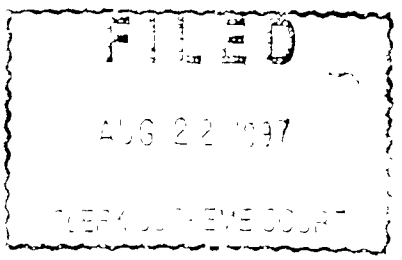
IN THE COURT OF APPEALS OF IOWA

No. 7-215 / 96-0632

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IN THE MATTER OF THE ESTATE OF LUELLA BAYER, Deceased,

JOAN BECKER, LOIS TAPHORN, BETTY HUEGERICH, TIM HACKFORT, JENNA HACKFORT, COLLEEN STEFFES, DOREEN STUEVE, MARY PLUCKHAHN, NANCY GACH, BOB HACKFORT, JOHN HACKFORT, DAN HACKFORT, KAREN KERKHOFF, DAVID HACKFORT, and BILL HACKFORT,



Appellants/Cross-Appellees,

vs.

LARRY SCHENKELBERG, Individually and as Executor of the Estate of Luella Bayer; GERALD TIGGES, MARY KAY TIGGES, Individually; and ROBERT JANSSEN and BARBARA JANSSEN, Individually; DEBBIE TRANNELL and GENE TRANNELL, Individually; ST. MARY'S CATHOLIC CHURCH and ST. ANTHONY'S REGIONAL HOSPITAL,

Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Carroll County, Joel E. Swanson, Judge.

Appellants appeal from the grant of a judgment notwithstanding the verdict in an action to set aside the decedent's will. **REVERSED AND REMANDED.**

Robert Kohorst and William Early of Kohorst Law Firm, Harlan, and David E. Green of Green and Siemann Law Firm, Carroll, for appellants.

Colin J. McCullough of McCullough Law Firm, Sac City, and Frank J. Comito of Neu, Minnich, Comito & Hall, Carroll, for appellees.

Heard by Habhab, C.J., and Cady and Streit, JJ.

HABHAB, C.J. 000017

Luella Bayer died on September 29, 1994. She was seventy-five years old. Luella was widowed and had no children. She executed a will on February 6, 1991, and the will was admitted to probate. Luella designated her friend, Larry Schenkelberg, as her executor. She left the bulk of her estate to Schenkelberg. She also left significant bequests to her hired hand and his wife, Robert and Barbara Janssen, and to her farm tenants, Gerald and Mary Kay Tigges.[1]

Luella's nieces, nephews, grandnieces, and grandnephews filed an action to set aside the will. A jury trial was held and defendants moved for a directed verdict at the conclusion of plaintiffs' case. The motion was denied. The jury found Luella's will was the result of the exercise of undue influence and a judgment was entered setting it aside. Defendants filed motions for a new trial and for judgment notwithstanding the verdict and plaintiffs resisted.

The district court granted the motion for judgment notwithstanding the verdict. The court found it was not evident from the testimony offered at trial that any of defendants' relationships or communications with the decedent rose to the level of an attempt to affect a wrongful purpose or to unduly influence Luella with respect to the distribution of her estate. The court concluded the record was "void" of evidence of a continuing and persistent effort by any of the defendants to unduly influence the

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[1] Four other beneficiaries of the will are also named as defendants, but apparently their conduct insofar as undue influence is not a significant issue in this appeal. They will be referred to later in this opinion.

testator and plaintiffs' case was "based on suspicion, surmise, conjecture, and speculation." The court ordered the will be admitted to probate.

On appeal, plaintiffs argue there was sufficient evidence to generate a jury question on the issue of undue influence and the court erred in granting a judgment notwithstanding the verdict. They contend the court substituted its judgment for that of the jury and improperly made assessments of witness credibility in determining whether to grant the motion.

To buttress their position, plaintiffs first direct to our attention that the trial judge, in doubting the credibility of Luella's beautician, stated in its ruling, "[I]t defies imagination that one would reveal intimate details to a beautician." The record reveals that the beautician testified Gerald Tigges, near the time Luella signed her will, stated to her after cutting his hair, "[B]oy, I sure missed the boat last night. And I [the beautician] said what are you talking about. And he said I got to get one more crack at her [Luella], and then I'll have that north farm."

Plaintiffs further direct to our attention that even though Larry Schenkelberg showered Luella with gifts, the trial court found such assertion was "hardly substantiated by any evidence." Plaintiffs again point out to us that there was direct testimony Schenkelberg gave Luella an emerald and a watch, a birthstone ring, a $500 gift certificate, a tiffany-style lamp, figurines, goblets, flowers, candy, and gift certificates to Mimi's Clothing store and Eckerman's Jewelry store.

