COURT OF APPEALS
DECISION
DATED AND FILED

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Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2007 **Cir. Ct. No. 2011PR80**

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

IN RE THE ESTATE OF LAURENCE L. ARNOLD:

KATHLEEN GIBEAUT,

APPELLANT,

V.

VOHNIE RABUCK,

RESPONDENT.

APPEAL from an order of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 BLANCHARD, P.J. In 2011, Laurence Arnold executed a new will naming his fiancée, Vohnie Rabuck, as the primary heir of his estate and

made non-testamentary transfers in Rabuck's favor. These transfers included interests in a house, a car, and beneficiary designations on life insurance policies and an investment account. Arnold subsequently died. After his death, his stepdaughter, Kathleen Gibeaut, challenged the 2011 will and non-testamentary transfers to Rabuck on the grounds that Rabuck had exercised undue influence over Arnold when he executed the 2011 will and made the transfers.

¶2 Following a court trial, the circuit court concluded that Rabuck did not exercise undue influence over Arnold in connection with the will or any challenged transfer. Gibeaut appeals, arguing that the court erred in failing to conclude that she had created a rebuttable presumption that Rabuck had unduly influenced Arnold based on two factors: (1) there was a confidential or fiduciary relationship between Arnold and Rabuck; and (2) the will was created and the transfers were made under suspicious circumstances. For the following reasons, we affirm.

BACKGROUND

¶3 The following facts come from testimony or documentary evidence credited by the circuit court and are not challenged by Gibeaut on appeal.

¶4 Arnold was married twice. Each marriage ended with the death of the wife. Gayle Holte was a child of Arnold's first marriage. Arnold's second marriage was to Gibeaut's mother, and occurred when Gibeaut was an adult.

¶5 Arnold and Rabuck had known each other for many years, in part because they lived across the street from each other. During the fall of 2009, Arnold asked Rabuck out to dinner. Rabuck declined because she was grieving the loss of her late husband. In October 2009, an affectionate correspondence

began between Arnold in Wisconsin and Rabuck, then in Florida. After Rabuck returned to Wisconsin in April 2010, the two spent "the whole spring and summer [of 2010] together." They took an eighteen-day trip to Europe. They travelled together to Florida. They became engaged.

¶6 In February 2011, Arnold told Rabuck he was considering leaving all of his property to her, which would be to the disadvantage of Holte and Gibeaut compared with the status quo. Rabuck responded that Arnold should call Holte and "discuss his overall plan with her." After Arnold spoke with Holte, he reported back to Rabuck, in part, "I guess I didn't know my daughter after all. She's very shallow."

¶7 In March 2011, Arnold had an attorney draft a deed creating a joint tenancy in his house with Rabuck, intending to make her the joint owner, although he would only later give the deed to an attorney for filing, as referenced below.

¶8 On April 9 and 10, 2011, Arnold experienced serious medical issues, during the course of which Rabuck took care of him. At that time, there was an angry confrontation between Holte and Arnold, after Holte questioned Rabuck's ability to care for Arnold.

¶9 On April 13, 2011, Arnold was admitted to a nursing home and spent the balance of that spring in the home. There was evidence that Arnold suffered dementia-like symptoms, but a medical doctor determined that at least by May 18, 2011, Arnold's cognition had improved and he was "able to appropriately communicate decisions necessary to manage his health care," and his health care power of attorney was deactivated. Arnold was released from the nursing home the next day.

¶10 The circuit court found that a critical consideration to Arnold during the period he had been in the nursing home and immediately thereafter was that he wanted to be cared for at home, and Rabuck was "the only individual" in his life "who spoke up and made [Arnold's] wishes known, who actually cajoled, who actually fought, and who was adamant to have [Arnold] return to his home in New Lisbon, Wisconsin." At the same time, the circuit court found, Arnold suffered through an "ordeal" in interacting with Holte and Gibeaut while he was in the nursing home, based on "perceived and actual problems [Arnold] had with both" relatives. "He felt dishonored, and he felt undermined, and he did believe that his daughters were more concerned with his assets than with him."

