IN THE COURT OF APPEALS OF IOWA

No. 1-299 / 00-1462
Filed December 12, 2001

IN THE MATTER OF THE ESTATE OF LESTER O. PRATT, Deceased,

RHONDA MUECKE, PENNI HOWE, TIM HOWE, JERRY BAULER, MARK PRATT, LINDA PRATT, SUSAN PRATT, a/k/a SUSAN KAY SORENSON, JOHN PRATT, BARRY HOWE, THE HEIRS OF SHIRLEY PETERSEN, RANDY PETERSEN, EARL E. PETERSEN, CARL J. PETERSEN, JR., BEVERLY EICKE, LINDA L. PETERSEN, CATHY R. SPINDER, and GERALD PRATT ESTATE, LINDA PRATT, Executor,
Plaintiffs-Appellants,
vs.

TERESA KUHLMANN, Executor of the LESTER O. PRATT ESTATE, TERESA KUHLMANN, Individually, and KINGSELY UNITED METHODIST CHURCH IN KINGSLEY, IOWA,
Defendants-Appellees.

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Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

The plaintiffs appeal a district court ruling granting the defendants' motion for summary judgment dismissing plaintiffs' action to set aside the decedent's will. **AFFIRMED.**

Maurice B. Nieland and Jeffrey D. Garreans of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, Sioux City, for appellants.

Steven R. Jensen of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett, Storm & Jensen, P.C., Sioux City, for appellees.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Hecht, J. takes no part.

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VAITHESWARAN, J.

In this will contest action, the relatives of Lester Pratt argue the district court should have: (1) afforded their replacement counsel more time to conduct discovery before granting the executor's summary judgment motion and (2) concluded there was a genuine issue of material fact as to Pratt's testamentary capacity and the executor's exercise of undue influence. We affirm.

I. Background Facts and Proceedings

Lester Pratt was a single man, who accumulated assets in excess of a million dollars at the time of his death. He had no children but had numerous nieces and nephews. In 1986, he executed a will that gave these relatives the bulk of his estate. However, two months before his death in 1998, he executed a new will bequeathing the majority of his estate to his friend and neighbor Theresa Kuhlmann, and nothing to his relatives.

Pratt died at the age of eighty-four. Kuhlmann was appointed executor of his estate. The relatives sued, claiming Pratt lacked testamentary capacity and the will was the product of undue influence.

Both Kuhlmann and the relatives engaged in extensive discovery, including depositions of the parties and the lawyer who drafted Pratt's will. Five months before trial, the relatives' attorney moved to withdraw, citing a conflict of interest. The district court granted his unresisted motion.

Replacement counsel for the relatives entered an appearance and joined in a motion filed by original counsel to continue the trial date and other deadlines. Kuhlmann resisted the continuance motion. On the same day, Kuhlmann also

designated seven medical personnel as expert witnesses. The court did not rule on the motion to continue trial.

Five weeks later, Kuhlmann moved for summary judgment. The relatives resisted on the grounds they required additional time to complete discovery before filing an opposition to the motion, and they believed a genuine issue of material fact existed on the issues of testamentary capacity and undue influence. The district court declined to grant the request for a postponement of the summary judgment ruling and granted Kuhlmann's motion for summary judgment. This appeal followed.

II. Court's Failure to Rule on Motion to Continue Trial

The relatives contend the district court should have continued trial as they originally requested when their replacement counsel first filed an appearance. The parties agree the district court did not rule on this motion to continue. Kuhlmann urges, that, in the absence of a ruling, we have nothing to review. The relatives respond that because the summary judgment record includes more than just the documents attached to the motion and resistance, we may examine the court's failure to consider and rule on their original motion to continue trial. *See* Iowa R. Civ. P. 237(c) (authorizing court to examine "pleadings, depositions, answers to interrogatories, admissions on file and any affidavits"); *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 890-91 (Iowa 1981).

