IN THE COURT OF APPEALS OF IOWA

No. 2-1081 / 12-0222
Filed February 13, 2013

WILLIAM BURKHALTER,
Plaintiff-Appellant,

vs.

STEVEN BURKHALTER,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, James H. Carter, Judge.

A plaintiff appeals a jury verdict for the defendant on a claim of undue influence. A defendant cross-appeals the denial of a directed verdict on the same. **REVERSED AND REMANDED FOR NEW TRIAL ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Martin Diaz and Elizabeth Craig of Martin Diaz Law Firm, Iowa City, for appellant.

William Nicholson and Robert Rush, Rush & Nicholson, P.L.C., Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

The case before us involves a dispute over the revocable trust of Louis Burkhalter Jr.[1] One of Louis's sons, William Burkhalter, sued his brother, Steven Burkhalter,[2] claiming Steven unduly influenced their father to modify the revocable trust just days before Louis's death. William also raised claims of lack of testamentary capacity and tortious interference with a trust. The district court directed a verdict for Steven on the tortious interference claim, and the jury returned a verdict for Steven on the testamentary capacity and undue influence claims. William appeals asserting the marshalling instruction on the undue influence claim was erroneous, heightening his burden of proof. Steven cross-appeals the district court's denial of his motion for directed verdict.

I. Background Facts and Proceedings

On January 14, 1980, Louis created the Louis D. Burkhalter Jr. Revocable Trust, with the United State Bank, a/k/a/ Hawkeye Bank, n/k/a U.S. Bank, N.A., of Cedar Rapids, Iowa, designated as trustee. The primary beneficiary of the trust, after the death of Louis and his wife, Margaret,[3] was William, with the remaining trust assets at the time of William's death to be distributed to the heirs of Louis.

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[1] We have noticed a trend in the non-compliance with our rules of appellate procedure dealing with appendices. One common error that was present in this appendix was the violation of Iowa Rule of Appellate Procedure 6.905(7)(c) which mandates, "The name of each witness whose testimony is included in the appendix shall be inserted on the top of each appendix page where the witness's testimony appears." Another common error that was present in this appendix was the violation of rule 6.905(7)(e) which mandates, "The omission of any transcript page(s) or portion of a transcript page shall be indicated by a set of three asterisks at the location of the appendix page where the matter has been omitted."

[2] There is a third brother, Edward, who is not a part of this lawsuit.

[3] Margaret died in September 2004.

The trust was amended in December 1995 naming William's wife, Cynthia, and son, Matthew, beneficiaries.

In 2003 the trust was again amended, providing the trustee may, at its discretion, use trust income or principal for the support of Louis's sister, Patricia. The home William lived in throughout his life was placed into the trust in 2004, with the intent that William, Cynthia, and Matthew would have "complete control of the residence" so long as it was "reasonable and approved by U.S. Bank."

The events of July 2007 are at the center of this lawsuit. Louis, then age ninety-eight, was in declining physical health and moved from the Woodlands Manor, the independent living wing at Meth-Wick assisted living community, to The Woodlands, the twenty-four hour care wing. On July 9, Steven, aware of this change, left his home in California and arrived in Cedar Rapids to see Louis. On July 11, Steven and Louis had a conversation about the trust, which, according to Steven's testimony, went as follows:

> [Louis] said to me . . . "I want to make a change with that trust. I want to change the beneficiaries to 50-50 with you and William. I want you to call Phil Hershner at the US Bank[.]" . . . [Louis] says, "Phil doesn't get into his office 'till like 9:00, 9:30, so I want you to call him this morning and go down to see him and tell him that I want to change the trust beneficiaries to 50-50 between William and Steven. I will sign whatever you want—whatever he wants me to sign to get that accomplished."

That same day, July 11, Steven went to meet with Hershner, who then called Louis's attorney, William Hochstetler. Hershner met with Louis the morning of July 11. Hochstetler met with Louis the next day. The trust was modified on July 13, 2007, dividing the trust assets equally between William and Steven. Louis died on July 19, 2007.

