IN THE IOWA SUPREME COURT

NO. 15-2126

DENNIS WORKMAN,

Plaintiff/Appellant,

vs.

GARY WORKMAN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARGARET E. WORKMAN, and LAVERNE WORKMAN, CYNTHIA NOGGLE, RANDY NOGGLE, MINDY (NOGGLE) SHERWOOD, CHRISTINE (WORKMAN) THOMPSON AND JEFFREY WORKMAN.

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE JOHN D. TELLEEN
SCOTT COUNTY PROBATE NUMBER ESPR074050

PLAINTIFF/APPELLANT'S FINAL BRIEF

REQUEST FOR ORAL ARGUMENT

Eric M. Updegraff AT0008025
HOPKINS & HUEBNER, P.C.
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: (515) 244-0111
Fax: (515) 244-8935
Email:EUpdegraff@hhlawpc.com
ATTORNEY FOR PLAINTIFF/APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Secondary Sources **Page**

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE I: THE DISTRICT COURT ERRED IN DETERMINING IN ITS SUMMARY JUDGMENT RULING THAT THE BURDEN OF PROOF DID NOT SHIFT TO GARY WORKMAN AS A RESULT OF A CONFIDENTIAL RELATIONSHIP AND UNDUE INFLUENCE

Ayers v. Shaffer, 748 S.E.2d 83 (Vir. 2013)

Cresto v. Cresto, 358 P.3d 831, 833-834 (Kansas 2015)

Eckstein v. Estate of Dunn, 816 A.2d 494 (Ver. 2002)

Heck v. Archer, 927 F.2d 495, 499-500 (Kansas App. 1996)

Howard v. Nasser, 613 S.E.2d 64 (S.C. 2005)

In re Aldrich's Estate, 3 So.2d 856 (Florida 1941)

In re Estate of Bethurem, 313 P.3d 237 (Nev. 2013)

In re Estate of Holcomb, 63 P.3d 9 (Okla. 2002)

In re Estate Luongo, 823 A.2d 942 (Penn. 2003)

In re Estate of Novak, 458 N.W.2d 221 (Neb. 1990)

In re Estate of Stockdale, 953 A.2d 454, 470 (N.J. 2008)

In re Fechter's Estate, 277 N.W.2d 143 (Wis. 1979)

In re Last Will and Testament of Melson, 711 A.2d 78 (Del. Sup. 1998)

In re Lobb's Will, 145 P.2d 808 (Oregon 1944)

In re Moses' Will, 227 So.2d 829 (Miss. 1969)

In the Will of Faulks, 17 N.W.2d 423, 440 (Wis. 1945)

Kelley v. Johns, 96 S.W.2d 189 (Tenn. App. 2002)

Matter of Estate of Gersbach, 960 P.2d 811 (New Mexico 1998)

Matter of Estate of Todd, 585 N.W.2d 273, 277 (Iowa 1998)

Matter of Estate of Bayer, 574 N.W.2d 667 (Iowa 1998)

Peak v. Adams, 799 N.W.2d 535 (Iowa 2011)

79 Am.Jur.2d *Wills* § 428

79 Am.Jur.2d Wills § 394 (2016)

ISSUE II: THE DISTRICT COURT ERRED IN DENYING A MOTION TO AMEND THE PLEADINGS TO CONFORM WITH THE EVIDENCE

Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181, 187 (Iowa 1987)

Holliday v. Rain & Hail L.L.C., 690 N.W.2d 59 (Iowa 2004)

Rife v. D.T. Corner, Inc., 641 N.W.2d 761 (Iowa 2002)

Swartzenruber v. Lamb, 582 N.W.2d 171 (Iowa 1998)

ROUTING STATEMENT

The Appellant believes that this case involves issues of first impression and issues of substantial importance so that the Iowa Supreme Court should retain jurisdiction. I.R.A.P. 6.1101(2)(c) & (d).

STATEMENT OF THE CASE

Plaintiff filed a petition alleging that the Will offered into probate in this matter was invalid based on: (1) lack of testamentary capacity; (2) undue influence; and (3) confidential relationship. (Petition and Jury Demand dated January 25, 2013, App. 1).

