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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0368

In re the Estate of Wayne A. Ulrich, Deceased.

Filed August 19, 2013
Affirmed
Stoneburner, Judge
Hudson, Judge, dissenting

Blue Earth County District Court
File No. 07PR11156

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Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges summary judgment dismissing her objection to probate of her uncle's 2004 will and claim for conversion. Because the district court did not err in concluding that appellant's evidence failed to establish any genuine issues of material fact to avoid summary judgment on her claim of undue influence and that appellant lacks standing to pursue a claim of conversion, we affirm.

FACTS

Wayne A. Ulrich (decedent) was 87 years old when he died in January 2011. Decedent never married and had no children. Decedent lived his whole life on the Ulrich family's heritage farm. Decedent's only sibling, Raymond Ulrich, lived on and farmed the property adjacent to the Ulrich family farm. In time periods relevant to this action, Raymond Ulrich was a widower, father of two adult, married daughters, Donna Schultz and Bette Schmidt, and grandfather to his daughters' eleven children.

Decedent did not have a close relationship with his brother, his nieces, or his grandnieces and grandnephews. Prior to 2004, Bette Schmidt, who lives in Iowa, visited Raymond Ulrich 10 to 12 times per year and saw decedent on about half of those visits. Donna Schultz and her husband, Joel Schultz, lived near decedent's farm. Of the family, Joel Schultz had the closest relationship with decedent. Joel Schultz spoke with decedent about once a week and he and Donna Schultz visited decedent about once a month. Other neighbors and friends visited with decedent and assisted him with farming and household tasks, especially prior to 2004, after which respondent Susan Sorenson Worlds (Sorenson) [1] became one of the primary persons who assisted decedent.

All witnesses described decedent as a person of strong opinions, not easily influenced, who knew what he wanted and did exactly what he wanted to do. In 1992**,** attorney Douglas Johanson drafted a will for decedent that provided for the care of

[1] At the time Sorenson met decedent, she was married to Randy Sorenson. That marriage ended in 2010. Sorenson has remarried and is now known as Susan Worlds. Because decedent knew her as Susan Sorenson, that is the name used in this opinion.

decedent's dog and devised his estate in designated shares among his nieces and their children.

Sorenson's friendship with decedent began in the mid-1990s. Sorenson passed decedent's farm on her way to and from work. She bought sweet corn from him and began to assist him in getting his mail from the mailbox that was across the highway from decedent's farm. When the friendship between Sorenson and decedent began, decedent had been a long-time friend of Wayne and Deborah Hohenstein, who, for some years, had assisted decedent with farming and household and personal chores. Decedent spoke daily on the telephone with Deborah Hohenstein until decedent abruptly distanced himself from the Hohensteins, accusing them and Raymond Ulrich of taking things from his home while he was hospitalized in 2004.[2]

On his return from the hospital in June 2004, decedent received daily home-healthcare assistance which continued until he entered a nursing home in 2007. He also began to rely more and more on Sorenson to help him with various household chores and personal grooming. Decedent was included in many Sorenson family events and began to look upon Sorenson as a daughter and considered her family as part of his family.

In June 2004, Johanson drafted a power of attorney naming decedent's neighbor, Steve Johnson, as attorney-in-fact with the power to "protect [decedent's] building site and all buildings and property located thereon. . . . [and] not allow anyone to enter my

[2] There is no evidence in this record that decedent's brother or the Hohensteins, who undertook to make decedent's home safe for his return from the hospital, took or destroyed anything of value from decedent's home. A list decedent prepared of the allegedly missing items identifies things such as dish towels, canning lids, ice cream pails, and a canister of dried prunes.

house except to help maintain it and care for my dog . . .." In July 2004, decedent called Johanson and told him that Sorenson was taking him to doctor appointments, helping with the dog, helping Steve Johnson, and had decedent's permission to be in his house. Decedent did not ask Johanson to take any action based on this information. But in October 2004, decedent asked Johanson to prepare a new power of attorney making Sorenson his attorney-in-fact and giving her broad authority. He also wanted a new will leaving everything to Sorenson, and, in the event she predeceased him, leaving everything to Sorenson's husband or children.

Johanson, who did not know how long decedent had known Sorenson or what their relationship was, drafted a power of attorney for Sorenson that did not give her the power to transfer decedent's funds to herself. Johanson met with decedent in decedent's home to review the requested documents. Johanson testified in his deposition that decedent stated that Sorenson would not accept a power of attorney that did not include a provision that she could transfer his property to her and that decedent wanted that restriction removed from the draft because Sorenson was "going to take care of him and keep him out of a nursing home." Johanson, who testified that it was always his practice to include such limitations in a power of attorney for a non-relative, declined to draft the power of attorney or will that decedent requested.

