STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1223

In re the Estate of:
Gene R. Budach
a/k/a Gene Budach
a/k/a Gene Roy Budach, Deceased.

Filed March 1, 2011
Affirmed
Hudson, Judge

Waseca County District Court
File No. 81-PR-09-190

Paul E. Grabitske, Law Offices of Paul E. Grabitske, PLC, Mankato, Minnesota (for appellant Gary Budach)

Karl O. Friedrichs, Friedrichs Law Office, PA, Mankato, Minnesota (for respondents Irene Krueger and Lynn Hagen)

William L. Hoversten, Patton Hoversten & Berg, PA, Waseca, Minnesota (for respondent personal representative Vance Swanson)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this will contest involving the surviving children of the deceased, appellant-will contestant challenges the district court's summary judgment in favor of respondents-will proponents, arguing that the district court erred in concluding that the appellant failed to

raise genuine issues of material fact regarding testamentary capacity and undue influence. We affirm.

FACTS

Gene Budach and Mildred Budach were married to each other for over sixty years. They had four children, David Budach, Irene Krueger, Gary Budach, and Lynn Hagen. David passed away in 2002.

Gene and Mildred passed away within a year of one another, Mildred on March 11, 2008 and Gene on February 6, 2009. This case involves a will contest regarding Gene's will between the couple's surviving children, appellant Gary and respondents Irene and Lynn.

Family businesses and relationships

For a number of years, Gene and Mildred owned and operated two businesses: a farm and a farm-implement store. By the time of Gene's death, however, Gary operated the farm and owned the store. But he rented the land for the farm and the buildings for the store from Gene, who retained ownership of this real estate.

Irene and Lynn performed limited administrative and janitorial tasks for the store over the years. But they assisted Gene and Mildred with a number of household tasks, including cleaning their home, arranging their medications, and taking them to appointments. They also assisted Gene with managing his financial and medical affairs: Irene was a signator on Gene's checking account, and Lynn was Gene's health-care agent.

There is evidence that Irene and Lynn believed that their parents favored David and Gary. Mildred's medical records indicate that on three occasions in 2006 and 2007, Mildred stated that Irene and Lynn had accused Gene and Mildred of favoring David and Gary and demanded that Gene and Mildred give them money. Lynn concedes that she prepared a document showing the disparities in the money that Gene and Mildred had given to David and Gary, as opposed to the money provided to Irene and Lynn, over the years. Irene also acknowledges asking her parents for money, but she states that it was money that her parents had promised to give to Irene and Lynn each year.

2005 will

Gene and Mildred executed a number of wills over their lifetimes. In December 2005, they executed wills which, in relevant part, (1) appointed the surviving spouse as the personal representative and Gary as the alternative personal representative; (2) transferred all probate assets to the surviving spouse, unless that spouse disclaimed an interest in some or all of the assets; (3) transferred any disclaimed assets into a trust, with the income and, potentially, a portion of the principal, benefitting the surviving spouse; (4) if there were no surviving spouse, or assets were disclaimed, granted Gary the first option to purchase the farm land for $572,750 and the first option to purchase the store buildings for $250,000; and (5) if there were no surviving spouse, provided that the residue of the estate would be divided between Irene (40 percent), Lynn (40 percent), and Gary (20 percent).

Mildred's death and administration of Mildred's will

Immediately after Mildred's death in March 2008, Gene, Gary, Irene, and Lynn attended a meeting to learn the contents of Mildred's will and discuss the administration of Mildred's estate. The family discussed Gene's right to disclaim some of the assets and to allow them to pass into the trust, although Gene ultimately opted not to exercise this right. The children also learned that Gene's 2005 will was similar to Mildred's will.

After learning the contents of Mildred's will, Irene and Lynn approached Gene to obtain a better explanation of its provisions, particularly the option prices for the land and buildings. Lynn also sent an email to the legal assistant for Robert Schmidt, the attorney who handled Gene's and Mildred's estate planning, stating that "[t]he prices are awfully cheap compared to what they are worth." At the end of June 2008, Gene, Irene, and Lynn met with Schmidt to discuss Mildred's will, the possibility of disclaimer, and procedures for the trust, but there is no indication that they discussed Gene's will at that time. Gary was not informed of the meeting, nor did he attend.

Drafting and executing the 2008 will

On July 8, 2008, Gene went to Schmidt's office by himself to discuss his estate plan. Gene said that, even before Mildred passed away, he had become uncomfortable with the distribution, particularly the fixed option prices for the land and the buildings. Gene stated that he and Mildred had intended to revise their wills but had not had the opportunity to do so before she died, and he wished to change the will to have the price determined at fair market value. Gene acknowledged that Irene and Lynn had expressed

some dissatisfaction with the 2005 will but stated that he was not being pressured to change it and had instead decided to do so of his own accord.

