IN THE COURT OF APPEALS OF IOWA

No. 0-360 / 09-1678
Filed June 30, 2010

BEVERLY J. ALGOE,
Plaintiff-Appellee,

vs.

WILLIAM H. JOHNSON, Individually, and as Executor of the Estate of Emogene Fern Johnson, Deceased,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Peter A. Keller, Judge.

William Johnson appeals from the district court's findings that the decedent, his mother, was not competent to make a will or sign a deed and that her actions were the result of his undue influence. **AFFIRMED.**

Thomas P. Lenihan, West Des Moines, for appellant.

Jerrold B. Oliver and G. Stephen Walters of Jordan, Oliver & Walters, P.C., Winterset, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

William Johnson appeals, contending the district court's findings that resulted in setting aside Emogene Johnson's August 11, 2004 will, which gave all of her property to William, and her May 17, 2005 quitclaim deed, which conveyed Emogene's homestead residence to William, are not supported by the record evidence. Because we find substantial evidence to support the trial court's finding that Emogene lacked testamentary capacity on August 11, 2004, and that William has not rebutted the presumption of the invalidity of the May 17, 2005 quitclaim deed, we affirm.

I. Background Facts & Proceedings.

The deceased, Emogene Johnson, and her husband, Roy, had a home in Van Meter, Iowa, where they raised their three children, Beverly, Janice, and William. In October 1998, Emogene suffered a severe stroke, which rendered her unable to speak or walk. Since that time, this family has been embroiled in conflict. A partial recounting of that conflict is set forth in *In re Estate of Johnson*, 739 N.W.2d 493 (Iowa 2007), and we will not repeat it here. Suffice it to say that Emogene was found incompetent to have executed powers of attorney in November 1998 and January 1999. *See Estate of Johnson*, 739 N.W.2d at 495. As a result, the purported conveyence of Emogene's interest in the homestead to Roy (who died in December 1999) executed under the power of attorney was found void, and the homestead was to be distributed in accordance with Emogene's will. *See id.* at 502. We are now faced with William's appeal from the district court's findings, which resulted in setting aside Emogene's 2004 will and a 2005 quitclaim deed concerning the Van Meter home.

Following a 1998 stroke, Emogene returned home in 1999. She was not able to walk or talk, and she required extensive care. Roy, Janice, and William lived in the home with Emogene, and all provided care for her. Janice was attorney-in-fact for Emogene.[1] Roy died in 1999, and the siblings' relationship, which had already been a difficult one, became very strained.

Emogene signed a power of attorney on March 4, 2003, naming William as attorney-in-fact, which effectively revoked the powers of attorney under which Janice had been acting. On March 6, William took over Emogene's checkbook and located Emogene's will in a safe deposit box. That will, dated February 3, 1984, left her entire estate to Roy, and if Roy predeceased her, to her children in equal shares.

In April 2003, Janice vacated the home, and William became Emogene's sole caretaker. On August 11, 2004, Emogene signed a will, prepared by William, leaving her entire estate to William. On May 17, 2005, Emogene signed a quitclaim deed transferring the Van Meter home to William.

Emogene died on March 1, 2007, and her August 11, 2004 will was admitted to probate. Beverly objected,[2] claiming Emogene lacked capacity to make a will on August 11, 2004, or sign the May 17, 2005 deed. She further claimed the documents were the product of undue influence by William.

Following a non-jury trial, the trial court found Emogene lacked testamentary capacity on August 11, 2004. The court also found the 2004 will was a result of undue influence by William. The court further found Emogene

[1] The power of attorney by which Janice acted as attorney-in-fact was not set aside until 2005 during probate of Roy's estate.

[2] Janice died in June 2004.

lacked capacity to transfer the homestead to William by quitclaim deed in May 2005, and the quitclaim deed was the result of undue influence. The court set aside the 2004 will and 2005 deed. William appeals.

II. Scope & Standard of Review.

Actions to set aside or contest wills are tried as law actions. Iowa Code § 633.33 (2009). Our review is for correction of errors of law. Iowa R. App. P. 6.907. The trial court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 6.904(3)(*a*).