Decedent then contacted Richard Corcoran of Blethen, Gage & Krause, P.L.L.P., in Mankato. Sorenson testified that she recommended Corcoran based on information about him she received from a business acquaintance. Sorenson was not a client of that

law firm. Sorenson drove decedent to and from the appointment with Corcoran, but she was not present for decedent's meeting with Corcoran and others from the law firm.

Because decedent was asking for an unusual disposition of his estate, attorney Corcoran had decedent meet privately with two other attorneys in the law firm to assess decedent's competence and whether he was being unduly influenced to make the power of attorney and change his will. All three lawyers who met and talked with decedent wrote memos to the file concerning their meetings with decedent. All of the attorneys concluded that decedent was a competent, very strong-willed person who made his own decisions and who was not likely to be unduly influenced.

The memos reflect that decedent explained to each of the attorneys, in individual conversations, that he was not very close to his brother, his nieces, or their children, and that Sorenson and her family were more like family to him than his own family. He explained that his nieces and their children would be inheriting his brother's farm and that was enough for them. Decedent stated that the Sorensons had provided a great deal of care for him.

Corcoran drafted the will and power of attorney. The will specifically excluded Raymond Ulrich and decedent's nieces and their children. Corcoran went over the will in detail with decedent before decedent signed it. Corcoran sent a copy of the power of attorney to Sorenson along with a detailed explanation of the duties and responsibilities of an attorney-in-fact including the duty to keep records of all of her financial transactions as attorney-in-fact.

Decedent remained in his home with assistance from home-health aides, Steve Johnson, and Susan Sorenson and her family until December 2007 when, after a hospitalization and on the recommendation of his doctor, decedent willingly entered Hillcrest Nursing Home. Susan Sorenson continued to visit and assist decedent while he was in the nursing home. She is the only person who took him on excursions from the nursing home, including visits to his farm to check on his crops and visit with his dog. The nursing home contacted Susan Sorenson when decedent needed anything. She was the only person, aside from the nursing home staff, who was with decedent when he died on January 2, 2011. She arranged for his burial.

Between 2005 and 2010, Sorenson wrote checks to herself from decedent's accounts totaling $256,102.49. Sorenson testified in her deposition that she did not keep records about these funds or what they were used for because the checks were all written at decedent's direction as gifts to her and were not transfers she made pursuant to her power of attorney. She testified that she believed that the power of attorney was only to be used in the event that decedent became incompetent to manage his own affairs, which never occurred.

Eight days after decedent's death, Donna Schultz petitioned for formal adjudication of intestacy, determination of heirs, and appointment of a personal representative. Sorenson filed an objection to the petition and petitioned for formal probate of decedent's 2004 will and for her appointment as special administrator pursuant to the will. Schultz filed an objection to Sorenson's petition. Based on the will, the district court appointed Sorenson the special administrator of decedent's estate. Schultz

then withdrew from the action and, by stipulation of the parties, Bette Schmidt was substituted for Schultz to pursue the intestacy petition and will objection. Subsequently, Schmidt filed a petition for formal probate of decedent's 1992 will and appointment of a personal representative. This petition asserts that the 2004 will was the product of undue influence. Schmidt requested removal of Sorenson as the special administrator and asserted that Sorenson converted approximately $300,000 of decedent's property.

After extensive discovery was completed, Sorenson moved for summary judgment. The district court granted summary judgment to Sorenson, concluding in a 42-page memorandum of law that Schmidt had failed to provide sufficient evidence to create a material fact issue on the claim of undue influence and that Schmidt lacks standing to pursue a claim of conversion. This appeal followed.

