IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00408 COA

IN THE MATTER OF THE LAST WILL AND
TESTAMENT OF CORA FRANCES
DEDEAUX: NARY L. DEDEAUX, JR.,
WARREN A. DEDEAUX, LAWRIE JAN
DEDEAUX KIRCUS, JOHN C. DEDEAUX
AND ALICIA QUIN DEDEAUX BARNES APPELLANTS

v.

DORIS DEDEAUX HEEBE, ALMA
DEDEAUX LONG AND NAOMI DEDEAUX
HERREN APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JASON H. FLOYD JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

FOR APPELLANTS: W. RAYFORD JONES

FOR APPELLEES: G.E. ESTES, JR.

NATURE OF THE CASE: WILLS, TRUSTS AND ESTATES

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF DORIS DEDEAUX HEEBE, ALMA DEDEAUX LONG AND NAOMI DEDEAUX HERREN, UPHOLDING VALIDITY OF WILL AND FINDING NO UNDUE INFLUENCE

MANDATE ISSUED: 9/16/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

McMILLIN, P.J., FOR THE COURT:

This case is an appeal from a judgment entered in a will contest tried before a jury in the Chancery Court of Harrison County. The jury upheld the validity of the will of Cora Frances Dedeaux executed approximately six months prior to her death at the age of ninety-eight years, and judgment was entered accordingly. The will contestants have brought this appeal, raising four issues which they suggest would require this Court to reverse. After full consideration of the issues, we affirm.

I.

Facts

Mrs. Dedeaux, at the time of her death, was survived by four daughters and two sons. Three sons had predeceased her. In the period prior to her death, Mrs. Dedeaux lived with one of her daughters, Naomi Dedeaux Herren. One other daughter, Doris, lived in New Orleans and was married to a federal judge, Fred Heebe. The proof indicated that Mrs. Dedeaux came to rely on Fred Heebe to some degree for informal advice in matters relating to her business and legal affairs. In 1990, she desired to execute a new will, and Heebe was instrumental in helping her obtain the services of a former law clerk to draft the will. Mrs. Dedeaux, in fact, entrusted the original of the 1990 will to Heebe for safekeeping. That will called for an essentially even division of Mrs. Dedeaux's estate

among her children except for one daughter, Mildred Dedeaux Stewart, who had previously received an inter vivos gift of the testatrix's home place.

According to testimony given at trial, Mrs. Dedeaux decided in April 1993 that she wanted to revise some of the terms of her 1990 will. In furtherance of this purpose, she requested that Heebe and his wife come to her residence and bring the existing will. In an ensuing conference, the testatrix gave instructions as to desired changes which the daughter, Doris Heebe, took down in the form of notes. The major change was a decision to exclude the testatrix's surviving sons and the lineal descendants of her predeceased sons from taking anything under the will except for fractional interests in certain mineral rights which, according to the evidence, were not particularly valuable. Mrs. Dedeaux further proposed to will the bulk of her estate to three of her four daughters, the excluded daughter being the recipient of the previously mentioned inter vivos gift. Doris Heebe was one of the three daughters favored under the proposed will.

Through the efforts of Doris Heebe, an appointment was arranged with Mr. Homes, the same attorney who had drafted the 1990 will. That conference was to be attended by Mrs. Dedeaux and Fred and Doris Heebe. Due to a sudden medical emergency involving the attorney's son, the attorney left his office shortly before the three arrived. The conference was not rescheduled. Instead, information about Mrs. Dedeaux's desires were relayed to the attorney over the telephone. A number of conversations apparently took place, some between Mrs. Dedeaux and the attorney and some involving the attorney dealing directly with Heebe. Ultimately, Homes mailed a draft of the revised will to Mrs. Dedeaux and transmitted a copy by telefacsimile to Heebe. Heebe suggested the need to correct two spelling errors, but except for that, the will was satisfactory in form to Heebe and Mrs. Dedeaux. At trial, Heebe testified that Mrs. Dedeaux continued during this process to consult with him on whether what she proposed to do "was legal."

A tentative appointment for the execution of the will at Attorney Homes's office was arranged. There was testimony that Mrs. Dedeaux requested Heebe and his wife to accompany her to the attorney's office, but that Heebe had a prior court commitment and begged off. Doris Heebe, however, traveled to her sister's home to take her mother to the appointment. At the last minute there was a change in plans, and Homes, accompanied by his wife, came to the home where Mrs. Dedeaux was residing. There the will was executed with Homes and his wife acting as subscribing witnesses. Other persons present in the home at the time were Doris Heebe and Naomi Dedeaux Herren. The will itself recited that it was being executed in triplicate, but Homes testified that to the best of his recollection, only two copies of the will were actually executed. One executed copy ultimately wound up in the possession of Fred Heebe, who was named as a co-executor in the will, and the other was retained by Homes in his office. The other co-executor named in the will was a son, Warren "Ike" Dedeaux; however, he apparently was neither consulted in advance concerning this fact nor informed that a new will substantially decreasing his portion of his mother's estate had been executed.

