IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

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IN THE MATTER OF THE ESTATE OF ESTELLA NEVADA REID, DECEASED

JIMMIE V. REID,

Plaintiff-Appellee,

vs.

BOBBY LEE REID,

Defendant-Appellant,

and

ANNE MILETICH,

Defendant.

Filed March 9, 1988

7-560
87-458

Appeal from the Iowa District Court for Marion County (No. 35-190) - Thomas A. Bown, Judge.

Beneficiary appeals from order setting aside will. **AFFIRMED.**

Stuart M. Pepper of Parrish & Kruidenier, Des Moines, for defendant-appellant Bobby Lee Reid.

Martha L. Mertz of Mick, Wilson & Mertz, Knoxville, and Bert Bandstra, Knoxville, for plaintiff-appellee.

Heard by Hayden, P.J., and Sackett, and Habhab, JJ.

SACKETT, J.

In this case we address the issue of the sufficiency of evidence to support a jury's finding decedent's will naming her step-son Defendant-Appellant Bobby Lee Reid as sole beneficiary was the result of undue influence. We affirm.

On March 21, 1985, decedent executed a will naming Bobby sole beneficiary. Decedent's prior will had named Bobby's brother, the decedent's step-son Jimmie V. Reid, as sole beneficiary. Jimmie filed a petition to set aside the March 21, 1985, will alleging Bobby had exercised undue influence over decedent when the will was executed. The jury made a finding of undue influence. Bobby has appealed from the resulting judgment contending (1) Jimmie had no standing to challenge the will, and (2) there was insufficient evidence to support the jury's findings of undue influence.

I.

Jimmie does have standing to contest the will. As a beneficiary under a prior will, Jimmie has standing to contest this subsequent will. In re Estate of Herm, 284 N.W.2d 191, 200 (Iowa 1979); Frazier v. State Cent. Sav. Bank, 217 N.W.2d 238, 239 (Iowa 1974).

II.

Bobby contends there is insufficient evidence to support a finding of undue influence. Undue influence is a substitution of the will of the person exercising the influence for that of the testator. In re Estate of Davenport, 346 N.W.2d 530, 531-32 (Iowa 1984). It must operate at the time the will is executed and must be the dominating factor. Id. at 532. Undue influence may be and usually is proven by circumstantial evidence. Olsen v. Corporation of New Melleray, 245 Iowa 407, 413, 60 N.W.2d 832, 836 (1953). In Davenport the court said:

> The elements necessary to establish a finding of undue influence are:
>
> (1) Susceptibility to undue influence.
>
> (2) Opportunity to exercise such influence and effect the wrongful purpose,
>
> (3) Disposition to influence unduly for the purpose of procuring an improper favor, and
>
> (4) Result clearly the effect of undue influence. (citations omitted). More than a "scintilla" of evidence is required.

Davenport, 346 N.W.2d at 532 (citations omitted).

Importunity, request and persuasion that do not go to the point of controlling the will of the testator do not constitute such undue influence as will invalidate a will. Johnstone v. Johnstone, 190 N.W.2d 421, 426 (Iowa 1971). The contestant must show a continuing and persistent effort to unduly influence the testator which destroys the testator's free will. In re Estate of Henrich, 389 N.W.2d 78, 83 (Iowa App. 1986). One who is infirm and mentally weak is more susceptible to influence than one who is not. In re Estate of Cory, 169 N.W.2d 837, 843 (Iowa 1969).

The fact a will is unnatural, unjust or unreasonable is a proper circumstance to be considered as tending to confirm the claim of undue influence. Davenport, 346 N.W.2d at 532; Frazier, 217 N.W.2d at 243. However, it is not sufficient for the contestant to merely show inequality of distribution under the will. Davenport, 346 N.W.2d at 532.

We view the evidence in the light most favorable to the verdict. Olsen, 245 Iowa at 413, 60 N.W.2d at 836. Decedent was eighty-two when the will was executed. There was evidence prior to the time of the execution of the will decedent was not oriented as to time, place and date. She was forgetful. She was uncertain as to when she had taken meals. Decedent had been in a nursing home shortly before the execution of the will. She was unable to make decisions about her day-to-day life. Bobby took decedent to the office of the

attorney when the will was drafted. Bobby testified upon deposition he was present in the room when the will was executed, a fact he denied at trial. The fact proponent is in the room when a will in his or her favor is executed should be taken into consideration in assessing the issue of substantial evidence. Shaw v. Duro, 234 Iowa 778, 787, 14 N.W.2d 241, 245-46 (1944).

We consider Iowa cases where the courts have found substantial evidence to support a finding of undue influence. See, e.g., Herm, 284 N.W.2d at 201 (the two proponents visited decedent in her sister's apartment on the day the will was drawn and one of the proponents, an internal revenue agent, typed the will); Frazier, 217 N.W.2d at 244 (decedent who had a longtime relationship with his own attorney had will drawn by proponent's attorney and proponent remained in room with testator and attorney while will discussed); Cory, 169 N.W.2d at 841 (will for decedent, age 83, was prepared in California by an attorney decedent had never met; attorney had been employed by decedent's wife of two months and his son from a prior marriage; decedent had no close contact with the son for 47 years; will was executed in said son's home); In re Telsrow's Estate, 237 Iowa 672, 676, 22 N.W.2d 792, 796 (1946) (proponents took decedent from sister's home in their car to an attorney decedent did not know to draw the will); In re Estate of Ensminger, 230 Iowa 80, 84, 296 N.W. 814, 815 (1941) (evidence showed several incidents in which proponent dealt with testator in a dominating way).

Additionally, Bobby was decedent's guardian and conservator. He was appointed March 6, 1985. As guardian and conservator of decedent he had a peculiar opportunity for exercising influence over her mind. Olsen, 245 Iowa at 413, 60 N.W.2d at 836-37. Where the dominant party in such a relationship has been active in the preparation or execution of the will, a suspicion of undue

influence arises. Herm, 284 N.W.2d at 200. We find substantial evidence to support the verdict and affirm the trial court.

AFFIRMED.