D E C I S I O N

I. Standard of review

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments" and must provide concrete evidence of genuine and material fact issues for the elements necessary to prove its claim. *Id.* We review de novo whether the district court erred in

its application of the law and whether there were any genuine issues of material fact when evidence is viewed in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

II. Undue influence

Schmidt does not claim that decedent lacked competence to make a will in 2004 or at any time thereafter: her claim is that the 2004 will is the result of undue influence exerted by Sorenson. Under Minnesota law, a will contestant has the burden of establishing undue influence. Minn. Stat. § 524.3-407 (2012). To establish that a will is invalid because of undue influence, "a contestant must show that another person exercised influence *at the time the testator executed the will* to the degree that the will reflects the other person's intent instead of the testator's intent." *In re Estate of Torgerson*, 711 N.W.2d 545, 550 (Minn. App. 2006) (emphasis added), *review denied* (Minn. June 20, 2006). The evidence the will contestant presents "must go beyond suspicion and conjecture." *In re Estate of Pundt*, 280 Minn. 102, 104, 157 N.W.2d 839, 841 (1968) (quotation omitted). "At trial[,] undue influence must be established by clear and convincing evidence. . . . That evidence generally will be circumstantial and direct evidence is not required." *In re Estate of Ristau*, 399 N.W.2d 101, 103 (Minn. App. 1987) (citation omitted).

Case law has established important factors which may prove undue influence:

> (1) an opportunity to exercise influence; (2) the existence of a confidential relationship between the testator and the person claimed to have influenced the testator; (3) active participation by the alleged influencer in preparing the will; (4) an unexpected disinheritance or an unreasonable

> disposition; (5) the singularity of will provisions; and (6) inducement of the testator to make the will.

Torgerson, 711 N.W.2d at 551. In this case, the district court thoroughly examined the deposition testimony of everyone whom the parties asserted had knowledge relative to petitioner's claim and concluded that, despite suspicion on the part of some witnesses that Sorenson unduly influenced decedent's will, no one presented a *fact* that would indicate that Sorenson unduly influenced decedent. Our painstaking review of the extensive record submitted on summary judgment supports the district court's conclusion that Schmidt has failed to present sufficient evidence to withstand summary judgment on her claim of undue influence.

A. Opportunity to exercise influence

It is undisputed that, in 2004, when decedent made the contested will, he was somewhat estranged from his brother, had cut off his prior relationship with the Hohensteins, and considered the Sorensons more like family than his own family. Sorenson was regularly visiting decedent and providing care to him at that time, and she continued to do so until his death. Decedent was also receiving assistance from home-health aides and from his neighbor, Steve Johnson, and he was not isolated or exclusively in Sorenson's company and care. Although Sorenson's relationship with decedent gave her an opportunity to exercise influence over him, decedent was not isolated, was not solely dependent on Sorenson for his care, and was competent. "Opportunity alone cannot sustain a finding of undue influence." *In re Estate of Anderson*, 379 N.W.2d 197, 201 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986).

Schmidt argues that Johanson's refusal to draft the power of attorney and will requested by decedent is evidence of undue influence exerted by Sorenson. But Johanson testified that decedent, in a meeting not attended by Sorenson, requested the documents, and stated that Sorenson would not accept a limited power of attorney. There is no evidence that Sorenson requested that decedent make a will in her favor or that she conditioned her declaration that she would keep him out of the nursing home on such a will. Johanson's testimony is not evidence that Sorenson took advantage of an opportunity to influence Ulrich's decision to change his will.

B. Existence of confidential relationship

Schmidt asserts that, because Sorenson was performing caregiving functions for decedent "and had an interest in his financial affairs," Sorenson had a confidential relationship with decedent in 2004 when he drafted his will. Schmidt cites *In re Estate of Opsahl*, 448 N.W.2d 96, 101 (Minn. App. 1989), for the proposition that a confidential relationship existed between the proponent of a will and a decedent where the will proponent had managed the financial affairs of the decedent for the years preceding his death. But Schmidt has not produced any evidence that Sorenson had managed or was involved in any of decedent's financial affairs before the 2004 will was executed. The record is conclusive that there was no confidential relationship between decedent and Sorenson prior to her becoming his attorney-in-fact, which occurred, at decedent's request, simultaneously with the 2004 will.

C. Participation by alleged influencer in preparing the will

Sorenson recommended attorney Richard Corcoran, drove decedent to an appointment with Corcoran, and picked him up from that appointment. The record reflects that Sorenson frequently transported decedent to appointments, and the record is conclusive that Sorenson was not present for any discussion between decedent and the attorneys in Corcoran's law firm and that Sorenson was not a client of that law firm. There is no evidence in the record that Sorenson participated in any way in the preparation of the will.