Gene stated that he wanted to ensure that his new will: (1) appointed all three children as co-personal representatives; (2) preserved Gary's first option to purchase the land and the buildings, but set the prices as the fair market value of the property; (3) changed the allocation of the residue of the estate so that it would be divided between Irene (42.5 percent); Lynn (42.5 percent); and Gary (15 percent); and (4) distributed his toy tractor collection. At the end of the meeting, Gene told Schmidt not to draft a new will until he informed Schmidt to do so. Almost three weeks later, Gene contacted Schmidt and asked him to prepare a will incorporating the revisions they had discussed.

On August 4, 2008, Gene was admitted to Owatonna Hospital, where he was diagnosed with edema, atrial fibrillation, and heart failure. On August 7, 2008, Gene was discharged from Owatonna Hospital and transferred to the New Richland Care Center (NRCC), where Gene remained until October 10, 2008. Gene's medical records from Owatonna Hospital and NRCC indicate that he was experiencing some difficulties with his short-term memory, daily decision-making, and altered perception and awareness during August 2008.

On August 6, 2008, Gene was scheduled to meet with Schmidt to sign the 2008 will, but Irene called Schmidt to inform him that Gene was in the hospital. Irene and Schmidt discussed the possibility of Schmidt coming to the hospital to have Gene sign the will. On August 9, 2008, after Gene had been transferred to NRCC, Schmidt paid an unscheduled visit to Gene during which Schmidt and Gene met alone. Schmidt asked

Gene if he wanted to deal with his will, but Gene responded that he could deal with it when he felt better. Gene confirmed that he still wanted to revise the 2005 will because he believed that it was unfair, not because he was feeling any pressure from his family. According to Schmidt's contemporaneous notes, Gene was very clear about his desires, and he showed no hesitation with regard to changing the 2005 will.

On August 11, 2008, Gene called Schmidt and indicated that he wanted to sign the will. Initially, Gene stated that either Irene or Lynn could bring him to Schmidt's office. When Schmidt asked Gene whether he would be able to handle the trip, however, Gene responded by asking Schmidt to speak to his daughter Lynn. Lynn, who was present in Gene's room, stated that it would be difficult for Gene to travel to Schmidt's office, and Schmidt responded that he would come to NRCC.

On August 12, 2008, Schmidt and two of his employees visited Gene. Lynn was present at the nursing home when Schmidt and his employees arrived, but she was not present in the room when Gene reviewed and signed the will. Before they could discuss anything else, Gene stated that he wanted to bequeath the glass cases for his toy tractor collection to each set of grandchildren. Gene understood that Schmidt would have to prepare a codicil and that Gene would have to sign it at a later date. Gene then proceeded to review the will, initial each page, and sign it. Schmidt subsequently drafted the codicil, and Gene executed it on September 24, 2008.

Gene's death and will contest

On December 18, 2008, Gene fell at home and was admitted to Owatonna Hospital with a broken hip. Upon discharge, Gene was once again admitted to NRCC,

where he remained until his death on February 6, 2009. Irene and Lynn subsequently filed for probate of the 2008 will and codicil. Gary filed an objection on the grounds that, when Gene executed the 2008 will, he lacked testamentary capacity and was subject to undue influence. Irene and Lynn moved for summary judgment on both issues. The district court granted the motion, concluding that even when the evidence was read in the light most favorable to Gary, he had failed to raise a genuine issue of material fact as to whether Gene lacked testamentary capacity or was under undue influence when he executed the 2008 will. Gary's appeal follows.

D E C I S I O N

On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). The court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Id.* The court is not to decide issues of fact but is instead to determine whether a genuine issue of material fact exists. *Id.* at 77. But to avoid summary judgment, "the nonmoving party must . . . establish that there is a genuine issue of material fact through substantial evidence." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). Substantial evidence is not "[m]ere speculation" but is "some concrete evidence" from which a reasonable factfinder can decide in the nonmoving party's favor. *Id.*

For a will to be valid, the testator must have had testamentary capacity and not have been under undue influence at the time the will was executed. *In re Estate of*

Anderson, 384 N.W.2d 518, 520 (Minn. App. 1986) (testamentary capacity); *In re Estate of Rechtzigel*, 385 N.W.2d 827, 832 (Minn. App. 1986) (undue influence). A will contestant bears the burden of proving a lack of testamentary capacity and the exercise of undue influence at the time of the will's execution. Minn. Stat. § 524.3-407 (2010). The burden for avoiding summary judgment, however, is lower.

