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IN THE COURT OF APPEALS OF IOWA

No. 3-535 / 92-2000

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF JEANNE A. NICHOLSON, Deceased.

RUTH J. RIECKE,

Appellant,

vs.

EDMUND H. CARROLL, Executor, JEAN PARRICK, MRS. TED GRIMES, YVONNE LEWIS, MRS. AL BORGMAN, GREG PELO, FAIRMONT CEMETERY ASSOCIATION, SALVATION ARMY, BUFFALO BILL MUSEUM, LeCLAIRE AMBULANCE SERVICE, and LeCLAIRE FIRE DEPARTMENT,

Appellees.

Appeal from the Iowa District Court for Scott County, James E. Kelly, Judge.

The plaintiff appeals a jury verdict against her in a challenge to the last will and testament of Jeanne A. Nicholson. **AFFIRMED.**

Phil L. Goedken, Bettendorf, for appellant.

Rand S. Wonio of Lane & Waterman, Davenport, for appellees.

Heard by Schlegel, P.J., Hayden, J., and Keefe, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, P.J.

The plaintiff appeals a jury verdict against her in a challenge to the last will and testament of Jeanne A. Nicholson. The plaintiff challenged the will on the grounds of undue influence and lack of testamentary capacity. The district court directed a verdict in favor of the defendants in this appeal on the issue of testamentary capacity. The district court also directed a verdict in favor of defendant Robert Jahns on the issue of his alleged undue influence over Nicholson. The jury returned a verdict in the defendants' favor.

The plaintiff now appeals, claiming the district court erred in: (1) failing to instruct the jury that if a confidential relationship existed, then a presumption of undue influence is established; (2) failing to submit the plaintiff's proposed instruction relating to attempts to isolate the testator and to spread rumors; and (3) failing to submit a clarifying instruction regarding the court's instruction on undue influence.

This case concerns a challenge to the last will and testament of Jeanne A. Nicholson by her sole surviving sibling, Ruth J. Riecke. Nicholson was divorced and had no children. Riecke challenged the will on the grounds of lack of testamentary capacity and undue influence. Riecke alleged Nicholson was unduly influenced by a caregiver, Jean Parrick, and Riecke's nephew, Robert Jahns. The matter proceeded to a jury trial.

The district court granted a directed verdict in the defendants' favor on the issue of the lack of testamentary capacity. The court also directed a verdict in the favor of Robert Jahns on the issue of his undue influence over Nicholson. The case was submitted to the jury on the issue of the undue influence of Jean Parrick.

During deliberations, the jury sent a note to the judge requesting a definition of the legal standard of the word "clearly" in an instruction defining undue influence. The instruction stated, in effect, that the result of the alleged undue influence must "clearly" be the result of undue influence. The court informed the jury that the word "clearly" had its ordinary, normal meaning. Neither party made objections to this instruction before it was submitted to the jury. The jury returned a verdict in the defendants' favor. Riecke filed a motion for new trial. The court overruled the motion and entered judgment on the jury's verdict.

The appellant first contends the trial court erred in failing to instruct the jury that if a confidential relationship existed between the deceased and the deceased's caregiver, Jean Parrick, then a presumption of undue influence is established, and the burden of proof shifts to the beneficiary to go forward with contrary evidence that shows no undue influence was exerted. Our scope of review regarding alleged erroneous instructions is on assigned error. Edwards v. City of Des Moines, 349

N.W.2d 786, 788 (Iowa App. 1984). Specifically, the appellant complains that by refusing to submit the following instruction, the trial court erroneously instructed the jury on the law:

> If you find a confidential relationship existed between Jeanne A. Nicholson and Jean Parrick, then a mandatory inference of undue influence is established and Jean Parrick had the burden of going forward with contrary evidence that there was no undue influence exerted and that she took no advantage of her dominant position.

To support this argument concerning the applicable law, the appellant cites Graham v. Courtright, 180 Iowa 394, 161 N.W. 774 (1917). Our reading of Graham does not support appellant's argument with regard to the controlling law. Graham involved a will contest concerning a bequest to the attorney who drafted the will. Id. at 403, 161 N.W. at 775. The court found that no presumption of undue influence is raised where the drafter of a will is a beneficiary. Id. at 408, 161 N.W. at 778. The court stated that such circumstances merely raise a suspicion which should be considered by the fact finder. Id.