D. Unexpected disinheritance, unreasonable disposition, singularity of will provisions, and inducement of the testator to make the will

Schmidt argues that the 2004 will constitutes an unexpected disinheritance, but, based on decedent's explanations given to three attorneys at the time he requested the 2004 will, the will does not constitute an unreasonable disposition or an unexpected disinheritance. Decedent clearly stated to three attorneys that he was changing his will because Sorenson was providing care to him that his family was not providing, he considered Sorenson to be like a daughter, and he considered her and her family, rather than his brother and nieces, to be his family. Decedent gave a reasonable explanation, based on family history, for not wanting to leave his estate to his brother, and he stated that he knew that his nieces would be adequately provided for by their father. When asked whether his family members might feel hurt about being excluded from his will, decedent noted that "that's the way it is, they don't take care of [decedent]."

In reversing the district court's conclusion of undue influence in *In re Estate of Anderson*, this court noted that a decedent's belief that other heirs were adequately provided for "coupled with the substantial evidence that [will-proponent] was his favorite child, lead us to conclude that decedent's division of his estate was not unusual or unexplainable." 379 N.W.2d at 201. In this case, Schmidt has not presented any *evidence* to refute decedent's explanation of his desire to leave his estate to the Sorenson family or to show that those explanations represent Sorenson's intent and not decedent's intent.

Schmidt has provided evidence that decedent was frugal, but his frugal lifestyle is not relevant to his choices about his estate. Schmidt has also produced evidence that decedent liked to be in the company and cared for by young attractive women, but no evidence that such women could overbear his will. That a person will be influenced by his associations, relationships, benefits or injuries received, and other circumstances has long been recognized as natural, as is the right of a person to "dispose of his property according to his predilections thus formed" and this alone does not warrant an inference of undue influence. *In re Mitchell's Estate*, 43 Minn. 73, 75-76, 44 N.W. 885, 886 (1890).

Although undue influence is generally a question of fact for the jury, the district court did not err in concluding that Schmidt failed to present evidence sufficient to create a jury question on whether, in 2004, Sorenson exerted an influence so dominant and controlling of decedent's mind that, in making the will, he ceased to act of his own free volition and became a mere puppet of Sorenson. *See Ristau*, 399 N.W.2d at 104

(affirming summary judgment based on lack of material fact issues to support a claim of undue influence). Schmidt argues that summary judgment was not appropriate in this case because the district court did not have the opportunity to assess the credibility of witnesses. But Schmidt does not assert that the district court failed to view the evidence in the light most favorable to her position. Rather, taking all of Schimdt's evidence (not mere suspicions) as true, the district court concluded that there is insufficient evidence to defeat the summary-judgment motion. "It is a testator's privilege to make such disposition of his property as he pleases; and, if the will is his,—that is, if it is the voluntary act of a competent testator,—it must stand, if properly executed in form." *Mitchell*, 43 Minn. at 76, 44 N.W. at 886.

III. Conversion

Schmidt argues that the district court erred by granting summary judgment to Sorenson on Schmidt's conversion claim because there is a genuine issue of fact as to whether Sorenson converted almost $250,000 of decedent's assets. "Conversion occurs where one willfully interferes with the personal property of another without lawful justification, depriving the lawful possessor of use and possession." *Williamson v. Prasciunas*, 661 N.W.2d 645, 649 (Minn. App. 2003) (quotations omitted). The common law elements of conversion are: "(1) plaintiff holds a property interest; and (2) defendant deprives plaintiff of that interest." *Id.*

Because decedent left his estate to Sorenson, the district court concluded that Schmidt does not have a property interest in decedent's estate and therefore lacks

standing to assert a claim of conversion. We agree. The district court did not err in granting summary judgment to Sorenson on this claim.

Affirmed.

HUDSON, Judge (dissenting)

I respectfully dissent because undue influence is a question of fact, which may preclude summary judgment. *In re Estate of Rasmussen*, 244 Minn. 215, 221, 69 N.W.2d 630, 635 (1955). Here, however, the district court resolved the key fact question in this case: whether Sorenson exerted undue influence on Ulrich in order to convince him to change his will. Accordingly, the grant of summary judgment should be reversed.

To establish that a will is invalid due to undue influence, "a contestant must show that another person exercised influence . . . to the degree that the will reflects the other person's intent instead of the testator's intent." *In re Estate of Torgerson*, 711 N.W.2d 545, 550 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). While neither conjecture nor suspicion suffices to prove undue influence, circumstantial evidence of undue influence is sufficient. *In re Estate of Anderson*, 379 N.W.2d 197, 200 (Minn. App. 1985) (noting that direct evidence is not required and "is usually unobtainable because the influence is rarely exercised openly in the presence of others"), *review denied* (Minn. Feb. 19, 1986). The circumstantial evidence here was abundant and compelling.

