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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-500 / 89-1936

IN THE MATTER OF THE ESTATE OF MARTIN C. HANSEN, DECEASED, RAYMOND J. HANSEN, EXECUTOR.

DOROTHY ALBERS,

137

Appellant,

vs.

RAYMOND J. HANSEN, Executor; RUBY HANSEN NICOLAISEN; MARY HANSEN; RAYMOND J. HANSEN, Individually; BARRY GOETTSCH; MICHELE GOETTSCH,

Appellees.

Appeal from the Iowa District Court for Sac County, Louie F. Beisser, Judge.

Albers appeals a district court decree refusing to set aside the May 20, 1986, will executed by the decedent, Martin Hansen. **AFFIRMED.**

Laurel L. Boerner of Boerner Law Firm, P.C., Ida Grove, for appellant.

Thaddeus Cosgrove, Holstein, and Jesse H. Leonard, Holstein, for appellees.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

On July 13, 1986, the decedent, Martin Hansen, died at age ninety. He was survived by his children, Dorothy Albers, Raymond Hansen, and Ruby Nicolaisen. The decedent's May 1986 will was filed for probate. Dorothy filed the petition to set the will aside.

In October 1982 the decedent executed several wills. After providing for his second wife, Clara, the decedent's final October 1982 will provided Dorothy would receive some farm land and would equally share in the residue of the estate. In April 1985 Clara died. After Clara's death, Dorothy's contact with her father was infrequent at best. However, Raymond, his wife Mary, and Ruby made frequent visits to the decedent.

The decedent's health started to deteriorate, and he eventually moved to a nursing home. The decedent told Raymond he wanted to see his attorney, Jesse Leonard, about his will. On May 19, 1986, Jesse went to the nursing home, and the decedent told him what he wanted in his will. Later that day, Dorothy visited the decedent at the nursing home. On May 20, 1986, Jesse and his secretary returned to the home with the completed will. Jesse read the will to the decedent and asked him after each paragraph whether he agreed with it. The decedent responded affirmatively. The decedent then signed the will with Jesse and his secretary as witnesses. However, the decedent did not specifically tell the two witnesses this was his will and he wanted them

to witness the agreement. The will provided for a gift to Dorothy of $10,000. However, only Raymond and Ruby were to share in the residue of the estate. The decedent made no additional provision for Dorothy, noting in the will she had not visited him since the death of Clara. The decedent died in July 1986.

Following trial, the district court admitted the May 1986 will into probate. Dorothy has filed this appeal. We affirm.

An action to set aside a will is triable as an action at law and, hence, our scope of review is on error and not de novo. Matter of Estate of Herm, 284 N.W.2d 191, 196 (Iowa 1979). The trial court's findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Dorothy first contends the trial court erred in finding the decedent's will was properly executed where the decedent did not declare the instrument to be his last will and testament to both witnesses and did not not request both witnesses to witness the execution of the will. We disagree.

Iowa Code section 633.279 (1991) provides for a will to be valid, it must be (1) in writing; (2) signed by the testator; (3) declared by the testator to be his will; and (4) witnessed by two competent witnesses who (a) sign at the request of the testator, (b) sign in the presence of the testator, and (c) sign in the presence of each other.

Upon examination of the criteria set forth in section 633.279, we conclude Dorothy's argument has no merit.

The record reveals prior to the execution of the will, a copy was provided to the decedent by his attorney, Jesse Leonard. Because the decedent had poor eyesight, he requested Leonard to read the will to him. Leonard read him the will, line by line, and asked the decedent following each item whether this was what he desired. The decedent answered affirmatively. Leonard testified at trial the decedent at all times appeared to be very sharp mentally and at all times knew what he was doing in requesting the changes in the will.

Our courts have previously addressed similar claims. In Matter of Estate of Graham, 295 N.W.2d 414, 417 (Iowa 1988), the supreme court noted the declaration requirement of section 633.279(1) was added to merely ensure the testator realize the testamentary significance of his actions. The court in Matter of Estate of Bearbower, 426 N.W.2d 392, 395 (Iowa 1988), reaffirmed the holding of In re Estate of Hagemeier, 244 Iowa 703, 706, 58 N.W.2d 1, 3, (1953), stating the request requirement of section 633.279(1) may be satisfied by evidence of the testator's acts or the surrounding circumstances.

We find the case at hand closely resembles the factual situations presented in Graham and Bearbower. In light of the discussions between Leonard and the decedent concerning the contents of each paragraph of the new will, and the

wording of the will itself, it is clear the decedent was well aware of the changes he was requesting, and he sufficiently declared this new will was to be his last will and testament. Leonard and his secretary, Betty Otto, visited the nursing home to attend the decedent's execution of the will. The decedent recognized both Leonard and Otto and did not object to their signing the document as witnesses. The record shows both signed the new will in the presence of the decedent and in the presence of each other. We hold the will was properly executed.

Dorothy next contends the trial court erred in failing to find she was left out of the will by mistake. This question, however, was not before the trial court, and the trial court made no such ruling on this question. Thus, we need not address an issue not presented to nor ruled upon by the trial court. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984).

Dorothy next maintains the trial court erred in failing to find the decedent's last will and testament was a product of undue influence. Dorothy alleges the decedent was very susceptible to undue influence from Raymond, Ruby, and Mary, the decedent's brother, sister, and sister-in-law, due to the decedent's deteriorating health. Dorothy points out she was informed of the decision to place the decedent in a nursing home only one day before.

The elements necessary to sustain 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. Matter of Estate of Davenport, 346 N.W.2d 530, 532 (Iowa 1984). Weak circumstantial evidence which at most raises the possibility of influence is not sufficient to support a finding of undue influence. Id. The contestant must show a continuing and persistent effort to unduly influence the testator which destroys the testator's free will. 1 S. Kurtz, Kurtz on Iowa Estates, §4.45, at 175 (1981).

In our judgment, Dorothy's allegations do not arise to even a scintilla of evidence. Though there is ample evidence of numerous visits by Raymond, Ruby, and Mary, there is no evidence other than speculation they intended their visits to influence the decedent to change his will. We affirm the trial court on this issue.

AFFIRMED.