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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

In the Matter of the Estate of	)	
ISABELLE O. BRITSON,	)	
Deceased,	)	Filed February 5, 1980
REUBEN BRITSON,	)	
Plaintiff-Appellee,	)	
vs.	)	
ERGEN BRITSON, IONE BEAL, GLADYS ANDERSON, CARROLL JOHNSON, STEPHEN JOHNSON, ESTHER HANSEN, HAZEL DAWSON, VIOLA MORRIS, NORMA DEAR, SYBIL FULLER, EDWARD JENNINGS BRITSON, JR., LORETTA DILALLO, SARAH RAUCH and IONE BEAL, Executrix of the Estate of Isabelle O. Britson,	)	268 2-61955
Defendants-Appellants.	)	

Appeal from Story District Court - David R. Hansen, Judge.

Defendants appeal ruling that upheld validity of testatrix's 1973 will, contending will resulted from undue influence by plaintiff and testatrix lacked requisite testamentary capacity to execute a valid will in 1973. Affirmed.

Donald L. Nelson of Nelson, Cahill & Cahill, Nevada, and John R. Hattery, Nevada, for defendants-appellants.

Robert L. Huffer, Story City, for plaintiff-appellee.

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

DONIELSON, J.

Defendants appeal ruling upholding validity of testatrix's 1973 will, contending will resulted from undue influence by plaintiff and testatrix lacked requisite testamentary capacity to execute a valid will in 1973. We affirm.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Isabelle Britson died June 18, 1977. Several days later one of her daughters, Ione Beal, filed a petition for probate of a will executed by Isabelle in 1964. On July 22, 1977, a son, Reuben Britson, filed a petition objecting to probate of the 1964 will, alleging a later will, executed in 1973, should be probated instead. Ione, joined by Isabelle's other children, filed an answer to Reuben's petition and objected to probate of the 1973 will, contending Isabelle lacked testamentary capacity to execute it and asserting the will resulted from undue influence by Reuben. The trial court found Isabelle had the requisite capacity when she executed the 1973 will and was not affected by undue influence from Reuben; the 1973 will was admitted to probate. Defendants appeal that judgment.

The disputed asset devised by the will is a 200-acre family farm. When Isabelle's husband died in 1961, she received an undivided two-thirds interest in the farm and her thirteen children shared in an undivided one-third interest. The 1964 will executed by Isabelle put one-half of her two-thirds interest in the farm and her residence in trust, with Ione as trustee, for the care, comfort, and welfare of her son Edward, who is retarded. The will further provided the remaining one-sixth interest in the farm be given in equal shares to the other twelve children, and on Edward's death the property in trust would pass in equal shares to the twelve children. The 1973 will put her entire two-thirds interest in the farm in trust for the use and benefit of Edward and Reuben, with Reuben as trustee and Reuben's wife as successor trustee. The will granted the trustee sole discretion to distribute income to the beneficiaries and provided on the death of Edward and Reuben the two-thirds interest in the farm was to go in equal shares to Reuben's five children.

II.

Contestants in this will contest had the burden of proof to establish testatrix was lacking in one or more of the essential elements of testamentary capacity or was

subject to undue influence. In re Estate of Secrist, 186 N.W.2d 665, 667 (Iowa 1971); In re Estate of Klein, 241 Iowa 1103, 1112, 42 N.W.2d 593, 598 (1950). These claims may be and usually are proven by circumstantial evidence, as direct proof is seldom available. Frazier v. State Central Savings Bank, 217 N.W.2d 238, 243 (Iowa 1974). The issue of undue influence is closely related to that of testamentary capacity. Conduct that might be insufficient to have an undue influence on a person of normal mental strength might be sufficient to operate on a failing mind, id.; one who is infirm is more susceptible to influence than one who is not. In re Estate of Ensminger, 230 Iowa 80, 82, 296 N.W. 814, 815 (1941). We turn initially to the issue of testamentary capacity.

A.

A contestant challenging a testatrix's testamentary capacity must show that when the will was executed the testatrix lacked mental capacity in one of the following respects:

1. To know and understand the nature of the instrument being executed;
2. To know and understand nature and extent of property;
3. To be able to identify and recall natural objects of bounty; and
4. To realize and know desired distribution of property.

A person lacking any of these characteristics cannot make a valid will. In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973); Secrist, 186 N.W.2d at 667.

We have carefully examined the record and conclude defendants failed to establish a deficiency in testatrix's mental capacity when she executed the 1973 will. We find particularly persuasive the testimony of Dayton Countryman, who drafted the will, and Mary Horine, who was Countryman's secretary when the will was drafted. Horine detailed her extensive conversation with Isabelle in Countryman's office regarding specific will provisions. Isabelle described her property holdings, named all her children, and set out her desired disposition and trust arrangement for Edward's care. At trial, Countryman described her as very alert and able to read the will along with him when they met to execute the will; he also testified she inquired about certain language and pronounced the will to be what she wanted.

