COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3346 **Cir. Ct. No. 02PR000173**

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

IN RE THE ESTATE OF MILDRED K. OLSEN:

KARI K. STUCKEL AND JENNIFER L. GILES,

OBJECTORS-APPELLANTS,

V.

ESTATE OF MILDRED K. OLSEN,

RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Kari Stuckel and Jennifer Giles challenged the 1990 Last Will and Testament of their grandmother, Mildred Olsen, on the grounds of testamentary capacity and undue influence. Emilie Anderson, as special

administrator for Mildred's estate, filed a motion for summary judgment, which the trial court later granted. Kari and Jennifer appeal, arguing only that there is a genuine issue of material fact as to whether Emilie exercised undue influence over Mildred. We disagree and affirm the judgment.

BACKGROUND

¶2 Mildred was a frugal person. She saved the wax liners from cereal boxes, took sugar packets from restaurants home with her, and was disinclined to give gifts. She had four children, sons Dennis Olsen and Joseph Olsen and daughters Virginia Molgaard and Emilie Anderson. Joseph was estranged from Mildred, and Dennis died some years ago. Mildred's two previous wills of October 11, 1979, and June 18, 1985, distributed her estate in one-third shares to Virginia, Emilie, and to Dennis's heirs: Kari and Jennifer (the objectors), and Nicholas Olsen and Andrew Molgaard. Thus, under these wills, Dennis's heirs each received one-quarter of his one-third share, or roughly 8.33% of Mildred's estate.

¶3 On October 15, 1990, Mildred executed another will that revoked all prior wills. This will still bequeathed Virginia and Emilie one-third of Mildred's estate but provided that Dennis's heirs would share the remaining one-third share with the rest of Mildred's grandchildren. Mildred had ten grandchildren. Thus, each grandchild received one-tenth of the remaining one-third share, or 3.33% of Mildred's estate. Dennis's heirs, therefore, received 5% less under this will.

¶4 Shortly after this new will was executed, Mildred established annuities that named Virginia and Emilie as annuitants. Mildred had never purchased annuities before.

¶5 On May 1, 1992, Mildred gave Virginia and Emilie a durable power of attorney. However, the power of attorney did not give Virginia or Emilie the power to gift. From 1992 until Mildred's death on July 13, 2002, Emilie gifted $716,000 from Mildred's estate to fourteen beneficiaries, two of which were not beneficiaries under Mildred's will. A substantial share of the gifts were to all of Mildred's grandchildren who received equal gifts from Emilie.

¶6 Kari and Jennifer knew that under the now revoked wills they, along with their other two siblings, were heirs to their father's one-third share of Mildred's estate, but Kari and Jennifer did not know the contents of either Mildred's 1990 will or the 1992 power of attorney. After Mildred died, Kari asked Emilie about Mildred's estate at the time Emilie was given a power of attorney. Kari also inquired as to what happened to some of Mildred's personal property and requested a general accounting of Mildred's finances. Emilie did not provide any of this information. Consequently, Kari and Jennifer challenged the 1990 will.

¶7 Kari and Jennifer alleged the 1990 will was executed while Mildred did not have the requisite testamentary capacity or was the product of Emilie's undue influence. Emilie moved for summary judgment. The trial court granted Emilie's motion, and Kari and Jennifer appeal, challenging only the court's finding on undue influence.

DISCUSSION

¶8 When reviewing a summary judgment, we perform the same function as the trial court, making our review de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment must be entered "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). All reasonable inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶9 Undue influence can be established by either of two tests. ***In re Estate of Friedli***, 164 Wis. 2d 178, 184, 473 N.W.2d 604 (Ct. App. 1991). Under the first test, the objector must establish (1) the testator's susceptibility to undue influence, (2) the person charged had an opportunity to unduly influence the testator, (3) a disposition on the part of the person charged to influence the testator to procure an improper favor, and (4) the achievement of a coveted result. ***Estate of Von Ruden***, 55 Wis. 2d 365, 373, 198 N.W.2d 583 (1972). The trial court considered this test only to find a lack of undue influence.

¶10 Under the second test, the objector must prove (1) a confidential or a fiduciary relationship between the testator and the favored beneficiary, and (2) suspicious circumstances surrounding the making of the will. ***Friedli***, 164 Wis. 2d at 184. Suspicious circumstances may be established "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.'" ***In re Kamesar's Estate***, 81 Wis. 2d 151, 166, 259 N.W.2d 733 (1977) (citations omitted).

¶11 Kari and Jennifer confine their argument to the second test. They contend that Emilie's appointment with the power of attorney in 1992, coupled with her unauthorized gifting of considerable sums from Mildred's estate—particularly in view of Mildred's disinclination to gifting—creates an inference of

"suspicious circumstances surrounding the making of the will." They also argue, without further explanation, that suspicious circumstances can be established by the fact that shortly after the 1990 will, Mildred established annuities that named Emilie and Virginia as annuitants.

¶12 As to Kari's and Jennifer's first argument, Mildred did not give Emilie a power of attorney until May 1, 1992, nearly nineteen months after Mildred changed her will on October 15, 1990. Thus, although Emilie later obtained a power of attorney and used that power to gift considerable sums from Mildred's estate, these acts do not show suspicious circumstances at the relevant time period: when Mildred executed her will on October 15, 1990.

¶13 As to Kari's and Jennifer's second argument, we fail to see how the creation of annuities with Emilie and Virginia as annuitants after the 1990 will was executed was evidence of suspicious circumstances surrounding the creation of the will. While Mildred had never purchased annuities before, we cannot agree that this new investment that occurred after the 1990 will was executed constitutes evidence of a change in Mildred's attitude at the time she executed the will. *See* ***Kamesar's Estate***, 81 Wis. 2d at 166 (suspicious circumstances may be established by an unexplained change in the testator's attitude).

¶14 Finally, we note that Mildred's modification did nothing more than allow all her grandchildren to inherit as opposed to a select few. Thus, it is unreasonable to contend that Emilie's acts create an inference of "suspicious circumstances surrounding the making of the will," since the modification itself does not give rise to an inference of suspicious circumstances. Therefore, because Kari and Jennifer fail to raise a genuine issue of material fact with respect to undue influence, we affirm the trial court's summary judgment of dismissal.

By the Court.—Judgment affirmed.

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