Plaintiffs, to strengthen their position that the trial judge was acting as the trier of fact, further direct to our attention a provision in the trial court's ruling where it stated the testimony of plaintiffs' expert witness was "far from convincing." Plaintiffs stated that the trial court, after noting that Luella did not accept Schenkelberg's proposal of marriage and move to Arizona, concluded by stating, "Clearly, if those facts be true, she made her own decision and was unaffected by alleged overtures of Mr. Schenkelberg and clearly was not influenced." [2]

Plaintiffs also contend the court erred in denying their request for a jury instruction on the issue of whether defendants and the decedent had a confidential relationship. Since we are reversing this case and for the most part upholding the jury verdict, the question of whether the court should have submitted a jury instruction on confidential relationship need not be addressed.

In their cross-appeal, defendants argue the trial court erred in failing to instruct the jury it had to determine whether each individual defendant unduly influenced Luella in the execution of her will. They contend the doctrine of partial invalidity would apply to set aside only specific bequests rather than the entire will. In the event this court reverses the district court's grant of judgment notwithstanding the verdict, defendants request they be granted a new trial and the jurors be directed to

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[2] There are a number of other instances directed to our attention where plaintiffs complain the trial judge passed on the credibility of witnesses when, in fact, that was for the jury's determination. It, however, would serve no useful purpose in this opinion to set forth each one.

determine if each individual defendant exerted undue influence over the testator. Plaintiffs dispute that the doctrine of partial invalidity applies.

I. Undue Influence. When reviewing a trial court's judgment notwithstanding the verdict, we view the evidence in the light most favorable to the nonmoving party, regardless of whether such evidence is contradicted, to determine if reasonable minds could differ on the issue. *In re Estate of Olson*, 451 N.W.2d 33 (Iowa App. 1989). Every legitimate inference that can be reasonably made from the evidence is considered, and if reasonable minds can differ on the issue, it is for the jury to decide. *American Family Mut. Ins. v. Goot*, 543 N.W.2d 870, 871 (Iowa 1996). However, substantial evidence, more than a scintilla, is necessary and it must rationally support a verdict in favor of the contestants. *In re Estate of Springer*, 252 Iowa 1220, 110 N.W.2d 380, 383 (1961).

> To establish undue influence, the following elements must be shown:
> (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.

Boehm v. Allen, 506 N.W.2d 781, 784 (Iowa App. 1993)(citing *In re Estate of Davenport*, 346 N.W.2d 530, 532 (Iowa 1984)).

Undue influence is usually "established by circumstantial evidence and may be and often is based upon a cumulation of many factors." *Id.* However, mental capacity and freedom from undue influence are presumed. *Matter of Will of*

Pritchard, 443 N.W.2d 95, 98 (Iowa 1989).

> Undue influence must be such as to substitute the will of the person exercising the influence for that of the testator, thereby making the writing express, not the purpose and intent of the testator, but that of the person exercising the influence. It must operate at the very time the will is executed and must be the dominating factor.

Davenport, 346 N.W.2d at 532 (citing *In re Estate of Roberts*, 258 Iowa 880, 888, 140 N.W.2d 725, 730 (1966)). The influence must be equivalent to "moral coercion."

> It is generally insufficient for the contestants to merely show inequality of distribution under the will, although that fact combined with other circumstantial evidence may support a verdict in contestant's favor. Likewise, a testator's physical or mental weakness is not sufficient to prove undue influence, although the evidence of such weakness is admissible to show a tendency toward susceptibility to undue influence. It is also generally insufficient to show minimal acts of influence as evidence of undue influence. Rather, the contestant must show a continuing and persistent effort to unduly influence the testator which destroys the testator's free will.

Id.

a) Susceptibility. The record reveals Luella was generally of good health during her lifetime and was able to take care of herself on a day-to-day basis. However, plaintiffs contend Luella was susceptible to undue influence as she was disposed to want for the attention and approval of others. In support of this contention, plaintiffs offered the testimony of Dr. Michael Rosmann, clinical psychologist. Although he had never examined Luella, Dr. Rosmann reviewed the depositions of each plaintiff, Larry Schenkelberg, Gerald and Mary Kay Tigges, Robert and Barbara Janssen, as well as the will and other relevant information.

Dr. Rosmann opined Luella was a very likeable and personable woman who greatly desired and sought the approval of others, which rendered her easily influenced by them. He stated defendants were in a position to have undue influence over Luella and may have unduly influenced her, and Luella was susceptible to influence at the time the will was made.

