IN THE COURT OF APPEALS OF IOWA

No. 3-296 / 12-1029
Filed June 12, 2013

BILLY J. MATKOVICH and
CAROL A. WARDLOW,
Plaintiffs-Appellants,

vs.

JOHN D. MATKOVICH and
CATHY L. MATKOVICH,
Defendants-Appellees,

and

CATHY L. MATKOVICH, Individually,
WES MATKOVICH, Individually,
ANDY MATKOVICH, Individually,
MICHELLE JONES, Individually,
SEAN WARDLOW, Individually,
JENNIE MATKOVICH, Individually,
KIRK WARDLOW, Individually,
CHAD WARDLOW, Individually,
BILLY MATKOVICH, Individually
and MARIJO ALLEN, Individually,
Defendants.

IN THE MATTER OF THE ESTATE OF
JENNIE A. MATKOVICH, Deceased.

Appeal from the Iowa District Court for Appanoose County, James Q. Blomgren, Judge.

The plaintiffs appeal the district court order denying their action to set aside the will. **AFFIRMED.**

Gregory G. Milani of Orsborn, Milani, Mitchell & Goedken, L.L.P., Ottumwa, for appellants.

Steven Gardner of Denefe, Gardner & Zingg, P.C., Ottumwa, and John Martin, Bloomfield, for appellees.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Jennie Matkovich's two oldest children—Bill Matkovich and Carol Wardlow—objected to the probate of her will and petitioned to set it aside. They allege Jennie was mentally incompetent at the time the will was executed and the will was the result of undue influence by Jennie's youngest child, John Matkovich. Following trial, the district court denied the request to set aside the will. Bill and Carol appeal.

The evidence shows Jennie Matkovich had the appropriate mental capacity to understand her property and the nature of the will she executed on February 3, 2009, and she was not unduly influenced by John. As a result, the plaintiffs have failed to carry their burden, and we affirm the district court order denying their request to set aside the will.

I. Background Facts and Proceedings.

Jennie Matkovich and her husband, William, owned approximately 280 acres of farmland in Appanoose County: 120 acres were known as "John's Place" and 160 acres were referred to as the "Home Place." When William died intestate in 1971, a one-half interest in the land passed to Jennie and an undivided one-half interest passed to Jennie's three children: Bill, Carol, and John. The following year, the children deeded this interest back to Jennie with the belief that Jennie's estate would later be divided between them.

In the wake of her husband's death, Jennie executed a will dated May 4, 1971. The will provided Jennie's only grandchild at the time would receive

$2000, and the balance of the estate would be equally divided between Bill, Carol, and John.

In 1974, Jennie purchased an additional 160 acres of farmland. She borrowed $7000 from Carol to make the down payment, which was repaid.

After William's death, John ran Jennie's farm operation. For more than thirty years, John farmed Jennie's land with his equipment. John and Jennie split the annual crop expenses. Jennie determined when her share of the crop would be sold and for what price. Jennie also owned cattle, which John took care of. With Jennie's consent, John and his wife, Cathy, built a home on the 120-acre parcel known as "John's Place" and have lived on the land since.

On October 31, 1983, Jennie executed a codicil to her will, which devised $2000 to each of her eight grandchildren. It also bequeathed John's Place to John, subject to John surviving her. As provided in her will, the rest of the estate was to be equally divided among her three children.

In November 2008, John contacted attorney Jim Craver at Jennie's behest. Jennie had told John she wished to change her will to leave him her entire farm operation because he had worked his entire life for it and provided her a living by doing so. She also wished to transfer John's Place to John inter vivos. Craver began working on a draft of the will and a deed to John's Place; when he became ill, Craver contacted attorney Thomas Anders to complete work on the will.

Anders sent a letter and revised drafts of a proposed will and proposed deed to John's Place to Jennie at her home on February 3, 2009. At Jennie's

instruction, John's Place was valued at $50,000 on the warranty deed. The will bequeathed $50,000 to Bill and Carol, with the balance of the estate going to John.

On February 5, 2009, Anders met with Jennie at the Golden Age Nursing Home, where she had been staying after being injured in a fall in January 2009. John and his wife, Cathy, were also present in the room as were Vickie Spurgeon, Craver's former legal assistant, and Deborah Hiatt, Anders's legal assistant. Anders read Jennie the draft of the will and asked her if she understood it. He also asked her about her assets to determine if she understood what they were. Jennie then executed the will.

Jennie died on March 7, 2009. Her will was admitted to probate on March 16, 2009. Bill and Carol filed an objection to probate of the will and a petition to set aside the will on July 14, 2009.[1] Bill and Carol waived a jury trial and a bench trial was held on February 6, 2012. On March 21, 2012, the district court entered its ruling denying and dismissing the action to aside the will. The plaintiffs' motion to enlarge and amend was also denied. The plaintiffs filed a timely notice of appeal.

II. Scope and Standard of Review.

Review of an action to set aside a will is triable at law. *In re Estate of Todd*, 585 N.W.2d 273, 275 (Iowa 1998). Our review on appeal from a will contest is on assigned error, not de novo. *Id.*

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[1] The plaintiffs also filed an action challenging the intervivos transfer of John's Place to John. The actions were consolidated and, following trial, the court denied the action. The plaintiffs do not challenge the court's ruling on the intervivos transfer on appeal.

III. Analysis.

A. Undue Influence.

The plaintiffs first contend the district court erred in denying their petition to set aside the will because it was the product of John's undue influence. They argue Jennie's age, health, and John's confidential relationship with Jennie made her susceptible to undue influence.

