IN THE COURT OF APPEALS OF IOWA

No. 1-109 / 00-676
Filed October 12, 2001

IN THE MATTER OF THE ESTATE OF SYLVIA E. KITCHEN, Deceased,

TOD HANEY, PEGGY HANEY, MICHELLE TROTTER, COLLEEN CLARK and GALEN CLARK,
Plaintiffs-Appellees/Cross-Appellants,

vs.

EALLEN KITCHEN, Individually and as Executor of the Estate of Sylvia E. Kitchen, and JANICE L. SANDERS,
Defendants-Appellants/Cross-Appellees.

FILED
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CLERK SUPREME COURT

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

The defendants appeal a district court ruling denying their motion for directed verdict, judgment notwithstanding the verdict, and motion for new trial in plaintiffs' will contest action against the defendants. **AFFIRMED.**

Rand S. Wonio and Troy A. Howell of Lane & Waterman, Davenport, for appellants.

Theodore J. Priester of Priester & Shie, Davenport, and Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellees.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

Sylvia Kitchen died on February 27, 1997. Her January 5, 1994 will was admitted to probate without objection in Scott County. Under the terms of her will Sylvia left the bulk of her estate to her niece, Janice Sanders, and Eallen Kitchen, a nephew of her late husband, Maynard.

Sylvia's will expressly revoked all of her prior wills, including one made on December 10, 1993. Under that will Sylvia left the bulk of her estate to Todd Haney and his wife, Peggy Haney.

These proceedings commenced with a petition to set aside Sylvia's January 5, 1994 will. The contestants, Todd Haney, Peggy Haney, Michelle Trotter, Colleen Clark, and Galen Clark, alleged that Sylvia's 1994 will was the "result of the undue influence of Eallen Kitchen and Janice L. Sanders."

In response, Eallen obtained an ex parte order from the district court authorizing employment of special counsel at estate expense to assist in the defense of Sylvia's will. In a ruling denying the contestants' motion to set aside this order the court modified it to "clearly delineate that the Executor will pay for all reasonable services which the Court hereinafter determines to be necessarily incurred on behalf of the estate, and are determined to be expenses of the estate."

In their answer, Eallen, Janice, and the other interested parties named as defendants denied the contestants' allegations of undue influence. They affirmatively alleged that the contestants' claims were barred by "res judicata" and "issue preclusion."

The proponents' res judicata and issue preclusion theories were subsequently advanced in their motion for summary judgment. Their theory of preclusion was based on an August 9, 1994 district court ruling entered in Sylvia's conservatorship that included the following determination concerning her January 5, 1994 will:

> Finally, after review of the sworn statements; the reports admitted by the guardian ad litem concerning his contacts with Sylvia Kitchen; and the applicable case law, the Court finds that Sylvia Kitchen did have full testamentary capacity to make the will which was drafted for her by attorney George Norman and which is dated January 5, 1994. Sylvia Kitchen had sufficient mental capacity to understand the nature of her act. She was able to recollect and knew the general extent of her property. Sylvia Kitchen could identify the natural objects of her bounty. She was able to know and comprehend the manner in which she wished to distribute her property among the natural objects of her bounty. Sylvia Kitchen understands the nature of the claim of those who are excluded from participation in her bounty. For all these reasons, the Last Will and Testament made by Sylvia Kitchen on January 5, 1994, is deemed to be a valid document.
>
> All of the above findings are made in spite of the resistance and objections lodged thereto by attorney Charles Munson on behalf of Mrs. Kitchen's grandchildren.

The district court denied the proponents' motion for summary judgment, stating:

> The structure of Iowa Probate Code, Chapter 633 of the Code of Iowa, 1997, governs proceedings to contest a will. Under Section 633.310 of the Code, an "interested person" may challenge a will only after the decedent's death and before the proponent probates the will. Under Section 633.308 of the Code, an "interested party" may bring an action to set aside a will after it has been admitted to probate. It is clear that no person can be an "interested person" or an "interested party" until after the death of the testator, which determines who is interested in the provisions of the will. Before death, there are no persons interested in the provisions of the will. At the time of the 1994 hearing, Sylvia E. Kitchen was alive. The will was ambulatory. No issue of undue influence could have been raised by the parties in 1994, since there were no "interested persons" who could bring such an action under Chapter 633 of the Code.