William filed a petition on January 25, 2008, alleging the 2007 modification was a result of undue influence, Louis lacked the capacity to make the modification, and Steven intentionally and improperly interfered with the distribution plan of the trust. A jury trial commenced on October 31, 2011, and the district court granted Steven's motion for a directed verdict on the tortious interference with the trust claim but denied it as to the undue influence and lack of capacity claims.

After an unreported conference, the parties and the court made a formal record regarding the court's proposed jury instructions. William objected to the court's marshalling instruction on undue influence, particularly the use of the word "clearly" in instruction number two, paragraph number five—"The changes made to the trust provisions were clearly the result of the foregoing circumstances"—claiming it was a commentary on the evidence and was suggesting a higher burden of proof than the preponderance of the evidence. The district court overruled William's objection. The jury returned a verdict for Steven, and the district court entered judgment accordingly. This appeal followed.

II. Issue Preservation

We turn to William's claim the court gave a faulty marshalling instruction on undue influence, such that his burden of proof was heightened. Steven claims William did not preserve error on this issue arguing William's objection at trial was not specific enough to alert the district court to the arguments now raised on appeal.

Objections to the court's instructions must specify the subject of the objection and the grounds of the objection. *Morgan v. Perlowski*, 508 N.W.2d 724, 729 (Iowa 1993). The objection must be sufficiently specific to alert the trial court to the basis for the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury. *Id.* An overruled objection can only avail the objector as to the ground specified. *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 231 (Iowa 1974).

The jury instruction given reads as follows:

> In order for [William] to prevail on his claim of undue influence, he must prove by a preponderance of the evidence that at or about the time the trust provisions were changed all of the following circumstances existed:
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> 1. Louis was susceptible to the type of influence described in paragraph 4 of this instruction.
> 2. Steven had the opportunity to exercise such influence over Louis.
> 3. Steven was inclined to influence for purposes of gaining favor.
> 4. Steven assumed a position of dominance over Louis's decisions to the extent that the decision to change the trust provisions was Steven's decision rather than Louis's decision.
> 5. The changes made to the trust provisions were clearly the result of the foregoing circumstances.

After an informal conference on the proposed jury instructions, the parties went on the record. William's objection was as follows:

> Now, with regard to what the Court is actually going to submit to the jury, [William] objects to that portion of Instruction Number 2, numbered paragraph number 5, in which the word "clearly" is used; as the court has indicated, has some reservation as to whether that's necessary. From [William's] perspective, first of all, we believe to some degree it's a commentary on the evidence and in many ways may replace what the court is suggesting is the burden of proof which is provided for in Instruction Number 5 which is that [William] must prove the allegations of undue influence by a preponderance of the evidence, and use of

> the word "clearly" would suggest that the burden is much greater than simply a likelihood or preponderance of the evidence, and to that extent, [William] objects to Instruction Number 2, paragraph 5.

After William alerted the court he had no further objections to the instructions, and immediately before the jury was to be brought in for closing arguments, the following exchange took place:

> THE COURT: But I wanted to make one more statement on the record with respect to the jury instruction that I had overlooked when we took the matter up. I wanted to point out that in Instruction Number 2, the fourth paragraph sets forth the concept of undue influence in a manner that requires the jury to find that there was undue influence as fait accompli, in other words, a completed act, so it's a much stricter requirement than the one that's found in the uniform jury instructions, so I don't think that the defendants have anything to complain about because it's more favorable to them than the uniform instruction; I just wanted to point that out.
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> Other than that, I guess there isn't any reason why we can't get going with the closing arguments.
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> COUNSEL FOR WILLIAM: And if I may, Your Honor, in response to your comments regarding 4, I think that adds to my concern about 5 being sort of superfluous at that point. If, in fact, they get to 4 and they believe that's occurred, 5 almost requires them to go back and analyze it again or use the concept of "clearly" I think which could potentially increase the burden, so I want to make sure that that's part of the record, and I think we're on the same page with regard to that.
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> THE COURT: Well, I see a lot of merit in that contention. I don't think "clearly" is necessary, and paragraph 5 isn't necessary because once you get through 4, you've wrapped it up completely, but I'm going to leave it the way it is.
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> . . . .
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> COUNSEL FOR WILLIAM: If I may, Your Honor, as I understand, the Uniform Jury Instruction 2700.4 has a requirement of susceptibility, opportunity, inclination, and then that the result was clearly brought about by undue influence, and I think that's why the Court sort of struggles with this—what information do you provide, and I think if I understand what you did is you created paragraph 4 to accomplish the equivalent of what's already described as clearly undue influence in the uniform instruction; am I understanding that correct?
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> THE COURT: Well, I tend to agree with that, but I'm going to leave paragraph 5 in for what it's worth; I don't think it's necessary, but –

