COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP341 **Cir. Ct. No. 2011PR144**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE ESTATE OF GERALD G. MAHR:

ST. PAUL EV. LUTHERAN CHURCH,

APPELLANT,

V.

IGNACIO VASQUEZ, ART DOLL, PAT DOLL, LAWRENCE BLANK, DEANNA BLANK, GERALDINE FONTENOT, HARTLEY DUS, LORRAINE DEITZ, DALE SANDTROTH, WAYNE SANTROTH, LOUIS VANRUDEN, JOANNE KACZMAREK, ELLEN HAALAND, KONG THONG THONSAVANH, BRENDA MAGEE AND JANET RESNICK,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. St. Paul Evangelical Lutheran Church (the Church) appeals an order of the trial court admitting the will of Gerald Mahr into probate. Specifically, the Church contends that Ignacio Vasquez unduly influenced Mahr, convincing Mahr to leave the entire residue of his estate to Vasquez. We affirm.

BACKGROUND

¶2 The following facts are taken from the record and from the trial court's findings of facts. Gerald Mahr died on January 23, 2011 at the age of 76. Mahr never married, had no children, and was an only child. After his parents' death, Mahr inherited his family's farm in Franklin, where Mahr resided his entire life. Mahr's closest blood relatives were cousins.

¶3 Between 1999 and 2009, Mahr drafted and executed five wills. In each of those wills Mahr made bequests to the Church, Vasquez, and multiple other individuals. Each will left an increasing amount of Mahr's residue to Vasquez. Under Mahr's final will, dated May 27, 2009, Vasquez became the sole beneficiary of the residue of Mahr's estate. The May 2009 will also left $10,000 to the Church. The May 2009 will significantly differed from Mahr's previously executed will, from which the Church was to receive $100,000 and half of the residue of Mahr's estate.

The Trial.

¶4 Several parties, including the Church, objected to the admission of the May 2009 will into probate. The objectors challenged the will on the grounds of undue influence by Vasquez and Mahr's lack of testamentary capacity. The trial court held a four-day bench trial. Multiple witnesses testified.

¶5 Christopher Sayrs, the attorney who drafted Mahr's May 2009 will, testified that he met with Mahr four times to discuss the will. Sayrs testified that at no point in those meetings did Mahr seem confused about the will. In fact, Sayrs stated Mahr even recognized a mistake in a draft that Sayrs later corrected. Sayrs told the trial court that Mahr gave specific reasons for disinheriting his relatives, and gave a specific reason lessening the amount he planned to leave to the Church—namely, that Mahr felt the Church was "wasting money." Before the final signing, Sayrs stated, he went through the will line by line with Mahr. Sayrs testified that Mahr showed no signs of confusion or lack of understanding, nor did Sayrs doubt Mahr's competence during their meetings.

¶6 Sayrs also testified that he had little to no contact with Vasquez during the will-drafting process. Sayrs stated that Vasquez would drop Mahr off at the meetings and that he (Sayrs) and Vasquez would exchange pleasantries, but that Vasquez would leave shortly after dropping Mahr off. Sayrs testified that Vasquez never asked to see the will, never asked to discuss it, and was not present during any of the meetings.

¶7 Sayrs also drafted a memorandum after each meeting with Mahr, documenting Mahr's wishes and his reasons for disinheriting relatives, reducing the Church's inheritance, and leaving the residue to Vasquez. Specifically, one of Sayrs' memorandums indicated that "Mr. Vasquez appears to be the only one who checks on [Mahr], takes [Mahr] to the doctor, takes [Mahr] out to eat, et cetera." Another memorandum indicated that Mahr was angry that the Church was asking Mahr to support an addition that Mahr felt was a waste of money, prompting Mahr to reduce the Church's share of his estate.

¶8 James Frinzi, an acquaintance of Mahr's, testified that he referred Mahr to Sayrs when Mahr was looking for a new attorney. Frinzi stated that he was a witness to the signing of the May 2009 will. Frinzi also stated that Mahr appeared competent when Mahr signed the will, that Mahr did not seem confused, that Mahr was "clear as a bell" during all of their conversations, and that Mahr did not appear to be acting involuntarily when he signed the will. Specifically, Frinzi stated that Mahr was "always his own man and in control."

¶9 Vasquez also testified, telling the trial court that he met Mahr in the Summer of 1995 or 1996. Vasquez stated that he noticed an outboard motor on Mahr's property for sale and stopped by to discuss it with Mahr. From there, Vasquez began taking care of chores and running errands on Mahr's farm, and the two developed a close friendship. Vasquez testified that he did not ask for payment for farming chores. Vasquez also stated that when Mahr stopped driving, he would drive Mahr to doctor's appointments, lawyer's appointments, the grocery store, and essentially anywhere Mahr needed or wanted to go.

¶10 Dr. Ross Lynch, a rehabilitation specialist, told the trial court that he administered a series of comprehension test questions to Mahr. Lynch testified that based on the tests, it was his opinion that Mahr read and wrote at a third-grade level and that Mahr did not comprehend the context of many of the questions asked.

¶11 After considering the testimony of multiple witnesses, the trial court admitted Mahr's will into probate, finding that the Church did not meet the burden of proving lack of testamentary capacity or undue influence. Specifically, the trial court found that Mahr was aware of how he wanted his property distributed. The trial court also noted that two tests for undue influence exist in Wisconsin: (1) a

four-element test, articulated by ***Estate of Hamm v. Jenkins***, 67 Wis. 2d 279, 227 N.W.2d 34 (1975), and a two-element test, articulated by ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 289 N.W.2d 813 (1980). Finding ***Dejmal*** inapplicable,[1] the trial court described each of the ***Hamm*** elements:

> The four element test for proof of undue influence includes, first of all, susceptibility. Is the testator susceptible to being influenced by the person charged with exercising undue influence? Primary factors are age, personality, physical and mental health, and ability to handle business affairs. Secondly, opportunity to influence. Third, disposition; that would be of the alleged influencer. Disposition to influence which implies a willingness to do something wrong or unfair and grasping or overreaching characteristics…. And finally coveted result; which goes to the naturalness or expectedness of the request.
>
> ….
>
> [W]hen three of the four elements are established by clear, satisfactory, and convincing evidence[,] [o]nly slight evidence is necessary to establish the fourth element.

The trial court then applied each of the elements to case:

> Going to then, the evidence that we have in this case. First of all, whether or not Mr. Mahr was susceptible of being influenced, I think that it is difficult to say that he was not…. [i]t's clear that people were able to influence [Mahr] to sign [power of attorney documents] and that he subsequently changed his mind and negated those transactions.
>
> ….
>
> But I would note that … executing the power of attorney is significantly different from a person understanding what he's doing in giving his property away

[1] The two-element test for undue influence requires findings of: "(1) a confidential relationship between the testator and the beneficiary and (2) suspicious circumstances surrounding the making of the will." *See* ***Estate of Kamesar v. Kamesar***, 81 Wis. 2d 151, 158-59, 259 N.W.2d 733 (1977). The trial court found that no suspicious circumstances existed surrounding the making of the will and declined to consider the test further. The Church does not challenge this ruling.

> at the time he died. It's an entirely different level of sophistication[.]
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> ….
>
> Second, opportunity to influence and in this instance the person we're talking about is Mr. Vasquez. The testimony of almost everybody who testified is that Mr. Vasquez, over the years, spent a lot of time with Mr. Mahr…. [A]ll of the witnesses knew Mr. Vasquez and had seen him with Mr. Mahr in one or another capacities or one or another times. This continued right up until the time of Mr. Mahr's death…. So the testimony is clear, the evidence is clear that Mr. Vasquez had opportunity to influence.
>
> ….
>
> And when we get to a disposition to influence and complying the willingness to do something wrong or unfair and grasping or overreaching characteristics, that is the element where I find there is not clear, satisfactory, and convincing evidence. Looking at the overall sequence of events, it is almost as though the challenges are … res ipsa loquitur: the thing speaks for itself.
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> ….
>
> To unduly influence a person who is susceptible require[s] more than demonstrated desire to obtain the share of the estate. Again, it implies a willingness to do something wrong or unfair in grasping or overreaching characteristics…. There is just nothing that the Court can find in the record which is clear and convincingly probative of the disposition to unduly influence. What the record, as a whole, does establish is a growing relationship between Mr. Mahr and Mr. Vasquez…. [I]t appears from all of the testimony that Mr. Vasquez was the person most consistently there and most consistently involved with Mr. Mahr.

(Some formatting altered.)