> In addition, this Court would only have jurisdiction as a probate court to hear such a suit after the death of the testator. Iowa Code section 633.12, 1997. Therefore, a prerequisite to bringing a suit to set aside a will based on undue influence is the death of the testator. Until that time, the will could be changed, and the issue of undue influence regarding one will is not the same as the issue of undue influence regarding another will. It is only the will that is probated and entitled to probate which may be attacked.

Prior to trial, the proponents filed a motion in limine seeking exclusion of evidence concerning Sylvia's testamentary capacity. Based on its reading of the petition, the district court held that contestants had only pled an undue influence claim and that they were accordingly limited to evidence supporting that theory. Contestants' motion to amend their petition to allege that Sylvia lacked the requisite testamentary capacity to make a will on January 5, 1994 was denied as untimely.

At the conclusion of the evidence, the district court denied the proponents' motion for a directed verdict and submitted the contestants' undue influence claim to the jury. The jury subsequently returned a general verdict in favor of the contestants.

The proponents moved for a judgment notwithstanding the verdict, claiming the evidence of undue influence was not sufficient to support the verdict. They also argued that the allegations of undue influence concerning Janice were divisible from those against Eallen and that any bequest or devise to her should accordingly stand. The district court, citing evidence from which the jury could infer both Eallen and Janice unduly influenced Sylvia, denied both motions and entered judgment accordingly. Eallen's application for payment of attorney fees incurred in defense of Sylvia's will was denied.

On appeal the proponents contend the contestants' challenge to Sylvia's January 5, 1994 will was precluded by the district court's earlier determination of its validity. They also claim that the evidence does not support the jury's implicit finding that Sylvia's will was the result of undue influence by either Janice or Eallen or, alternatively, that the doctrine of partial validity should have been applied to salvage Sylvia's bequests. Eallen additionally contends the district court erred by denying his application for attorney fees.

II. Claim Preclusion.

We review this issue for errors of law. Iowa R. App. P. 4.

The proponents contend the district court erred in failing to grant their motion for summary judgment. They argue that the contestants waived any claim that the district court lacked jurisdiction to determine the validity of Sylvia's 1994 will by raising issues of undue influence in the relevant conservatorship proceedings and by failing to appeal from the resulting judgment confirming the validity of Sylvia's will. They also argue that the court erred in determining that the ambulatory nature of wills prohibits an ante-mortem will contest. We disagree.

When a claim could not have been addressed in a prior proceeding because of limitations on subject matter jurisdiction, the resulting judgment is not considered preclusive. *Shumaker v. Iowa Dep't of Transp.*, 541 N.W.2d 850, 852-53 (Iowa 1995) (citing Restatement (Second) of Judgments § 26 (1982)). A court lacks jurisdiction to address a claim when brought by a party lacking the requisite standing. *Bronner v. Exchange State Bank*, 455 N.W.2d 289, 290 (Iowa Ct. App. 1990); *In re Trust of Willcockson*, 368 N.W.2d 198, 202 (Iowa Ct. App.

1985). Standing requires that a party have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Birkhofer ex rel. Johannsen v. Brammeier*, 610 N.W.2d 844, 847 (Iowa 2000) (quoting Black's Law Dictionary 1405 (6th ed. 1990)). Standing also requires the complaining party to show a specific personal and legal interest in the litigation and that they are injuriously affected. *Birkhofer*, 610 N.W.2d at 847. Because a testamentary instrument operates only upon the maker's death, no rights accrue to or vest in any other person until the death of the testator and the instrument is admitted to probate. *In re Estate of Lundgren*, 250 Iowa 1233, 1236-37, 98 N.W.2d 839, 841-42 (1959).

Although the parties raised issues of undue influence and Sylvia's testamentary capacity in the 1994 conservatorship proceeding, none had the requisite standing to challenge the validity of her will under either theory. *See Birkhofer*, 610 N.W.2d at 847 (Potential beneficiaries or heirs at law have no legal interest sufficient to establish standing.). As a result, the district court at that time lacked the requisite jurisdiction to address either the contestants' challenge to Sylvia's January 5, 1994 will or the proponents' application to confirm it. *Shumaker*, 541 N.W.2d at 852 ("If . . . a claim could not have been presented in the first action because of limitations in subject matter jurisdiction, it will not be precluded in a later action."). We are also unable to reconcile the proponents' claim that the court's general supervisory jurisdiction over the administration of conservatorship, Iowa Code § 633.10(3), permits an ante-mortem determination of these issues with either the foregoing authorities or Iowa's statutory scheme governing the prosecution of a will contest. *See* Iowa

Code §§ 633.308, 633.310. Lastly, our determination that the district court lacks jurisdiction to entertain ante-mortem will contests is dispositive of the proponents' claim that the contestants are bound by the court's 1994 conservatorship ruling by virtue of their failure to challenge it on appeal. *See In re Estate of Lilienthal*, 574 N.W.2d 349, 352 (Iowa Ct. App. 1997) (parties not bound by earlier judgment that is void for lack of subject matter jurisdiction).