With respect to the challenge to the quitclaim deed, our review is de novo. *See* Iowa Code § 633.33 ("[A]ll other matters triable in probate shall be tried by the probate court as a proceeding in equity."); Iowa R. App. P. 6.907 ("Review in equity cases shall be de novo."); *see also Jeager v. Elliott*, 257 Iowa 897, 908, 134 N.W.2d 560, 566 (1965). We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Discussion.

We begin our discussion with these general principles: "Mental capacity and freedom from undue influence are presumed." *In re Estate of Huston*, 238 Iowa 297, 299, 27 N.W.2d 26, 28 (1947). The person denying their existence or asserting any fact that would render the instrument ineffective assumes the burden of proof on that issue. *Id.* However, with respect to inter vivos transfers, where a confidential relationship is found to exist between the grantor and a grantee, a presumption against the validity of the conveyance arises, and the burden of upholding the conveyance as to its fairness passes and rests upon the

grantee. *Jaeger*, 257 Iowa at 910, 134 N.W.2d at 568; *see also Oehler v. Hoffman*, 253 Iowa 631, 634, 113 N.W.2d 254, 256 (1962).

We further summarize:

> [C]ontestants seeking to set aside a will based on undue influence carry the burden of proving the essential elements of the action by a preponderance of the evidence. Persons seeking to set aside inter vivos transfers carry a higher burden of proving their cause of action by clear, satisfactory and convincing evidence. Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefitted parties to prove—by clear, satisfactory, and convincing evidence—their freedom from undue influence. No such presumption of undue influence exists in the case of a will contest, even where the testator and beneficiary stand in a confidential relationship. But a suspicion of overreaching may arise where the dominant party has participated in the actual preparation or execution of the will.

In re Estate of Todd, 585 N.W.2d 273, 277 (Iowa 1998) (footnotes and citations omitted), *abrogated on other grounds by Jackson v. Schrader*, 676 N.W.2d 599, 605 (Iowa 2003). With these principles in mind, we address William's argument regarding testamentary capacity.

A. August 11, 2004 Will—Capacity.

In order for a decedent to have general mental capacity to make a will, the decedent must know and understand (1) the nature of the instrument then being executed; (2) the nature and extent of the decedent's property; (3) the natural objects of the decedent's bounty; and (4) the distribution the person desires to make of her property. *In re Estate of Henrich*, 389 N.W.2d 78, 81 (Iowa Ct. App. 1986). All of the four elements "must exist coextensively at the time the will is executed." *Id*. To show the testator lacked capacity, the party asserting the claim must demonstrate the decedent lacked any one of the four elements noted.

In re Estate of Gruis, 207 N.W.2d 571, 573 (Iowa 1973). The proof of a mental deficiency must be applicable to the time of making the will. *In re Estate of Roberts*, 258 Iowa 880, 889, 140 N.W.2d 725, 730 (1966).

> While it is true that evidence of mental capacity must refer to the exact time of the making of the will, evidence of the condition of the mind of the testator at other times may be received if there is a reasonable basis for the conclusion that it throws some light on his mental competence at the time the will was made.

Gruis, 207 N.W.2d at 573.

William contends the trial court erred in ruling he had not rebutted the presumption that Emogene's disability did not improve from that level which existed on January 11, 1999. *Cf. In re Estate of Guinn*, 242 Iowa 542, 547, 47 N.W.2d 243, 245 (1951) (noting "[i]f a satisfactory showing is made that the disease of mind is of a progressive nature . . . presumption arises that said condition continues, and the duty of going forward with the evidence to overcome this presumption, shifts to the proponents").

In this case the record contains substantial evidence to support the trial court's finding that Emogene lacked the mental capacity to know the nature and extent of her property. The court found the testimony of Dr. Lynn Rankin credible and convincing. Dr. Rankin had seen and evaluated Emogene in 1998 and 1999. She testified that Emogene suffered the most severe type of stroke that a person can survive, and that recovery from such a stroke was very limited. She further testified that Emogene suffered global aphasia, which means that Emogene was unable to express herself through speech or writing and would have had difficulties understanding spoken or written words. Dr. Rankin testified the vast majority of recovery from any stroke takes place in the first six months,

and that the type of damage suffered by Emogene is generally permanent. Dr. Rankin further testified that an accurate determination of how much cognitive ability the victim of such a stroke had regained would require a battery of tests, which never occurred here.