Plaintiffs also presented evidence Luella advanced large sums of money to the Janssens, although Robert was not performing the work he was hired to do. Evidence also indicated Luella would not fire Robert despite his poor performance. Additionally, plaintiffs presented evidence which indicated Luella was not financially astute, as she made bank deposits incorrectly and seemed to be unaware of the extent of the value of her estate.

b) Opportunity. Plaintiffs presented evidence Larry Schenkelberg saw Luella once a week for dinner. Evidence also indicated Robert Janssen saw Luella every day and Barbara Janssen visited her twice each week. Gerald Tigges also had frequent contact with Luella.

c) Disposition. Evidence was presented at trial which indicated Robert Janssen successfully secured large sums of money as advances in pay, and he and Barbara also obtained large sums in loans from Luella.

There was evidence Luella felt it necessary to consult with Schenkelberg in all major purchasing decisions. He apparently influenced her decision to purchase a

Cadillac, although she felt she was unable to afford it. Schenkelberg ultimately was to receive the car pursuant to Luella's will.

Regarding the depositions of Gerald and Mary Kay Tigges, plaintiffs introduced evidence Gerald had made statements to the effect that if he "got one more crack at [Luella]," he would receive one of her farms.

d) Result. The will provided Robert and Barbara Janssen would receive the farm they occupied during Luella's life. Schenkelberg received all of Luella's household goods and her home and the farm she lived on. Gerald and Mary Kay Tigges also received a farm. Plaintiffs received nothing under the will, although Luella had indicated on different occasions they would be provided for.

Disposition Under this Division. After reviewing the evidence in the light most favorable to plaintiffs, we find there is sufficient and substantial evidence to support the jury verdict with regard to defendants Larry Schenkelberg, Roberta and Barbara Janssen, and Gerald and Mary Kay Tigges. The issues were properly submitted to the jury as there was sufficient evidence to cause reasonable minds to differ. The trial court erred in sustaining the judgment notwithstanding the verdict as to these defendants. Accordingly, we reverse the trial court's grant of judgment notwithstanding the verdict and reinstate the jury verdict as to these defendants.

II. Instruction Requiring Individual Determination for each Defendant. Defendants maintain that if only some of the defendants unduly influenced Luella, the will should be declared partially invalid as to the bequests to those who are found to

have exerted undue influence. They argue the innocent beneficiaries should not lose their bequests because of the actions of other beneficiaries. They allege the trial court erred in refusing to instruct the jury to make individual findings as to each defendant. They request this matter be remanded for a new trial and an instruction be given to the jury requiring it to determine whether each individual defendant unduly influenced Luella in the execution of her will.

For the reasons expressed previously in this opinion, the request for a new trial is denied. The requested instruction, which for reasons not explained was limited as to the issue of undue influence to the defendants Larry Schenkelberg, Roberta and Barbara Janssen, and Gerald and Mary Kay Tigges only, and made no reference to the defendants Debbie Trannell and Gene Trannell, St. Mary's Catholic Church, and St. Anthony's Regional Hospital. The special interrogatories submitted with the requested instruction also fail to include the defendants Debbie Trannell and Gene Trannell, St. Mary's Catholic Church, and St. Anthony's Regional Hospital. In addition, it is neither supported by nor does it request an instruction setting forth the law relating to partial invalidity.[3] Further, we are not convinced the requested instruction represents the law in this state when it casts upon the plaintiffs the burden to prove Luella Bayer was "unquestionably" subject to undue influence. The proof required is only that she be "susceptible" to undue influence.

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[3] From our examinations of the pleadings, we find no reference to partial invalidity.

Having determined the court erred in sustaining the motion for judgment notwithstanding the verdict as to defendants Larry Schenkelberg, Robert and Barbara Janssen, and Gerald and Mary Kay Tigges and the reinstatement of the verdict as to them, it follows that the provisions of the will relating to each of those defendants are invalid. That, of course, does not finalize this appeal, for we must yet consider the bequests of the remaining defendants.

In a great majority of American jurisprudence, it has been established that parts of a will may be held valid and enforceable, even though other parts are invalid because of undue influence. Partial invalidity was first touched on by our supreme court in *In re Estate of Eiker*, 233 Iowa 315, 6 N.W.2d 318 (1942). However, the court in *Eiker* did not consider the effect of this rule on the facts before it, for it found the issue was first made on appeal. Later, in the case of *In re Estate of Ankeny*, 238 Iowa 754, 28 N.W.2d 414 (1947), after recognizing the question of partial invalidity was new in Iowa, our supreme court stated, "it has arisen in many states and been definitely decided." *Id.* The Iowa supreme court then quoted the following from 68 C.J., *Wills* section 254:

> It is a rule of general application that if a will is valid as to some of its provisions and invalid as to others, and the valid provisions can be separated from the invalid, and upheld without doing injustice to any of the beneficiaries under the will, or defeating the general intent of the testator, the will must be sustained in so far as it is valid, even though the invalid provisions relate to or affect most or nearly all of the estate, except that otherwise valid provisions which are by their terms dependent upon invalid provisions must fail with the latter.