¶11 After being released from the nursing home, Arnold met with Attorney Richard Radcliffe three times during 2011. The "precursor" for these meetings was "conflict between [Arnold] and [Holte] and between [Arnold] and [Gibeaut]" and difficulty that Arnold was having accessing his financial accounts. This conflict involved developments that included the following: (1) Holte, who had a power of attorney for Arnold, transferred accounts belonging to Arnold to a financial institution in the city where she lived; (2) Gibeaut changed the locks on Arnold's house; and (3) items were removed from Arnold's house without his permission. Thus, at the time of his meetings with Attorney Radcliffe, Arnold "felt abandoned ... let down, … [and] betrayed by [Holte], his daughter, and by [Gibeaut], his stepdaughter."

¶12 While Rabuck was present during meetings that Arnold had with Attorney Radcliffe, Arnold consistently provided all information and answered all questions that Radcliffe had. "Attorney Radcliffe described [Arnold] as being absolutely in control of his decision-making[], [and experienced] no problems with his speech pattern or his reaction time [in responding to] a specific

question…. [A]rnold was 'alert, oriented, and happy to be in control of his own affairs.'" Radcliffe specifically testified that his opinion was that Arnold "was not unduly influenced by" Rabuck.

¶13 The first meeting between Arnold and Attorney Radcliffe was held on May 24, 2011, at which time Arnold terminated the durable power of attorney and health care power of attorney for which Holte was the primary agent. During this meeting, Arnold introduced Rabuck to Radcliffe as his fiancée.

¶14 During the second meeting with Attorney Radcliffe, on June 2, 2011, Arnold brought with him a copy of the deed to his homestead. Arnold said that he wanted to leave the homestead to Rabuck, through what the circuit court characterized as "survivorship tenancy." Arnold also said that he wanted a new will prepared because his existing will was twenty-five years old. Arnold explained that he had previously gifted $50,000 to Holte and wanted to exclude her from his new will. During this meeting, Arnold also instructed Attorney Radcliffe to designate Rabuck as the primary agent of his durable power of attorney for financial management and his health care power of attorney.

¶15 During the second meeting with Attorney Radcliffe, Rabuck was present, but said that she was not getting involved in financial decisions and wanted no input in the discussions.

¶16 During a third meeting with Attorney Radcliffe, on June 14, 2011, Arnold directed Radcliffe to file the deed to his homestead that included Rabuck's new joint tenancy or "survivorship" interests. Arnold also signed powers of attorney and a new will drafted by Radcliffe, which is a focus of this case, which named Rabuck as his fiancée and the sole beneficiary of his estate.

¶17 Rabuck was not present "[p]rior to and during the execution of" the will. In response to questions posed by Radcliffe during this third meeting, Arnold said that (1) he was not in "any way" concerned about Rabuck handling his money, (2) he wanted Rabuck "to receive everything" that Arnold possessed, and (3) he wanted this outcome because Rabuck had taken care of him and she was "the love of his life." Arnold also explained during this meeting that he wanted to designate Rabuck as the person to receive bonds worth $85,000 upon his death.

¶18 Separately, an associate of a financial services firm testified that, when Arnold requested a change in beneficiaries on two life insurance policies in May 2011, Rabuck was present for the meeting but said little, and Arnold made statements that included the following: "My daughter is doing nothing but wanting to steal my money." The circuit court concluded that, from Arnold's perspective, "it certainly is reasonable that" Arnold could have concluded that his daughters were attempting to steal from him by closing and transferring his financial accounts to a lower interest bearing account, changing locks on his house, and removing items from his house, all done without his permission.

¶19 As to the Arnold-Rabuck relationship, the court found that it "really seem[s] beyond dispute that [Arnold] and [Rabuck] had a close and natural relationship, which [culminated] with the two of them falling deeply in love with one another."

¶20 Arnold died on September 28, 2011, at age 88. His 2011 will was filed with the register in probate, after which Gibeaut was appointed special administrator of the estate pursuant to the petition of Holte. Gibeaut sought to have the 2011 will declared void, and to have a prior will dated 2002 reinstated. Rabuck opposed both actions.