The trial court found the evidence submitted by William concerning Emogene's testamentary capacity less than convincing. Dr. Charles Caughlan, who is board certified in internal medicine and geriatrics, was Emogene's physician for five years, but did not become her physician until after her stroke. He testified he performed two examinations to determine Emogene's competency in 2003 and 2005. Both examinations consisted of questions created by William that could be answered by "yes" or "no" head nods.

On February 17, 2003, Dr. Caughlan's office notes provide in part:

> She [Emogene] has expressive aphasia, which make communication difficult. She can read and answer with nods. I asked her these specific questions:
> "Do you want to live at home?"—Positive nod.
> "Do you want to move and live at a nursing home?" –Negative nod.
> "Do you understand these questions?"–Positive nod.
> "Do you want Bill to take care of you?"–Positive nod.
> "Do you want Bill as your guardian?"–Positive nod.
> "Do you want to keep Janice as your Power of Attorney?"–Negative head shake.
> "Do you want Beverly as your Power of Attorney?"–Negative head shake.
> "Do you want Bill as your Power of Attorney?"–Positive nod.
> "Do you want to remove Janice as your Power of Attorney?"–Positive nod.
>
> . . . .
>
> It seems to me as if this lady is getting excellent care at home. She clearly wants to stay at home with her son, Bill. It appears that she wishes to not have her daughter as her power of attorney and that she wants to make a switch to Bill. She was asked these questions multiple times, and the answers were consistent.

> It is my opinion that she is able to make decisions referable to her own health care in the future and is clear on what she wants here.

On February 24, 2005, "in anticipation of an upcoming court date," William again asked Dr. Caughlan to "verify competency." The doctor's note also states that Emogene was to undergo neuropsychiatric testing with Dr. Derrick Campbell, "but not close enough to the court date."[3] Dr. Caughlan's notes indicate Emogene "seems to understand and is able to answer questions." He further notes that William "brings in a list of questions." Dr. Caughlan wrote:

> I don't think that she has been coached on these. She says that she wants her estate settled now. She says that she wants to receive total ownership of the house in Van Meter. She wants Bill to be her guardian. She does not want to move to a nursing home. She wants Bill to continue to care for her in Van Meter. Bill has a will and she says that the will is what she wants. She says that she wants Bill to receive her whole estate. I believe that she is competent and reasonably well cared for by Bill, who is quite hypervigilant about her situation.

William contends Emogene's "improvement and alertness" is supported by a letter written by Dr. P.L. Weigel. We first note that this letter does not address Emogene's testamentary capacity; it was apparently written in response to a request that the doctor write "regarding William Johnson's care of his mother Emogene." Dr. Weigel does state, "Even though she couldn't talk, her eyes showed she was aware of her environment—until her final illness: pneumonia, heart attack and renal failure."

We agree there is evidence in the record that Emogene "retained alertness and the ability to demonstrate emotions and feeling" as asserted in appellant's brief. But, awareness of one's environment, alertness, and the ability

[3] There is no indication this testing ever occurred.

to demonstrate emotions are not synonymous with testamentary capacity. What is required is the ability to know and understand (1) the nature of the instrument then being executed; (2) the nature and extent of the decedent's property; (3) the natural objects of the decedent's bounty; and (4) the distribution the person desires to make of her property. *Henrich*, 389 N.W.2d at 81. These qualities are not evident in the record.

William testified his mother made great progress after her stroke. He testified she could read and did read the newspaper every day. We note, however, that William also testified that he supplied Emogene with a typewriter, which he asserts she used to type the alphabet. He testified he hoped "she would get to the point with this electric typewriter that she would start typing words when she got comfortable with where the letters were." However, William testified she did not type words. He explained this was because "[t]his was beneath her. She was old enough that she didn't need to type words. She didn't need to relearn to speak." We find this explanation self-serving and unconvincing.

The trial court concluded that the "weight of the evidence supports plaintiff's contention that Emogene lacked the capacity to make a will." The court found that in addition to Dr. Rankin's credible testimony about the lasting effects of this serious stroke, Andrea Bussey who was present at the signing of Emogene's will, testified that

> at the signing Emogene did not speak or make sounds, and was not asked any questions as required by the Iowa Code about the document she was signing. She also testified she had an uneasy feeling about whether the testator fully understood what was occurring at the signing of her will.

