

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF
ROSE MILLER.

No. 44920

IN THE MATTER OF THE LIVING
TRUST OF ROSE MILLER.

HOWARD BLOOM; AND BARBARA
LEPOME, INDIVIDUALLY AND AS
THE WIFE OF ROBERT C. LEPOME,
ESQ.,

Appellants,

vs.

MARILYN BERKSON, AN
INDIVIDUAL; AND GERTRUDE
MALACKY, AN INDIVIDUAL,
Respondents.

FILED

JUL 12 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order, entered pursuant to a jury verdict, finding that the decedent was unduly influenced in a probate and trust matter. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Appellants Howard Bloom and Barbara LePome argue that the jury's verdict should be reversed for five reasons: (1) the verdict is not supported by substantial evidence; (2) the misconduct of Cary Payne, Esq., permeated the trial, thereby depriving Bloom and LePome of a fair trial; (3) the district court lacked jurisdiction in the matter as citations were never served on the parties; (4) Dr. Etcoff's testimony concerning Rose Miller's capacity was improper; and (5) the district court refused to instruct the jury that the only issue to decide was that of undue influence. We assume that the parties are familiar with the facts and recite them

only as necessary to discuss the disposition of this matter. We conclude that the jury's verdict is not supported by substantial evidence.¹

This court will not disturb the findings of a jury if they are supported by substantial evidence.² In such instances, this court's review is limited to determining whether substantial evidence supports the jury's verdict.³ "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'"⁴

In this case, the district court ruled as a matter of law that Miller was competent and possessed the requisite mental capacity to execute a new will and an amendment to her living trust (the May plan), on May 16, 2001. Thus, the sole issue for the jury to determine was

¹Additionally, we conclude that Bloom's argument that the district court lacked jurisdiction because citations, pursuant to NRS 137.010, were never issued is without merit. NRS 137.010 deals solely with contests to a will and here, the contest was to a trust. Moreover, Bloom's petition for appointment as trustee was granted, thereby giving the district court jurisdiction pursuant to NRS 164.010(1). Similarly, we note that Bloom's argument that the named charitable beneficiaries are indispensable parties is without merit because the February plan and the May plan name the same charitable beneficiaries. Thus, regardless of what plan is held to be the operative trust, the charitable beneficiaries' interests are unaffected.

Because we conclude that the jury's verdict is not supported by substantial evidence and reverse the ruling by the district court, the remaining issues raised by the appellants are moot.

²Close v. Flanary, 77 Nev. 87, 93, 360 P.2d 259, 263 (1961).

³Id. at 95, 360 P.2d at 263.

⁴State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

whether Miller was unduly influenced on May 16, 2001. The jury concluded that she was.

[I]t is well settled that mere possession of influence and the opportunity and motive to exercise it are not sufficient; it must appear, either directly or by justifiable inference from the facts proved, that the influence was exercised so as to destroy the free agency of the testator and control the disposition of the property under the will.⁵

“[I]t is equally well settled that, unless the influence of the beneficiary be unduly exercised, it is not material that the beneficiary was interested in the will, or had better opportunity for solicitation or persuasion than the contestants.”⁶ “Influences resulting from family relationship have no taint of unlawfulness.”⁷ “It is only when such an influence is unduly exerted, so as to prevent the will from being truly the act of the testator, that the law condemns it as a vicious element of the testamentary act.”⁸

A careful review of the record reveals that the jury’s verdict is not supported by substantial evidence. Dr. Etcoff merely testified that Miller was susceptible to undue influence on May 16, 2001, not that she was unduly influenced on May 16, 2001. Moreover, there was no direct evidence that either John Gorman, Esq., or LePome (the only two people present during the execution of the May plan) destroyed the free agency of Miller in executing the plan. A reasonable mind could not accept the evidence presented to the jury as adequate to support its conclusion that

⁵In Re Hegarty’s Estate, 46 Nev. 321, 326, 212 P. 1040, 1042 (1923).

⁶Id.

⁷Id. at 328, 212 P. at 1042.

⁸Id.

Miller was unduly influenced in executing the May plan on May 16, 2001. The evidence of undue influence was circumstantial, which created a suspicion at best and suspicion alone cannot constitute undue influence.⁹ Further, , the testimony of Gorman and LePome demonstrated the opposite; that Miller fully intended to disinherit respondents Marilyn Berkson and Gertrude Malacky and to provide for Bloom and LePome.¹⁰

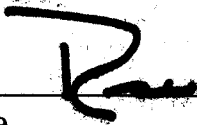
⁹Id. at 327, 212 P. at 1042.


¹⁰Our reversal is not predicated on appellants' argument concerning respondents' counsel's misconduct. However, we note that Cary Payne's misconduct permeated the trial which likely influenced the jury's verdict. Likewise, respondents' answering brief, written by Payne, is both inaccurate and disingenuous as it contains misleading assertions, evidence which was not admitted at trial, as well as other statements which are not supported by the record or otherwise pertinent to this appeal. Such a lack of candor toward Nevada tribunals creates an unnecessary waste of judicial resources. We caution Payne to avoid such practices in the future.

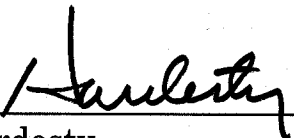
An unreasonable disposition or a sudden change of feelings toward a relative are insufficient to support a finding of undue influence.¹¹

Accordingly, we

ORDER the judgment of the district court REVERSED.


_____, C. J.
Rose


_____, J.
Maupin


_____, J.
Hardesty

cc: Chief Judge, Eighth Judicial District
Hon. Joseph S. Pavlikowski, Senior Judge
Howard Roitman, Settlement Judge
Richard E. Donaldson
Marquis & Aurbach
Bruce L. Gale
Cary Colt Payne
Clark County Clerk

¹¹Id.