On July 9, 2014, the Defendant moved for summary judgment on all three theories. (Motion for Summary Judgment dated July 9, 2014, App. 38).

On March 12, 2015, the District Court entered a ruling granting in part and denying in part the motion for summary judgment. (Order on Motion for Summary Judgment dated March 12, 2015, App. 797). The District Court determined that summary judgment was appropriate on the issues of testamentary capacity and confidential relationship. (Order on Motion for Summary Judgment dated March 12, 2015, App. 797).

The case then proceeded to jury trial on the issue of undue influence. (Trial Transcript 1, App. 245). The jury returned a verdict determining that

the Defendant did not exercise undue influence over the testatrix. (Civil Verdict Form 1 and Civil Verdict Form 2 entered November 19, 2015, App. 809.

The Plaintiff filed a timely notice of appeal. (Notice of Appeal, App. 807)

STATEMENT OF FACTS

The crux of this case centers on the relationship between the various family members. LaVerne and Margaret Workman had 3 children. (Trial Transcript p. 23-24, App. 267-268). Dennis is the oldest child. (Trial Transcript p. 23, App. 267). Gary is the second son. (Trial Transcript p. 24, App. 268). The elder Workmans adopted their sister Cindy when she was approximately five years old. (Trial Transcript p. 24, App. 268).

Dennis Workman was born and raised on a farm. (Trial Transcript p. 22, App. 266). He graduated from Durant High School in 1965. (Trial Transcript p. 22, App. 266). After high school he attended Muscatine Community College, majored in agriculture, and graduated with a degree in the same in 1967. (Trial Transcript p. 22, App. 266). After community college, Dennis went to the Institute of Broadcast Arts and received a diploma. (Trial Transcript p. 22, App. 266). He then attended St. Ambrose University before transferring to University of California Berkley. (Trial

Transcript p. 22, App. 266). He received his Bachelor's Degree from UC-Berkley. (Trial Transcript p. 22-23, App. 266-267). After graduating Dennis took a job as an announcer on a radio station in Ventura California. (Trial Transcript p. 23, App. 267). Later, Dennis acquired a teaching certificate and taught school. (Trial Transcript p. 23, App. 267).

The dispute among the family members concerns certain tracks of farm land in Eastern Iowa. LaVerne Workman inherited one-third of a family farm. (Trial Transcript p. 23-24, App. 267-268). Eventually, LaVerne ended up with the entire interest in that family farm. (Trial Transcript p. 25-26, App. 269-270). At some point LaVerne exchanged that farm in a 1031 exchange for farm ground closer to Margaret's farm ground. (Trial Transcript p. 26, App. 270).

As most family disputes go, the relationship between the family members was pretty good in the beginning. Dennis testified that he and Gary Workman had a pretty good childhood. (Trial Transcript p. 25, App. 269). As they grew up they both ended up in California. (Trial Transcript p. 25, App. 269). During that time LaVerne was farming the two farms by himself or renting out the ground. (Trial Transcript p. 25, App. 269).

In 1981, Gary decided to return to Iowa to farm with his father. (Trial Transcript p. 27, App. 271). The decision surprised Dennis because he did

not think that Gary was interested in moving back home. (Trial Transcript p. 27, App. 271). Gary explained to Dennis that their parents had made Gary an offer he could not refuse. (Trial Transcript p. 27, App. 271).

In the 1980s Dennis had some financial difficulties. (Trial Transcript p. 27, App. 271). He purchased a radio station in Denver, Colorado. (Trial Transcript p. 27, App. 271). When he purchased the radio station he did so with the understanding that it could convert from a day time station to a full-time radio station. (Trial Transcript p. 27-28, App. 271-272). It turned out that the radio station's facilities could not handle such a concept. (Trial Transcript p. 28, App. 272). At the same time the previous owner changed the station's format making it less desirable to advertisers. (Trial Transcript p. 28, App. 272). As a result of these various problems Dennis wound up declaring bankruptcy. (Trial Transcript p. 28, App. 272). He first tried a Chapter 11 bankruptcy, but ended up with a Chapter 7 bankruptcy. (Trial Transcript p. 28, App. 272). Additionally, Dennis ended up with a $1.1 million judgment against him. (Trial Transcript p. 30, App. 274).

