COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP513 **Cir. Ct. No. 2009IN22**

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

IN RE THE ESTATE OF HAROLD C. HENRIKSEN:

MARY ELLEN HINTZ,

APPELLANT,

V.

CLAIRE HENRIKSEN-KNUDSEN,

RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mary Hintz appeals from a judgment admitting her father's will to probate. Mary argues the circuit court erred by dismissing her undue influence claim. We affirm.

¶2 Harold Henriksen executed a will on March 30, 2004, giving his entire estate to his daughter Claire Henriksen-Knudsen.[1] The will specifically excluded Mary and her brother, Harold Henriksen, Jr. A prior will in 1990 divided ninety percent of the estate equally between the three siblings, after certain bequeaths.

¶3 After Harold's death, an application was filed for informal administration of the 2004 will. Mary subsequently filed a demand for formal proceedings and objected to the admission of the will to probate.[2] Mary contended the will was the product of Claire's undue influence. The matter was tried to the circuit court. The court admitted the will to probate and dismissed the claim of undue influence. Mary now appeals.

¶4 Undue influence must be proved by clear and convincing evidence. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Where a circuit court has made factual findings that underlie the issue of undue influence, we will not upset those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2)[3]; ***Odegard v. Birkeland***, 85 Wis. 2d 126, 134, 270 N.W.2d 386

[1] In the event of Claire's death, the estate went to Claire's husband, Stephen Knudsen. Claire's issue were not named in the will.

[2] Harold Henriksen, Jr., also filed a claim against the estate. Harold, Jr., did not appeal the circuit court judgment.

[3] References to the Wisconsin Statutes are to the 2009-10 version unless noted.

(1978). Whether the facts found by the circuit court fulfill the legal standard of undue influence is a question of law we review de novo. *See* ***Nottelson v. DIHLR***, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980).

¶5 There are two avenues by which an objector to a will may challenge its admission on the theory of undue influence. The first method is a four-element test that requires the challenger of the will to prove that: (1) the decedent was susceptible to undue influence; (2) there existed the opportunity to influence the decedent; (3) there was a disposition to influence the decedent; and (4) the coveted result was achieved. *See* ***Odegard***, 85 Wis. 2d at 135.

¶6 The second method by which to prove undue influence has two components: (1) a confidential relationship between the testator and the favored beneficiary; and (2) suspicious circumstances surrounding the making of the will. *See* ***Estate of Kamesar***, 81 Wis. 2d 151, 158-59, 259 N.W.2d 733 (1977).

¶7 In the present case, the circuit court provided a thorough, considerate and lengthy analysis of the evidence. The court found that the will was not the product of undue influence under either the four-element or the two-element test. On appeal, Mary merely takes umbrage with the circuit court's ruling and rehashes the evidence, in contravention of our standard of review, which she fails to address.

¶8 For example, Mary supports her argument of undue influence with evidence that her father lacked testamentary capacity. However, the circuit court relied upon other testimony that her father displayed testamentary capacity at the time of the signing of the will. The attorney who drafted the 2004 will testified that he met with Harold over a four-year period prior to execution of the will. Throughout those years, the attorney did not perceive Harold to be susceptible to

suggestion or disposed to influence. The attorney testified Harold was consistently able to make his own decisions and handle his affairs. In the attorney's opinion, there were no suspicious circumstances concerning the drafting, execution or contents of the will. He explained the 2004 will was not a sudden or unexplained change in Harold's direction or attitude. The attorney testified that on the date the will was signed, Harold was "competent and in full possession of his senses and mental faculties." The court found the attorney's testimony "highly credible" and appropriately gave it great weight. *See* ***Estate of Kesich***, 244 Wis. 374, 383, 12 N.W.2d 688 (1944).

¶9 Mary also relies upon evidence pertaining to Harold's mental and physical health. However, the circuit court emphasized the testimony of Harold's primary care physician, Dr. Michael Schneeburger, that notwithstanding fluctuations in mental and physical health, he was aware of no evidence that Harold was not competent on March 30, 2004. Numerous other witnesses who knew Harold also testified that he was alert and had a clear mind on and near March 30.

¶10 Mary also points to evidence of Harold's increasing dependence upon Claire to support her allegations of an opportunity to influence. However, evidence was also adduced from which the circuit court could reasonably conclude that Harold's will "made sense based on his relationships with various family members." Harold's closest relationships were with Claire and her husband Stephen. The court stated, "The testimony showed that for many, many years Claire consistently provided for the daily needs of her parents." As the court noted:

> [T]he opponents to the will argued this gave [Claire] the opportunity to isolate, control, and manipulate her father in

> order to influence how he decided on the terms of his will; however, the testimony showed otherwise.

¶11 In this regard, the circuit court emphasized testimony showing that Mary and Harold, Jr., made very few attempts to visit their father. The court found that although they blamed this on Claire, their decisions were based on other factors. Other witnesses testified that Mary and Harold, Jr., had been estranged from their parents for many years. The court stated:

> In very clear contrast was the relationship with Claire, which appeared to always have been loving, close, strong and supportive. Her relationship, as well as Stephen Knudsen's, was strong, positive, and close for many years, making them the natural and logical objects of the testator's bounty. It is clear why they were favored in the will.

¶12 The record supports the circuit court's determination that "there was nothing proven to show that Claire was overreaching or engaged in wrongdoing to unfairly gain her father's estate." The court was not required to accept Mary's view of the evidence, and it is not the function of an appellate court to review the weight of the testimony and the credibility of witnesses. *See* ***Estate of Dejmal***, 95 Wis. 2d at 151. The court applied the correct legal standard and the facts found by the court were sufficient to establish the absence of undue influence.

By the Court.—Judgment affirmed.

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