> COUNSEL FOR WILLIAM: But as I understand it, what the Court is doing is rather than using–and I understand you're going to leave that in, but the uniform instruction requires four things. You've got five things including the "clearly" language. The fourth thing that you do is essentially give them a definition of "undue influence."
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> THE COURT: I actually think that's correct, yes.

William's motion for a new trial asserted, "plaintiff objected to the inclusion of both the extra element and the word clearly because including both effectively heightened his burden of proof." He continued by claiming the instruction was improper because it "allowed [the] jury to find the changes made were the result of undue influence, but simultaneously find for Defendant by finding the changes made were not clearly the result of undue influence" causing the instruction to be conflicting, confusing, and prejudicial.

On appeal, William argues the "heightened burden" created by the marshalling instruction was prejudicial to him and it conflicted with the separate burden of proof instruction which correctly stated the burden of proof as by "a preponderance of the evidence." He claims the burden was heightened when the district court instructed paragraph four of instruction number two—William must prove Steven "assumed a position of dominance over Louis's decision to the extent that the decision to change the trust provisions was Steven's decision rather than Louis's decision"—in addition to the "clearly" language. Moreover, on appeal, William concedes he did not specifically object to the additional element so long as the district court removed the word "clearly" from paragraph five on instruction number two.

While abiding by our error preservation rules is fundamental, there was significant back and forth between the district court and William's attorney. While

not precise in articulating his objection, it is apparent from the discussion with the court that his objection encompassed the more thoughtfully worded argument in his motion for new trial and on appeal. *See Peterson v. First Nat'l Bank of Iowa*, 392 N.W.2d 158, 164 (Iowa Ct. App. 1986) (providing error can be preserved even if technical error preservation steps are not taken so long as the goals of the preservation, including a sufficient record on appeal, are satisfied).

III. Jury Instruction

As we find the issue is properly before us, we next address its merits. We read the court's instructions as a whole when determining whether there has been error. *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). We review jury instructions to determine if they correctly state the law and are supported by substantial evidence. *Id.* If instructions are erroneous, they must be prejudicial before we will order reversal. *Id.* We recognize that giving instructions that are conflicting and confusing is reversible error. *Sammons v. Smith*, 353 N.W.2d 380, 385 (Iowa 1984). "An instruction is not confusing if a full and fair reading of all of the instructions leads to the inevitable conclusion that the jury could not have misapprehended the issue presented by the challenged instruction." *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986). Thus, we consider the instructions as a whole and if the jury has not been misled there is no reversible error. *Id.*

The elements of setting aside a trust, or modification thereof, for undue influence are the same as modifying or setting aside a will. *See* Iowa Code § 633A.3101 (2007) (providing the "remedies available to the aggrieved person in attacking the . . . modification of a revocable trust [are] as one would [have] if

attacking the propriety of the execution of a will"). In order to set aside a will or trust on grounds of undue influence, the contestant must prove: (1) the testator was susceptible to undue influence; (2) the defendant had an opportunity to exercise undue influence and effect the wrongful purpose; (3) the defendant had a disposition to influence unduly to procure 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). There must be at least some evidence of undue influence; "An unnatural disposition of property will not of itself carry the issue of undue influence to the jury." *In re Will of Grahlman*, 81 N.W.2d 673, 684 (Iowa 1957).

