COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3571

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

IN RE THE ESTATE OF PETER BLUMKA, DECEASED:

ED MORDELL AND LAVERNE BLUMKA,

APPELLANTS,

V.

ESTATE OF PETER BLUMKA AND BARBARA BLUMKA, PERSONAL REPRESENTATIVE,

RESPONDENTS.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Ed Mordell and LaVerne Blumka[1] appeal an order admitting the late Peter Blumka's will to probate. The issue is whether the trial court erred by rejecting the appellant's claim of undue influence in the making of the will. We affirm.

¶2 Certain facts are not in dispute. Peter Blumka died in January 2000 at the age of 80. His first will, signed in 1980, left his estate to his wife, Valerie. If she predeceased him, it divided his estate equally between his brother, Robert Blumka, and Valerie's brother, Mordell. After Valerie died in 1997, Peter executed a second will leaving everything to Robert.

¶3 Barbara Blumka was Peter's niece. She lived in Michigan and over the years rarely saw Peter, but reported that she spoke over the phone to him and Valerie several times per year. After Valerie's death, her contacts with Peter became much more frequent, at least once weekly by phone. She also called his neighbor on occasion to see how he was doing. At some point Peter asked her to come and live with him, and she told him that she would but only after her mother passed away. She visited him once after Valerie died, in 1999.

¶4 In June 1998, Peter executed a third will naming Barbara his primary beneficiary, and reducing Robert's bequest to $1,000. He explained to his attorney that he was grateful to Barbara for her attention to him and her promise to care for him in the future. He also criticized Robert for trying to get at his bank accounts. In September 1998, in his fourth and final will, he removed the $1,000

[1] The notice of appeal lists LaVerne Blumka as an appellant, as does the caption. However, the record reflects no objection to the will by LaVerne Blumka in the circuit court. Rather, LaVerne's husband, Robert Blumka, objected to probate of the will at issue here.

bequest to Robert, leaving Barbara as his sole heir. He again expressed anger at Robert. His attorney testified that she was satisfied that he was competent and rational when he signed both the third and fourth wills.

¶5 The appellants challenged the fourth will on the claim that Barbara unduly influenced Peter to name her his primary and subsequently his sole beneficiary. After hearing testimony from several witnesses, the trial court concluded that Peter was not susceptible to undue influence; that Barbara had little opportunity and no disposition to unduly influence him; and that she in fact had not done so. The court ultimately concluded "that the will being signed in September of 1998 was a product of [Peter's] own desires and wishes and not something that was procured by another person, and that no improper influence was exercised over him to obtain this result." In this appeal, the appellants contend that they sufficiently proved undue influence such that the trial court's finding to the contrary is clearly erroneous.

¶6 Undue influence has four elements: susceptibility, opportunity to influence, disposition to influence, and coveted result. ***Johnson v. Merta***, 95 Wis. 2d 141, 155, 289 N.W.2d 813 (1980). An objector must prove undue influence by clear, satisfactory and convincing evidence. ***Id.*** at 154. We review the trial court's finding as to whether the objector has met that burden under the clearly erroneous standard. ***Id.*** at 154.[2]

[2] Undue influence may be proved, alternatively, by showing a confidential relationship between the testator and the favored beneficiary and suspicious circumstances surrounding the making of the will. ***Sensenbrenner v. Sensenbrenner***, 89 Wis. 2d 677, 686, 278 N.W.2d 887 (1979). The appellants here did not attempt to prove undue influence under this test.

¶7 The evidence supports the trial court's finding that Peter was not susceptible to undue influence. There is no question that after Valerie's death Peter was lonely and suffered from short-term memory loss and other complications of the aging process. However, there was also evidence that he actively managed his financial affairs, was able to live on his own and adequately take care of himself, and that he did not need any community services. He was competent, rational, articulate, and firm in his opinion when dealing with his attorney regarding the wills. He was aware that Barbara might not come to live with him for years. From that evidence the court could reasonably infer that despite his age related infirmities, Peter was not susceptible to undue influence.

¶8 The evidence also supported the finding that Barbara had little opportunity and no disposition to influence Peter, and did not do so. No witness contradicted her testimony that the subject of Peter's will never came up between them. Although Barbara called Peter frequently, she did not visit him between his wife's death and the dates he drafted the wills in her favor. Peter never told anybody that she was pressuring him. The appellants' only evidence for the inference that Barbara was disposed to unduly influence Peter was the fact that she had much more contact with him after his wife's death than before. However, the trial court reasonably refused to infer any bad motive from this fact. We do not deem it unusual that Barbara would have more contact with Peter than she previously had once he had become a lonely widower.

> Influence gained by kindness and affection will not be regarded as 'undue' if no imposition or fraud be practiced, even though it induced the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. … [The law should not] deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

Sensenbrenner v. Sensenbrenner, 89 Wis. 2d 677, 699, 278 N.W.2d 887 (1979) (citation to quoted cases omitted).

By the Court.—Order affirmed.

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