Shortly before Mrs. Dedeaux's death, at a time when she was hospitalized for what proved to be her final illness, Fred Heebe delivered his executed copy of the will to Ike Dedeaux. After Mrs. Dedeaux's death, two chancery proceedings were commenced concerning her estate. One of the proceedings alleged that Mrs. Dedeaux died intestate and sought to open an administration. The 1993 will in Ike Dedeaux's possession was filed in that proceeding with a caveat against its admission to probate. The other proceeding, commenced by Fred Heebe in his capacity as co-executor, with Mr.

Homes acting as attorney for the estate, offered the 1993 will for probate, using the executed copy retained by Homes in his office. The two proceedings were consolidated, and an issue *devisavit vel non* regarding the validity of the 1993 will was drawn up to be tried by jury. The sole issue to be tried under the *devisavit vel non* was a claim that the will was executed as the result of undue influence exerted by one or more of the favored beneficiaries and therefore, void. The case was tried to a jury which upheld the validity of the will by a ten to two verdict, and this appeal ensued.

We will discuss the issues raised by the appellants (the contestants at trial) in the same order presented in their brief. For sake of clarity, we will, where appropriate, refer to the parties collectively as the contestants and proponents rather than appellants and appellees.

II.

The Weight of the Evidence to Sustain the Will

The contestants assert that the chancellor erred when he denied their motion for a new trial on a claim that the verdict was against the weight of the evidence. The contestants' argument is based on a two-step analysis. First, they contend that there were enough facts before the jury to give rise to a presumption of undue influence under the rule announced in such cases as *Holland v. Traylor*, 227 So. 2d 829 (Miss. 1969) and *Croft v. Alder*, 237 Miss. 713, 115 So. 2d 683 (1959). Those cases stand for the proposition that (a) when the testatrix and the beneficiary enjoy a confidential relationship, and (b) where the beneficiary plays an active role in the execution of the will or its execution is attended by suspicious circumstances, a rebuttable presumption of undue influence arises. *Holland v. Traylor*, 227 So. 2d 834-35; *Croft v. Alder*, 237 Miss. at 722-23, 115 So. 2d at 686. Once such a presumption arises, the burden of going forward shifts to the proponents of the will to present evidence to overcome the presumption that must be clear and convincing to the trier of fact. *Weston v. Estate of Lawler*, 406 So. 2d 31, 34 (Miss. 1981). Thus, the second step of the contestants' argument asserts that the proponents' evidence in favor of the will was not of such quality as to clearly and convincingly negate the presumption of undue influence.

Our work must, therefore, also be two-fold. First, we must determine if the contestants did, in fact, present evidence fairly calculated to give rise to the presumption of undue influence. If not, then our analysis is at an end. However, if we conclude that there was enough evidence to create the presumption, then we must move to the second level and determine whether the proponents submitted evidence which can fairly be said to be clear and convincing that the will expressed the independent desires of the testatrix, free of the improper influence of the favored beneficiaries.

A.

The Presumption of Undue Influence

Initially, our analysis must deal with the question of whether any of the daughters favored in the will enjoyed such a confidential relationship with their mother that their efforts in regard to the execution of the will must be examined further. The mere existence of close kinship, standing alone, would not appear to be sufficient to give rise to a confidential relationship. The proof in this case showed, however, that Mrs. Dedeaux was a lady of substantially advanced age, being well into her nineties when the will was executed. Though the testimony was uncontradicted that she retained her mental faculties, it does not appear subject to question that Mrs. Dedeaux depended to a great degree on others for most of the day-to-day necessities of life. She was, for instance, unable to drive and thus dependent on her children for her most basic transportation needs. The proof also indicates rather clearly that she placed a substantial amount of trust in her daughter, Doris Heebe, either directly or through reliance on her husband, in matters relating to her legal affairs and particularly in regard to the testamentary disposition of her estate. Though the contestants limit their specific allegations of undue influence to Mrs. Dedeaux's daughters, this Court finds that in considering this issue as it relates to Doris Heebe, it is impossible to distinguish between her actions and those of her husband. In that light, we note that Fred Heebe himself testified that on at least one occasion, for unexplained reasons, he listened in on a telephone conversation between his wife and Mrs. Dedeaux concerning the new will. That he played a substantial role in the drafting and execution of this will, which substantially increased his wife's share of Mrs. Dedeaux's estate, is simply not subject to question. We note that under Mississippi law, in regard to the issue of undue influence, it is not necessary that this influence flow directly from the beneficiary. It may flow indirectly from someone in a relationship with the beneficiary who would arguably benefit, at least indirectly, from the testatrix's largesse. *See Weston v. Estate of Lawler*, 406 So. 2d at 34.