We agree with Kuhlmann that the relatives did not preserve error. It is well settled that we will generally review only those issues that have been passed upon by the district court. *Vincent v. Four M Paper Corp.*, 589 N.W.2d 55, 64

(Iowa 1999). In the absence of a district court ruling on the original motion to continue trial, we have nothing to review.

While our summary judgment rule does authorize a court to examine documents outside the summary judgment record prior to ruling on a motion for summary judgment, the court is to do so for the sole purpose of determining whether a genuine issue of material fact exists. Iowa R. Civ. P. 237(c). The motion to continue trial sheds no light on this question. Therefore, our general error preservation rule applies, and we decline to rule on whether the original motion to continue trial should have been granted.

III. Continuance of Summary Judgment Ruling

Alternately, the relatives contend Iowa Rule of Civil Procedure 237(f) authorized the district court to postpone ruling on the summary judgment motion until they had an opportunity to conduct further discovery. That rule states:

> Should it appear from the affidavits of a party opposing the motion that the party for reasons stated cannot present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The relatives' attorney attached an affidavit to his resistance attesting to the fact he had been involved with unrelated trials for most of the first half of the month in which he was retained. The attorney asserted:

> [e]xtensive discovery must be undertaken including but not limited to depositions of treating physicians of the decedent, obtaining expert witnesses who may testify as to the mental status of the decedent and other discovery must be undertaken to fully be able to prepare the plaintiff's case for trial.

The district court declined to postpone its ruling, noting the heirs had engaged in considerable discovery in the twenty months preceding the filing of

the summary judgment motion. The court also noted the absence of specificity in counsel's affidavit seeking more time. The court stated it was incumbent upon counsel to identify "with some precision" the materials he hoped to obtain through additional discovery and "exactly how he expects those materials would help him in opposing summary judgment." Finally, the court concluded,

> the mere fact that plaintiffs now have different counsel is not reason for delaying ruling, at least in the absence of any allegation prior counsel was in some way dilatory in pursuing discovery likely to be helpful to his clients.

Our review of this ruling is for abuse of discretion. *Bitner v. Ottumwa School Dist.*, 549 N.W.2d 295, 301 (Iowa 1996).

We cannot conclude the district court's denial of counsel's request to postpone ruling on the summary judgment motion amounted to an abuse of discretion. Although a nonmoving party generally should be afforded the chance to conduct discovery before a summary judgment motion is resolved, there is no requirement that a summary judgment ruling be postponed until all discovery is completed. *Bitner*, 549 N.W.2d at 302. The record here discloses that original counsel for the relatives served Kuhlmann with interrogatories and requests for production of documents and noticed a deposition of Kuhlmann and her husband prior to withdrawing from the case. Additionally, there is no evidence that Kuhlmann obstructed or was unresponsive to this discovery. *See Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 503 (Iowa 1986) (noting plaintiffs were deprived of reasonable opportunity to defend issues in summary judgment motion by defendant's refusal to disclose certain facts peculiarly within its realm of knowledge, forcing plaintiffs to file motion to compel); *Carter v. Jernigan*, 227

N.W.2d 131, 135 (Iowa 1975) (holding district court abused its discretion in refusing to let plaintiffs obtain answers to interrogatories and take defendants' depositions as they were attempting to do at the time of the summary judgment proceeding). Finally, although we are sympathetic to counsel's assertion that his trial schedule limited his time to review the extensive file in this case, we note that the court scheduled the hearing on the summary judgment motion to take place seven weeks after the motion was filed. In sum, while we might have ruled differently were we the district court, we cannot conclude the court's decision to rule immediately on the summary judgment motion amounted to an abuse of discretion.

IV. Merits

The relatives next assert there exist genuine issues of material fact precluding summary judgment on the questions of whether Pratt had testamentary capacity and whether he was subject to undue influence. *See* Iowa R. Civ. P. 237(c). We will address each question in turn.