First and foremost was the testimony of Ulrich's long-time attorney and friend, Douglas Johanson. In October 2004, when Ulrich approached Johanson about changing his will, the two had known each other for nearly 23 years. In his deposition, Johanson testified that, over the years, Ulrich stopped in his office once or twice per month, primarily to talk politics and farming. Johanson testified that he and Ulrich had "always hit it off" and that he knew Ulrich "pretty well." And significantly, it was Johanson who drafted Ulrich's earlier will in 1992. Thus in October 2004, when Ulrich asked Johanson

to change his will (and power of attorney) – completely disinheriting his family in favor of Sorenson – Johanson expressed grave concerns. Specifically, Johanson testified that:

- From what Ulrich told him, it appeared that Ulrich had only known Sorenson for a matter of months;
- Ulrich told him that Sorenson would not accept a power of attorney without a provision allowing her to transfer Ulrich's property to herself;
- Ulrich told him that Sorenson was "going to take care of [Ulrich] and keep him out of a nursing home," leading Johanson to conclude that this was an inappropriate "money for care" situation;
- Despite his caution to Ulrich and presentation of less drastic alternatives, Ulrich refused to consider them and kept saying "I want to do this";
- Ulrich was "infatuated with Sue doing this;" he was "obsessed with no nursing home;" Ulrich kept saying "she will keep me out of a nursing home" and "she wants her control;" "it was always to keep out of a nursing home to get this care";
- The conversation was "upsetting" to Johanson. He felt Ulrich "was different in the sense that he wasn't visiting with me like he normally would. It was totally different than any conversation I've ever had with him." Johanson "thought he had a sense of desperation that he was going to go to a nursing home and this was a way he didn't have to go . . ." and
- Johanson thought it was a "con."

Ultimately, Johanson told Ulrich he would not amend the will, even though he knew that if he didn't ". . . do this will, this relationship would end." Johanson's testimony was based upon his 23-year personal and professional relationship with Ulrich and was plainly more than conjecture or suspicion. Equally important, it strongly suggested that Ulrich's 2004 will reflected Sorenson's intent, not Ulrich's.

In contrast, the attorneys at the Blethen, Gage & Krause firm—who, unlike Johanson, had just met Ulrich—concluded that, despite the substantial change in Ulrich's will and power of attorney, there was no undue influence. To their credit, the Blethen, Gage attorneys recognized the potential for undue influence and addressed it by having several attorneys talk with Ulrich to assess his competence and question him about his relationship with Sorenson and his family. But the fact that they concluded Sorenson had not exercised undue influence only serves to highlight the materiality of Johanson's contrary conclusion. There was plainly a factual dispute on the key issue in the case. Accordingly, whether Sorenson exercised undue influence over Ulrich's decision to change his will should have gone to the trier of fact for resolution.

In addition to Johanson's testimony, several other witnesses testified that Ulrich's behavior and demeanor radically changed around the time the new will was executed. For example, Ulrich's long-time friends, the Hohensteins, stated that, after years of regular contact with Ulrich, which included assisting him with household and farming chores, and daily telephone calls from Ulrich, around 2004, Ulrich accused the Hohensteins of stealing from him and abruptly terminated all contact.

Finally, the majority notes that Ulrich was legally competent and was a strong-willed individual. In addition, he gave a reasonable explanation, based on family history, for not wanting to leave his estate to his brother and nieces. That may all be true, but I reject the implicit assumption that simply because Ulrich was legally competent and strong-willed, he was not vulnerable and susceptible to undue influence, especially given his advanced age and ill-health. The record is clear that Ulrich desperately wanted to remain in his own home as long as possible. Indeed, he was terrified of spending his final years in a nursing home and apparently was willing to take extraordinary measures to avoid that fate. Johanson repeatedly stated that Ulrich told him that Sorenson would take care of him and keep him out of a nursing home. Johanson indicated that this was the driving force behind the change in the will. Even the Blethen, Gage attorneys indicated that Ulrich told them that Sorenson had assisted him and would keep him from having to go to a nursing home and that this was important to him. Thus, there was strong circumstantial evidence that Sorenson—who plainly had ample opportunity to exercise considerable influence upon Ulrich—exploited his poor health and fear of being placed in a nursing home in order to convince him to change his will. At a minimum, this evidence raised a genuine issue of material fact on the issue of undue influence, making summary judgment improper. Accordingly, I would reverse and remand this matter for trial.