COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1228 **Cir. Ct. No. 99-PR-30**

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

IN RE THE ESTATE OF MARGARET BARBER, DECEASED:

ESTATE OF MARGARET BARBER, BY ITS PERSONAL REPRESENTATIVE, BARBARA L. FRANKE,

PETITIONER-RESPONDENT,

V.

CAROLE BARBER STOVIAK,

OBJECTOR-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

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

¶1 NETTESHEIM, P.J. Carole Barber Stoviak appeals from a circuit court judgment admitting the will of her mother, Margaret Barber, into probate over Carole's objection. The Last Will and Testament of Margaret Barber, dated

December 30, 1997, disinherited Carole and divided Margaret's estate between her two other daughters including Barbara L. Franke, who is designated as Margaret's personal representative and power of attorney. The circuit court rejected Carole's argument that Margaret's will was the product of Barbara's undue influence.

¶2 Carole raises several challenges to the circuit court's judgment. First, Carole argues that the circuit court erred in its determination that a fiduciary relationship was not established when Margaret appointed Barbara as her power of attorney. Second, Carole argues that the circuit court made legal and factual errors regarding the law of undue influence. While we agree with Carole that Barbara stood in a fiduciary relationship vis-a-vis Margaret, we nonetheless uphold the court's determination that Barbara did not commit any acts of undue influence in violation of that relationship. Therefore, we affirm the judgment.

FACTS

¶3 In 1975, Margaret gave her daughter, Carole, $22,000 for the purpose of adding living quarters for Margaret in Carole's existing residence. Margaret moved into the living quarters in 1976. On November 28, 1983, Margaret executed a will drafted by her personal attorney, Paul Binzak, leaving her net estate in equal shares to her three daughters, Barbara, Earlene, and Carole. Margaret lived with Carole for the next fourteen years.

¶4 By September 1997, Margaret was having health problems and she took up residence with her daughter, Barbara. During this time, Margaret relied heavily upon Barbara for the "administration of her business and personal affairs."

¶5 On October 27, 1997, Margaret executed a second will drafted by Binzak. This will reduced Carole's share of the net estate to twenty percent and

increased the respective shares of Barbara and Earlene to forty percent. According to Binzak, Margaret wanted to change her will because Carole had put deadbolts on her door so she could not get into her living quarters at Carole's house. At this time, Binzak also assisted Margaret in granting Barbara and Earlene powers of attorney for Margaret.

¶6 On December 1997, Margaret executed yet another will with the assistance of Binzak. This will disinherited Carole and divided Margaret's net estate between Barbara and Earlene.

¶7 In January 1998, Carole commenced guardianship proceedings against Margaret. Following a psychological examination, Margaret was determined to be competent and Carole then voluntarily dismissed the proceeding. Later that year, Carole filed a lawsuit against Margaret claiming prescriptive rights to certain lands owned by Margaret. Carole sought both an easement and punitive damages from Margaret. Both claims were eventually dismissed by mutual agreement between Carole and Margaret.

¶8 On September 5, 1999, Margaret died at the age of eighty-eight, survived by her three daughters. Barbara filed a petition for the admission of Margaret's latest will into probate and for her appointment as personal representative of the estate. Carole objected, alleging that Barbara was Margaret's fiduciary and that she had exercised undue influence over Margaret. Carole attempted to establish both the four-part test and the two-part test of undue influence recognized in Wisconsin. The circuit court determined that Barbara was not Margaret's fiduciary. The court further found that even though Barbara had the opportunity to influence Margaret, Carole failed to prove undue influence

under either test. Thus, the court admitted Margaret's will for probate and appointed Barbara as the personal representative of the estate. Carole appeals.

DISCUSSION

Undue Influence

¶9 Whether or not undue influence exists is a mixed question of law and fact. We will not set aside the trial court's findings of fact as to the circumstances unless clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000).[1] The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the finder of fact. ***Lellman v. Lellman***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). When reviewing findings of fact, we view the evidence in a light most favorable to the finding. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). However, whether the facts of record meet the legal standard for undue influence is a question of law that we review de novo. *See* ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998) (we decide questions of law without deference to the trial court).

¶10 In order to prove undue influence, the objector must show by clear, satisfactory and convincing evidence that the testatrix's free will and volition have been overborne, destroyed or directed by the overpowering influence of another. ***Bermke v. Sec. First Nat'l Bank***, 48 Wis. 2d 17, 20, 22, 179 N.W.2d 881 (1970). Undue influence can be established under either a four-prong test or a two-prong test. ***Hoeft v. Friedli***, 164 Wis. 2d 178, 184, 473 N.W.2d 604 (Ct. App. 1991).

[1] All statutory references are to the 1999-2000 version.

Carole has elected, without objection from the Estate, to proceed under the two-prong test on appeal.[2] Under this test, Carole must prove that a fiduciary relationship existed between Margaret and Barbara and that "suspicious circumstances" surrounded the making of the will. ***Id***.