Weighing against this evidence is the testimony of Isabelle's doctor, Dr. Harold D. Meyer. Dr. Meyer testified Isabelle had numerous strokes and suffered from hardening of the arteries, and hypertension. He also described her as agitated, temporarily confused, and lacking good judgment during her hospital stay that ended September 5, 1977. However, Dr. Robert H. Heise saw her two days following the execution of the will and found her to be mentally competent and detected no mental impairment.

A testatrix is presumed to possess the requisite testamentary capacity. In re Will of Walker, 152 Iowa 154, 160, 128 N.W. 386, 389 (1910). The requisite testamentary capacity is less than that required to engage in business generally or even to make contracts. Drosos v. Drosos, 251 Iowa 777, 786, 103 N.W.2d 167, 172 (1960). While Isabelle may have exhibited a diminishing mental capacity, this alone is insufficient to prove lack of testamentary capacity. See Leonard v. Shane, 182 Iowa 1134, 1142, 166 N.W. 373, 376 (1918). Testimony of witnesses as to departure from what they consider normal conduct and their expression of opinion of incapacity has weight only to the extent it is supported by observed facts. Gruis, 207 N.W.2d at 573. Here, evidence in the record from disinterested witnesses established Isabelle had the requisite testamentary capacity when she executed the 1973 will.

B.

Defendants also contend the 1973 will resulted from undue influence by Isabelle's son, Reuben. They point to the circumstances surrounding the making of the will as evidence of Reuben's undue influence. Although it is a close question, we conclude the trial court correctly held undue influence had not been proven by a preponderance of the evidence.

> Influence, to be undue, must be such as to substitute the will of the person or persons exercising the influences for that of the testator, thereby making the writing express, not the purpose and intent of the testator, but that of the person or persons exercising the undue influence. It must be equivalent to moral coercion and must operate at the very time the will is made, and must dominate and control the making of it.

Olsen v. Corporation of New Melleray, 245 Iowa 407, 413, 60 N.W.2d 832, 836 (1953).

A contestant alleging undue influence must show that:

(1) Testatrix was susceptible to undue influence;

(2) Influencer had opportunity to exercise undue influence and affect the wrongful purpose;

(3) Will reflects a disposition appearing to be the effect of undue influence; and

(4) Influencer had a disposition to assert undue influence to procure an improper favor.

In re Estate of Adams, 234 N.W.2d 125, 128 (Iowa 1975); Frazier, 217 N.W.2d at 244.

The trial court held defendants had established the existence of the first and second elements by a preponderance of the evidence, and the fourth was proven when Reuben's credibility was resolved against him. It also found Reuben had a confidential relationship with Isabelle. But, the trial court concluded the "1973 will does not appear to be clearly the product of any undue influence on Reuben's part." We find substantial evidence in the record supporting this conclusion and concur with the trial court. Proof of opportunity and disposition to exercise undue influence is insufficient to prove its existence. See Frazier, 217 N.W.2d at 244.

Defendants claim Reuben's undue influence is shown by the dispositional differences between the 1964 will and the 1973 will. The major change found in the 1973 will is the eventual disposition of the farm. Under the 1964 will the farm would have been divided equally among the children at Edward's death. Under the 1973 will Reuben shares in the trust's income and only his children will ultimately receive the farm. While this dispositional change greatly benefits Reuben to the detriment of defendants, it is not so unreasonable, unjust, or unnatural to confirm the claim of undue influence. See id. at 243-45; In re Estate of Eiker, 233 Iowa 315, 317, 6 N.W.2d 318, 320 (1942).

Our conclusion is supported by evidence in the record showing Isabelle's overriding concern for Edward's welfare. Due to Edward's diminished mental capabilities, he requires constant care and supervision; both of the wills provided for his care. The evidence is clear that Reuben among all the children showed a love and concern for Edward. The generous treatment of Reuben in the 1973 will can thus be viewed as Isabelle's way of rewarding and thanking him for the care and concern he showed for Edward, as well as herself. Although Reuben's actions may have influenced Isabelle, we are unconvinced he bent her will to his. See Frazier, 217 N.W.2d at 243 (importunity,

request, and persuasion that do not control will do not prove undue influence). Neither inequality nor injustice in the respective amounts given by a testatrix to her children raises a presumption of undue influence. See Vannest v. Murphy, 135 Iowa 123, 130, 112 N.W. 236, 239 (1907).

We affirm the trial court's judgment.

AFFIRMED.