

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 12, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to § 808.10, STATS., within 30 days hereof, pursuant to RULE 809.62(1), STATS.

NOTICE

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No. 96-1108

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**In the Matter of the Estate of
Lydia May Hanisch, a/k/a Lydia M.
Hanisch, a/k/a May Hanisch:**

SALLY GAKENHEIMER,

Appellant,

v.

ESTATE OF LYDIA MAY HANISCH,

Respondent.

APPEAL from an order of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Sally Gakenheimer appeals from an order admitting into probate a will and two codicils executed by her mother, Lydia May Hanisch. She argues that the trial court erred in excluding evidence under

§ 885.16, STATS., the dead man's statute, and that the trial court's admission of the will and codicils is not based on appropriate consideration of the relevant factors and the evidence. We affirm the order.

Lydia May Hanisch died on December 24, 1994, at the age of ninety-three. She was survived by her son, Harold W. Hanisch, and her daughter, Sally Gakenheimer. Admitted into probate were a will of July 20, 1982; a codicil of September 21, 1983; and a codicil of September 18, 1987. In her original will, Lydia left real estate owned at her death to Harold and provided that the residue of her estate be divided equally between Harold and Sally. The 1987 codicil provided that the residue of the estate be divided between Harold and his wife Jeanine. Sally was disinherited from receiving anything from her mother's estate. Sally objected to the admission of the documents into probate on the ground that they were the product of undue influence by Harold.

All three documents were drafted by Attorney Richard Nuss. He testified that in 1982 Lydia presented him with handwritten notes about the provisions to be put in her will. Although unknown to Nuss at that time, the notes had been prepared by Harold. In 1987, Lydia contacted Nuss for changes to her will. She brought to Nuss a list of provisions written in longhand entitled "Codicil to my will." Sally suggested that the document contained words and grammar that Lydia would not use.

Sally lived in Delaware. Lydia and Harold resided in Fond du Lac. Lydia lived independently until she entered a nursing home in the summer of 1994. Prior to 1982, Lydia would travel to Delaware and stay with

Sally and her husband Walter and their two children. Between 1982 and 1987, Sally and her family would visit Lydia in Wisconsin once a year.

Sally testified that after 1982, Harold and his family had less and less contact with her family. In August 1987, an incident occurred which resulted in a total discontinuance of contact between Harold, Sally and their families. There was an angry family exchange with regard to Susan Gakenheimer, Sally's twenty-year-old daughter, having taken Brad Hanisch, Harold's seventeen-year-old mentally handicapped son, to the local Holiday Inn to pick up Sally from a high school reunion party. Sally sought to illicit testimony from Susan and Walter Gakenheimer about conversations with Lydia regarding the hotel incident and other matters. Objections were sustained under the dead man's statute.

Sally contends that because her husband Walter and her children only had a contingent and remote interest in Lydia's estate, they were not incompetent under the dead man's statute¹ to give testimony about

¹ Section 885.16, STATS., provides in part:

No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person ... unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in

conversations with Lydia. See *Estate of Christen*, 72 Wis.2d 8, 11-13, 239 N.W.2d 528, 530-31 (1976); *Estate of Nale*, 61 Wis.2d 654, 659-60, 213 N.W.2d 552, 555 (1974). No offer of proof was made as to the testimony these witnesses would have given as to conversations with Lydia regarding possible undue influence. Section 901.03(1)(b), STATS., provides that error may not be predicated upon a ruling which excludes evidence unless the substance of the excluded evidence was made known to the judge by an offer of proof. Contrary to Sally's characterization of the testimony, it is not self-evident from the context of the questions the substance of the evidence that was excluded. We need not consider the court's ruling under the dead man's statute in the absence of an offer of proof.

Two tests exist for determining whether a testamentary document is the result of undue influence. The two-element test requires a finding of a confidential or fiduciary relationship and suspicious circumstances surrounding or relating to the preparation or signing of the probate document. See *Estate of Vorel*, 105 Wis.2d 112, 117, 312 N.W.2d 850, 853 (Ct. App. 1981). The four-element test requires the court to consider issues of: (1) susceptibility, (2) opportunity, (3) disposition, and (4) coveted result. See *Estate of Kamesar*, 81 Wis.2d 151, 158, 259 N.W.2d 733, 737 (1977).

Sally argues that the trial court failed to apply these elements. We disagree because the trial court's opinion discusses the evidence bearing on each element. Although the court may not have made a specific negative

(. . . continued)

respect to matters to which such testimony relates.

finding as to each element, that the factors were not satisfied is implicit in its decision. See *Estate of Villwock*, 142 Wis.2d 144, 149, 418 N.W.2d 1, 3 (Ct. App. 1987) (when a trial court fails to make express findings of fact, we may assume that a missing finding was determined in favor of the judgment).

Sally's contention that the court failed to consider the factors is simply a disagreement with the findings made by the trial court. We consider whether the trial court's finding that no undue influence occurred is against the great weight and clear preponderance of the evidence. See *In re Hamm Estate*, 67 Wis.2d 279, 282, 227 N.W.2d 34, 35 (1975) (undue influence must be proved by clear, satisfactory and convincing evidence and the trial court's finding will not be upset on appeal unless it is against the great weight and clear preponderance of the evidence).

Here the evidence established that Lydia and Harold enjoyed a good mother-son relationship, with Harold performing a number of functions for Lydia as she progressed in age. Harold and his wife drove Lydia around, completed her income tax returns, saw to her daily needs, held her power of attorney, and monitored her health and care at the nursing home. This was within the normal bounds of an adult child caring for an elderly parent. There was no special undertaking as a fiduciary relationship entails.

The evidence also established that Lydia drove herself to Nuss's office to procure the changes to her will. She was unaccompanied during those meetings with Nuss and never gave Nuss any indication that the changes were influenced by Harold. Indeed, the 1987 codicil itself gave an explanation for

Sally's disinheritance.² Lydia was a strong-minded woman. She was eighty-six when the 1987 codicil was executed. She did not give Harold a power of attorney until 1989 and did not find it necessary to obtain help with her checkbook until 1991 or 1992. The susceptibility to influence was not established by clear and convincing evidence.

What is telling in the review of the evidence is the trial court's finding that the testimony of Sally's witnesses was "tailored" to the factors suggesting undue influence. This was a credibility determination by the trial court which we cannot disturb on appeal. See *Plesko v. Figgie Int'l*, 190 Wis.2d 764, 775-76, 528 N.W.2d 446, 450 (Ct. App. 1994). The trial court simply did not believe Sally's suggestion that Harold used the Holiday Inn incident to influence Lydia's testamentary disposition. We are not persuaded that the trial court's finding is against the great weight and clear preponderance of the evidence.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² The codicil provided: "I leave nothing to my daughter, Sally May Gakenheimer, as she will be adequately provided for." Nuss testified that Lydia told him that Sally had married into money.