¶21 Following a two-day bench trial and post-trial briefing, the circuit court made findings that included the foregoing and concluded that none of the transfers at issue, testamentary or non-testamentary, were the result of undue influence.

DISCUSSION

¶22 An objector to a will claiming undue influence must identify proof that is clear and convincing. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Factual findings supporting a decision of undue influence will not be upset unless we conclude that they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2011-12);[1] ***Odegard v. Birkeland***, 85 Wis. 2d 126, 134, 270 N.W.2d 386 (1978). Whether the facts found by the court fulfill the legal standard of undue influence is a question of law that we review independently. *See* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

¶23 The circuit court concluded that there was no undue influence here after analyzing the facts under each of the two different legal tests under which an objector to a will may challenge its admission on the theory of undue influence. Apparently on the grounds that "only one test need be met for the objector to prevail," *see* ***Miller v. Vorel***, 105 Wis. 2d 112, 117, 312 N.W.2d 850 (Ct. App. 1981), Gibeaut challenges the court's decision under only one of these tests, not both. Rabuck follows Gibeaut in discussing only one test. Therefore, we follow

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

the parties in reviewing the court's decision under the one test that Gibeaut addresses in this appeal.

¶24 Under the test at issue, a rebuttable presumption of undue influence arises if Gibeaut proves two factors: (1) a confidential or fiduciary relationship existed between Arnold and Rabuck at the time of the will creation and transfers at issue, and (2) the will creation and transfers occurred under suspicious circumstances. *See* ***Glaeske v. Shaw***, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420.

¶25 We need not address the first factor of this test, whether there was a confidential or fiduciary relationship between Arnold and Rabuck. Both factors are required, and as we now explain Gibeaut fails to persuade us that the second factor, suspicious circumstances, was present. That is, for purpose of resolving this appeal, we assume without deciding that there was a confidential or fiduciary relationship, and rest our decision on the conclusion that there was a lack of proof of suspicious circumstances.

¶26 While she devotes much of her briefing to highlighting particular facts in the record that she submits the circuit court did not sufficiently appreciate, Gibeaut fails to point to any fact found by the circuit court on the issue of suspicious circumstances that she argues is clearly erroneous. Moreover, the record is substantial in this case, and we have provided in our summary above only some of the many facts presented at trial supporting the circuit court's view that the circumstances were not suspicious. *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 (When a circuit court fails to make a specific finding regarding a fact that is nonetheless supported by the record, "an

appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision.").

¶27 Neither party offers much in the way of legal authority regarding what type of circumstances should be deemed "suspicious" in this context. However, the following observations of the supreme court appear pertinent, even though they were made in a somewhat different context. The context was the court's review of a circuit court determination as to whether a "coveted result" of alleged undue influence had been attained, which the supreme court explained involves consideration of "the naturalness" of the disposition:

> A will which excludes a natural object of the testator's bounty raises a "red flag of warning," but that fact alone does not make the disposition unnatural where the record shows logical reasons for such a disposition.
>
> Thus, where the record shows that a 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.

Zelner v. Krueger, 83 Wis. 2d 259, 284, 265 N.W.2d 529 (1978) (citations and quoted source omitted).

¶28 As should be clear from our summary above, this statement in ***Zelner*** matches what the circuit court concluded regarding the "naturalness," to use the term from ***Zelner***, of Arnold's dispositions. The circuit court here amply supported its conclusion that Arnold's love for Rabuck provided "logical reasons" for the dispositions, and also that Arnold became convinced that he had been abandoned by relatives "in his hour of need." The record supports the court's conclusion that, in the words of another supreme court case, Arnold's "free agency … free will and volition" were not "destroyed or directed by the overpowering influence of another." *See* ***Bermke v. Security First Nat'l Bank of Sheboygan***, 48

Wis. 2d 17, 22, 179 N.W.2d 881 (1970); *see also* ***Hoffman v. Wisconsin Valley Trust Co.***, 48 Wis. 2d 45, 50, 179 N.W.2d 846 (1970) ("All people are motivated and should have reasons to act, but in undue-influence cases the influence must be undue and overreaching of the testator's mind, causing him to act as the influencer intends.").

