IN THE COURT OF APPEALS OF IOWA

No. 9-700 / 08-2005
Filed December 30, 2009

**IN THE MATTER OF THE ESTATE OF
BERNIECE M. GRAY, Deceased**

**KAREN GRAY, GARY GRAY JR.,
TERESA GRAY, REX GRAY, RICK GRAY,
RICHARD SHAFFER, KEVIN SCHAFFER
and KIMBERLY SHAFFER,**
Plaintiffs-Appellees,

vs.

**MARYLOU CARDER, as Executor of the
Estate of Berniece M. Gray,**
Defendant-Appellant.

Appeal from the Iowa District Court for Clarke County, Paul R. Huscher, Judge.

Testator's daughter/executor appeals jury verdict finding she unduly influenced the will's execution. **AFFIRMED.**

Richard J. Murphy, Osceola, and Richard O. McConville of Coppola, McConville, Coppola, Hockenberg & Scalise, P.C., West Des Moines, for appellant.

Catherine K. Levine, Des Moines, and Arnold O. Kenyon III of Kenyon & Nielsen, Creston, for appellees.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, P.J.

This appeal involves a challenge to the validity of the last will and testament of Berniece M. Gray. After a one-week trial, a jury returned special verdicts finding Berniece had the testamentary capacity to execute her September 2005 will, but the will was obtained through the undue influence of her daughter/executor, Marylou Carder. Marylou, as executor, appeals, arguing expert testimony was improperly admitted, the court erred in failing to grant a mistrial, and there was insufficient evidence to submit the issue of undue influence to the jury. Finding no error, we affirm.

I. Background Facts and Proceedings.

Marvin and Berniece Gray had three children—Marylou, Gary, and Patricia. Marylou lived in Illinois, Gary and his spouse, Kay, lived near Marvin and Berniece in Osceola, and Patricia and her spouse, Dick, lived in West Des Moines. Patricia and Dick visited Marvin and Berniece regularly and took numerous trips with them. Gary farmed Marvin and Berniece's land.

Marylou had a physical argument with her mother in the late 1960's and communication between them stopped "for quite a while." A second estrangement ended in 1993, when Marylou returned home for her sister Patricia's funeral. Also after Patricia died, Dick continued to see Marvin and Berniece on a regular basis.

Marvin died in March 2005. Although Marylou was informed of his hospitalization and subsequent death, Marylou did not attend Marvin's funeral

and did not inform her two sons of Marvin's death. Marylou did not believe her son Marc Carder deserved to attend his grandfather's funeral.

Shortly before Gary died in July 2005, attorney Van Werden was contacted about making some changes to Berniece's will. Gary knew he was gravely ill and knew he was the executor in Berniece's will. Gary wanted Dick to become executor and have a power of attorney. Van Werden met with Berniece and Dick at Berniece's home. Van Werden testified Berniece initially stated she would just leave her estate to Dick. However, Dick protested and it appeared to Van Werden that "Dick wanted to be sure that she was fair to all three families."

Berniece decided to leave one-third to Dick and his children and one-third to Gary. Because Gary was ill, Van Werden discussed who Gary's share would go to if Gary predeceased Berniece. Berniece decided it would be divided among Gary's wife and children. Originally Berniece was not going to give one-third to Marylou because Marylou did not have much income and Berniece thought a bequest would "just knock her off the [government] program." Van Werden suggested Berniece use a special needs trust with Marylou's two sons as trustees so the bequest would not interfere with government benefits. Berniece agreed to the trust.

A few weeks later, Van Werden returned to Berniece's home to discuss the completed will. Dick was also present. As Van Werden was explaining the will's terms before execution, Berniece objected to the bequest to Marylou stating: "No. No, that's not right." The record reveals:

> Q. Okay. So in that time span [two to three weeks] she didn't seem to recall anything about a trust? [Van Werden] A. No, I don't

> think she—she recalled anything about the trust. There again, I explained it to her and Dick explained it to her; that Marylou's sons would be overseeing it. And Dick was strongly encouraging her to leave a third to Marylou.

Berniece executed the July 2005 will and also gave Dick a power of attorney.

When Gary died in July 2005, Marylou returned to Iowa for the funeral. Berniece failed to recognize the body in the casket as her son Gary. Marylou originally planned to stay about a week, but decided to remain longer. Among others, Marylou stated the following reasons for staying longer: she found Dick's power of attorney; Dick brought Berniece a bill from Van Werden for a will when Marylou had been unaware of a new will; Berniece needed her help; and disputes arose between Marylou and other family members after Gary's death.