These difficulties resulted in creditors contacting Dennis's parents in an attempt to collect the debts. (Trial Transcript p. 30, App. 274). Consequently, LaVerne and Margaret had to hire an attorney to deal with those creditors. (Trial Transcript p. 31, App. 275).

In 1986, Dennis moved back to the farm. (Trial Transcript p. 31, App. 275). He stayed there from 1986 through 1989. (Trial Transcript p. 31-32, App. 275-276). At that time Dennis expressed his interest in farming the family farm. (Trial Transcript p. 31-32, App. 275-276). However, Gary was not interested in Dennis farming the family farm with him. (Trial Transcript p. 31-32, App. 275-276). Dennis's next move was to start a convenience store in Clinton that he ran for about a year and a half. (Trial Transcript p. 32, App. 276).

The testimony at trial reveals that over the years Dennis tried to come back to Iowa and get into family farming a dozen times or more. (Trial Transcript p. 32, App. 276). Dennis testified that LaVerne and Gary did want Dennis to come back to the family farm but that his mother was in favor of it. (Trial Transcript p. 32, App. 276). Dennis explained that Margaret would call him up and she would be crying when discussing him coming back to the farm. (Trial Transcript p. 32, App. 276).

It is Dennis's opinion that his mother wanted him to return to the farm and felt coerced by Gary and LaVerne because they did not want him to return. (Trial Transcript p. 32, App. 276). Dennis explained that he would call his mother and ask her if he could return to the farm. (Trial Transcript p. 32, App. 276). She would tell him that she would talk to Gary and

LaVerne. (Trial Transcript p. 32, App. 276). Margaret would then call him back several days later and explain that Gary and LaVerne had nixed him returning to the farm. (Trial Transcript p. 32, App. 276).

Dennis also had numerous discussions with his mother about her desires for her property. (Trial Transcript p. 36, App. 280). These conversations started in the 1980s and continued through the 1990s. (Trial Transcript p. 36, App. 280). It was Margaret's wish that everyone be treated fairly. (Trial Transcript p. 37, App. 281). Originally, Margaret explained to Dennis that it was her desire that Dennis get her farm, the south farm, and that Gary get their father's farm, the north farm. (Trial Transcript p. 37, App. 281).

Thus, began a continuous deterioration of Dennis and Cindy's share of the assets in favor of Gary Workman. (Exhibits 1-10, App. 815-865).

In the first Will in evidence Margaret Workman set out a scheme as follows:

1. Her husband would receive all her personal property and a life estate in their homestead;
2. If her husband failed to survive her then the homestead would go to Dennis, Gary and Cynthia in equal shares;
3. If her husband failed to survive her then her personal property would

be divided equally amongst the three children;

4. If her husband survived her then she bequeathed her 200 farm to her husband, Dennis and Gary to be theirs absolutely in fee simply in the following proportion shares:
    a. LaVerne gets 40 acres;
    b. Gary gets the north 80 acres;
    c. Dennis gets the south 80 acres.

(Trial Exhibit 1, App. 815).

In a codicil to this 1983 Will Margaret Workman amended the bequest to Dennis and instead bequeathed his portion of the farm to a spendthrift trust for the benefit of Dennis. (Trial Exhibit 2, App. 818). The trust's terms allowed for a release of the property to Dennis at the trustee's discretion. (Trial Exhibit 2, App. 818).

In 1987 Margaret put together a second Will. (Trial Exhibit 3, App. 820). In this Will the bequest of the homestead shifted from Cynthia to Gary. (Trial Exhibit 3, App. 820). Instead Cynthia would have received approximately $25,000 in cash. (Trial Exhibit 3, App. 820). Each of the children would receive 1/3 of the residue of the estate. (Trial Exhibit 3, App. 820). The farm would have been split up as follows: (1) Gary gets the south 80 (as opposed to the north 80); (2) the north 80 acres goes to a

spendthrift trust for Dennis; and (3) the remaining 40 acres would have gone to Gary's children Jeffrey and Christine Workman. (Trial Exhibit 3, App. 820).