Ankeny, 238 Iowa at 766, 28 N.W.2d at 420. The supreme court in *Ankeny* also cited with approval the following taken from 68 C.J., *Wills* section 448:

> In the absence of statutory provision to the contrary, it is generally held that, where some of the provisions of a will are void for fraud or undue influence, which can be separated from the valid parts of the will without doing injustice to the beneficiaries, or impairing the general intent of the testator, the whole will is not rendered invalid, and the portions not affected with undue influence will be given effect.

Ankeny, 238 Iowa at 766, 28 N.W.2d at 420.

We think the circumstances of this case are such that the doctrine of partial invalidity should be applied. Applying that doctrine with the jury's finding of undue influence as to defendants Larry Schenkelberg, Robert and Barbara Janssen, and Gerald and Mary Kay Tigges, we conclude Articles III, IV, V, VI, VII except for the twenty shares of stock bequeathed to Debbie Trannell, and VIII are invalid, for we believe there is substantial evidence to support the jury verdict that the execution thereof by the testator was procured by undue influence. Probate as to those articles should be denied. Article IX is invalid for it cannot be separated from the valid parts of the will. Article XI is invalid and another executor should be appointed.

As to the remainder of the will, those provisions are entirely separable from the articles declared invalid, and it is clear they were not executed by the exercise of undue influence but were the will of the testator and accordingly should be admitted to probate. The court, for the reasons and to the extent hereafter explained, should have sustained the defendants' motion for judgment notwithstanding the verdict as to

the defendants Debbie Trannell and Gene Trannell, St. Mary's Catholic Church, and St. Anthony's Regional Hospital.

In determining that the valid portions of the will are separable from the invalid, we note that from the plaintiffs' pleadings, it was never alleged nor is there any proof Debbie Trannell and Gene Trannell (although Gene Trannell is named as a defendant, we are unable to find he was bequeathed anything under the testator's will), St. Mary's Catholic Church, and St. Anthony's Regional Hospital exerted undue influence as it relates to their bequests under the decedent's will. Thus, the decedent's will is valid as to Article II which bequeathed the sum of $1000 to St. Mary's Parish, Willey, Iowa, for masses for the repose of the decedent's soul, and Article VII which bequeathed twenty shares of stock of the Carroll County Bank to Debbie Trannell. The will should be admitted to probate as to those articles.

The bequest under Article X, the residual clause of the decedent's will, poses a problem not easily resolved. Once again, there is no pleading or proof that St. Mary's Parish, Willey, Iowa, and St. Anthony's Regional Hospital of Carroll, Iowa, exerted undue influence on the testator. However, it is clear the decedent's intent under her will was to bequeath to the church and the hospital only that property that remains after the distribution of the property bequeathed in the previous articles.

Since we have determined the property bequeathed under Articles III, IV, V, VI, VII except for the twenty shares of stock bequeathed to Debbie Trannell, and VIII are invalid, that property passes under the laws of intestate succession. If there is any

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property remaining that is not specifically bequeathed under those articles previous to Article X, that property shall pass to St. Mary's Parish, Willey, Iowa, and St. Anthony's Regional Hospital of Carroll, Iowa, under the residual clause of the decedent's will. To that extent, the will should be admitted to probate as to Article X.

In conclusion, we have given effect to those provisions of the will that are not affected with undue influence. While one should not be permitted to profit from his own wrong, others who are innocent should not suffer therefrom. *In re Estate of Hollis*, 234 Iowa 761, 770, 12 N.W.2d 576, 581 (1944) We believe the provisions of the will which are void for undue influence can be separated from the valid parts of the will. We have considered all aspects of this case and, as stated in *In re Horner's Will*, 237 N.Y. 489, 143 N.E. 655 (1924):

> The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the . . . [instrument] will function if the knife is laid to the branch instead of at the roots.

In re Horner's Will, 237 N.Y. at 495, 143 N.E. at 656-57.

We have considered the remaining contentions raised by the parties and find they are without merit.

REVERSED AND REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO PROCEED IN A MANNER CONSISTENT WITH THIS OPINION.