**IN THE COURT OF APPEALS OF IOWA**

No. 2-672 / 11-1702
Filed September 6, 2012

**IN THE MATTER OF THE ESTATE OF HELEN A. HETRICK, Deceased.**

**AUDREY BLIEN and ALICIA DAY,**
Plaintiffs-Appellants/Cross-Appellees,

**vs.**

**MARY E. MARINE, Individually and as Executor of the Estate of HELEN A. HETRICK, Deceased,**
Defendant-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Judge.

Will contestants appeal from the dismissal of their action. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants/cross-appellees.

Steven E. Ballard of Leff Law Firm, L.L.P., Iowa City, for appellee/cross-appellant.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

**POTTERFIELD, J.**

**I. Background Facts and Proceedings.**

In 2006 Helen A. Hetrick made a will that left everything to her husband; in the event he did not survive her, Helen's daughters, Audrey Blien and Mary Marine, each were to have fifty percent of the estate. Helen's son, Butch, had died in April 2006 and Helen's August 2006 will left nothing to Butch's daughter, Alicia Day. In August 2009, Hetrick made a new will leaving everything to Mary.

In this action, Audrey and Alicia ("contestants") assert the 2009 will was invalid because Helen lacked testamentary capacity and was suffering from an "insane delusion" that there were problems in the relationship between Kevin (Audrey's son) and Jack (Audrey's second husband and Kevin's adoptive father). Although the evidence showed that Helen said Jack did not treat Kevin well, contestants presented no evidence that anyone attempted to prove to Helen that Jack had not mistreated Kevin. They also assert the will was the result of undue influence by Mary. A jury found that the contestants did *not* prove Helen lacked the mental ability to make a will, or that the 2009 will resulted from undue influence. The trial court dismissed the contestants' petition and taxed costs to them, including the cost of a video deposition.

On appeal, the contestants argue the trial court abused its discretion in failing to instruct the jury on delusions. They also assert the trial court abused its discretion in failing to admit all of Helen's medical records, including those arising after 2010 when Helen was hospitalized with cancer and medicated with powerful drugs including morphine and methadone. Finally, they assert the court erred in taxing costs. On cross-appeal, Mary challenges two evidentiary rulings relevant

only if judgment is reversed. Because we affirm on the appeal, we need not address the cross-appeal.

**II. Scope and Standards of Review.**

This is a law action. *See* Iowa Code §§ 633.11, .33 (2011). Our review, therefore, is for correction of errors at law. Iowa R. App. P. 6.907.

We review a refusal to give a jury instruction for an abuse of discretion. *Anderson v*. *State*, 692 N.W.2d 360, 363 (Iowa 2005); *Kiesau v*. *Bantz*, 686 N.W.2d 164, 171 (Iowa 2004). "Error in giving or refusing to give a particular instruction does not warrant reversal unless the error is prejudicial to the party." *Mulhern v*. *Catholic Health Initiatives*, 799 N.W.2d 104, 110 (Iowa 2011).

We also review a court's ruling on evidentiary matters for an abuse of discretion. *See Hall v*. *Jennie Edmundson Mem'l Hosp*., 812 N.W.2d 681, 685 (Iowa 2012). "An abuse of discretion exists when the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Heinz v*. *Heinz*, 653 N.W.2d 334, 338 (Iowa 2002) (internal quotation marks and citations omitted).

**III. Merits.**

*A*. *Jury Instructions*. The jury was asked to determine whether Helen was competent when she executed her August 2009 will, and whether Mary had unduly influenced Helen's execution of this will. Instruction number 8 informed the jury that Helen had the mental ability to make a will if she:

> 1. Knew a will was being made.
> 2. Knew the kind and extent of her property.
> 3. Was able to identify and remember those persons she would naturally give her property to.
> 4. Knew how she wanted to distribute her property.

> A will is valid if the person making the will meets the above tests, even if her mental or physical powers are impaired. A person does not have to be able to make contracts or carry on business generally. However, you may consider physical weakness or infirmity, the rational nature of the distribution, along with any other evidence in deciding if a person has the mental ability to make a will.

Instruction number 9 provided: "Lack of mental ability to make a will must exist at the time the will was made. You may consider evidence of Helen Hetrick's condition of mind at other times if you decide such evidence throws some light on her mental ability at the time the will was made." There is no claim the instructions do not correctly state the law and we note they are patterned after the language of Iowa Civil Jury instructions 2700.2 and 2700.3.

The jury was also properly instructed with regard to the contestants' claim of undue influence. Instruction number 10 sets forth the elements identified in *In re Estate of Dankbar*, 430 N.W.2d 124, 126 (Iowa 1988) (noting four elements necessary to sustain a finding of undue influence in the execution of a will: "1) the testator's susceptibility to undue influence, (2) opportunity to exercise such influence and effect the wrongful purpose, (3) disposition to influence unduly for the purpose of procuring an improper favor, and (4) a result clearly the effect of undue influence."). *See also* Iowa Civ. Jury Instruction 2700.4. Instruction number 12 informed the jury it could consider the condition of the will maker's mind and whether it was subject to dominance, whether the maker's property distribution was "unnatural, unjust, or unreasonable," whether the maker of the will was mentally weak, and "any other facts or circumstances shown by the evidence which may have any bearing on the question." These factors are

consistent with Iowa law. *See Frazier v. State Cent. Sav. Bank*, 217 N.W.2d 238, 243 (Iowa 1974); Iowa Civ. Jury Instruction 2700.6.