Furthermore, even though such circumstances may create an inference of undue influence, depending upon the facts of the particular case, the burden does not shift to the proponent to negative the allegation of undue influence. Id. at 414, 161 N.W. at 780. The Graham court overtly stated:

> Whatever the proof, however, the burden does not shift, and it can never rightly be said that the burden is upon the proponent to negative the allegation of undue influence. Strictly speaking,

> the burden of proof never changes during the trial.

Id. at 413, 161 N.W. at 780 (citations omitted).

Our supreme court has recently recognized that Graham rejects the existence of such a presumption. In In re Estate of Dankbar, 430 N.W.2d 124 (Iowa 1988), the court stated:

> Where, as here, the persons charged with undue influence stand in a fiduciary relationship with the testator, unique opportunities for influence exist which may be properly considered. Thus, when the dominant party in such relation "'initiates the preparation of the will or gives directions as to its contents to the scrivener . . . and is made a beneficiary thereunder,'" there arises a suspicion, but not a presumption, of undue influence. See Olsen, 245 Iowa [407, 413-14, 60 N.W.2d 832, 837 (1953)] (quoting Graham v. Courtright, 180 Iowa 394, 407, 161 N.W. 774, 778 (1917)); see also [In re] Estate of Herm, [284 N.W.2d 191, 201 (Iowa 1979)].

Id. at 128 (emphasis added).

Accordingly, it is clear that the trial court did not erroneously instruct the jury on the controlling law. If the trial court had instructed the jury as requested by the appellant, the jury would have been misinformed with regard to the guiding legal principles to be applied during deliberation. The appellant's argument is entirely without merit.

Next, the appellant contends the trial court failed to include the following requested words in Jury Instruction 11--an instruction informing the jury of the circumstances to consider when determining the existence of undue influence:

> [Y]ou may consider any attempts to isolate the testator from others as well as setting afoot rumors, half-truths to the testator with respect to those persons disinherited.

The refusal to include the plaintiff-appellant's proposed jury instructions rests largely in the sound discretion of the trial court. State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970) (citing State v. Shephard, 255 Iowa 1218, 1231, 124 N.W.2d 712, 719-20 (1964)). We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

The trial court administered Jury Instruction Number 11 which was patterned after Iowa Civil Jury Instruction 2700.6. This instruction permitted the jury to consider eight different factual circumstances in determining whether undue influence was exerted, including the "catch-all" category: "8. Any other facts or circumstances shown by the evidence which may have any bearing on the question."

The trial court refused to include the appellant's requested words "because to do so would have been to comment upon the evidence." We agree. As noted by the supreme court in Edwards v. City of Des Moines, "A party cannot complain if instructions fail to emphasize

circumstances favorable to him. This is precisely what instructions should avoid." Edwards, 349 N.W.2d at 788 (quoting State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974)).

The trial court properly recognized that the appellant "was not prevented from arguing those alleged facts to show undue influence, and in fact did argue those facts and the inferences which could be drawn from them to the jury." The trial court did not abuse its discretion by refusing to instruct the jury as requested by the appellant.

Finally, the appellant asserts the trial court abused its discretion in refusing to give a so-called "clarifying instruction" in response to a jury question arising during deliberation. Iowa Rule of Criminal Procedure 197 permits the court, in its discretion, to further instruct the jury while the jury is deliberating. During deliberation, the jury sent a note to the judge, inquiring:

> Re: Instruction #9, point 4:
> "The result was clearly brought about by undue influence."
>
> Define for us the legal standard established by the use of the word "clearly?"

Jury Instruction Number 9 was taken, verbatim, from Iowa Civil Jury Instruction 2700.4--an instruction describing the essential elements of proving undue influence. The plaintiff-appellant requested the court to "clarify" the instruction by adding the word "appearing" to the instruction. The trial court declined the request and,

instead, informed the jury that the word "clearly" had its ordinary, normal meaning and told the jury that the jury was deemed to know the ordinary, normal meaning of words in the English language. We conclude the trial court did not abuse its discretion in refusing to give the requested instruction.

AFFIRMED.