In 1995 Margaret put together another Will. In this Will the property is divided even more favorably to Gary Workman. (Trial Exhibit 4, App. 825). The major changes concern the farm ground. (Trial Exhibit 4, App. 825). In this Will the farm bequests work as follows: (1) Gary gets the south 80 acres; (2) Gary gets the north 80 acres as remainder man to a life estate for the benefit of the Workman Family Trust; and (3) Gary's children Jeffrey and Christine get the remaining 40 acres. (Trial Exhibit 4, App. 825). The Workman Family Trust would have been a limited trust for the benefit of Dennis wherein Gary and a Bank would have discretion to distribute income and principal to Dennis. (Trial Exhibit 4, App. 825). After Dennis passed away then Gary would receive 75% of the funds in the trust and Cynthia would receive 25%. (Trial Exhibit 4, App. 825).

In 1999 Margaret put together another Will. (Trial Exhibit 5, App. 833). In this Will she bequeathed cash to: (1) Gloria Dei Lutheran Church $1,000; (2) Cynthia $25,000; (3) Grandson Randy Noggle $10,000; (4) Mindy Noggle $10,000. (Trial Exhibit 5, App. 833). In terms of the homestead she granted a life estate in it to her husband LaVerne and then a

life estate to Dennis. (Trial Exhibit 5, App. 833). If Dennis does not occupy the homestead then:

1. Marcia T. Turner gets 50% if she is Dennis's spouse or is cohabitating with him at the cessation of the life estate; OR Each of the following get 20% of the 50%: (1) Cynthia Noggle; (2) Randy Noggle; (3) Mindy Noggle; (4) Jeffrey Workman; and (5) Christine Workman. (Trial Exhibit 5, App. 833)
2. The children of Dennis Workman get 50%; OR Each of the following get 20% of the 50%: (1) Cynthia Noggle; (2) Randy Noggle; (3) Mindy Noggle; (4) Jeffrey Workman; and (5) Christine Workman. (Trial Exhibit 5, App. 833)

Additionally, Gary is given the option to purchase the homestead at fair market value at the cessation of the life estates. (Trial Exhibit 5, App. 833)

The 1999 Will marks the beginning of what appear to be equalization payments in lieu of giving Dennis (or a trust on Dennis's behalf) any interest in the farm ground. (Trial Exhibit 5, App. 833) The terms concerning the farm are as follows:

1. Gary receives both the north 80 acres and south 80 acres subject to an obligation to put $80,000 into a Family Trust. (Trial Exhibit 5, App. 833); The $80,000 is to be paid in $10,000 increments on a yearly

basis until it is paid off. (Trial Exhibit 5, App. 833)

2. Gary's children Jeffrey and Christine receive the remaining 40 acres. (Trial Exhibit 5, App. 833)

The Family Trust, funded by these $10,000 a year payments, was a spendthrift trust for the benefit of Dennis. (Trial Exhibit 5, App. 833). The Will also contains a provision setting out that Gary's share, should he not survive Margaret, would be shared equally by his children. (Trial Exhibit 5, App. 833). This Will also contains a statement that "It may appear that I have provided more generously for my son, Gary, than my other two children, but in part it is in repayment for work and improvements he has done on our farmlands. In addition, I have made gifts to my children during my lifetime." (Trial Exhibit 5, App. 833). The documents purports that Margaret executed it on March 15, 1999. (Trial Exhibit 5, App. 833).

The evidence demonstrates that Gary Workman had been attending meetings with LaVerne and Margaret about estate planning just prior to this Will. (Trial Exhibit 17, App. 868). In a letter dated October 23, 1998, Joan U. Axel, an attorney with Stanley, Lande & Hunter, wrote a letter to Mr. and Mrs. LaVeren E. Workman. (Trial Exhibit 17, App. 868). Ms. Axel began her letter "After our meeting last week, we reviewed some of the many issues you and Gary presented." (Trial Exhibit 17, App. 868). In that letter

Ms. Axel set out the three primary goals as:

(1) Transfer LaVerne's farm to Gary now and completely.

