IN THE COURT OF APPEALS OF IOWA

No. 1-389 / 90-1684

FILED
DEC 31 1991
CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF RUBY DAMMANN, Deceased.

RICHARD DAMMANN, GERI SPIES, NANCY McCORD and **SANDRA HASS**,

Appellants,

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vs.

LeROY H. DAMMANN and **FREDA DAMMANN**, Individually, **LeROY H. DAMMANN**, as Executor of the Estate of Ruby Dammann, and **FREDA DAMMANN**, as Executor of the Estate of Ruby Dammann, and the **ESTATE OF RUBY DAMMANN**,

Appellees.

Appeal from the Iowa District Court for Carroll County, Paul E. Hellwege, Judge.

Plaintiffs appeal a district court ruling granting defendants' motion for judgment notwithstanding the verdict. **REVERSED AND REMANDED.**

Robert Kohorst of Kohorst Law Firm, Harlan, for appellants.

David E. Green of Green & Siemann, Carroll, for appellees.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

Habhab, J., takes no part.

OXBERGER, C.J.

Six children were born to the marriage of Ruby Dammann and Lester Dammann, including the defendant, LeRoy, and the four plaintiffs, Richard, Geri, Nancy and Sandra. A sixth child predeceased his parents.

On February 18, 1982, Lester deeded a farm to Ruby valued at $106,695 on March 8, 1989. In July 1986, Lester died, survived by his wife, Ruby. Lester's will gave Ruby all his personal property and gave her a life estate in his real property. The five children were given the remainder.

In April 1988, Ruby Dammann executed a new will in the law office of Claus Bunz. In March 1989, Ruby died and her will was admitted to probate. Ruby's will gave all her interest in real estate to LeRoy.

In July 1989, the plaintiffs filed a petition seeking to set aside Ruby's 1988 will as the product of undue influence. Following trial, the jury ruled in favor of the plaintiffs. LeRoy then filed a motion for judgment notwithstanding a verdict. The district court granted the motion and plaintiffs have appealed.

PRESERVATION OF ERROR: Plaintiff/Appellants assert the trial court erred in granting judgment notwithstanding the verdict where counsel failed to move for a directed verdict at the close of the evidence. We have repeatedly held that ordinarily, matters not raised in the trial court, cannot be effectively asserted for the first time on appeal. See

State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974) Although we find appellants vigorously resisted the motion for judgment notwithstanding the verdict, there was no issue raised before the trial court regarding opposing counsel failure to move for a directed verdict. The trial court had no opportunity to consider this argument and we will not consider it now.

JUDGMENT NOTWITHSTANDING VERDICT: We therefore consider whether the trial court was correct in granting a motion for judgment notwithstanding the verdict. We review the trial court's ruling granting judgment notwithstanding the verdict pursuant to Rules Civ.P. 242(b), by considering whether evidence, taken in the light most favorable to the party resisting the motion, regardless whether the evidence was contradicted, and taking every legitimate inference that might be fairly or reasonably deduced therefrom, showed that the movant was entitled to a directed verdict at the close of all evidence. Suss v. Schammel, 375 N.W.2d 252, 255 (Iowa 1985). After viewing the evidence in the light most favorable to the Plaintiff, if reasonable minds could differ on the issue, it is appropriate to submit the issue to the jury and the verdict should be upheld. See Dennett v. City of Des Moines, 347 N.W.2d 691, 692 (Iowa Ct. App. 1984).

The four elements necessary to establish undue influence are:

1. the testator must have been susceptible to undue influence;

2. the person alleged to have exercised undue influence must have had the opportunity to exercise it;

3. the person must have had the disposition to influence the person unduly for the purpose of procuring an improper favor; and

4. the result must clearly appear to be the effect of undue influence.

Pence v. Rawlings, 453 N.W.2d 249, 252 (Iowa Ct. App 1990).

In granting a judgment notwithstanding the verdict, the trial court concluded:

> There is not a scintilla of evidence that either of the Defendants were involved with the Decedent making either appointment with Mr. Bunz or they were privy to the contents of the will in question until decedent's death. The evidence fails to show either a disposition to influence unduly for the purpose of procuring an improper favor or a result clearly the effect of undue influence.

