



IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF)
EMMA HEROLD, DECEASED,)

DOROTHY J. CIPPERLEY, Individually)
and as Executor of the Last Will and)
Testament of Emma Herold, Deceased,)
and JERRY DEAN RADLE,)
Appellees,)

Filed May 31, 1979

vs.)

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2-62199

RAMONA R. MCGAVIN, RAWLIN R.)
RADLE, ROMA R. WALSH, and)
ADELA RADLE, Named Executor)
of a Purported Last Will and Testament)
of Emma Herold, Deceased,)
Appellants.)

Appeal from Cherokee District Court - Murray S. Underwood, Judge.

Appellants appeal from the trial court's judgment in this will contest alleging insufficient evidence to support the court's findings of mental incapacity and undue influence and errors in the admission of certain testimony and in the failure to appoint a temporary administrator. - AFFIRMED.

John D. Loughlin, of Loughlin Law Firm, Cherokee, for Appellant.

J. R. Miller, of Miller, Miller & Miller, Cherokee, for Appellees.

Heard by Oxberger, C. J., and Donielson, Shell, Carter and Johnson, JJ.

PER CURIAM

Appellants, named executor and several beneficiaries of decedent's 1970 will, appeal from trial court's judgment declaring the 1970 will null and void and declaring the 1965 will decedent's valid last will and testament. We affirm.

I. This action was properly tried at law. The proceeding below was essentially a will contest and, thus, triable in probate as a law action. Section 633.33, The Code 1977; section 633.311, The Code 1977; In re Estate of Seerist, 186 N.W.2d 665, 667 (Iowa 1971). Consequently, our review is not de novo. Iowa R. App. P. 4; Solbrack v. Fosselman, 204 N.W.2d 891, 893 (Iowa 1973). Findings supported by substantial evidence and justified as a matter of law are binding and will not be disturbed on appeal. Keith v. Community School Dist. of Wilton in the Counties of Cedar and Muscatine, 262 N.W.2d 249, 255 (Iowa 1978).

II. The trial court found that the decedent, Emma Herold, did not possess the requisite mental capacity to execute the February 9, 1970 will and that her decision to make this will was the result of undue influence exercised upon her. Appellants maintain that substantial evidence did not exist in the record to support the trial court's findings. Findings of fact are supported by substantial evidence if the findings may be reasonably inferred from the evidence, Briggs Transportation Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978), and if reasonable minds would accept them as adequate to reach a conclusion. City of Davenport v. Pub. Employment Relations Bd., 264 N.W.2d 307, 311 (Iowa 1978). In this case substantial evidence did exist from which the trial court could infer that the decedent lacked mental capacity to execute a will. A testator is not mentally capable of executing a will if she lacks the ability to understand the nature of the instrument she is executing, to know and understand the nature and extent of her property, to remember the natural objects of her bounty, or to know the distribution which she desires to make of her property. In re Estate of Adams, 234 N.W.2d 125, 127 (Iowa 1975); In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973); Seerist, 186 N.W.2d at 667. In this case, testimony from several witnesses provided substantial evidence that, at the time of the making of the will, the decedent was uncommunicative, uncomprehending and basically unable to understand, in all respects, the nature of the act that she was performing.

Although raising a more difficult question, the trial court's finding of undue influence is, likewise, supported by substantial evidence. Undue influence may be proven by circumstantial evidence. Frazier v. State Central Savings Bank, 217 N.W.2d 238, 243 (Iowa 1974). Direct proof is seldom available. Id. Undue influence is established by showing that the decedent was susceptible to undue influence, that a disposition and opportunity to exercise undue influence for improper purposes existed, and that the result clearly appears to be the effect of undue influence. Adams, 234 N.W.2d at 128.

In this case Emma Herold was 87 years old, in failing physical and mental health, and unable to care for herself. Her brother, Albert, to whom she was the closest and with whom she normally made decisions, had predeceased her. She was definitely subject to being unduly influenced. See In re Estate of Cory, 169 N.W.2d 837, 842 (Iowa 1969). The evidence also shows that Frank Radle, the brother of Emma, and his wife, Adela, were disposed to exercise influence over Emma. It is clear that Frank, who had earlier challenged the probating of Albert's will which named Emma as executor and left to her all of Albert's property, and who also had unsuccessfully petitioned to be named Emma's conservator, sought control of Emma's property. Furthermore, because Emma's 1965 will bequeathed nothing to either Frank, Adela or their children, it is apparent that the Radle family stood to profit by Emma's execution of a will more favorable to them. Frank and Adela, who lived in close proximity to Emma and who visited her regularly, also had the opportunity to influence her. Finally, the 1970 will clearly appears to be the result of undue influence exercised by the Radles. Emma had never gotten along well with Frank and did not like Adela. And yet, the 1970 will left sixty percent of Emma's property to the Radle children. The will was drawn up by an attorney selected by the Radles even though Emma had an attorney whose services she had used for many years. Emma was never left alone with the attorney, the Radles remaining by her side throughout the execution of the will document. The trial court's finding of undue influence was justified.