A. Testamentary Capacity. To have general testamentary capacity, Pratt must have known and understood (1) the nature of the instrument being executed; (2) the nature and extent of his property; (3) the natural objects of his bounty; and (4) the disposition he wished to make under the last will and testament. *In re Estate of Lachmich*, 541 N.W.2d 543, 546 (Iowa Ct. App. 1995). The relatives contend there is a genuine issue of material fact as to the second element, the nature and extent of Pratt's property. They rely on the following evidence: (a) a discrepancy in the notes of Pratt's lawyer as to the amount of land Pratt owned; and (b) medical records documenting disorientation during

Pratt's hospitalization for hernia surgery several months prior to his death. We find neither generates an issue of material fact on whether Pratt knew and understood the nature and extent of his property.

At best, the lawyer's notes suggest the lawyer, rather than Pratt, did not know the extent of Pratt's holdings. It is as likely the notation is nothing more than a scrivener's error.

As for the medical records, we note that the disorientation cited by the relatives occurred immediately after surgery. The records document no such disorientation the day before surgery. In fact, the records show a man fully cognizant of his situation, as reflected by Pratt's assertion that he would only undergo surgery if given a spinal anesthetic. Similarly, medical records for the day after Pratt's surgery do not document any disorientation.

The balance of the summary judgment record establishes Pratt was a strong-willed, independent man. As one of his relatives' spouses put it, "even people in town knew that there was Lester's way and then there was the right way." She went on to state, "we never told him what to do, what to say, where to go. He was Lester, and you just never did."

The record also reveals Pratt was well aware of his holdings. His attorney testified Pratt appeared to have no problem with memory and, indeed, sketched out a piece of property he wished to deed to the Kuhlmanns shortly before he executed the will. Although Pratt did not recognize one of his relatives who visited him in the spring of 1998 and was confused about directions on one occasion in 1995, these facts do not call into question his knowledge of the

extent of his holdings. *See In re Estate of Henrich*, 389 N.W.2d 78, 82-3 (Iowa Ct. App. 1986).

Our court has stated the nonmoving party must produce more than a scintilla of evidence to generate a question of material fact on the issue of testamentary capacity. *In re Estate of Olson,* 479 N.W.2d 610, 615 (Iowa Ct. App. 1991). We conclude the relatives did not do so here.

B. Undue Influence. The relatives next argue they generated an issue of material fact on the question of undue influence. To prevail, they must prove: (1) Pratt was susceptible to undue influence; (2) Kuhlmann had an opportunity to exercise undue influence over Pratt; (3) Kuhlmann had a disposition to influence Pratt unfavorably to obtain an improper favor; and (4) the result reflected in the will was clearly the effect of undue influence. *In re Estate of Bayer*, 574 N.W.2d 667, 671 (Iowa 1998); *Henrich*, 389 N.W.2d at 83. The party contesting the will has the burden of proving all four elements. *Bayer*, 574 N.W.2d at 671.

The relatives focus on the second element, an opportunity to exercise undue influence. They assert the deposition of Pratt's attorney and Kuhlmann's answer to an interrogatory create a material fact issue on the question of Kuhlmann's opportunity to influence Pratt. However, even if it is conceded Kuhlmann had the opportunity to influence Pratt, opportunity alone is not enough to establish undue influence. *Henrich*, 389 N.W.2d at 83. There must be evidence to show the influence "was in fact exerted with respect to the making of the testament itself." *In re Estate of Davenport*, 346 N.W.2d 530, 533 (Iowa 1984). The influence "must dominate the motives of the testator in executing his

will", effectively amounting to "moral coercion." *Id.* at 532. There must be a showing of "a continuing and persistent effort to unduly influence the testator which destroys the testator's free will." *Id.; Henrich*, 389 N.W.2d at 83.

While Kuhlmann's answer to an interrogatory establishes she had the opportunity to unduly influence Pratt concerning his will, it also unequivocally establishes that she did not avail herself of that opportunity. Kuhlmann stated Pratt asked her if she had a lawyer. She indicated she did not. She recommended he go to the lawyer he had previously used. Pratt expressed dissatisfaction with that lawyer. Kuhlmann then mentioned there was a law office down the hall from where she worked.