This Court is of the opinion that the proof was overwhelming that Doris Heebe (acting in concert with her husband, in whom Mrs. Dedeaux placed substantial trust) enjoyed a confidential relationship with Mrs. Dedeaux for purposes of analyzing a claim of undue influence.

The next point of inquiry becomes, therefore, whether these persons enjoying this confidential relationship played an active part in the preparation of the new will. *See Holland v. Traylor*, 227 So. 2d 834-35; *Croft v. Alder*, 237 Miss. at 722-23, 115 So. 2d at 686. We also answer that question affirmatively. The facts we have already related indicate that Doris Heebe and her husband, Fred Heebe, were intimately involved in the drafting of this will. They prepared notes for submission to the drafting attorney and accepted responsibility for transporting Mrs. Dedeaux to a conference with the attorney under the assumption that they would be active participants in the conference. One of them was present when Mrs. Dedeaux executed the will, and the other acted to preserve the will until shortly before Mrs. Dedeaux's death in a manner making it unlikely that any of the largely-disinherited sons would discover what had transpired, even though one of them was named as a co-executor in the will.

These considerations, coupled with the fact that the drafting attorney for the will was a former law clerk of Fred Heebe who had met Mrs. Dedeaux through Heebe's recommendation are more than sufficient, whether couched in terms of "involvement in the preparation of the will" or "suspicious circumstances regarding the execution of the will," to give rise to a presumption of undue influence.

A somewhat different situation arises in regard to the remaining daughters. Though Mrs. Dedeaux resided in the home of Naomi Dedeaux Herren, there is no indication that she played any part in the preparation or execution of the will. There is even less evidence -- essentially none -- that Alma Dedeaux Long played a role in the circumstances leading up to the new will. Thus, the evidence would appear to fail as a matter of law as to a claim of undue influence against these two daughters. *See Simm v. Adams,* 529 So. 2d 611, 615 (Miss. 1988); *Croft v. Alder,* 237 Miss. at 723-24, 115 So. 2d at 686.

Nevertheless, having found a presumption of undue influence to have arisen through (a) the relationship of trust existing between Mrs. Dedeaux, on the one hand, and Doris Heebe and her husband, on the other, and (b) the Heebes' active participation in the preparation and execution of the will, we accept the proposition that the terms of a will are not divisible in these circumstances, and that the instrument must stand or fall in its entirety. Therefore, if the verdict is to be sustained, this Court must conclude that the proponents of the will presented clear and convincing evidence to overcome the presumption of undue influence arising as to Doris Heebe and her husband.

B.

Overcoming the Presumption

The Mississippi Supreme Court has set out three considerations that must be assessed in determining whether the proponents of a will have overcome a presumption of undue influence, once the presumption has arisen.

In order for [the beneficiaries] to have overcome this presumption of undue influence, the evidence must have shown by clear and convincing evidence that (A) [the beneficiaries] exhibited good faith in the fiduciary relationship with [the testatrix]; (B) [the testatrix] acted with knowledge and deliberation when [she] executed the . . . will; and (C) [the testatrix] exhibited independent consent and action.

Pallatin v. Jones, 638 So. 2d 493, 495 (Miss. 1994) (citations omitted).

There is, based upon our review of the record, a substantial amount of testimony that would indicate that all of the participants in this matter acted in good faith, and that the testatrix, exercising independent judgment, executed the will with full knowledge of its effect and after having duly deliberated thereon.

Doris Heebe testified that she attempted to discourage her mother from changing the will until she had the opportunity to reflect further on the matter and that she consented in assisting her only when her mother insisted. She further testified that she attempted, in vain, to persuade her mother to leave her out of the major bequests in the will since she was already financially comfortable.

Fred Heebe testified that he was simply helping, out of a sense of respect and devotion, what he considered to be a very strong-willed woman who knew her own mind and was not susceptible to the

influence of others.

Fred Heebe's former law clerk, who drafted the will, professed to a deep affection and respect for the testatrix which caused him to work nights on the will to speed its completion and which further caused him to be willing to come to the home where Mrs. Dedeaux lived to avoid any delay in the execution of the will. He also testified that he had discussed the contents of the will in some depth with the testatrix and found her to be independent of thought and well aware of what she desired to accomplish in the will.