The trial court found

> it difficult to believe that Emogene had a remarkable recovery such that, after the most severe type of stroke a person can suffer and still live, she was able to fully understand the extent of her property or was able to know how she wanted to distribute her property.

The trial court indicated William

> testified that before the Will was executed he would go over the Will with his mother three or four times each day for three to four weeks prior to the execution, to ensure that it was exactly what his mother wanted. The court finds this activity suspicious. It seems unusual that the defendant believed his mother was competent and able to read and yet he found it necessary to read to her the Will (that he drafted) up to 63 times before its execution.
>
> The court concluded:
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> The doctor's [Dr. Rankin's] testimony, as a board certified neurologist, is credible, and she testified that this type of stroke renders a person incapable of comprehending such as to be able to understand a document such as a will. The fact that Emogene was unable to speak to convey her wishes or to write what she wanted done with her property is another factor to consider in determining lack of testamentary capacity. The evidence supports that Emogene did not have the testamentary capacity to make the Will and the Will should therefore be set aside.

Although William presented some evidence to the contrary, there is substantial evidence to support the court's finding that Emogene lacked testamentary capacity on August 11, 2004. We affirm this ruling.

B. May 17, 2005 Quitclaim Deed—Capacity.

The trial court also found that Emogene lacked the capacity to deed the Van Meter home to William on May 17, 2005. William does not dispute the existence of a confidential relationship between him and Emogene. Consequently, the conveyance is "presumptively fraudulent and voidable." *See In re Estate of Herm*, 284 N.W.2d 191, 200 (Iowa 1979). To overcome this

presumption of undue influence, it is William's burden to "prove by clear, satisfactory, and convincing evidence that [he] acted in good faith throughout the transaction and [Emogene] acted freely, intelligently, and voluntarily." *Jackson*, 676 N.W.2d at 605.

Even assuming William acted in good faith throughout the transaction, he did not show that Emogene acted intelligently and voluntarily. "A higher degree of mental competence is required for the transaction of ordinary business and the making of contracts than is necessary for testamentary disposition of property." *Costello v. Costello*, 186 N.W.2d 651, 654-55 (Iowa 1971). The district court concluded:

> This Court determined in the above section that Emogene did not have the testamentary capacity necessary to make a will. Because the test to determine mental capacity for the making of contracts, such as a quitclaim deed, is higher than that for testamentary capacity, it follows that Emogene did not have the mental capacity to engage in a business transaction. Therefore the Deed conveying the property at 125 Hazel Street should be set aside.

On our de novo review, giving the appropriate weight to the trial court's credibility findings, we too conclude Emogene did not possess sufficient consciousness or mentality, when the deed was executed, to understand the import of her acts. *See id.* at 654.

Emogene suffered a severe, disabling stroke in 1998 that damaged three of the four lobes of the left side of her brain, causing the death of brain tissue in the areas of the brain associated with cognition. Brain tissue does not regenerate. Emogene was left unable to speak. Dr. Rankin testified that Emogene was unable to undergo an assessment in 1999 for depression "due to

the degree of cognitive impairment and language impairment." She testified that recovery of the kind asserted by William would be "unusual" and "amazing."

There was evidence that Emogene was aware of her surroundings, had regained the ability feed herself, to change a television channel, and to look at a newspaper. Yet, we have only William's interpretation of her actions from which to infer she regained the capacity to read, understand, and communicate. Dr. Caughlan testified that there is a neuropsychiatric battery of tests that can be performed to determine the competency of persons who have suffered such a stroke, but he was not trained to perform them. Indeed, it appears Emogene had been scheduled to see Dr. Campbell to undergo that testing, but that testing did not occur. The absence of this testing gives us pause—particularly in light of William's expressed awareness of the serious doubts as to Emogene's capacity.

Our de novo review of this issue leads us to agree with the trial court's finding that Emogene was not competent on May 17, 2005, to execute the deed conveying her homestead to William.

Having found Emogene lacked the capacity to execute either the will or deed, we affirm the trial court's rulings that both documents must be set aside. We need not expand on the district court's well reasoned findings concerning undue influence. We therefore affirm.

AFFIRMED.