1. Fiduciary Duty

¶11 With respect to the first prong, the circuit court rejected Carole's argument that Barbara's status as the holder of Margaret's power of attorney did not, standing alone, establish a fiduciary relationship between Barbara and Margaret. We disagree. Both ***Miller v. Vorel***, 105 Wis. 2d 112, 312 N.W.2d 850 (Ct. App. 1981), and ***Hoeft*** provide that the execution of a power of attorney, without more, establishes a fiduciary relationship. ***Miller***, 105 Wis. 2d at 117; ***Hoeft***, 164 Wis. 2d at 186-87. It is undisputed that Margaret appointed Barbara and Earlene as her powers of attorney in 1997. Although the Estate invites us to revisit the law set forth in ***Miller*** and ***Hoeft***, we lack the authority to do so. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Thus, we conclude that a fiduciary relationship existed between Barbara and Margaret.

2. Suspicious Circumstances

¶12 The second prong of the test requires the objector to establish the existence of suspicious circumstances. ***Miller***, 105 Wis. 2d at 117. These suspicious circumstances must be demonstrated by evidence that is clear,

[2] The four-prong test, not used here, requires a showing of susceptibility of the testator to undue influence, opportunity by the favored beneficiary to influence the testator, disposition by the favored beneficiary to influence the testator, and receipt of a coveted result. ***Sensenbrenner v. Sensenbrenner***, 89 Wis. 2d 677, 686, 278 N.W.2d 887 (1979).

convincing and satisfactory. ***Bermke***, 48 Wis. 2d at 20. The test for suspicious circumstances is whether the free agency, the free will and volition of the testator or testatrix has been destroyed or directed by the overpowering influence of another. ***Id***. at 22.

¶13 As the circuit court acknowledged in its oral decision, a will which excludes the natural object of the testator's bounty raises a "red flag of warning." ***Zelner v. Krueger***, 83 Wis. 2d 259, 284, 265 N.W.2d 529 (1978) (citing ***Hydanus v. McMahan***, 22 Wis. 2d 665, 673, 126 N.W.2d 536 (1964)). However, "that fact alone does not make the disposition unnatural where the record shows logical reasons for such a disposition." ***Zelner***, 83 Wis. 2d at 284. Here the circuit court concluded that logical reasons existed for Margaret's dispositional estate plan and, as a result, Carole failed to show the existence of suspicious circumstances or undue influence.

¶14 In arriving at its decision, the circuit court considered the facts and law of ***Miller*** and ***Zelner***—both cases in which the natural objects of the testator had been excluded from the will. In ***Miller***, the court found that suspicious circumstances existed because the primary beneficiary, a friend of the testator's, had "extensive involvement" in preparing the will, a layman drafted the will, it was prepared in haste and there was no explanation for the complete omission of the natural objects of the testator's bounty. ***Miller***, 105 Wis. 2d at 117. The ***Miller*** court reasoned that the circuit court could reasonably infer from these factors that the testator had not prepared the will of his own free will. ***Id***. However, in ***Zelner***, the court declined to find undue influence noting that there had been a bitter division in the family since the testator's divorce from the objectors' mother and that the testator's estrangement from his daughters was not the result of undue influence. ***Zelner***, 83 Wis. 2d at 283-84. Applying the four-

prong test, the ***Zelner*** court further found that the evidence did not show that the testator was susceptible to undue influence. ***Id***. at 284.

¶15 Carole argues that the following facts establish suspicious circumstances as a matter of law in this case: (1) the nature and timing of Margaret's radical change to her long-standing estate plan; and (2) the changes were made by a frail and depressed testatrix for the benefit of her power(s) of attorney, one of whom she relied on for care and the administration of her business affairs. In so arguing, Carole essentially challenges the circuit court's findings of fact which are at the crux of its determination that there was nothing in the record to indicate that Barbara influenced Margaret or that Margaret did not execute her various wills by free and voluntary acts.

¶16 We have reviewed the record and conclude that the circuit court's findings of fact as to suspicious circumstances are not clearly erroneous. WIS. STAT. § 805.17(2). Like the circuit court, we find Binzak's testimony most compelling. Binzak had been Margaret's attorney since 1983 when he drafted her first will. In requesting the first changes to her will in October 1997, Margaret informed Binzak that Carole had changed the locks to her living quarters. In addition, Margaret was attempting to equalize the estate based upon the $22,000 gift she made to Carole in the 1970's. Margaret also advised Binzak of her "deteriorated relationship" with Carole. In Binzak's opinion, Margaret was competent at the time of this initial change in her will and the change was the product of a rational thought process.

¶17 With respect to the December 1997 will, which is at issue in this case, Binzak testified that Barbara drove Margaret to his office for the consultation. However, Binzak did not speak with Barbara about the will and she

remained outside the office during his consultation with Margaret. During the consultation, Margaret discussed her problems with Carole, and her belief that she had already taken care of Carole. Binzak asked Margaret whether she had discussed her changes to the will with Barbara, and Margaret indicated that she had not. Barbara remained outside of the office while Margaret executed the new will. In Binzak's opinion, Margaret showed no signs of influence or duress and there were not any suspicious circumstances surrounding the execution of the December 1997 will.