I

Testamentary capacity exists if, at the time of making the will, the testator understands "the nature, situation, and extent of his property and the claims of others on his bounty or his remembrance and . . . is able to hold these things in his mind long enough to form a rational judgment concerning them." *In re Congdon's Estate*, 309 N.W.2d 261, 266 (Minn. 1981) (quotation omitted). The following factors are relevant in determining whether Gene possessed testamentary capacity when he executed the 2008 will: (1) the reasonableness of Gene's property disposition; (2) Gene's conduct within a reasonable time of executing the disputed will; and (3) Gene's mental and physical condition. *Anderson*, 384 N.W.2d at 520. The district court concluded that even when the evidence is viewed in the light most favorable to Gary, it does not create a genuine issue of material fact regarding Gene's testamentary capacity. We agree.

Initially, Gary contends that the 2008 will is unreasonable. But "the testator may make an unjust, unreasonable, and unfair will if he chooses." *In re Forsythe's Estate*, 221 Minn. 303, 314, 22 N.W.2d 19, 26 (1946). "[T]he fairness and reasonableness of the disposition [do not] prove competency or the opposite." *Id.* The 2008 will preserves Gary's first option to purchase the land and the buildings, but sets the price at the fair

market value; increases Irene's and Lynn's shares of the residue by 2.5 percent; and decreases Gary's share of the residue by 5 percent. These changes, which do not alter Gene's overall testamentary scheme, are not so unreasonable that they provide circumstantial evidence of Gene's lack of testamentary capacity.

Next, Gary argues that Gene's conduct was erratic during his first stay at NRCC. Gary cites an affidavit from a former employee of NRCC in which she opined that Gene was suffering from some dementia based on three incidents when Gene failed to recognize her and used confused and nonsensical speech. But there is no indication that the former employee, whose position is not identified in the affidavit, had the necessary qualifications to diagnose Gene as showing signs of "some dementia." Nor is there any indication of when these incidents occurred relative to the time at issue here—the date on which Gene executed the 2008 will. We therefore conclude that this affidavit is insufficiently specific to be probative as to Gene's testamentary capacity. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) (stating that while the court does not weigh evidence, it "is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented").

Finally, Gary argues that there is medical evidence that Gene lacked the mental capacity to execute the 2008 will. It is well recognized that the mental capacity required to execute a will is far less than is necessary to enter into a contract, such that even an individual under conservatorship can have the capacity to execute a will. *Congdon*, 309 N.W.2d at 267. Gene's medical records from Owatonna Hospital indicate that during the

weeks before and after he executed the 2008 will, Gene was experiencing difficulty with his short-term memory, daily decision-making, and altered perception and awareness. Based on her review of Gene's medical records, Gary's expert witness, Dr. Linda Marshall, opined that Gene had "moderate cognitive impairment," meaning that he was unable to manage his financial affairs and make daily decisions. She further opined that Gene had "limited capacity when he signed the [2008] will." But as the district court concluded, "Dr. Marshall does not explain how [Gene's inability] to manage his financial affairs [and] make daily decisions . . . [could] lead[] to the conclusion that Gene lacked the ability to comprehend the nature and extent of his bounty as well as the natural disposition of his bounty."

Thus, when considered as a whole, the evidence presented by Gary is insufficient to create a genuine issue of material fact as to whether Gene lacked testamentary capacity at the time he executed the 2008 will.

II

"Undue influence . . . is influence of such a degree exerted upon the testator by another that it destroys or overcomes the testator's free agency and substitutes the will of the person exercising the influence for that of the testator." *In re Wilson's Estate*, 223 Minn. 409, 413, 27 N.W.2d 429, 432 (1947). Whether undue influence was exercised on the testator depends on "the effect of the influence, which in fact was exerted, upon the testator's mind, considering his physical and mental condition, the person by whom the influence was exerted, [and] the time, place, and all the surrounding circumstances thereof." *Id.* The following factors are relevant in determining whether Irene and Lynn

exerted undue influence over Gene: (1) the opportunity Irene and Lynn had to exercise influence; (2) any confidential relationship between Irene, Lynn, and Gene; (3) any active participation in the preparation of the will by Irene and Lynn; (4) any disinheritance of Gary; (5) the singularity of the will's provisions in favor of Irene and Lynn; and (6) the exercise of actual influence or persuasion by Irene and Lynn. *Id.*

Irene and Lynn concede that each of them had the opportunity to influence Gene and that each of them had a confidential relationship with him. But the opportunity to influence and a confidential relationship alone are insufficient to establish undue influence. *See In re Estate of Ristau*, 399 N.W.2d 101, 104 (Minn. App. 1987) (affirming summary judgment against a will contestant where only factors indicating undue influence were existence of opportunity and confidential relationship). Thus, Gary must provide some additional evidence of undue influence to survive summary judgment.

