COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP565 **Cir. Ct. No. 2011PR77**

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

IN RE THE ESTATE OF NORMAN W. ELY:

MARK ELY,

APPELLANT,

V.

LISA ORTH, DUSTIN ELY AND CASEY ORTH,

RESPONDENTS.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Mark Ely, Norman Ely's son, appeals an order admitting to probate Norman's will dated August 16, 2011.[1] He contends the circuit court improperly granted summary judgment to his niece and Norman's granddaughter, Lisa Orth; her brother, Dustin Ely; and Casey Orth over Mark's undue influence objection. We agree that a genuine issue of material fact precludes summary judgment on the undue influence issue—specifically, suspicious circumstances—and remand for an evidentiary hearing.

BACKGROUND

¶2 Norman Ely died on August 26, 2011. On September 22, Lisa, Dustin, and Casey filed a petition for formal administration of a will dated ten days before Norman's death. In that will, Norman bequeathed certain personal property to Lisa, Dustin, and Casey, with Lisa and Dustin receiving equal shares of the remaining estate.

¶3 Mark objected to the will, asserting that Lisa exerted undue influence to cut him and Rick out of the will shortly before their father's death. Following Mark's appointment as personal representative, Lisa, Dustin, and Casey again petitioned to probate Norman's will. A hearing was scheduled for February 1, 2012.

¶4 On January 30, Mark filed a second objection, which included numerous exhibits supporting his and Rick's undue influence position. Among

[1] Although the Notice of Appeal stated that Rick Ely, Mark's brother, is also a party to this appeal, Mark did not request that he be included in the case caption. We construe the briefs as making arguments on behalf of both Mark and Rick, but—as the sole captioned appellant—we will refer only to Mark throughout this opinion. For ease of reading, we will refer to all parties by their first names.

these exhibits was a will dated July 30, 2004, which purported to divide Norman's estate equally among Mark, Rick, Lisa and Dustin.

¶5 Mark attached several deposition transcripts to his objection as exhibits. Lisa, whom Norman had given power of attorney, stated that Norman asked her to get his 2004 will shortly before his death. At Norman's direction, she crossed off Mark's and Rick's names. Lisa then selected an attorney and arranged two appointments. Norman executed the new will at the second appointment, after which Lisa withdrew $48,000 from Norman's bank account. She kept $20,000, gave $20,000 to Dustin, and deposited the remaining $8,000 in a new checking account.

¶6 Mark Brey, whom Lisa selected to draft Norman's 2011 will, stated that Lisa made two appointments with him. During the first appointment, he spoke with Lisa and Norman in his office.[2] Brey stated Norman was "an unhappy individual," "hostile," and "clearly didn't want to be there." Norman appeared to be frail, and would not get out of his vehicle on the second appointment to execute the new will. He did not explain his request to exclude Mark and Rick from the will, and Brey did not ask for an explanation.

¶7 Lisa responded to the objection on January 31, 2012 with a submission that included testimony or statements from various individuals suggesting Norman was competent and of sound mind in the days preceding his death. Brey stated that once or twice, when Lisa tried to explain something to Norman, Norman would "basically tell her to shut up." Brey also opined that

[2] Lisa did not recall Norman being with her at the appointment on August 15, 2011.

Norman was not susceptible to being influenced. Lisa's submission also included a nursing home evaluation, and a statement from Pam Kuhn which suggested that Norman was alert and coherent on August 20, 2011.

¶8 The circuit court did not take evidence at the February 1, 2012 hearing, and apparently treated the parties' submissions as cross-motions for summary judgment on the issue of undue influence. The court noted there were "certainly some things here that fit with the concept of undue influence," including Lisa's selection of the drafting attorney, the absence of a prior relationship between Norman and Brey, the changing of the will shortly before Norman's death, and Lisa's accompanying Norman to the appointments.

¶9 However, the court ultimately concluded it had no "good evidence at all that [Norman] did not understand what he was doing." The court reasoned that Norman "logically knew that he didn't have long left on the earth," would naturally have considered the final disposition of his property, had time to consider that disposition between visits to Brey, and was considered mentally competent by Brey, Kuhn, and nursing home staff. It concluded Norman "seems like … a rather forceful fellow and he got what he wanted." The court then ordered Norman's 2011 will admitted to probate.

DISCUSSION

¶10 We review a grant of summary judgment de novo, but apply the same methodology as the circuit court. ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. We first examine the pleadings to determine whether a claim has been stated, then determine whether there is a dispute as to any material fact. ***Id.***, ¶41. Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[3]

¶11 Traditionally, undue influence is established by proof of four elements: (1) susceptibility to undue influence; (2) opportunity to influence; (3) disposition to influence; and (4) coveted result. ***Lee v. Kamesar***, 81 Wis. 2d 151, 158, 259 N.W.2d 733 (1977). However, "the nature and purpose of undue influence is such that it is usually exercised under cover or in secret with little or no opportunity for the presence of disinterested parties." ***Freitag v. Solverson***, 9 Wis. 2d 315, 317-18, 101 N.W.2d 108 (1960). Because of these difficulties, undue influence is usually shown by circumstantial evidence. ***Id.*** at 318. Further, "when three of the four elements are established by the required proof, only slight evidence as to the fourth element is necessary to prove its existence." ***Id.***

