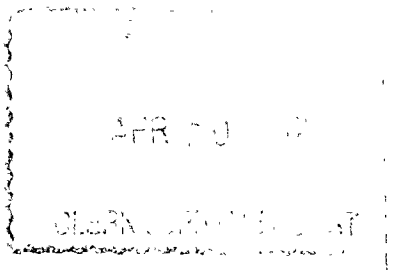
IN THE COURT OF APPEALS OF IOWA

No. 7-088 / 96-0590



IN THE MATTER OF THE ESTATE OF PEARL LOHF,
Deceased,

HAROLD W. LOHF,
Plaintiff-Appellant,

vs.

ELMER W. LOHF and ELMER W. LOHF, Executor of the Estate of PEARL LOHF, Deceased,
Defendants-Appellees.

Appeal from the Iowa District Court for Benton County, David M. Remley, Judge.

The plaintiff appeals from the judgment entered against him following a jury trial on his action to contest the will of the decedent based on undue influence by the defendants. **AFFIRMED.**

James T. Holmes and James C. Holmes of Holmes & Holmes, Cedar Rapids, for appellant.

Mark E. Mossman of Mossman, Mossman & Fraker, L.L.P., Vinton, for appellees.

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

HUITINK, J.

The dispute between the parties arises out of an action filed by the Plaintiff Harold W. Lohf (Harold) to set aside the will of the parties' mother, Pearl Lohf (Pearl). Harold appeals the decision of the district court excluding evidence of a separate pending lawsuit against the defendant Elmer W. Lohf (Elmer), concerning the estate of the parties' father, William Lohf (William).

I. Background Facts and Proceedings.

William and Pearl were married in 1925 and had two sons, Harold, born in 1927, and Elmer, born in 1928. The couple owned a 288-acre farm near Belle Plaine in Benton County, the "home place," on which they operated a successful grain-livestock operation with their two sons and William's brother, Eldo. Harold married his wife Doris in 1949 and moved onto a rented 180-acre farm north of the home place. Harold and his wife purchased a 160-acre farm north of the home place in the 1960's and purchased another nearby farm in the early 1970's. Elmer moved off the home place in 1971 when he married his wife Charlotte and the couple began purchasing farms in the area. At the time of trial, they owned 770 acres. Over the years, the brothers and their father shared labor and machinery and farmed the home place together.

The cooperative farming arrangement at the home place subsided in the early 1970's. Elmer continued to participate in an informal partnership with his father and

by 1975, he was receiving a fifty-percent share of the livestock. In 1978, William and Pearl executed mirror wills equally dividing their property between Harold and Elmer.

The health of both William and Pearl deteriorated in the early 1980's. In October 1986, William was diagnosed with a heart condition. Following physician's orders, Elmer and Charlotte took William to St. Luke's Hospital in Cedar Rapids. At William and Pearl's request, Elmer stopped at their attorney's office in Vinton. The couple instructed the attorney to draft mirror wills providing that upon the death of the survivor, their property was to be distributed to Elmer. No provisions were made for Harold. William and Pearl read and signed the wills before two independent witnesses.

After William's death in November 1990 at the age of ninety-one, Harold filed an action to contest the will and also sought to be appointed as Pearl's conservator. Elmer challenged Harold's standing to file the will contest and Harold subsequently dismissed the action.

Pearl died in April 1994 at the age of eighty-nine. Pearl's will was admitted to probate in May 1994 and Elmer was appointed executor of her estate. The gross value of her estate was $839,466.02.

In September 1994, Harold filed a petition to set aside Pearl's will asserting that she lacked testamentary capacity and also that the will was the result of undue

influence by Elmer. Harold dismissed his testamentary capacity claim prior to trial. The case was tried to a jury in January 1996. Judgment in Elmer's favor was entered that same month.

In October 1995, Harold filed a separate action against Elmer for tortious interference with Harold's right of inheritance from his father.[1] The suit alleged Elmer purposefully deprived Harold of his inheritance under the original will completed by William in 1978. During the trial to contest Pearl's will, Elmer testified his father's 1986 will had been probated and the estate was closed. Harold sought to cross-examine Elmer concerning the existence of the pending tort action. The district court made the following observations upon excluding this proffered evidence:

> Number 1, under Rule 401 of the [Iowa] Rules of Evidence, it's not relevant. And, Number 2, even if it is relevant, under Rule 403, the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury and the considerations of undue delay, waste of time and presentation of cumulative evidence.

On appeal, Harold challenges the trial court's decision asserting the ruling deprived him of a fair trial of the issues. Harold properly preserved this issue by making an offer of proof before the trial court.

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[1] Harold also filed a third suit against his brother in which he sought to set aside specific joint tenancy transfers made by William and to impose a constructive trust upon Elmer as to those assets. The district court sustained Elmer's motion to dismiss the action prior to trial of the present action. Harold is separately appealing the dismissal.

II. Standard of Review.

As a general rule, decisions concerning relevance and materiality are discretionary. *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410, 412 (Iowa 1995). We reverse only upon a showing that such discretion has been abused to the prejudice of the complaining party. *Id.* Even otherwise relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403; *Sunrise Developing Co. v. Iowa Dep't of Transportation,* 511 N.W.2d 641, 644 (Iowa App. 1993).

III. Admissibility of Pending Lawsuit.

Harold argues that since the 1986 wills were identical and executed simultaneously, it was necessary for the jury to consider Elmer's influence concerning both wills and not simply Pearl's will alone. Elmer testified on direct examination that William's 1986 will had been probated and closed. Harold contends the evidence of the tort action was required to rebut the inference that the closing of William's estate conclusively established his will was not the result of Elmer's influence.

We find Harold's arguments are without merit. The jury was required to determine whether Elmer unduly influenced his mother in the drafting of her 1986 will. The fact that a tort action had been filed concerning his father's will does not make it more probable Elmer unduly influenced his mother. We also note both parties introduced evidence describing the relationships between Elmer and both

parents. Furthermore, evidence was introduced concerning any opportunity Elmer would have had to exercise improper influence over his parents. Finally, the record reveals Harold was able to establish through other testimony the relevance of the simultaneous execution of his parents' wills and also Elmer's role in these events. Accordingly, the exclusion of the evidence relating to the tort action did not result in any prejudice to Harold. *See* Iowa R. Evid. 103(a) ("error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, . . ."). We affirm the decision of the trial court.

AFFIRMED.