On August 26, 2005, Marylou wrote in her journal that Berniece had a memory issue. Four days later, Marylou and Berniece went to see attorney Murphy so Berniece could make a new will. Marylou may have called Murphy to arrange the appointment. Marylou accompanied Berniece to Murphy's office, but did not attend the discussion of the will's terms. Berniece stated she wanted to leave her estate to Marylou and name Marylou executor.

On September 7, 2005, Berniece terminated Dick's power of attorney and gave Marylou a power of attorney that specifically prohibited Marylou from making a gift to herself from Berniece's property. The next day, with Marylou present, Berniece executed her new will leaving her entire estate to Marylou.

Marylou accompanied Berniece on numerous trips to the bank. In October 2005, Berniece removed Marvin's name from her bank accounts and placed Marylou's name on the bank accounts. Marylou made no contributions to

the bank accounts. Marylou was living in an apartment when she took $163,000 out of a joint Berniece/Marylou bank account in July 2006 and purchased a house for cash. Marylou did not discuss buying the house with Berniece before the purchase. The deed was in Marylou's name only. On August 1, 2006, Marylou moved into the new house.

Family members believed Marylou was blocking their access to Berniece. In the summer of 2006, the contestants filed a petition for an involuntary conservatorship. Marylou called attorney Murphy to discuss the petition. After consulting with attorney Murphy, Berniece responded by filing a voluntary petition for guardianship and conservatorship, which requested Marylou act as Berniece's conservator.

In October 2006, Berniece moved into Marylou's newly-purchased house. Also in October 2006, Mr. Booth talked to Berniece after being appointed her guardian ad litem. Berniece could not provide Booth with "any responses that indicated to me that she had any real awareness of what was going on financially or otherwise." Rather, Berniece "would refer me to [Marylou] to try to get a response to any question I had." Booth also solicited information from Berniece's doctors, whose names were provided by Marylou. Booth recommended a guardianship and conservatorship be established.

In January 2007, a few days before the hearing on the guardianship and conservatorship petitions, Marylou executed a quitclaim deed transferring the $163,000 house to Berniece's name alone. By agreement of the parties, the court named Marylou as Berniece's guardian and Bob Porter as her conservator.

The court ordered Marylou to facilitate contact and encourage a relationship between Berniece and the rest of the Gray family.

In February 2007, Porter attempted to obtain two house safes from Marylou in order to do an inventory as conservator. Marylou became very upset and would not agree to access.

In April 2007, Berniece fell twice and was hospitalized in Des Moines. Marylou did not call any family members to tell them Berniece was in the hospital. Subsequently, Berniece was moved to a nursing home. In May 2007, Berniece went to a hospice. Marylou did not inform the family, the court, or Porter, that Berniece had been moved to the hospital, the nursing home, or the hospice. Porter filed an application to determine the status of Berniece because he did not know her location. The court ordered Marylou to divulge Berniece's location to her guardian ad litem.

In July 2007, the court removed Marylou as guardian due to her failure to comply with court orders and appointed Dick as Berniece's guardian. Only after Marylou was removed as guardian was Porter able to inventory the contents of the two safes. Berniece died on September 29, 2007.

In October 2007, Marylou petitioned to probate Berniece's September 2005 will. The court admitted the will and appointed Marylou executor. Family members contested the will. In October 2008, a jury determined Berniece was competent to execute the 2005 will, but Marylou had unduly influenced the will's execution. This appeal followed. "An action to set aside a will is triable at law,"

accordingly, we review for correction of errors at law. *In re Estate of Dankbar*, 430 N.W.2d 124, 126 (Iowa 1988).

II. Expert Testimony

The Estate filed a motion in limine seeking to exclude the testimony of Dr. Bender as irrelevant "because of the time between the date of the will and his observations." The Estate claims the court erred in allowing Dr. Bender to speculate on Berniece's mental condition and susceptibility to influence at the time of the execution of the will.

The trial court denied the motion noting Dr. Bender had examined Berniece and would testify to his observations about Berniece in addition to a general description of dementia and its general rate of progression. The court ruled testimony about the progression of dementia "may aid the jurors in their determination or their deliberation in trying to determine whether or not she suffered from that condition previously . . . ." On appeal, the Estate argues the district court abused its discretion by permitting Dr. Bender to testify.