We affirm on this issue.

III. Sufficiency of the Evidence.

We review a judgment notwithstanding the verdict on error. *Roling v. Daily*, 596 N.W.2d 72, 74 (Iowa 1999). The question is whether the evidence, when viewed in the light most favorable to the plaintiffs, was sufficient to generate a jury question. *Nesler v. Fisher & Co.*, 452 N.W.2d 191, 193 (Iowa 1990). We review the court's denial of a motion for new trial for abuse of discretion. *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 345 (Iowa 1999). If the jury verdict is not supported by substantial evidence and fails to effectuate substantial justice, a new trial may be ordered. *Id.* at 345-46. The trial court has broad discretion in passing on motions for new trials, and it is only when there is a clear abuse of that discretion that we will interfere with the denial of such motion. *Houvenagle v. Wright*, 340 N.W.2d 783, 785 (Iowa Ct. App. 1983). A court has no right to set aside a verdict just because it might have reached a different conclusion. *Id.*

A finding of undue influence requires proof of the following elements:

> 1) the testator must have been susceptible to undue influence; 2) the person alleged to have exercised undue influence must have had the opportunity to exercise it; 3) the person must have had the

> disposition to influence the testator unduly for the purpose of procuring an improper favor; and 4) the result must clearly appear to be the effect of undue influence.

In re the Estate of Henrich, 389 N.W.2d 78, 83 (Iowa Ct. App. 1986). Undue influence is usually established by circumstantial evidence and may be and often is based upon a cumulation of many factors. *Boehm v. Allen*, 506 N.W.2d 781, 784 (Iowa Ct. App. 1993). Conduct which might be insufficient to unduly influence a person of normal mental strength might be sufficient to operate upon a failing mind. *Olsen v. Corp. of New Melleray*, 245 Iowa 407, 416, 60 N.W.2d 832, 838 (1953).

The proponents do not dispute the fact that they had the opportunity to influence Sylvia or that she was susceptible to such influence. They, instead, contest the sufficiency of the evidence demonstrating that they were disposed to unduly influence Sylvia or that the resulting will was the result of that influence.

We, like the district court, find the evidence is sufficient to support the jury's implicit findings on these issues. The evidence indicates both Eallen and Janice intervened in Sylvia's financial affairs based on their common dissatisfaction with the terms of Sylvia's farm contract with Todd and Peggy Haney. There is also evidence that both sought to isolate Sylvia from other family members and exclude them from information and influence concerning her financial affairs. Their interference with Sylvia's longstanding relationship with her family attorney, Walter Newport, and selection of another attorney to write Sylvia's will, leaving them the bulk of her estate, provide additional support for the jury's verdict. Accordingly, we find no merit in either the proponents' motion

for judgment notwithstanding the verdict or motion for new trial and affirm on this issue.

Because we find substantial evidence that Sylvia's will was the result of undue influence by Janice, we need not consider Janice's claim that Sylvia's bequest to her should be salvaged under the doctrine of partial validity. *See In re Estate of Ankeny*, 238 Iowa 754, 765, 28 N.W.2d 414, 420 (1947) (doctrine of partial invalidity intended to protect innocent beneficiaries from misdeeds of others).

IV. Attorney Fees.

Our review is for correction of errors at law. Iowa R. App. P. 4.

We reject Eallen's claim that he is entitled to attorney's fees for defending the challenge to Sylvia's January 5, 1994 will.

Iowa Code section 633.315 provides as follows:

> When any person is designated as executor in a will, or has been appointed as executor, and defends or prosecutes any proceedings in good faith and with just cause, whether successful or not, that person shall be allowed out of the estate necessary expenses and disbursements, including reasonable attorney fees in such proceedings.

A finding of undue influence by the executor precludes an allowance of fees under the "good faith and just cause" test of section 633.315. *Swartzendruber v. Lamb*, 582 N.W.2d 171, 177-77 (Iowa 1998). Because Eallen was found to have unduly influenced Sylvia, he is not entitled to attorney fees. We affirm the decision of the district court.

AFFIRMED.