¶18 In addition, the circuit court noted Binzak's testimony that at the time Margaret executed her will in December 1997, "she knew exactly what she had and the contents of the will and knew exactly what was happening." The court also pointed to the results of Margaret's psychological examination for the guardianship proceeding which revealed that she was "alert and competent, she didn't appear to be impaired, her remote and recent history was good [and] she was not a suggestible type of person."

¶19 Carole argues that the timing and radical nature of the change to Margaret's will constitute suspicious circumstances. But the circuit court found, and the evidence demonstrated, that Margaret had logical reasons for the changes and was not subject to undue influence. *See* ***Zelner***, 83 Wis. 2d at 284. Carole and Margaret had an ongoing contentious and deteriorating relationship. Thus, while Carole would otherwise be a natural object of Margaret's bounty, the record here shows a "logical reason" for Margaret to exclude Carole from such bounty. *See* ***id***. Although Barbara was caring for Margaret at the time her final will was executed, Barbara was not involved in the drafting or execution of the will. *See* ***Bermke***, 48 Wis. 2d at 22 (undue influence did not exist where the will was prepared by the testator's own attorney, the testator went alone to discuss and

execute the will and the will remained unchanged for a year and a half before the testator's death).

¶20 Finally, Carole argues that the circuit court improperly emphasized Margaret's testamentary capacity or competency to execute her will. This argument is a nonstarter. As we have noted, a crucial question under the special circumstances test is whether the free will and volition of the testatrix has been destroyed or directed by the influence of another. ***Id.*** From this it logically follows that the circuit court was required to speak to Margaret's testamentary capacity and competence. Moreover, Carole's pleadings put these matters squarely at issue. Carole alleged that in February 1997, Margaret "suffered from mental deterioration" and eventually began suffering from "dementia and insane delusions." Furthermore, in the circuit court the parties were proceeding under both the four-prong test and two-prong test for undue influence. Among other elements, the four-prong test requires proof of "susceptibility," ***Miller***, 105 Wis. 2d at 116, which often inquires into the testator's mental state at the time the will was made, *see e.g.*, ***Mielke v. Nordeng***, 114 Wis. 2d 20, 25-26, 337 N.W.2d 462 (Ct. App. 1983). Therefore, Margaret's mental capacity or "susceptibility" was a critical issue in this case. We reject Carole's argument that the circuit court erroneously emphasized testamentary capacity or that it imposed "susceptibility" as a requirement under the two-prong test.

¶21 Although Carole does not challenge Margaret's testamentary capacity on appeal, Carole renews her arguments relating to Margaret's alleged insane delusions or erroneous or false beliefs. Carole's arguments focus on Margaret's apparent belief that Carole was to repay the $22,000 gift and Margaret's belief that Carole had changed the locks to her residence.

¶22 When insane delusions are alleged, the question is not whether a testator has a general testamentary capacity, for many persons laboring under insane delusions may be competent to make a will. ***Joslin v. Henry***, 4 Wis. 2d 29, 34, 89 N.W.2d 822 (1958). Rather, the question is whether the insane delusions under which the testator suffered materially affected the will in question. ***Id***. Both sides presented their conflicting evidence about the $22,000 gift and the locked doors. Based on the evidence presented at trial, the circuit court rejected Carole's claim that the will resulted from Margaret's "insane delusions." We defer to the circuit court's findings of fact as they are not clearly erroneous.

Frivolousness

¶23 The Estate requests that we find Carole's appeal frivolous pursuant to WIS. STAT. RULE 809.25(3). We decline to do so. Although we have rejected Carole's challenge to the circuit court's ruling as to suspicious circumstances, we have agreed with her appellate challenge to the court's ruling that Margaret and Barbara did not have a fiduciary relationship. We cannot award fees under RULE 809.25(3) unless "the entire appeal is frivolous." ***Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 403, 596 N.W.2d 828 (Ct. App. 1999).

¶24 As a final matter, we note a troubling aspect regarding Carole's presentation of this case. In the recital of facts, Carole's counsel has failed to provide us an accurate and complete representation of the relevant facts. The result is a one-sided and distorted presentation of the factual history. Counsel's role as an advocate does not entitle him to omit relevant facts that do not assist his case. This tactic is especially distressing where, as here, counsel is challenging the circuit court's findings and those facts lie at the heart of the court's decision.

CONCLUSION

¶25 We conclude that, as the holder of Margaret's power of attorney, Barbara had a fiduciary relationship with Margaret at the time Margaret executed her will. However, we further conclude that Carole failed to establish the existence of "suspicious circumstances" surrounding the execution of Margaret's will. Because Carol did not satisfy this second prong of the test, we agree with the circuit court that Barbara did not exert undue influence upon Margaret. We therefore affirm the circuit court's judgment admitting Margaret's will to probate.

¶26 Because Carole has succeeded on the issue of whether Margaret and Barbara had a fiduciary relationship, we reject the Estate's request to declare this appeal frivolous pursuant to WIS. STAT. RULE 809.25(3).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.