The admission of expert testimony is largely within the discretion of the district court. *Johnson v. Am. Family Mut. Ins. Co.*, 674 N.W.2d 88, 91 (Iowa 2004). Expert testimony should be admissible if it will assist the jury in understanding the evidence or determining a fact at issue. *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 13 (Iowa 1999). "We are committed to a liberal rule on admissibility of opinion testimony, and only in clear cases of abuse would the admission of such evidence be found to be prejudicial." *Heinz v. Heinz*, 653 N.W.2d 334, 341 (Iowa 2002).

Dr. Bender is an experienced physician practicing primarily in geriatrics with specialized training in dementia disorders. Dr. Bender explained the evaluation and treatment processes for dementia to the jury. In December 2006, Dr. Bender's partner administered a standard dementia evaluation to Berniece. While a normal score was twenty-seven or above, Berniece scored an eighteen, revealing a "significant impairment in cognition." Dr. Bender stated this initial examination, along with Berniece's "clinical presentation," highly suggested Alzheimer's disease with a strong vascular component.

Dr. Bender reviewed Berniece's medical records since November 2005 and first examined her in early January 2007. Dr. Bender believed the stressful, emotional events of Berniece's husband death in March 2005, followed by her son's death in July 2005, directly impacted "the memory centers of the brain. In fact, they can even accelerate the brain's deterioration." Dr. Bender opined Berniece had some memory and cognitive impairment in November 2005. He further stated:

> We have gained new insight into how long it takes this illness to develop. We can say with some certainty that Berniece's illness actually started a long time before she presented. The brain has great reserve. By the time Berniece started to have memory problems, which was certainly a few years before she presented to me, she would have lost thirty percent of the function in . . . the hippocampus, which is where new memories are formed. It takes a long time for the brain to lose that.
>
> So our insight into how long these illnesses take to develop has expanded. It is variable, however. But we can say with some certainty that Berniece had this illness several years before she presented.

Based on his personal examination and medical records review, Dr. Bender also opined Berniece could have been susceptible to influence.

However, Dr. Bender could not state Berniece's dementia had progressed to the stage where she was unable to competently distribute her property in September 2005.

The jury was asked to determine whether Berniece was competent when she executed her September 2005 will and whether Marylou had unduly influenced Berniece's execution of this will. "Testamentary capacity is a mixed question of law and fact." *Ipsen v. Ruess*, 241 Iowa 730, 734, 41 N.W.2d 658, 661 (1950). Contestants must "establish [the] testator, at the exact time of the making of the will, lacked . . . testamentary capacity." *In re Estate of Gruis*, 207 N.W.2d 571, 573 (Iowa 1973). "Because mental capacity is a subject that is unfamiliar to the ordinary juror, the courts permit opinion testimony by experts who are familiar with the general subject of mental capacity . . . ." *Ipsen,* 241 Iowa at 734, 41 N.W.2d at 661. "[T]he expert's opinion is a fact inference -- a medical diagnosis that the consequences of the facts amount to a certain mental status. Whether that status would measure up to legal capacity or incapacity is for the jury to decide." *Id*.

Although the capacity at issue is capacity at the time of execution, evidence of the condition of the testator's mind at other times may be received if there is a reasonable basis for the conclusion this evidence throws some light on mental competence at the time of execution. *Gruis*, 207 N.W.2d at 573. "It is not essential that there be evidence of the exact date of execution of the instrument," because a person's prior or subsequent condition "is admissible to evidence his condition at the time in issue." *In re Estate of Springer*, 252 Iowa 1220, 1225,

110 N.W.2d 380, 384 (1961). Where a disease is progressive, "it is not necessary that the observations upon which the opinion of an unsound mind was based were had at the time the will was executed or immediately before." *Id*. at 1232, 110 N.W.2d at 388.

We hold the trial court did not abuse its discretion in allowing the testimony of Dr. Bender, an expert on the progressive disease of dementia, as relevant evidence regarding the mental condition and susceptibility of Berniece. The jury could properly weigh Dr. Bender's testimony in resolving the issues presented. In fact, the jury determined Berniece was competent to execute the September 2005 will, a finding favorable to the Estate.