Later, Pratt told her went to that law office and spoken to a lawyer. Kuhlmann stated,

> Lester showed me a piece of paper with his notes on it. Lester said he wanted to make a will and he wanted me and my husband to have whatever was left after he was gone. I told Lester no, that he did not need to do that. Lester said he knew that he did not need to, but he wanted to and he would rather see us have it than anyone else.

Several days after this conversation, Kuhlmann stated she had another conversation with Pratt in which he reiterated his desire to name her and her husband in his will. Again, she told him "that was not necessary." When he urged he would like to see them have his property, she told him "it was his property and he could do whatever he wanted to do with it." According to Kuhlmann, Pratt subsequently informed her he had received a draft of the will and his lawyer had urged him to include other names in the will, but he did not wish to put any other names in it. Kuhlmann stated she advised Pratt, "that decision was his to make, and that he should do what he wanted." Pratt later

showed Kuhlmann his will and indicated he intended to put it into his safety deposit box. He advised he had not included Kuhlmann's husband's name in the will because he knew Kuhlmann would be fair to him.

At best, this interrogatory answer evinces a failure on Kuhlmann's part to clamor for removal of her name from Pratt's will. We are not convinced her less than selfless response is sufficient to generate a fact issue on the undue influence claim, in light of the very high "moral coercion" standard set forth in our jurisprudence.

The deposition transcript of Pratt's lawyer also establishes Pratt's decision to name Kuhlmann as the primary beneficiary was his decision alone. The lawyer stated he did not know Kuhlmann when Pratt retained him. He believed Pratt came alone to their first conference on the will. *See Bayer*, 574 N.W.2d at 673 (finding no evidence defendants played a part in execution of will). Pratt expressed a desire to give most of his property to Kuhlmann. The attorney asked Pratt if he had other relatives he wished to consider in the will. Pratt indicated he did have other relatives but he wished to give them nothing because, in his opinion, they had a better life than his.

Approximately two months after this first meeting, Pratt's lawyer held another conference with Pratt. Pratt told him to prepare the will. Again, there is no indication Kuhlmann came with him. The lawyer prepared the will and sent it to Pratt to review. The lawyer stated Pratt did not indicate he had discussed the will with anyone and did not advise him there was any agreement with Kuhlmann concerning the will.

Approximately two weeks later, Pratt came in to sign the will. Kuhlmann was not present at the execution.[1] Pratt told his lawyer he had read the will earlier and approved of it. He then signed it.

The lawyer's testimony is insufficient to generate a genuine issue of material fact on the question of whether Kuhlmann exercised undue influence over Pratt in the preparation and execution of the will. As our highest court has repeatedly stated, "there must be a solid foundation of established facts upon which to rest an inference of its existence" rather than "suspicion, surmise, conjecture, or speculation." *Davenport*, 346 N.W.2d at 533; *accord Bayer*, 574 N.W.2d at 674. We find that solid foundation lacking here.

In reaching this conclusion, we do not ignore evidence that Kuhlmann did exert influence over Pratt with respect to certain matters unrelated to the will. For example, Pratt's lawyer testified that Pratt executed a power of attorney in favor of Kuhlmann just a month before his death. However, this document was prepared and executed after the will.

We also note testimony suggesting Kuhlmann had been assisting Pratt with his financial affairs for some time before the power of attorney document was executed. Indeed, it was she who apparently dealt with the financial aftermath of a car accident Pratt was in shortly before the will was executed. However, again, this piece of information does not suggest she also exercised influence over his preparation of the will. *See Davenport*, 346 N.W.2d at 533.

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[1] The record does suggest Pratt directed his lawyer to have Kuhlmann come over later to discuss an insurance matter arising out of a car accident Pratt was in. She apparently did so.

Finally, the summary judgment record reveals Pratt transferred to Kuhlmann $12,000 about five months before his death, deeded to her a portion of his land, and relied on Kuhlmann to give the attorney factual information pertaining to the land transfer. This is perhaps the most troubling evidence in the record on the issue of undue influence, particularly in light of testimony that Pratt was generally "a cautious man with his money." [2] However, the relatives have not pointed to any evidence that Pratt made these transfers at Kuhlmann's behest. *See Bayer*, 574 N.W.2d at 672-3 (discounting plaintiff's evidence of ongoing loans made by testator to defendant against the advise of her attorney). Indeed, the relatives could have, but did not, challenge these inter-vivos transfers of property as the product of undue influence. *See In re Estate of Todd,* 585 N.W.2d 273, 277 (Iowa 1998); *In re Estate of Baessler*, 561 N.W.2d 88, 92 (Iowa Ct. App. 1997). More importantly, they have not shown how these transfers related to Pratt's preparation and execution of the will. *See In re Secrist's Estate*, 186 N.W.2d 665, 667 (Iowa 1971) (noting "[i]mportunity, request and persuasion, which do not control the making of the will, are not sufficient"); *In re Latch's Estate,* 162 N.W.2d 465, 469 (Iowa 1968) (noting undue influence must operate "at the very time the will is executed and must be the dominating factor."). As the Iowa Supreme Court stated in *Bayer,* the fact that a testator leaves property to

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[2] *Cf. In re Adams Estate,* 234 N.W.2d 125, 128 (Iowa 1975) (submissible issue of undue influence where spouses controlled testator's affairs, took her to attorney of their choosing, arranged for and were present at preparation of will naming them conservators); *In re Dashiell's Estate*, 250 Iowa 401, 406, 94 N.W.2d 111, 114 (1959) (submissible jury question on undue influence where testator suffered from mental diseases, was confused and disturbed and a nephew with whom she was living advised attorney to change will to confer a substantial benefit on his family); *In re Soderland's Estate*, 239 Iowa 569, 575, 30 N.W.2d 128, 132 (Iowa 1947) (submissible issue where ill testator came to live with nephew, who had complete charge of all testator's property and asked testator to sign over property to avoid inheritance taxes).

friends "because of their acts of kindness or friendship does not support the presumption of undue influence." *Bayer*, 574 N.W.2d at 674.

In summary, the relatives have not created a genuine issue of material fact precluding summary judgment on the undue influence claim. Their resistance suggests they cannot prove the first and third elements of an undue influence claim, Pratt's susceptibility to undue influence, and Kuhlmann's disposition to influence Pratt unfavorably to obtain an improper favor. As proof of undue influence requires proof of all four elements, and the relatives cannot establish elements one and three, we agree with the district court that Kuhlmann is entitled to summary judgment this claim. Finding no genuine issue of material fact on the questions of testamentary capacity or undue influence, we affirm the district court's grant of summary judgment in favor of Kuhlmann.

AFFIRMED.

Sackett, C.J., concurs; Vogel, J., dissents.

VOGEL, J. (dissenting)

I respectfully dissent. In ruling on the summary judgment motion within ten weeks after new counsel was retained, the district court severely limited the plaintiffs' ability to properly defend against the motion. The plaintiffs' file, which was voluminous despite the absence of numerous deposition transcripts, was not delivered to new counsel until two to three weeks post-appearance.

Fairness dictates that new counsel be afforded an adequate opportunity to collect and study previously conducted discovery, and to assess the sufficiency of that discovery as it relates to any factual issues. *See generally Carter v. Jernigan*, 227 N.W.2d 131 (Iowa 1975) (providing that a party must be allowed to conduct adequate discovery). *Cf. Kulish v. Ellsworth*, 566 N.W.2d 885, 890 (Iowa 1997) (finding no abuse of discretion in denying extra time to supply expert affidavits in resistance to summary judgment, where issue involved legal, rather than factual, questions). Only after having a reasonable amount of time in which to analyze the case can new counsel be prepared to effectively resist the motion. *See Miller v. Continental Ins. Co.* 392 N.W.2d 500, 503 (Iowa 1986) (noting summary judgment procedure must not be so summary as to deny resisting party a reasonable opportunity to respond to presented issues). I therefore believe failure to delay ruling on the defendants' summary judgment request amounted to an abuse of discretion, and I would reverse the decision of the district court.