Gary contends that there is circumstantial evidence of Irene's and Lynn's active participation in the preparation of the 2008 will. He points out that (1) Irene called Schmidt's office on August 6, 2008, to reschedule Gene's meeting with Schmidt to sign the 2008 will; (2) Lynn was present on August 11, 2008, when Gene spoke to Schmidt over the telephone and arranged for Schmidt to visit NRCC so Gene could sign the 2008 will; and (3) Lynn was present when Schmidt arrived at NRCC on August 12, 2008, for Gene to execute the 2008 will. But the Minnesota Supreme Court has previously held that where the parties accused of undue influence merely made telephone calls to an attorney on the testator's behalf and were merely present, but did not participate, during the discussion and execution of the will, there was no evidence of active participation. *In*

re Mazanec's Estate, 204 Minn. 406, 407–12, 283 N.W. 745, 745–48 (1939). Likewise, here, Gary has at best presented evidence that Irene and Lynn assisted Gene with scheduling meetings with Schmidt and that Lynn was present when Schmidt arrived for the execution of the 2008 will. Even viewed in the light most favorable to Gary, this evidence is insufficient to create a factual dispute regarding the existence of undue influence.

Gary concedes that the 2008 will does not disinherit him, but he contends that the 2008 will represents a significant change in Gene's testamentary intentions and singularly favors Irene and Lynn. "An entire change from former testamentary intentions is a strong circumstance to support a charge of undue influence." *In re Olson's Estate*, 227 Minn. 289, 298, 35 N.W.2d 439, 446 (1948). "This is especially true where the effect of the change is to give the beneficiary charged with exercising undue influence a 'larger' share of testator's estate than he would have received otherwise." *Id.* But here, the overall testamentary scheme is the same in the 2005 and 2008 wills: Gary has the first option to purchase the land and the buildings, and Irene and Lynn receive larger shares of the residue of the estate. The main differences between the two wills are (1) the mechanism for determining option prices for the land and the buildings and (2) the size of Irene's, Lynn's, and Gary's shares of the residue of the estate. But these changes are insufficient to support a finding that the 2008 will reflected an entire change in Gene's testamentary intentions.

Gary counters that the 2008 will significantly increases Irene's and Lynn's inheritances. But a party opposing summary judgment cannot rely on mere averments or

denials, but must present specific facts showing a genuine issue for trial. *DLH, Inc.*, 566 N.W.2d at 71; Minn. R. Civ. P. 56.05. Gary has produced no evidence regarding how the change to the option price for the land and buildings or the 2.5 percent increase in Irene's and Lynn's respective shares of the residual estate will affect the amount of Irene's and Lynn's inheritances, let alone that the changes will result in *significant* increases in their inheritances.

Finally, Gary contends that he has presented evidence of actual influence, namely evidence indicating that Gene, Irene, and Lynn discussed Gene's will and that Gene changed his will based on these discussions. There is evidence that (1) Irene and Lynn told Gene that they believed that Mildred's will, which they knew was similar to Gene's 2005 will, was unfair; (2) Lynn prepared a document at Gene's request regarding the differences between what David and Gary had received and what Irene and Lynn had received; and (3) Gene told Schmidt that he was changing the 2005 will because he believed it was unfair. But to constitute undue influence, the evidence "must go beyond mere suspicion and conjecture and show, not only that the influence was in fact exerted, but that it was so dominant and controlling of the testator's mind . . . [that] he ceased to act of his own free volition and became a mere puppet of the wielder of that influence." *Congdon's Estate*, 309 N.W.2d at 268 (quotation omitted). Here, even when the evidence is read in the light most favorable to Gary, it indicates that Gene's conversations with Irene and Lynn may have influenced his decision to change his will, but it is insufficient to create a genuine issue of material fact as to whether the influence of Irene

and Lynn was so dominating and controlling that the 2008 will ceased to reflect Gene's intentions.

Gary further argues that Mildred's medical records show that Irene and Lynn exerted undue influence over Gene and Mildred. But these medical records are from 2006 and 2007, over one year before Gene initiated discussions with Schmidt about changing the 2005 will. Moreover, at best, these medical records show that Mildred felt pressure from Irene and Lynn, not that Gene felt pressure from them.

For these reasons, Gary has failed to establish through substantial evidence a genuine issue of material fact regarding any undue influence by Irene and Lynn.

Affirmed.