No other reasons are set forth by the trial court as the basis for its decision.

INVOLVEMENT IN MAKING THE APPOINTMENT WITH RUBY'S COUNSEL: We find the appropriate question to ask in the context of an undue influence case is not whether LeRoy "made" the appointment for Ruby, but whether he had the opportunity to influence her in making the appointment. The record

indicates that LeRoy had several discussions with Ruby about the old will from the time Lester died until the time she executed her new will in 1988. LeRoy and Freda Dammann were the only relatives of Ruby who knew of the 1988 will. They knew this in spite of the fact, Ruby had instructed her attorney to tell no one about the will. There is no dispute that LeRoy was in frequent contact with his mother prior to the making of the new will. Reasonable minds could infer that he had ample opportunity to influence Ruby's decision to make an appointment to draft a new will. Evidence that LeRoy was actually involved in contacting the attorney to make the appointment for Ruby is irrelevant to the issue of undue influence. We find any consideration upon the lack of such evidence to support a motion for judgment notwithstanding the verdict, in a case of undue influence, is without merit.

PRIVY TO CONTENTS OF THE WILL BEFORE RUBY'S DEATH: The trial court next noted in its granting of the motion, the absence of any evidence establishing that LeRoy knew of the contents of Ruby's will before her death. We find any evidence supporting "knowledge" of specific results of undue influence is not required to establish a claim of undue influence.

DISPOSITION TO INFLUENCE UNDULY FOR THE PURPOSE OF PROCURING AN IMPROPER FAVOR: We consider whether there was sufficent evidence to create a genuine issue in a

reasonable juror's mind that LeRoy had a disposition to influence unduly to procure improper favor's from Ruby. Testimony indicated that LeRoy had signed over to himself his father's pickup truck without paying for it or informing the other children of his intent to acquire the vehicle. On another occassion, LeRoy acquired title to a livestock trailer for no consideration. Testimony was admitted that Ruby stated during the time of this transaction "Well, let him have it, he's taken everything else." (emphasis added). In addition, LeRoy testified that a machinery sale contract was forgiven by his father and admitted that no gift tax return was filed. This transaction was not reported in his father's estate. LeRoy was the executor of that estate. LeRoy's brother, Richard Dammann testified that after his father's death, LeRoy in speaking about the machinery contract, told him he was paying for it. We find that reasonable minds could have differed regarding whether the machinery contract was or was not forgiven. Likewise, we find that reasonable minds could differ on the issue of LeRoy's "disposition" to influence unduly to procure improper favors.

EVIDENCE OF A RESULT CLEARLY THE EFFECT OF UNDUE INFLUENCE:

The trial court determined in support of its decision to grant judgment notwithstanding the verdict that there was no evidence of an improper favor or a result clearly of the effect of undue influence. We disagree.

Testimony was given by Claus Bunz, the attorney who drafted Ruby's 1988 will. Mr. Bunz indicated that Ruby brought in a typewritten sheet of information to be incorporated into the will. Ruby had no typewriter. In addition, evidence was presented that she was not the type of person to prepare such a sheet. No evidence indicated that a break in relationships had occurred between Ruby and her other children since the making of her 1982 will. In the 1982 will, Ruby had left her daughters family heirlooms. Ruby's 1988 will did not. The 1982 will gave a remainder interest to the children. The 1988 will gave essentially all of Ruby's estate to LeRoy and his wife Freda.

Plaintiffs point to the numerous inconsistencies in LeRoy's testimony. LeRoy denied that he knew prior to Ruby's death that she had a will before 1988. He then acknowledged on cross examination that he did know. LeRoy then denied the presence of a typewriter in his home and later acknowledged there was a typewriter at their home. We find in light of these discrepancies and the dramatic shift in the treatment of the children under Ruby's 1988 will, that sufficient evidence was present to which reasonable minds could differ on whether the change in Ruby's will was brought about by the undue influence of LeRoy. We find the trial court erred in granting the motion for judgment notwithstanding the verdict. We

reverse the trial court and re-instate the jury verdict. We remand this matter to the trial court for judgment order consistent with this opinion.

REVERSED AND REMANDED.