¶12 Only two of these four undue influence elements appear to be disputed: susceptibility and disposition.[4] Mark asserts Lisa had the disposition to unduly influence because she admitted to taking $48,000 out of Norman's bank account in the days preceding his death, keeping $20,000 for herself. However, a disposition to unduly influence "means more than a desire to obtain a share of the

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

[4] Lisa also contends Mark has failed to provide any evidence of a coveted result. This assertion appears to be based on her belief that the record "shows reasons as to why a testator would leave out those who may be the natural beneficiaries of his bounty." However, she neither describes Norman's reasons for excluding Mark nor identifies where in the record we might find them. We need not consider arguments unsupported by citations to the record. ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988). In any event, Lisa concedes the exclusion of Norman's natural heirs raised a "red flag of warning." *See* ***Hydanus v. McMahan***, 22 Wis. 2d 665, 673, 126 N.W.2d 536 (1964).

estate. It implies a willingness to do something wrong or unfair." ***Kamesar***, 81 Wis. 2d at 161. Here, Mark claims Lisa acknowledged she sought to eliminate his and Rick's shares because she "never cared" for Mark, and believed Rick was "mentally unstable." If Lisa did say these things, Mark has not indicated where in the record we might find her statements. We need not consider arguments unsupported by citations to the record. ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988).

¶13 We might excuse Mark's slim proof on the disposition element if he had submitted evidence creating a genuine issue of material fact as to Norman's susceptibility. *See* ***Freitag***, 9 Wis. 2d at 318 ("when three of the four elements are established by the required proof, only slight evidence as to the fourth element is necessary to prove its existence"). However, the evidence, viewed in the light most favorable to Mark, at best establishes only that Norman was taking ten to thirteen medications and was, to use Brey's word, "frail." Mark claims Norman was "on the brink of kidney failure" at the time he executed his will, and his medications would have accumulated in his bloodstream. The record citations he provides, however, do not support this claim. In any event, Mark does not identify what medications Norman was using, nor does he provide any medical evidence establishing the effect they might have had on Norman's state of mind. Accordingly, Mark has failed to create a genuine issue of material fact as to susceptibility.

¶14 Nevertheless, a presumption of undue influence may also be created by proof of two elements: (1) a confidential relationship between the testator and the favored beneficiary; and (2) suspicious circumstances surrounding the making of the will. ***Kamesar***, 81 Wis. 2d at 164. "When the objector proves the existence

of both elements by the required quantum of evidence, a presumption of undue influence is raised, which must be rebutted by the proponent." ***Id.***

¶15 That Lisa had a confidential relationship with Norman is undisputed. Lisa had Norman's power of attorney and handled his financial matters in the months immediately preceding his death. Management of a testator's personal and business affairs can give rise to a confidential relationship. ***Id.*** at 165. Our supreme court has previously found a confidential relationship when the proponent of the will and potential beneficiary was given a power of attorney and procured the drafting of the will. *See* ***Malnar v. Stimac***, 73 Wis. 2d 192, 203, 243 N.W.2d 435 (1976).

¶16 The suspicious circumstances requirement is satisfied by "proof of facts 'such as the activity of the beneficiary in procuring the drafting and execution of the will, or a sudden and unexplained change in the attitude of the testator, or some other persuasive circumstance.'" ***Kamesar***, 81 Wis. 2d at 166 (quoting ***Patterson v. Jensen***, 246 Wis. 319, 360, 17 N.W.2d 423 (1945); ***Hamm v. Jenkins***, 67 Wis. 2d 279, 294, 227 N.W.2d 34 (1975)). Here, it is undisputed that Lisa handwrote changes on Norman's 2004 will. She selected an attorney with whom Norman had no prior relationship and had a new will drafted. Lisa testified she did not recall Norman being with her at the first appointment.[5] At the second appointment, Norman refused to leave his vehicle. Brey found this

[5] Brey, however, testified that Norman did accompany Lisa to the first appointment. Thus, at a minimum, a genuine issue of material fact exists as to whether Norman was present at the first appointment with Brey. This is important given the circuit court's observation that the period between the two appointments gave Norman time to reconsider the disposition of his property.

atypical. Norman provided no explanation for his desire to exclude Mark and Rick.

¶17 In concluding that Mark has presented sufficient evidence of suspicious circumstances, we are mindful that "[t]he basic question to be determined from the evidence is always whether 'the free agency of the testator has been destroyed.'" ***Kamesar***, 81 Wis. 2d at 166 (quoting ***Hamm***, 67 Wis. 2d at 294-95). To be sure, there was ample evidence supporting the circuit court's view that Norman was "a rather forceful fellow and he got what he wanted." However, the court also recognized that there was evidence that "fit with the concept of undue influence." Accordingly, it was improper for the court to decide the case based entirely upon the submissions of the parties. It was necessary for the court to receive evidence and making findings of fact.

¶18 We conclude a genuine issue of material fact exists as to whether Norman was unduly influenced in the making of his 2011 will under the confidential relationship-suspicious circumstances test. Accordingly, we reverse and remand to the circuit court for an evidentiary hearing.

By the Court.—Order reversed and cause remanded with directions.

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