We agree with Steven that every subpart of instruction number two by itself is a correct statement of law. *See In re Estate of Cory*, 169 N.W.2d 837, 842 (Iowa 1969) (defining undue influence); *In re Estate of Davenport*, 346 N.W.2d 530, 532 (Iowa 1984) (providing the necessary elements for undue influence, including the "result clearly the effect of the undue influence"); *see also In re Estate of Herm*, 284 N.W.2d 191, 200 (Iowa 1979) (providing circumstances to consider in deciding if there was undue influence). However, subpart four and five of instruction number two combined had the effect of adding another layer necessary to prove undue influence. The model instruction for undue influence does not include subpart four, which is an excerpt from the definition of undue influence. Iowa Uniform Civil Jury Instruction 2700.4. While combining correct statements of law may not be the most prudent means of instructing the jury, it is not erroneous unless it causes prejudice. *See Wells v. Enterprise Rent-A-Car Midwest*, 690 N.W.2d 33, 36 (Iowa 2004). Prejudicial error occurs if the trial

court materially misstates the law, if the instructions mislead the jury, or if through repetition, the instructions give undue emphasis to otherwise correct statements of law. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 575 (Iowa 1997); *see also Benn v. Thomas*, 512 N.W.2d 537, 539 (Iowa 1994) (holding "[w]hen jury instructions contain a material misstatement of the law, the trial court has no discretion to deny a motion for a new trial").

We believe the district court's addition of paragraph four in the marshalling instruction was sufficiently prejudicial to warrant reversal. The district court even said:

> the fourth paragraph sets forth the concept of undue influence in a manner that requires the jury to find that there was undue influence as a fait accompli, in other words, a completed act, so it's a much stricter requirement than the one that's found in the uniform jury instructions, so I don't think that the defendants have anything to complain about because it's more favorable to them than the uniform instruction[.]

In essence, by adding paragraph four, the plaintiff must prove (1) Louis was susceptible to influence, (2) Steven had the opportunity to exercise such influence, (3) Steven was inclined to influence Louis, and (4) the undue influence was a "fait accompli" (a thing actually accomplished). At that point, under the jury instruction given here, the plaintiff must still go back and prove the changes to the trust were clearly the result of these four things. The district court explained "paragraph 5 isn't necessary because once you get through 4, you've wrapped it up completely." Essentially, adding the fourth paragraph added another step the plaintiff had to prove, thereby rendering the instruction faulty either through repetition, or by giving undue emphasis to otherwise correct statements of law. *See Waits*, 572 N.W.2d at 575.

The instruction on burden of proof could not cure any error as suggested by William because of this faulty jury instruction adding a layer to prove undue influence. We therefore reverse and remand for a new trial.[4]

IV. Conclusion

The district court erroneously, prejudicially, and incurably instructed the jury as to undue influence. Because of the faulty jury instruction, we must remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL ON APPEAL; AFFIRMED ON CROSS-APPEAL.

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[4] Steven also filed a cross appeal arguing the district court erred by finding substantial evidence on every element of undue influence and thereby denying his motion for direct verdict. Review of the trial court's denial of a motion for directed verdict is for correction of errors of law and is limited to the grounds raised in the motion. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). "A directed verdict is appropriate in cases where any element of the claim is not supported by substantial evidence." *Hill v. Winnebago Indus., Inc.*, 522 N.W.2d 326, 328 (Iowa Ct. App.1994).

Because direct proof is rarely available in these situations, undue influence may be proven by circumstantial evidence. *In re Estate of Dankbar*, 430 N.W.2d 124, 128 (Iowa 1988). Looking at the evidence in the light most favorable to William as the nonmoving party, we find there was sufficient evidence to deny the motion for directed verdict and send the issue to the jury. We therefore will not extensively address this issue.