COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0203 **Cir. Ct. No. 00-PR-26**

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

IN RE THE ESTATE OF ZOURA S. DREXLER:

BARBARA S. HORLACHER,

OBJECTOR-APPELLANT,

V.

ESTATE OF ZOURA S. DREXLER, BY ALBERT F. HORLACHER, JR., PERSONAL REPRESENTATIVE,

RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Barbara S. Horlacher appeals from the judgment and order of the circuit court which admitted the will of Zoura S. Drexler to probate and dismissed the objections of Barbara Horlacher. She argues on appeal

that Drexler was not of sound mind when she executed the will, and that Drexler's heir, Albert F. Horlacher, Jr., exercised undue influence over Drexler to persuade her to execute the will. We conclude that the circuit court did not err, and we affirm.

¶2 Barbara Horlacher and Albert Horlacher are the children of Zoura S. Drexler. After Drexler's death, Albert filed a petition for administration of Drexler's will. Barbara then filed an objection which was tried to the court. The testimony at trial established that Drexler signed a will which left her estate to her son, Albert, and specifically excluded her daughter, Barbara. At the time she signed the will, Drexler explained to her attorney that she was excluding her daughter because Barbara received income from her father's estate, Drexler believed Barbara would dissipate everything, and Barbara had commented to Drexler that she could not wait until Drexler died so she could obtain her portion of the estate. Albert was unfamiliar with the contents of the will prior to the time of Drexler's death. The court specifically found that Drexler was of sound mind when she made the will and that there was no evidence of suspicious circumstances surrounding the making and execution of the will.

¶3 On appeal, Barbara first argues that trial court erred when it found that Drexler had the mental capacity to make the will.

> The burden of proof at trial when a will is challenged for want of the testator's testamentary capacity is that of introducing clear, convincing and satisfactory evidence. ***Estate of Dobrecevich***, 14 Wis.2d 82, 85, 109 N.W.2d 477 (1960). The standard of review is not whether this court would reach the same findings, but whether the findings should ". . . be affirmed as not being contrary to the great weight and clear preponderance of the evidence. ***In Matter of Estate of Becker***, 76 Wis.2d 336, 346, 251 N.W.2d 431 (1977)." ***Estate of Evans***, 83 Wis.2d 259, 271, 265 N.W.2d 529 (1978). Therefore, there is a heavy burden upon the appellant-objector to demonstrate that the trial

> court erred in concluding that the decedent's lack of mental capacity was not proven by clear, convincing and satisfactory evidence.

In Matter of Estate of Sorensen, 87 Wis. 2d 339, 343-44, 274 N.W.2d 694 (1979).

¶4 In this case, there was more than sufficient evidence to support the trial court's findings. A multitude of witnesses testified to Drexler's mental capacity, including her neighbor, the person who cleaned for her, the attorney who drafted the will, and the doctors who treated her. The evidence also showed that Drexler managed her own financial affairs up until the time of her death. Further, the evidence established that Drexler consulted the attorney about the contents and execution of the will without Albert's knowledge.

¶5 Barbara's evidence, on the other hand, consisted of one doctor who never examined or treated Drexler. The doctor based his opinion on his examination of Drexler's medical records. This doctor conceded, when questioned by the court, that it was difficult to give an opinion on the mental capacity of a person he had never examined. Based on this evidence, we cannot conclude that the trial court erred when it found that Drexler had the requisite mental capacity to make her will.

¶6 Barbara also argues that her brother, Albert, exercised undue influence over Drexler. There are two tests for determining whether undue influence has been exercised. The first test has four elements: (1) a person who is susceptible of being unduly influenced by the person charged with exercising undue influence; (2) the opportunity of the person charged to exercise such influence on the susceptible person to procure the improper favor; (3) a disposition on the part of the party charged, to influence unduly such susceptible person for

the purpose of procuring an improper favor either for himself or another; and (4) a result caused by, or the effect of such undue influence. ***Becker***, 76 Wis. 2d at 347.

¶7 The trial court found that Drexler was not a person subject to undue influence. We conclude that this finding is supported by the record. As to the second element, the court found that Arthur had the opportunity to influence Drexler because Albert held Drexler's durable power of attorney and was the agent for her health care matters. This finding is also supported by the record.

¶8 The third element is a disposition to unduly influence. This factor requires "more than a desire to obtain a share of the estate, it implies grasping and overreaching, and a willingness to do something wrong or unfair." ***Evans***, 83 Wis. 2d at 282 (citation omitted). The trial court found that Albert did not have such a disposition. This finding is supported by the fact that Albert did not know about the execution of this will until immediately prior to Drexler's death. We conclude that the trial court properly found that Albert did not have a disposition to unduly influence.

¶9 The fourth element is the desire to achieve a coveted result. The fact that a will benefits the alleged influencer does not prove this element. ***Id.*** at 284. "Thus, where the record shows the testator was alienated from the natural objects of his affection or felt that they had abandoned him in his hour of need, a will may be natural even though it makes no provision for them." ***Id.*** In this case, the evidence showed that Drexler had sound reasons for excluding Barbara from her will. Drexler believed that Barbara had been adequately provided for by her father's estate, and was concerned that Barbara would dissipate anything she received. Further, Barbara had been insolent to Drexler, telling Drexler that she

could not wait for her to die so she could inherit her estate. We conclude that the trial court's findings on all four elements are fully supported by the record.

¶10 There is a second method for determining whether there was undue influence. When there is a confidential or fiduciary relationship between the testator and the principal beneficiary, that fact, coupled with the existence of suspicious circumstances, can create an inference of undue influence. ***In re Estate of Malnar***, 73 Wis. 2d 192, 202, 243 N.W.2d 435 (1976).

¶11 Here, the trial court found that there was a confidential relationship between Drexler and Albert based on the durable power of attorney. The court also found, however, that Albert exercised this power "very, very carefully, very scrupulously, very infrequently and for very minor matters." In fact, despite the power of attorney, Drexler continued to manage her own finances up until the time of her death. The trial court specifically found that there were no suspicious circumstances. Given that Drexler executed the will without Albert's knowledge, we agree with the trial court's findings. We conclude that the trial court properly found that Albert did not exercise undue influence over Drexler.

¶12 The next issue Barbara asserts is that the trial court erred when it denied her pretrial request to obtain Albert's psychiatric records. Albert objected to the discovery request on the grounds that the evidence was privileged, and the trial court denied Barbara's motion to compel. The court invited Barbara to renew the motion if the evidence at trial created a basis for granting it.

¶13 Discovery matters are within the discretion of the trial court. ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 204, 366 N.W.2d 160 (Ct. App. 1985). A party may obtain discovery of any matter which is not privileged and which is

relevant to the pending action. WIS. STAT. § 804.01(2) (2001-02). On the basis of privilege alone, the trial court's ruling was proper.

¶14 Further, at the time the trial court ruled, Barbara had not presented any evidence which showed that Albert's psychiatric records were relevant to any of the issues in the case. Nor did the evidence presented at trial reveal anything which would make Albert's psychiatric records relevant to Barbara's claim of undue influence. This lack of relevant evidence is demonstrated by the fact that Barbara never renewed her motion during the trial. We conclude that the trial court did not err when it would not allow Barbara to obtain these records.

¶15 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.