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DISTRICT II

May 15, 2019

To:

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You are hereby notified that the Court has entered the following opinion and order:

2018AP250

In re the estate of Marilyn Y. Ver Velde: Joseph G. Ver Velde v.
Estate of Marilyn Y. Ver Velde by Personal Representative
Jeffrey J. Ver Velde (L.C. #2016PR115)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joseph G. Ver Velde appeals an order denying his petition to admit into probate a codicil executed by his mother, Marilyn Y. Ver Velde. Based upon our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

In 2006, Marilyn executed a will leaving half of her estate to her son Jeffrey J. Ver Velde and the other half to be held in trust by Jeffrey for Joseph's children. The will was drafted by Marilyn's attorney, and it named Jeffrey as personal representative. Marilyn did not get along with Joseph's wife, and Joseph was intentionally excluded from the will. Marilyn died in December 2016, and Jeffrey petitioned to admit the will to probate.

Thereafter, Joseph filed a codicil signed by Marilyn on June 17, 2016, changing the trustee of his children's share from Jeffrey to Joseph. Joseph's attorney prepared the codicil at Joseph's direction and without speaking to Marilyn. Joseph arranged to have Marilyn sign the codicil at his father's nursing home, where two employees, including a social worker, witnessed the signing. Joseph took the codicil with him and did not make a copy for anyone.

Jeffrey objected to the codicil, and the circuit court conducted an evidentiary hearing. The social worker who witnessed the codicil's execution testified that she did not review the document before signing and did not realize it was a will codicil. She testified that Marilyn inquired what she was being asked to sign and that Joseph said it was "a statement for the bank."

It is undisputed that Marilyn was admitted to the hospital days after she signed the codicil. She never returned home. Jeffrey was Marilyn's power of attorney. He testified that by June 2016, his mother had become "very confused" about financial matters such as "banking

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

statements, telephone bills, ... taxes.” Jeffrey’s wife confirmed that Marilyn did not understand the difference between bills and bank statements and had lost skills she previously used. Marilyn never told Jeffrey or his wife that she wanted Joseph to act as trustee.

Joseph testified that he took his mother to her attorney’s office in June 2016, but Marilyn’s attorney “wasn’t receptive to making any changes” to the will. He asked the attorney “could we modify [the trustee] aspect” of the will, but his mother “was very excited about reminiscing about numerous things in the area and her focus wasn’t strongly on the task at hand.” As such, Marilyn’s attorney “didn’t think [the change] would be prudent.” Joseph was allowed to present a recorded conversation between himself and his mother.

The circuit court refused to admit the codicil, determining that Marilyn was “taken advantage of and manipulated by a son who couldn’t accept that she didn’t like his wife and didn’t want him to be the trustee.” The court found “very credible” the social worker’s testimony that Joseph misinformed Marilyn about the codicil’s contents, and “testimony that [Marilyn] was confused and she wasn’t doing well at this time.” As to the recorded conversation, the court found that Joseph was “leading” his mother and that: “ It seems like she just wants to be sure all of her grandchildren are getting stuff. ... [I]t just doesn’t sound like she understood about having one brother or another be the trustee. I didn’t hear that at all. It sounds like she was manipulated.”

The record supports the circuit court’s determination that Marilyn’s codicil was the result of undue influence. Undue influence may be proven under a two-element or a four-element test. Under the two-element test, the objector must prove “a confidential or fiduciary relationship ... between the testator and the beneficiary coupled with the existence of ‘suspicious

circumstances.” *In re Estate of Vorel*, 105 Wis. 2d 112, 117, 312 N.W.2d 850 (Ct. App. 1981) (citation omitted; alteration in original). The existence of both elements raises a rebuttable presumption of undue influence. *In re Estate of Kamesar*, 81 Wis. 2d 151, 164, 259 N.W.2d 733 (1977).

Joseph was Marilyn’s son and procured the codicil. This establishes the requisite “confidential relationship.” *See id.* at 165. The record is replete with suspicious circumstances. Joseph hired his own attorney to draft the codicil after Marilyn’s attorney deemed it imprudent. He never arranged for his mother to meet the attorney but made a recording on which he led and manipulated his mother into apparent agreement. He misrepresented to Marilyn that the codicil was simply “a statement for the bank,” and did not provide a copy to anyone. The change was sudden, near the end of her life, and unexpressed to anyone but Joseph.²

Joseph’s reliance on the self-proved nature of the codicil misses the mark. *See* WIS. STAT. § 853.04 (describing what constitutes a self-proved will); WIS. STAT. § 856.16 (a self-proved will is conclusively presumed to meet the formality requirements of WIS. STAT. § 853.03). That the codicil was executed in compliance with § 853.03 does not conclusively establish the absence of undue influence in its procurement. *See* § 856.16 (other requirements of valid execution are rebuttably presumed).

Joseph’s remaining arguments fail to account for the standard of review. The credibility of witnesses is a matter for the circuit court, whose factual findings “shall not be set aside unless

² For the reasons set forth in Jeffrey’s brief, the facts of record also satisfy the four-element test, which requires proof of susceptibility, opportunity, disposition to influence, and a coveted result. *In re Estate of Vorel*, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981).

clearly erroneous.” WIS. STAT. § 805.17. In arguing the weight of evidence, Joseph asks us to make inferences he advanced in a post-hearing letter to the circuit court. The court declined to consider Joseph’s proffered “additional information.” The assertions in the letter are not part of the evidentiary record, and Joseph neither argues nor demonstrates that the circuit court erroneously exercised its discretion in denying reconsideration. *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.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals