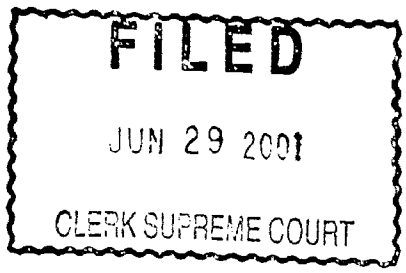
IN THE COURT OF APPEALS OF IOWA

No. 1-335 / 00-0619
Filed June 29, 2001



IN THE MATTER OF THE ESTATE OF CLARENCE S. BRANT, Deceased,

DIANNA K. BRACK, SANDY A. TOMAS, LARRY C. BRANT and ANNETTE M. MOSSMAN,
Plaintiffs-Appellants,

vs.

BETTY LOUISE SCHEETZ MORRIS,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

The plaintiffs appeal a district court ruling dismissing their challenge to the decedent's will and their motion for new trial. **AFFIRMED.**

John C. Wagner and Kimberly K. Hardeman of John C. Wagner Law Offices, P.C., Amana, for appellant.

Robert D. Houghton, Diane Kutzko, and Sarah J. Gayer of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellee.

Considered by Sackett, P.J., Huitink and Streit, JJ.

SACKETT, P.J.

Plaintiffs-appellants Dianna K. Brack, Sandy A. Tomas, Larry C. Brant and Annette M. Mossman, children of decedent Clarence S. Brant's deceased son Kenneth, contested their grandfather's April 6, 1995 will. This appeal follows the district court's denial of plaintiff's motion for a new trial following a jury verdict in favor of defendant-appellee Betty Louise Scheetz Morris, Clarence's daughter. Plaintiffs on appeal contend (1) the district court erred in excluding testimony by Clarence from trial proceedings in a prior case, and (2) that the jury verdict was not supported by sufficient evidence. We affirm.

Clarence Brant died on March 3, 1997. Plaintiffs' father, Kenneth Brant, who was one of Clarence's two children, died on March 10, 1995, prior to the execution of the challenged will. Kenneth and any members of his family were excluded from benefiting under the April 6, 1995 will where decedent left his estate to defendant Betty Morris, his only other child.

Clarence had executed a will in 1977 dividing his assets between his children Kenneth and Betty. Over the years, Clarence gave Kenneth and his family substantial sums of money. The challenged will was executed in the month after Kenneth's death. The will related Clarence had provided for Kenneth and his family over the years and Clarence wished to make no further provision for them in his will.

Clarence and Kenneth farmed together from the early 1950's until Kenneth's death. Following Kenneth's death Clarence without success sued Kenneth's estate in *Brant v. Brant,* Johnson County Probate No. 23714, Case

No. EQ56839. Clarence contested the existence of a partnership between the two men and sought over $100,000 in damages from the Kenneth's estate.

Plaintiffs, in contesting Clarence's will, claimed he lacked testamentary capacity to execute it in April of 1995, and that it was the product of defendant's undue influence.

At trial plaintiffs sought to admit a deposition of Clarence taken in *Brant v. Brant*. Plaintiffs also sought to admit parts of the transcript of the trial. Plaintiffs contend the district court erred in excluding the deposition and Clarence's trial testimony.

The defendant contends error was not preserved on this issue. Defendant further contends the deposition and trial transcript were not admissible because they were inadmissible hearsay. Defendants further urge that the district court's ruling should be affirmed because no substantial rights were affected.

In arguing that the verdict was based on an error at law, plaintiffs claim the district court erred in its interpretation of Iowa Rule of Evidence 804(b)(1) in sustaining defendant's objection to plaintiffs' evidence. Plaintiffs attempted to enter into evidence the deposition of Clarence and his trial testimony. This evidence, according to plaintiffs, would help to establish defendant had unduly influenced Clarence to change his will in her favor. The district court had denied defendant's motions in limine seeking to exclude this evidence, but sustained defendant's objections at trial on the basis that the evidence was inadmissible hearsay.

Plaintiffs claim on appeal that this evidence is an Iowa Rule of Evidence 804(b)(1) exception to the hearsay rule and that the court therefore erred as a

matter of law in excluding it. Defendant counters that 1) plaintiffs failed to make an offer of proof and therefore did not preserve this issue for appellate review; and 2) defendant was not a party to the prior litigation and therefore would have had no opportunity or motive to develop the testimony of Clarence Brant through direct or cross-examination.

Plaintiffs have failed to demonstrate that the rule 804(b)(1) exception to the hearsay rule applies in this case. Plaintiffs offer no evidence that defendant would have had a similar motive or opportunity in the prior trial to develop Clarence's testimony, either through direct or cross-examination, as she would have in the current trial concerning her undue influence over her father. Further, plaintiffs cite no authority for their contention that defendant need only have been in privity with the parties in the former litigation rather than being an actual party or a predecessor in interest.

In addition, the evidence plaintiffs sought to introduce only showed that Betty was helping Clarence put his books together and that she found a diary. The same evidence came from other witnesses. We affirm the district court on this issue.

Plaintiffs next contend they should have been granted a new trial because the verdict in this case was not supported by sufficient evidence.

Trial courts have wide discretion in deciding motions for a new trial. *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998). We do not reweigh the facts. Rather, we review for abuse of discretion. *Pratt v. Piper,* 500 N.W.2d 716 (Iowa Ct. App. 1993). In order to show an abuse of discretion, we must show that the court

exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

In contesting the will plaintiffs claimed at trial that decedent had lacked testamentary capacity and had been subjected to undue influence when writing the will. The jury's verdict denied their claim.

In order to demonstrate lack of testamentary capacity, plaintiffs were required to show Clarence failed to 1) understand the nature of the instrument being executed; 2) know and understand the nature and extent of his property; 3) remember the natural objects of his bounty; and 4) know the disposition he wanted to make. *In re Estate of Dankbar,* 430 N.W.2d 124, 127-28 (Iowa 1988). Testamentary capacity is presumed. *In re Will of Pritchard,* 443 N.W.2d 95, 98 (Iowa Ct. App. 1989). Plaintiffs have the burden of proof on this issue. *See Dankbar*, 430 N.W.2d at 127-28. Yet there was substantial evidence that Clarence was competent to make the April 1995 will. The attorney who drafted the challenged will and consulted with Clarence frequently between March 17, 1995 and April 11, 1995, testified that Clarence told him Kenneth and his family had gotten their share of his money. The attorney further testified Clarence knew what property he owned, and in the attorney's opinion Clarence was competent to make a will. There was no basis to grant a new trial on this issue.

To demonstrate undue influence plaintiffs must show 1) testator's susceptibility to undue influence; 2) defendant's opportunity to exercise such influence and effect the wrongful purpose; 3) defendant's disposition to influence unduly for the purpose of procuring an improper favor; and 4) a result clearly the effect of undue influence. *In re Estate of Todd,* 585 N.W.2d 273, 277 n.4 (Iowa

1998). Freedom from undue influence is presumed. *Pritchard,* 443 N.W.2d at 98. Plaintiffs have the burden of proof on this issue *Todd*, 585 N.W.2d at 279. Yet there is substantial evidence to support a finding Clarence was not subject to undue influence in drafting the challenged will. There was testimony at or near the time the will was drawn that Clarence was strong willed, that he expressed the reason he left no money to Kenneth's family was that they had received sufficient monies during his lifetime, and that Clarence had considerable affection for the defendant. The district court is affirmed in all respects.

AFFIRMED.