III. Appellants challenge the admissibility of the testimony of certain witnesses, alleging that improper foundation had been laid to allow these non-expert witnesses to testify as to the mental soundness of Emma Herold at the time of the execution of the

1970 will. Receipt of opinion testimony, lay or expert, rests largely within the discretion of the trial court; a reviewing court will not reverse unless a manifest abuse of discretion resulting in prejudice to the complaining party appears. Speed v. State, 240 N.W.2d 901, 903 (Iowa 1976); Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). Non-experts may give their opinion of the mental unsoundness of a testator at the time of the execution of a will only after first testifying to facts which reasonably tend to support their opinion. Ward v. Sears, 247 Iowa 1231, 1233, 78 N.W.2d 545, 546-49 (1956). Ipsen v. Reuss, 239 Iowa 1376, 1387, 35 N.W.2d 82, 90 (1948), *aff'd* 241 Iowa 730, 41 N.W.2d 658 (1956). Whether sufficient facts have been detailed is primarily a matter to be determined by the trial court in the exercise of sound discretion. *Id.* The discretion of the trial court ceases where the record shows as a matter of law that the facts upon which an opinion is based are not sufficiently stated by a witness. Ganrud, 206 N.W.2d at 314.

A review of the record in this case reveals sufficient factual bases for allowing these witnesses to offer their opinion of the mental incapacity of Emma Herold. The trial court did not abuse its discretion.

IV. Appellants also challenge the admission of the testimony of certain witnesses, claiming that the Dead Man's Statute, section 622.4, The Code 1977, renders such testimony inadmissible. A witness who will either gain or lose by direct legal operation and effect of a judgment is an interested witness under section 622.4 and incompetent to testify concerning personal transactions and communications between himself or herself and the decedent. Sisson v. Johnson, 187 N.W.2d 745, 747 (Iowa 1971). But witnesses are not incompetent under section 622.4 to testify concerning the appearance and actions of the testator ascertained by them through observation, nor are they incompetent to testify as to personal transactions or communications with the testator in which they took no part. Ipsen, 239 Iowa at 1385, 35 N.W.2d at 89 (1948).

Here, Dorothy Cipperley and Jerry Radle both stood to either lose or gain in the final outcome of this action. Nonetheless, their testimony was admissible under section 622.4 since it consisted of observations of rather than personal transactions and communications with the decedent. The trial court's rulings were proper.

V. Appellants further claim that the testimony of Emma Herold's attorney, Loyal Martin, was inadmissible under the Dead Man's Statute and under section 622.10, The

Code (1977), dealing with privileged communications. Both of these arguments are without merit. Attorney Martin withdrew from the case prior to taking the witness stand; thus, even though he stood to recover compensation for legal services that he had rendered, he was not barred by section 622.4 from testifying. In re Estate of Farley, 237 Iowa 1069, 1079-80, 24 N.W.2d 453, 459-60 (1946).

Nor was he barred from testifying by section 622.10, The Code. The attorney-client privilege belongs to the client. Bailey v. Chicago, Burlington & Quincy R. R. Co., 179 N.W.2d 560, 563 (Iowa 1970). Generally the privilege survives the client's death. Id. But, just as the parties to a will contest do not have standing to assert the testator's physician-patient privilege, Adams, 234 N.W.2d at 129, neither do parties to a will contest have standing to assert a testator's attorney-client privilege. The Iowa Supreme Court has said:

Where the validity of an instrument, shown to have been executed by a decedent, is attacked on the ground of fraud or mental incompetency or undue influence, ... [i]t is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client.

Olsson v. Pierson, 237 Iowa 1342, 1353, 25 N.W.2d 357, 363 (1946). Where all parties claim under the deceased, the proceedings are not adverse to the estate in that the interest of the deceased, as well as the interest of the estate, is that the truth be ascertained. Id. at 1351, 25 N.W.2d at 362. A court's function in a will contest action is to protect the testator's true intent by establishing or defeating the challenged instrument. Id. Consequently, no one party in such an action can be said to represent the testator, Id., or to have standing to invoke the testator's attorney-client privilege. See generally, Id. at 1350-53, 25 N.W.2d at 361-63; Winters v. Winters, 102 Iowa 53, 56-60, 71 N.W. 184, 185-86 (1897); Denning v. Butcher, 91 Iowa 425, 436-37, 59 N.W. 69, 72-73 (1894). The trial court properly admitted the testimony of attorney Martin.

VI. Appellants finally maintain that the trial court's failure to appoint a temporary administrator in place of the executor, Dorothy Cipperley, who is a plaintiff-appellee in this action, gave undue advantage to the plaintiffs and placed these defendants in an unfair position. This contention is without merit. The authority of the trial court to appoint a special administrator is discretionary. In re Estate of Telsrow,

235 Iowa 763, 765, 16 N.W.2d 626, 628 (1945). A party's interest in a will contest does not necessarily render that individual incapable of acting as the executor of the estate which is the subject of the will. Id. In this case, the executor had performed all of her duties, except the filing of the final report, before this cause of action came before the court. We find no abuse of discretion.

AFFIRMED.