¶12 The trial court admitted Mahr's will into probate. The Church drafted and submitted an order summarizing the trial court's findings. The order stated, as relevant:

> 7. The Court finds that the four element test of undue influence applies in this case. Under said test, the Court rules that the Objectors must prove by clear, satisfactory, and convincing evidence, the following elements: 1) that the testator was susceptible to undue influence, 2) that the alleged influencer had the opportunity to influence the testator, 3) that the alleged influencer had the disposition necessary to influence the testator, and 4) that the alleged influencer obtained his coveted result.
>
> 8. The Court finds that all but one element have been satisfactorily established by the requisite standard of proof and the Court finds that the Objectors failed to prove that Mr. Vasquez had the disposition necessary to influence the testator by clear, satisfactory and convincing evidence. The Court finds no clear, convincing and satisfactory evidence of such disposition on the part of Mr. Vasquez.

The trial court signed the order on November 5, 2013, over objections by Vasquez's counsel that the order included findings not made by the trial court.

The Motion for Reconsideration.

¶13 Days after the trial court signed the Church's proposed order, the Church filed a Motion for Reconsideration, stating that the trial court improperly applied the standard of clear, satisfactory and convincing evidence to all four elements of undue influence. The Church requested that the trial court reverse its decision and deny admission of the May 2009 will to probate on the grounds of undue influence. The Church argued:

> Respectfully, the case law is clear that when three of the elements for undue influence are established by clear, convincing and satisfactory evidence, the 4th element does not need to be established by clear and satisfactory evidence but only by "slight evidence…." [W]e believe the slight evidence standard has been met and undue influence should be found.

¶14 Vasquez opposed the motion, arguing that the Church itself created the basis for its motion by misstating the trial court's findings. Specifically,

Vasquez argued that the trial court found that no clear and convincing evidence existed to support a finding that Vasquez had the "disposition to influence" Mahr, and that the trial court made no findings that Vasquez obtained a "coveted result." Yet, the Church's signed order stated: "The Court finds that all but one [of the four] element[s] have been satisfactorily established by the requisite standard of proof[.]" Vasquez argued that the order added findings not made by the trial court, and requested that the trial court clarify the November 5, 2013 order.

¶15 On December 30, 2013, the trial court signed an amended order, drafted by Vasquez's counsel, denying the Church's reconsideration motion and amending its November 5, 2013 order. The amended order stated:

> 2. The Court's Order dated November 5, 2013 is hereby clarified and amended as follows:
>
> A. Paragraph 8 of the Court's Order dated November 5, 2013 is hereby withdrawn and vacated, and the following language is added in its place:
>
> 8. (a) The Court finds that the first two elements (that Mr. Mahr was susceptible to undue influence, and that Mr. Vasquez had the opportunity to influence Mr. Mahr) have been proven by clear, convincing and satisfactory evidence.
>
> (b) The Court finds that the Objectors have failed to prove that Mr. Vasquez had obtained a coveted or unnatural result by clear, convincing and satisfactory evidence.
>
> (c) The Court finds that the Objectors have failed to prove that Mr. Vasquez had the disposition necessary to influence Mr. Mahr, either by clear, convincing and satisfactory evidence, or even by slight evidence.
>
> B. The following language is hereby added to paragraph 7 of the Court's Order dated November 5, 2013:

> Where three of the four elements are established by clear, satisfactory, and convincing evidence, only slight evidence is required to establish the remaining element.

¶16 The Church now appeals.

DISCUSSION

¶17 On appeal, the Church contends that the trial court erroneously denied its motion for reconsideration and instead amended its November 5, 2013 order "without any reasons for the significant changes being identified, discussed or reasoned[.]" The Church also contends that the trial court erroneously denied its motion because the facts of this case establish that Vasquez did unduly influence Mahr when Mahr executed his May 2009 will.

Standard of Review.

¶18 We review a trial court's decision to deny or grant a motion for reconsideration for an erroneous exercise of discretion. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Under this standard, we review the record to determine whether the trial court "employed a process of reasoning in which the facts and applicable law are considered in arriving at a conclusion based on logic and founded on proper legal standards," and we will "generally look for reasons to sustain a trial court's discretionary decision." ***Murray v. Murray***, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999). "To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." ***Koepsell's Olde Popcorn Wagons, Inc.***, 275 Wis. 2d 397, ¶44.

I. The Amended Order.

¶19 The Church contends that the trial court, in essence, changed its mind when it issued the December 30, 2013 order. WISCONSIN STAT. § 805.17(3) (2011-12)[2] permits a trial court to amend an order by making additional findings, or by amending findings or conclusions. The statute states, as relevant:

> Upon its own motion or the motion of a party made not later than 20 days after the entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly.

¶20 Here, the Church filed a motion for reconsideration within days of the trial court's November 5, 2013 order. Vasquez opposed the motion, and also requested clarification of the trial court's November 5, 2013 order. Accordingly, the trial court was within its statutory right to amend the findings stated in the November 5, 2013 order.

