FILED
AUG 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF EMMA L. BAKER, DECEASED.

281

MARLENE R. JOSS,

Plaintiff-Appellant,

vs.

CHARLES A. BAKER, ET AL.,

Defendants-Appellees.

Filed August 26, 1982

2-158
2-66976

Appeal from Polk District Court - James P. Denato, Judge.

The contestant of a will appeals from the trial court's ruling upholding the will. AFFIRMED.

Robert E. Dreher of Dreher, Wilson, Adams, Jensen, Sayre & Gribble, Des Moines, Iowa, for plaintiff-appellant.

Robert G. Riley and Gregory R. Brown of Duncan, Jones, Riley & Finley, Des Moines, Iowa, for defendants-appellees.

D. J. Goode of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, Iowa, for defendants-appellees co-executors and co-trustees.

Heard en banc.

The contestant of a will appeals from the trial court's ruling upholding the will. The contestant asserts that the confidential relationship between the testator and one of the proponents (her son) created a presumption of undue influence which the proponents should have been required to overcome. In addition, the contestant asserts that the trial court erred by permitting certain testimony over her objection based on the "dead man's statute," and by excluding on foundational grounds certain opinion testimony concerning testator's testamentary capacity and susceptibility to undue influence.

Emma Baker died in 1979, at the age of 88, in possession of assets worth over a million dollars. She was survived by one son, Charles; another son, Frank, had died earlier. She was also survived by six grandchildren. Five of the grandchildren were the children of Charles; the sixth grandchild was Frank's daughter, plaintiff Marlene Joss.

Emma Baker executed several wills between the time of her husband's death in 1970 and her own death in 1979. All of these wills left most of her property in the ownership or control of Charles and his wife and children. The earlier wills, dated from 1970 to 1977, left Marlene $50,000 in cash and 40 acres of land. A will executed in 1978 left Marlene only the $50,000 in cash; witnesses for Charles testified that Emma had stated she was intentionally reducing Marlene's bequest because she had suffered harassment from Marlene. Emma's final will, executed in January 1979, also left Marlene $50,000; the 1979 will differed from the 1978 will only in that it established a trust for the gifts to Charles' side of the family in order to avoid inheritance taxes.

Marlene contested the 1979 will on the ground it had been procured by the undue influence of Charles and his wife during a period of time when Emma lacked the mental capacity to make a will. A lengthy trial was held, during which the parties presented sharply conflicting evidence about Emma's alertness and mental competence during the years before her death and about Emma's relationships

with Charles and Marlene.

The district court rejected Marlene's contest and upheld the will. The court concluded that Marlene had failed to prove testamentary incapacity at the time the 1979 will was executed or at the time any previous will was executed. This finding is not challenged on appeal. The court also concluded that the 1978 reduction of the gift to Marlene was done by Emma's personal decision and was not procured by any influence of Charles. The court noted that Charles had managed Emma's business affairs for about a decade before her death and had been influential with her in general as to all matters, but the court commented that any influence he may have had over her decisions regarding property was not "undue influence" but was entirely normal in light of the close relationship between mother and son.

I. Undue Influence. The first matter which Marlene argues on appeal is that "the trial court erred when it failed to apply a rule of law requiring the proponents to overcome a presumption of undue influence in view of the alleged confidential relationship of the Bakers to the testator, their activities with respect to the execution of the will, and the unnatural distribution." As a result of Iowa Code § 633.33 (1981), this is an action at law. Accordingly, the trial court's findings of fact are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

On our review of the evidence and the relevant case law, we conclude that the trial court did not engage in any misconception of the applicable law as to the burden of proof or applicable presumptions so as to induce an incorrect result. Instead, we believe that the trial court correctly concluded that because there is no bench mark of fair dealing in evaluating the propriety of a particular testamentary disposition, the rules which govern inter vivos transfers to persons enjoying a confidential relationship with the grantor do not necessarily apply with equal force in testamentary situations. See, e.g., In re Estate of Herm, 284

N.W.2d 191, 201 (Iowa 1979). In the present case the challenged will, as it affects Marlene's interests, is not noticeably dissimilar from an earlier will executed by testator on July 24, 1978, six months prior to the execution of the challenged will. There was testimony from the lawyer who drafted the July 24, 1978, will that as it affected Marlene's interests, the testator had expressed a specific intent and reason for eliminating a devise of real estate to Marlene which had been contained in a prior will executed May 19, 1977. Otherwise, Marlene's share of testator's estate under the 1977, 1978, and 1979 wills remains the same. In view of these circumstances and in the absence of more compelling evidence of undue influence as to the earlier wills, the trial court's findings of fact on the issue of undue influence find adequate evidentiary support in the record and may not be disturbed.

II. Dead Man's Statute (§ 622.4). The next point urged by Marlene on appeal is that the trial court erred in permitting attorney William Fulton to testify to personal conversations and transactions with the decedent. It is claimed that the witness is incompetent to give such testimony by reason of Iowa Code § 622.4 (1981). In this regard we conclude that Marlene has failed to demonstrate that attorney Fulton, as potential attorney for the executor at the time the will was drawn, enjoyed sufficient interests in the decedent's estate to bar his testimony under the statute. See and compare, In re Kenney's Will, 213 Iowa 360, 239 N.W. 44 (1931).

III. Excluded Opinion Testimony. Finally, we consider Marlene's claim that the trial court erred in excluding the opinion testimony of two witnesses as to the mental competency and susceptibility to undue influence of the testator. Trial courts have a broad latitude in ruling upon the admissibility of such testimony. Porter v. Iowa Power & Light Co., 217 N.W.2d 221, 231 (Iowa 1974). Their rulings in this regard will be reversed only when an abuse of that discretion is shown. Speed v. State, 240 N.W.2d 901, 908 (Iowa 1976). We find no abuse of

discretion on the challenged ruling and, in addition, we believe that this testimony, if received, would not have altered the result. We have considered all issues presented and find no basis for reversal.

AFFIRMED.