received substantial joint tenancy property.

Even considering Hoffman's testimony, the evidence falls short of supporting the jury's finding of undue influence. While Hoffman felt Judy was attempting to influence her father, nothing in his testimony supports a finding he found Mervel to be of such mind as to be subject to the influence.

We reverse and reinstate the voided codicil.

REVERSED; CODICIL REINSTATED.