The contestants asked that the court give the following instruction:

> The presumption that a person has the mental ability to make a Will does not apply if a person suffers from mental illness. Proponents and Contestants agree that Helen Hetrick suffered from mental illness, and that this [sic] mental illness was a permanent condition. Proponents and Contestants dispute the significance of the effect of Helen Hetrick's mental illness on her mental ability to make a Will. You may consider Helen Hetrick's mental illness, including whether she suffered delusions, and whether it would affect any one or more of the elements of mental ability to make a Will.
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> In considering whether Helen Hetrick had the mental ability to make a Will, you may consider whether she had delusions. A delusion is more than a mere mistake of fact, but must be a belief that cannot be removed, at least permanently, by evidence or logical argument. If a belief is based upon evidence, it is not a delusion, but where a belief is not based on evidence and cannot be removed by evidence, it may amount to a delusion.

Even assuming the instruction might have some basis in law,[1] the trial court noted there was no medical testimony that Helen suffered from delusion as there had been in the *Dankbar* case.

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[1] *See Firestine v. Atkinson*, 218 N.W. 293, 294-96 (Iowa 1928); *but see Dankbar*, 430 N.W.2d at 130 n.1 (rejecting claim that court erred in refusing to instruct the jury with regard to "insane delusions" described in *Firestine* as it "simply has no applicability where, as here, the testator's delusion is but one of the many manifestations of her total mental illness that bears on her testamentary capacity").

One commentator has stated the concept of an "insane delusion" "considers the wrong issues":

> The problem is that in creating a test for an insane delusion, or monomania, courts have fashioned rules that are simultaneously over and under inclusive. Insane delusion law considers the wrong issues. Instead of considering the testator's mental abilities—as is done in most capacity decisions—the monomania doctrine attempts to determine why the testator believed what he believed and why he did what he did.
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> . . . .
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> As discussed in more detail below, in order for a court to invalidate a will based on the testator's insane delusion, the contestant must prove two facts. First, the contestant must show that the testator suffered from

We conclude the contestants' theories were adequately covered by the instructions given and thus no prejudice resulted from the court's failure to give the proposed instruction. *See Johnson v*. *Interstate Power Co*., 481 N.W.2d 310, 324 (Iowa 1992). Whether Helen lacked testamentary capacity and whether her will was the result of undue influence were questions for the jury. *Dankbar*, 430 N.W.2d at 130. We do not disturb the jury's findings that contestants failed in their proof.

*B*. *Evidentiary Ruling*. The court allowed the contestants to introduce medical records indicating Helen experienced depression and general anxiety throughout the years surrounding her making of the 2009 will. However, the court granted Mary's motion in limine excluding proposed exhibits 108, 109,[2] 110, 111, and 112 (nursing and care provider notes from April and May 2010).

Evidence of mental capacity must refer to the exact time of the making of the will. *In re Estate of Gruis*, 207 N.W.2d 571, 573 (Iowa 1973). Yet, "evidence of the condition of the mind of the testator at other times may be received if there is a reasonable basis for the conclusion that it throws some light on his mental competence at the time the will was made." *Id.* The trial court excluded the exhibits on grounds "they do not shed any light on the decedent's testamentary

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> an insane delusion. Proving that a delusion is insane, however, is more difficult than one might expect. Specifically, it is difficult to distinguish between a testator suffering from an insane delusion and a testator who has merely reached a wrong, mean-spirited, or "stupid" conclusion. An insane delusion could invalidate the will, but a wrong, mean-spirited, or "stupid" conclusion should not.

Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 Real Prop. Prob. & Tr. J. 67, 68-69 (2007) (footnotes omitted).

[2] While appellants list exhibit 109 as being excluded, the trial transcript indicates exhibit 109 was admitted without objection.

capacity as of August 21, 2009." Considering that Helen was diagnosed with cancer in January 2010 and her mental capacity was thereafter affected by pain medication and the progression of the disease, we find no abuse of discretion.

*C. Taxation of Costs.* Finally, the contestants argue the court incorrectly taxed the cost of a video recording of the deposition of Dr. Mary McLaughlin ($414.48). They do not object to the stenographic record of the deposition, but they argue the video cost was unnecessary. Iowa Rule of Civil Procedure 1.716 provides:

> Costs of taking and proceeding to procure a deposition shall be paid by the party taking it who cannot use it in evidence until such costs are paid. The judgment shall award against the losing party only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial.

Costs for depositions are not "necessarily incurred" within the meaning of this rule unless they are "introduced into evidence in whole or in part at trial." *Woody v. Machin,* 380 N.W.2d 727, 730 (Iowa 1986). Once the threshold requirement that the deposition be introduced into evidence is met, the trial court has discretion to tax the deposition expense as a cost. *Id.* We review the court's determination of necessity for an abuse of that discretion. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 786 (Iowa 2002).

The parties submitted the testimony of Dr. Laughlin via videotaped deposition. The record indicates a charge of $238.08 for the "videotaping services and media on DVD Video," as well as charge of $176.40 for the transcript of the deposition. The video was played for the jury and the transcript was introduced as an exhibit "such that the testimony does not need to be

reported" by the court reporter. The district court found the deposition "was a necessary expense for the Executor, given the busy schedules of medical doctors and the difficulty in securing their appearance in court." We find no abuse of discretion in the court's taxation of cost, particularly in light of the fact that the court reporter at trial did not transcribe the doctor's videotaped testimony.

**AFFIRMED.**