FILED
DEC 17 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF BERTHA BESCHORNER, Deceased.	)	
	)	26
HELMUT MAIWALD, NORMA JEAN MAIWALD, CHRISTOPHER MAIWALD and JEAN MAIWALD,	)	Filed December 17, 1987
Plaintiffs-Appellants,	)	
vs	)	7-322 86-948
FRANCES LAWSON,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Calhoun County (9944), James C Smith, Judge.

Objectors appeal the decision of the trial court finding the will of the decedent was valid. **AFFIRMED.**

Thomas W. Polking of Wilcox, Polking, Gerken, Schwarzkopf & Hoyt, Greene, for plaintiffs-appellants.

Thomas L. McCullough of McCullough Law Firm, Sac City, for defendant-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

27

HAYDEN, J.

Objectors (hereinafter Maiwalds) appeal the decision of the trial court finding the will of the decedent, Bertha Beschorner, was valid. The Maiwalds assert the trial court erred in determining a prior trial court ruling regarding the competency of Bertha to sign a deed did not preclude deciding in this case whether Bertha was competent to make a will on that same day. The Maiwalds also assert the trial court erred in a number of procedural and evidentiary rulings. The Maiwalds' final assertion on appeal is there was insufficient evidence for the jury to determine Bertha was competent to execute the will. We affirm.

This case involves the probate of a June 10, 1981 will, which gave the appellee, Frances Lawson, one-half of Bertha's farm property and gave the Maiwalds the other half of the property. Bertha's previous will gave the entire property to the Maiwalds. Also on June 10th, Bertha, who was eighty-eight years old, executed a deed granting all of her land to Lawson, with the reservation of a life estate. A trial court later ruled Bertha was not competent when she executed the deed and this court affirmed on appeal.

I. **Issue Preclusion.** The Maiwalds assert the trial court decision regarding the deed established Bertha was suffering from Alzheimer's disease on June 10, 1981, and that Lawson is therefore precluded from contesting that determination in this proceeding. We disagree with the Maiwalds' understanding of the trial court's ruling. The issue before the trial court was whether Bertha was competent to execute a deed. To that end, the court found her Alzheimer's disease was so far advanced as to render her incompetent to do so. However, a higher degree of mental competence is required for such transactions than is necessary for testamentary dispositions of property. Costello v. Costello, 186 N.W.2d 651, 654-55 (Iowa 1971). The trial court did not have before it,

and did not address, whether Bertha's Alzheimer's disease rendered her incompetent at the lower degree of mental competence required for testamentary dispositions of property. Nor in making its determination regarding competence to execute the deed was it necessary for the court to find Bertha had Alzheimer's disease. Whether or not Bertha suffered from Alzheimer's disease, and to what extent, was not the issue before the trial court. The court merely considered evidence Bertha was afflicted with Alzheimer's disease, in conjunction with other evidence of incompetence, to determine whether Bertha was competent to execute a deed.

As such, we conclude the doctrine of issue preclusion does not apply in this case. As stated in Noel v. Noel, 334 N.W.2d 146, 149 (Iowa 1983):

> To bar further litigation on a specific issue four requirements must be established:
>
> (1) the issue concluded must be identical;
>
> (2) the issue must have been raised and litigated in the prior action;
>
> (3) the issue must have been material and relevant to the disposition of the prior action, and
>
> (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. The issue in the prior trial court ruling, whether Bertha was competent to execute a deed, is clearly not identical to that raised in these proceedings. The issue here is whether Bertha had the requisite testamentary capacity to execute a will. Thus, the first requirement for issue preclusion is not met for this issue. The issue of whether Bertha suffered from Alzheimer's disease, we conclude, was not necessary and essential to the trial court's judgment regarding her competence to execute a deed. Thus, the fourth requirement for issue preclusion was not met for this issue.

II. Testimony of Dr. Berryhill. On February 10, 1984, Lawson filed her answers to interrogatories, stating that no experts had been hired at that time. On April 3, 1984, she supplemented her answer to interrogatory number five, which requested a list of all witnesses, including the substance of the facts to which each witness was expected to testify. In her supplemental answer, Lawson listed Dr. Berryhill. Lawson did not supplement her answer to interrogatory number three, regarding expert witnesses. The Maiwalds apparently made no inquiry before trial regarding Dr. Berryhill's testimony. The jury trial commenced May 30, 1986.

At trial, Lawson called Dr. Berryhill as an expert witness to testify Bertha suffered from multi-infarct dementia (MID) and not Alzheimer's disease. The distinction is that a MID victim has a variable mental capacity, whereas an Alzheimer's victim has progressively lower mental competence. The Maiwalds requested the testimony of Dr. Berryhill be excluded since they allegedly had no notice of it. The trial court denied this request. The court found the Maiwalds had sufficient notice of Dr. Berryhill's identity and they were being "picky" in requiring that his identity be placed in the right spot technically in the interrogatories. Nonetheless, the trial court allowed the Maiwalds to take Dr. Berryhill's disposition prior to his testimony. On appeal, the Maiwalds assert the trial court abused its discretion in allowing the testimony of Dr. Berryhill.

Trial courts possess broad discretion regarding the imposition of discovery sanctions. Carter v. Wiese Corp., 360 N.W.2d 122, 136 (Iowa App. 1984). Generally, abuse of discretion will be found only where there is no support for the decision in the record. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972). We find an abuse of discretion when such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable.

Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983). Moreover, exclusion of an expert as a witness is the most severe sanction and should not be imposed lightly; other sanctions are available, such as a continuation of the trial. Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 421 (Iowa 1985).

In this case, continuation of the trial is exactly what occurred. The Maiwalds were allowed to take Dr. Berryhill's deposition before he testified. We conclude the disinclination of the trial court to impose a more severe sanction was reasonable and not an abuse of discretion.

III. Admissibility of Evidence of the Prior Trial. Throughout the trial, the court sustained all objections to the introduction of any evidence of the lawsuit regarding Bertha's competence to execute the deed and of the trial court's ruling in that case. The Maiwalds assert, in essence, the trial court abused its discretion in doing so.

The trial court has a wide discretion in the matter of evidentiary rulings concerning relevancy and materiality. Carter v. MacMillan Oil Co., Inc., 355 N.W.2d 52, 55 (Iowa 1984); Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288 (Iowa 1979). Evidence is relevant if it renders the existence of a fact more probable or less probable with it than without it. Briner v. Hyslop, 337 N.W.2d 858, 869 (Iowa 1983). However, the trial court has discretion to exclude relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Iowa R. Evid. 403; see Kalianov v. Darland, 252 N.W.2d 732, 736 (Iowa 1977). The trial court must first determine whether the evidence has some probative value; if it does, then the court must weigh the probative value against the policy grounds for exclusion. State v. Harman, 238 N.W.2d 139, 145 (Iowa 1976).

The trial court found evidence of the prior lawsuit was not probative regarding whether Bertha had the requisite testamentary capacity to execute a will. The court also found such evidence would be prejudicial. We agree.

Evidence of the proceeding regarding the deed would cause confusion regarding the degree of mental competence required to execute a will, rather than a deed. It also would not be clear to the jury the finding of incompetence regarding the deed does not govern the determination regarding the will. Thus, the issues would be confused and the jury misled. We conclude the trial court did not abuse its discretion in excluding evidence of the prior proceeding.

IV. Admissibility of Testimony Regarding Bertha's Competence. At trial, the court allowed two of Lawson's witnesses to answer questions the Maiwalds assert address mixed questions of law and fact. These exchanges proceeded as follows, in pertinent part:

> [Lawson's attorney:] Well, in your mind when you signed that document, did you believe that Bertha was competent to sign it?
>
> [Maiwalds' attorney:] Your Honor, I object to that question as calling for a legal conclusion that cannot be arrived at by a non-expert witness.
>
> [Lawson's attorney:] I'll withdraw the question and rephrase it. Did you believe that Bertha had the mind to do it?
>
> [Maiwalds' attorney:] Your Honor, same objection. It's calling for a legal conclusion by a non-expert witness.
>
> THE COURT: You go ahead and answer what your belief was that day.
>
> [Margarite Hendricks:] I thought that she understood it, and I thought that's what she wanted to do. She indicated that.
>
> * * *
>
> [Lawson's attorney:] Mrs. Lammers, what can you say to this jury as your honest judgment and opinion as to whether Bertha was mentally competent in the first two weeks that she was at your nursing home?

[Maiwalds' attorney:] Your Honor, I object to that as about the fourth time we've asked the same question. Calling for legal conclusion that no expert—or non-expert can be asked to answer.

THE COURT: Do you understand what he's asking you for, ma'am? Do you understand what the question asks of you?

[Nadine Lammers:] Yes, sir.

THE COURT: All right. You go ahead and answer.

[Nadine Lammers:] I think she was mentally competent because--well, for on two occasions; once when she was weeping, and I tried to comfort her—she never ever talked about anybody or talked--mentioned any names ever. But she continued to cry softly, and she said, "I do not want to hurt anybody. I love everybody."

And that showed me that she was able to experience stress, and one other time when I was helping her out the door to go out in the yard—and I can't remember that there was anything that precipitated it, but she said, "Honey, you work hard for your money. Get yourself something nice or get something nice for somebody else and do it now and don't have any left." And that did make me feel bad for her.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Iowa R. of Evid. 704; Grismore v. Consolidated Products Co., 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942). However, no witness should be permitted to give his opinion directly that a person had the capacity to execute a will. Grismore, at 361, 5 N.W.2d at 663. The Federal Advisory Committee's Note to this rule of evidence suggests how it should work in practice. After mentioning that Rules 403, 701 and 702 are available to exclude opinions phrased in terms of inadequately explored legal criteria, the Note states

> Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

The question to the first witness, Ms. Hendricks, "Did you believe Bertha had the mind to do it [sign the will]?" is plainly the type which should have been excluded. However, Ms. Hendrick's answer, with which we are actually concerned, was not similarly offensive to the rule. Her answer did not state an opinion regarding Bertha's capacity to make a will. It merely stated Ms. Hendricks thought Bertha understood and desired the provisions of the will.

The testimony of the second witness, Ms. Lammers, was also admissible. Her statements were made in the context of her personal observations of Bertha. She ventured an opinion as to Bertha's mental competence, but this opinion did not address whether the mental competence she felt Bertha retained was sufficient to constitute the requisite testamentary capacity to execute a will. Nor was Ms. Lammers asked whether she thought Bertha's mental competence rose to that degree.

We conclude the trial court did not err in admitting the answers of these two witnesses.

V. Sufficiency of the Evidence. The Maiwalds' final assertion on appeal is there was insufficient evidence for the jury to find Bertha had the testamentary capacity to execute a will. We disagree. We conclude there is substantial evidence in the record to support the verdict of the jury.

AFFIRMED.