¶21 Moreover, the findings in the November 5, 2013 order, drafted by the Church, did not accurately reflect the findings made by the trial court in its oral ruling. The four-element undue influence test, recognized and discussed by the trial court, requires findings that: (1) the testator was susceptible to undue influence; (2) the person alleged to have exerted undue influence had the opportunity to influence the testator; (3) the person alleged to have exerted undue influence had the disposition to influence the testator; and (4) a result coveted by the person alleged to have exerted undue influence was actually achieved by the will. *See* ***Glaeske v. Shaw***, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420. The trial court also recognized that where three of the four elements are

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

proven by clear, convincing and satisfactory evidence, only slight evidence of the fourth element is necessary. *See* ***Estate of Brehmer v. Demien***, 41 Wis. 2d 349, 352, 164 N.W.2d 318 (1969). However, the November 5, 2013 order misstated the burden established by the four-element test, stating that all four elements must be proven by clear, convincing and satisfactory evidence. The November 5, 2013 order also misstated the trial court's findings of fact, stating that the court found that three elements of undue influence were proven by "the requisite standard of proof." However, the trial court expressly found that only two elements—susceptibility and opportunity—had been proven by the requisite standard of proof. The trial court expressly noted that "[t]here is just nothing that the Court can find in the record which is clear and convincingly probative of the disposition to unduly influence." The court also made multiple findings indicating that Vasquez's inheritance was not a coveted or unnatural result. The trial court found, based on the testimony of multiple witnesses, that Vasquez and Mahr had a close relationship, that Vasquez was consistently there for Mahr, and that Mahr had no immediate family to which to leave his estate. Accordingly, the trial court did not erroneously amend the November 5, 2013 order.

II. Undue Influence.

¶22 The Church also contends that the evidence in the record does not support the trial court's finding that Mahr was not unduly influenced by Vasquez.

¶23 Undue influence must be proved by clear and convincing evidence. *See* ***Dejmal***, 95 Wis. 2d at 154. Where a trial court has made factual findings that underlie the issue of undue influence, we will not upset those findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***Odegard v. Birkeland***, 85 Wis. 2d 126, 134, 270 N.W.2d 386 (1978). Whether the facts

found by the trial court fulfill the legal standard of undue influence is a question of law we review *de novo*. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980).

¶24 As to the trial court's findings under the four-element test previously articulated, the Church contends that Vasquez obtained an unnatural and coveted result as a result of Mahr's May 2009 will. We disagree.

¶25 Here, the trial court provided a considerate and lengthy analysis of the evidence. The trial court considered the testimony of multiple witnesses, each of Mahr's wills leading up to the May 2009 will, and the relationship between Vasquez and Mahr. The trial court noted that while the amount of Mahr's estate intended to be left to Vasquez grew with each will, Mahr and Vasquez's relationship grew as well. The court considered Sayrs's testimony that Mahr was cognizant of his decision to leave the residue of his estate to Vasquez, and that Vasquez was not present during any of the meetings regarding the will. The court also considered testimony from multiple other witnesses confirming that Vasquez took care of Mahr by running his errands, taking him to appointments, and doing his chores, among other things. The trial court considered Lynch's testimony that Mahr did not function at a high intellectual capacity, but noted that Mahr did demonstrate the level of sophistication necessary to determine whom he wished to leave his property to upon his death. It was significant that Mahr changed his will on multiple occasions to the benefit of some and the detriment of others.

¶26 The Church also contends that "it was unnatural to exclude, in the 2009 Will, a large percentage of blood relatives and life-long friends previously included in executed wills in favor of a person Mr. Mahr met late in his life[.]" The trial court noted that Mahr did not have a large percentage of blood relatives;

rather, Mahr's parents were deceased, he was an only child, he did not marry, and he never had children. Mahr's only known blood relatives were a handful of cousins, whom Mahr had particular reasons for excluding. According to Sayrs, Mahr articulated his reasons for seeking to exclude his relatives, telling Sayrs that his relatives never demonstrated an interest in his well-being until they realized what Mahr would leave behind after his death. Mahr also articulated his reasons for reducing the amount left to the Church, telling Sayrs that the Church was "wasting money" on an expansion the Church sought to build.

¶27 The record supports the trial court's findings that Vasquez's inheritance was not coveted or unnatural. Because the trial court found that the Church satisfied only two of the elements necessary to prove undue influence, we conclude that the court appropriately admitted Mahr's May 2009 will into probate. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.