Undue influence occurs where one substitutes his or her will for the will of the testator, making the writing the intent of the person exercising the influence rather than that of the testator. *In re Estate of Davenport*, 346 N.W.2d 530, 531-32 (Iowa 1984). There are four elements of an undue influence claim:

> (1) the testator was susceptible to undue influence; (2) defendants had an opportunity to exercise undue influence and effect the wrongful purpose; (3) defendants had a disposition to influence unduly to procure an improper favor; and (4) the result, reflected in the will, was clearly the effect of undue influence.

In re Estate of Bayer, 574 N.W.2d 667, 671 (Iowa 1998). For influence to be considered undue, it must be the "equivalent to moral coercion." *Id.*

Those seeking to set a will aside, based on undue influence, carry the burden of proving the essential elements of the action by a preponderance of the evidence. *Todd*, 585 N.W.2d at 277. While undue influence may be proved by circumstantial evidence, more than a "scintilla" of evidence is required. *Bayer*, 574 N.W.2 at 671. "Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be *a solid foundation of established facts upon which to rest an inference of its existence.*" *Id.* The existence of a confidential relationship gives rise to a suspicion—though

not a presumption—of undue influence where the dominant party in the confidential relationship participates in either the preparation or the execution of the contested will. *Id.* at 675.

The district court found the plaintiffs fell short of their burden of proving John exerted undue influence over Jennie in executing her will. We agree. The evidence shows Jennie exercised free will in drafting her petition to bequeath the bulk of her estate to John. Those present at the time Jennie signed her will—Anders and Spurgeon—testified that Jennie appeared to know what she was doing when she signed the will and that she understood the nature of the will. When Anders asked Jennie if she knew approximately how many acres of farm land she was bequeathing to John, she answered "about 300 acres," which is an accurate representation of the number of acres of farmland she owned following the transfer of John's Place to John. When Anders explained to Jennie that John would be receiving a substantial portion of her property to the exclusion of her two other children, Jennie stated she wished to favor John in the property distribution because John had provided her a living for the past thirty years.

Spurgeon in particular was looking for indications that Jennie was being directed by John and found none; in fact, she noted that Jennie did not look to John for guidance at any time. Although John and Cathy were present in the room at the time the will was signed, neither took part in the discussion between Jennie and Anders.[2]

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[2] We acknowledge that it is "good practice" for an attorney to confer with the testator alone to allow for the testator to freely and unreservedly express his or her intentions, and that such practice "lessens the chance of a claim of undue influence." 13 Julie L.

B. Testamentary Capacity.

The plaintiffs also contend the district court erred in failing to set aside the will entered on February 5, 2009, because Jennie lacked testamentary capacity.

In order to have testamentary capacity when executing a will, the testator must have known and understood the following: "(1) The nature of the instrument being executed; (2) The nature and extent of his property; (3) The natural objects of his bounty; and, (4) The disposition he desired to make under his last will and testament." *In re Estate of Lachmich*, 541 N.W.2d 543, 545 (Iowa Ct. App. 1995). The proof of a mental deficiency must be applicable to the time the will was made. *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa 1988). Evidence of the testator's mental condition at other times may be allowed if it sheds light on the testator's mental competence at the time the will was made. *Id.* The burden of proof is on those contesting the will. *Id.*

We likewise find the plaintiffs failed to show Jennie lacked testamentary capacity at the time she executed the will. Jennie was able to correctly recount her assets to Anders, and Anders found that Jennie understood the nature of her will and knew what she was doing. Spurgeon also was of the impression that

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Pulkrabek & Gary J. Schmit, Iowa Practice: Probate § 7:24, at 101 (2012). We further recognize that an attorney's representation of both a beneficiary and a testator may lead to a finding of undue influence. *Id.* When a will is ready to be signed, only the testator, lawyer, and witnesses should be present. *Id.* § 7:29, at 106. While there is insufficient evidence to establish undue influence in the case at bar, we caution attorneys against engaging in representation that will lead to undue influence or raise the question of whether undue influence was exerted over a testator. By taking the simple precautions outlined in the Iowa Practice series, this type of litigation can be avoided. *See id.* § 7:29, at 106-07 (outlining the steps an attorney should take when the will is ready to be signed).

Jennie knew what she was doing when she executed the will and was aware of her assets.

While there is evidence that Jennie's physical health was deteriorating at the time she executed the will, two disinterested parties presented evidence of Jennie's competence. Dennis Cochran, who was an acquaintance of Jennie, saw her at the nursing home on several occasions during the last weeks of her life. Cochran visited with Jennie on more than one occasion and described her as alert and aware of her circumstances. Cochran found nothing to indicate Jennie could not handle her affairs.

Dr. Kathleen Lange also indicated that Jennie was of sound mind at the time she executed the will. Dr. Lange and her medical partner had treated Jennie since 2005. She testified that Jennie made her own decisions regarding her health care and described her as "self-minded." Jennie had definite opinions about her health, which she was able to express clearly.

Dr. Lange testified that Jennie had "probable early dementia," meaning she had some short-term memory problems but was able to take care of herself. An April 2007 clinical assessment showed Jennie's thought processes were intact and that she was oriented. On July 15, 2008, Jennie scored twenty-seven points out of a possible thirty on a mental status examination, indicating minimal cognitive impairment. Dr. Lange testified that this score is consistent with a finding that Jennie was capable of making decisions concerning her own welfare and the distribution of her property. Jennie's mental competence was the same when Dr. Lange examined her in January 2009 after her fall. Upon reviewing the

Golden Age Nursing Home's staff notes, Dr. Lange indicated Jennie's mental state in February 2009 was similar to what it was in July 2008. Dr. Lange opined that Jennie was capable of making decisions about her welfare and the distribution of her property on February 3, 2009.

Because the plaintiffs have failed in their burden of proving undue influence and a lack of testamentary capacity, we affirm the district court order denying their action to set aside the will.

AFFIRMED.