¶29 Rabuck argues that disinheriting "the natural objects of his bounty" was "the only logical" path for Arnold to have followed, given Arnold's circumstances in 2011 and his reasonable perception of various actions taken by Gibeaut and Holte. Whether or not this is exaggeration, we conclude that the facts found by the court, as well as additional facts in the record, easily support the court's decision regarding suspicious circumstances as a matter of law. As summarized above, key facts supporting the circuit court's findings include that Arnold distrusted his daughter and stepdaughter due to their transferring his bank accounts and investments and changing the locks to his house, and that Arnold believed that Rabuck, the "love of his life," was the only one who cared for him.

¶30 Gibeaut argues that the circuit court erred in "failing to enunciate the standard of review it applied in its examination of the evidence, thereby making review impossible." This is a puzzling argument. The phrase "standard of review" ordinarily refers to the level of deference a court gives to a decision of another court or an administrative agency. It appears that Gibeaut intends to argue that the circuit court was obligated to state the applicable legal test and then apply that test using the correct terminology. If this is her argument, it is without merit.

¶31 In making this argument, Gibeaut points to supreme court precedent emphasizing the fact-intensive nature of the inquiry, including this passage:

> In determining whether the surrounding circumstances here are suspicious, we are to consider "the facts surrounding the situation," and "scrutinize the evidence more closely and weigh it more carefully than ... in other cases." Additionally, we are to keep in mind that "because acts of undue influence are usually done in secret, proof thereof must be based upon circumstantial evidence."

Hamm v. Jenkins, 67 Wis. 2d 279, 300-01, 227 N.W.2d 34 (1975) (footnotes and quoted sources omitted). As the court explained in ***Hamm***, under this approach, facts are paramount, while legal propositions tend to recede into the background: "'In undue influence determinations the emphasis is on the facts surrounding the situation. Legal precedent often is of little value.'" ***Id.*** at 300 n.10 (quoted source omitted).

¶32 We first observe that the circuit court's fact finding in this case appears to have been notably thorough, including frequent references to details of exhibits and in the testimony of witnesses, and allowing the parties to submit post-trial briefs following a two-day trial. We see no suggestion from the record that the court failed to scrutinize the evidence carefully in reaching the conclusion that Arnold's 2011 estate planning decisions were "clearly understandable." Consistent with this view, as stated above, Gibeaut does not challenge any particular aspect of the court's findings, but instead simply points to various facts in the record that could raise countervailing inferences. She asserts that "one can only guess at whether the evidence was scrutinized as required," but we are not left to guess. We have the record to review, and Gibeaut has the record from which to make arguments, if any are viable.

¶33 Beyond that, if Gibeaut means to argue that reversal of the circuit court is required on the grounds that the court did not explicitly state that it was applying the "greater scrutiny" rule, she misconstrues a fundamental aspect of our

role in reviewing circuit court decisionmaking. As the court explained in ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987), if a circuit court's legal conclusion is correct, "it should be sustained, and this court may do so on a theory or on reasoning not presented to the trial court."

¶34 Gibeaut argues that the circuit court's conclusion that there were no suspicious circumstances is "fruit of a poisonous tree," with the poisonous tree being the court's incorrect conclusion there was no confidential or fiduciary relationship between Rabuck and Arnold. This argument is difficult to address, because it is presented in a highly abstract manner. However, it is sufficient to observe that the legal test for undue influence at issue here consists of two steps, not one. Gibeaut fails to develop an argument based on legal authority for her premise, which we question, that a court necessarily errs on the second step if it errs on the first. *See* ***Becker v. Zoschke***, 76 Wis. 2d 336, 351-52, 251 N.W.2d 431 (1977) (concluding that there was no undue influence since no suspicious circumstances existed, despite confidential relations between beneficiary and testator).

¶35 If Gibeaut intends to make additional legal arguments regarding the suspicious circumstances issue, as opposed to simply emphasizing certain facts and deemphasizing countervailing facts in the substantial record, they are insufficiently developed or supported for us to address.

CONCLUSION

¶36 For these reasons, we conclude that Gibeaut failed to demonstrate undue influence and affirm the judgment of the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.