We cannot help but observe that all of the evidence for the proponents on the vital issues of this case came from those who would benefit directly or indirectly from the upholding of this will, or those intimately connected with them, and must, therefore, be seen as self-serving. However, that fact alone does not destroy the probative value of such testimony. The jury in this case, sitting as the trier of fact, heard the testimony, observed the demeanor of the various witnesses, and was charged to then decide what degree of credence they would give to the testimony. None of the testimony of these witnesses was substantially impeached or contradicted, and the jury elected, apparently, to accept the testimony as true. Were this Court to conclude that, had it been sitting as the trier of fact, we might have decided the case differently, that alone would not permit us to disturb this verdict. We conclude that taken in the light most favorable to the verdict, there was evidence which the jury could reasonably find to be clear and convincing that the presumption of undue influence had been overcome. *See, e.g., Barber v McClure,* 250 Miss. 396, 405, 165 So. 2d 156, 160 (1964). This issue is, therefore, without merit.

III.

The "Missing" Will

The contestants allege the chancellor erred in refusing to permit the jury to consider the fact that only two signed copies of the will could be accounted for when the will stated on its face that three copies were to be signed. The contestants claim the failure to produce a third copy was evidence of a subsequent revocation by destruction. The chancellor did not err on this point. The issue of *devisavit vel non*, entered well in advance of trial, framed the issue to be resolved by the jury. The sole issue so framed was the claim of undue influence in the will's execution. Subsequent revocation by destruction may have been a legitimate issue had the opponents properly pled it and insisted upon it being contained among the issues to be tried under the *devisavit vel non*. The contestants did not attempt to raise this issue until they filed a written motion to that effect at the conclusion of the evidence. The trial court properly denied this untimely motion to permit the jury to consider an alternative ground to overturn the will. *See, e.g., Trotter v. Trotter,* 490 So. 2d 827, 833-34 (Miss. 1986).

IV.

Exclusion of Testimony Favorable to the Contestants

The contestants claim that the chancellor committed reversible error when he refused to permit Christine Dedeaux, the wife of one of the contestants, to testify that the testatrix had become upset at the death of one of her unmarried sisters when it was discovered that the deceased sister had favored some of her nieces and nephews over others in her will. Christine Dedeaux was apparently prepared to testify that this incident was a motivating factor in the execution of the 1990 will, which called for a largely-equal distribution of the testatrix's estate among her surviving descendants. The probative value of this evidence, according to the contestants' argument, is that it indicated a firm resolve by the testatrix to treat her offspring in an essentially equal manner, thereby rendering suspect the later will which departed from that purpose.

Decisions regarding the admission or exclusion of evidence are entrusted to the trial court's discretion. *See General Motors Corp. v. Jackson*, 636 So. 2d 310, 314 (Miss. 1992). Even evidence that is arguably relevant may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." M.R.E. 403. It is entirely possible that the testatrix may have been firm in her resolve to treat her children equally in 1990, but that subsequent events occurred, not necessarily involving nefarious conduct on anyone's part, which altered that resolve. Thus, while we cannot say that the excluded evidence had absolutely no probative value, we can say with some degree of comfort that its exclusion did not so fundamentally affect these contestants' right to a fair trial as to constitute reversible error. *See* M.R.E. 103(a).

V.

The Sufficiency of the Evidence

The contestants claim the chancellor erred when he denied their motion for a directed verdict at the end of the trial and when he subsequently denied their motion for a JNOV. These are procedural devices to test the sufficiency of the evidence. The trial court should grant such a motion only upon reaching the conclusion that considering all the evidence in the light most favorable to the prevailing non-movant, a reasonable and fair-minded juror could only return a verdict in favor of the movant. *See Wirtz v. Switzer,* 586 So. 2d 775, 779 (Miss. 1991); *Weston v. Estate of Lawler,* 406 So. 2d at 34-35. We, as an appellate court, review the trial court's denial of such motions in that same light. *Wirtz v. Switzer,* 586 So. 2d at 779.

We have discussed the evidence in our consideration of Issue II dealing with the weight of the evidence. Without needless repetition of the evidence that would tend to sustain this verdict, we hold that there was evidence presented that was largely uncontradicted and unimpeached (though unquestionably self-serving) that if believed by the jury, was sufficient to carry the proponents'

burden in this case. By its verdict, the jury indicated that it chose to believe the testimony of the witnesses presented by the proponents. There is no basis, given our limited scope of review, to substitute our judgment as to the credibility properly assignable to these witnesses for that exercised by the jury. For that reason, we conclude that this issue is without merit.

THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE DIVIDED EQUALLY AMONG THE APPELLANTS, NARY L. DEDEAUX, JR., WARREN A. DEDEAUX, LAWRIE JAN DEDEAUX KIRCUS, JOHN C. DEDEAUX AND ALICIA QUIN DEDEAUX BARNES.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.