III. Denial of Mistrial.

The Estate argues the court erred in failing to grant its motion for a mistrial due to Marc Carder's testimony concerning Marylou's violent character. Marc is Marylou's oldest son and Berniece's grandson.

"Trial courts are vested with broad discretion in determining whether to grant a mistrial," which is "an extreme remedy." *Yeager v. Durflinger*, 280 N.W.2d 1, 7 (Iowa 1979). "Such discretion is recognition of the trial court's better position to appraise the situation in the context of the full trial." *Id*. Therefore, we review for an abuse of discretion.

Marc testified:

> Q. . . . At some point did you get concerned about your grandmother? A. Yes I was very concerned about her health, as well as her safety. Because my mother was known to become violent–
>
> [Court sustains the Estate's objection]

> Q. . . . When did this start developing for you, that you became concerned about Berniece's welfare? A. September of '05.
>
> Q. Okay. And you were beginning to tell us why you were concerned. I want you to just tell me your concerns based on your own personal knowledge, not on anything else you might have heard or things like that. But based on your own personal knowledge what was your source of concern? [Court overrules the Estate's objection] A. It was my concern—It was my grandmother's safety of being around my mother.
>
> Q. And why was that? A. Because she was prone to becoming physically violent in discussions with her.
>
> Q. You have had that situation yourself? A. Yes, I did. She actually physically assaulted me.
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> [The Estate's objection is sustained and the court holds a discussion outside the presence of the jury. The Estate's motion for a mistrial is denied. The jury returns.]
>
> The Court: Ladies and gentlemen, the last testimony in this matter as to any basis for [Marc's] opinion as to his mother's character is to be disregarded by you and is not to be considered in your deliberations in this case.

"Not every erroneous admission of evidence requires a reversal." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). "Generally, when improper evidence has been promptly stricken and the jury admonished to disregard it, no error occurs." *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999). Unless proven otherwise, we presume the jury followed the court's admonition. *State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988). "Consequently, this court should reverse only when justice would not be served by allowing the trial court judgment to stand." *Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988).

We note Marc's testimony was not extensive and prior to Marc's testimony, the following testimony of Kay Gray, Berniece's daughter-in-law, was admitted without objection.

> Q. Okay. At some point did you become concerned about Berniece's well-being with Marylou there? A. Yes.

> Q. And why? Why did you have concern? A. Well, no one could go in and see her, and I had known that at the time – at one time especially Marylou had given her a black eye.
> Q. So you were concerned about her physical safety? A. Yes.

Additionally, the Estate was able to protect itself from any prejudicial effect by testimony from Marylou, who explained she was estranged from Marc. Marylou also stated she only hit her mother once, in 1967 or 1968, and explained it was in response to her mother hitting her first.

The trial court properly admonished the jury to disregard a portion of Marc's testimony, we have no reason to conclude the jury ignored the court's instruction, and our review of the record as a whole shows no abuse of discretion.

IV. Insufficient Evidence of Undue Influence.

The Estate argues the trial court erred in overruling its motion for directed verdict because there was insufficient evidence of undue influence to submit the issue to the jury. Four elements are necessary to sustain a finding of undue influence in the execution of a will:

> (1) the testator's 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) a result clearly the effect of undue influence.

Dankbar, 430 N.W.2d at 126. Because undue influence is generally not exercised in public view, circumstantial evidence is utilized and it is "only rarely that direct evidence of its operation is available." *In re Estate of Cory*, 169 N.W.2d 837, 843 (Iowa 1969). "Unnatural, unjust, or unreasonable distributions

may be properly considered." *Dankbar*, 430 N.W.2d at 129. The testator's testamentary capacity is important because conduct that might not unduly influence "a person of normal mental strength might be sufficient to operate upon a failing mind. One who is infirm and mentally weak is more susceptible to influence than one who is not." *Cory*, 169 N.W.2d at 843. This, however, does not mean the testator must lack competency for the issue of undue influence to be submitted to the jury. *Id*.

When applying the above rules, "each case is largely determined by its own facts." *Id*. Additionally, it is well settled "the evidence must be viewed in the light most favorable to the contestant, who is given the benefit of all permissible inferences." *Dankbar*, 430 N.W.2d at 129.

Applying these principles to the facts detailed above, we conclude there was sufficient circumstantial evidence to generate a jury question on the issue of Marylou's undue influence of Berniece's will execution. The district court properly overruled the Estate's motion for directed verdict on this issue.

AFFIRMED.