(2) Honor Gary's wishes to have no dealing with Dennis regarding property now or after your deaths.

(3) Treat Dennis as fairly as possible.

(Trial Exhibit 17, App. 868).

The letter then recommends that "the best way to achieve your goals for Gary and to treat Dennis as fairly as possible would be to set aside to Dennis non-farm assets." (Trial Exhibit 17, App. 868) The letter then requests that they "Please talk this over with Gary and see which way will work best for all concerned." (Trial Exhibit 17, App. 868)

On November 6, 1998, Ms. Axel wrote a letter following up on a telephone conference dated October 29, 1998. (Trial Exhibit 18, App. 871). The document explained that LaVerne and Margaret were planning two real estate transfers and a lease. (Trial Exhibit 18, App. 871). In particular the letter demonstrates:

1. Gary would get LaVerne's Scott County farm subject to an interest in LaVerne for his life. LaVerne will have all the net income from the farm during his lifetime.
2. Transferring Gary's one-half interest in the Durant duplex to LaVerne.

LaVerne will then dispose of this property in his will.

3. Entering into a written farm lease between Gary and LaVerne for a 5-year renewable term.

(Trial Exhibit 18, App. 871)

The letter explains: "We are very happy to work with you, as you know. However, on reflection, we wonder if you would like Lowell Dendinger to complete your plan? He will want to know about these changes." (Trial Exhibit 18, App. 871). The letter concludes: "We have the appointment saved we scheduled: November 12, 1998, at 9:00 a.m. in the Wilton office. Gary and his wife would need to be present or stop in in advance to sign the Durant duplex deed if you move forward with this plan." (Trial Exhibit 18, App. 871).

In 2001, Margaret Workman apparently executed yet another Will. (Trial Exhibit 6, App. 841). Stanley, Lande & Hunter, the same firm representing Gary Workman in this Will contest, prepared the Will. (Trial Exhibit 6, App. 841). In the 2001 Will the bequests remain mostly the same as in the 1999 Will. (Trial Exhibit 6, App. 841). The Will bequeaths the homestead to LaVerne for his life and then to the Workman Family Trust of 1991, subject to Gary's right to purchase the homestead after his father's death. (Trial Exhibit 6, App. 841). In terms of the farm ground, the Will

gives LaVerne a life estate in the 160 acres with Gary as the remainder man. (Trial Exhibit 6, App. 841). The 2001 Will then provides for $100,000 in equalization payments to be made $10,000 per year to the Workman Family Trust. (Trial Exhibit 6, App. 841). Gary may seek a reduction in the total amount of these payments if he pays for an independent appraiser to determine the value of the farmland has decreased by 1/3 or more. (Trial Exhibit 6, App. 841). There are no provisions for an increase in the total value of these payments if the value of the farmland has increased. (Trial Exhibit 6, App. 841). If Gary does not survive Margaret then his interest passes to his children subject to the obligation to make the $10,000 per year payments. (Trial Exhibit 6, App. 841). The will then gives the remaining 40 acres to Gary's children Christine and Jeffrey. (Trial Exhibit 6, App. 841). The 2001 Will also includes the statement:

> My husband and I wish to formally acknowledge that we recognize and understand that the cumulative effect of our wills and The Workman Family Trust will be to give our son, Gary, a disproportionately large share of our combined assets. We have intentionally and knowingly made these provisions understanding that Gary will receive more of our combined estates than our other two children. We have done this to recognize the many years of contribution and effort made by Gary, which has benefited us over the years that he has lived near us. The statement I am making in this paragraph is merely precatory and intended to express my intent.
>
> (Trial Exhibit 6, App. 841).

Margaret then executed a couple of codicils to this will.

In January 2003, Margaret executed a document altering her distribution scheme. (Trial Exhibit 7, App. 850). She altered the specific bequests from the 2001 Will by:

1. Giving the homestead to the Workman Family Trust, subject to a life estate to LaVerne and giving Gary the right to purchase the homestead ***at its assessed value*** (as opposed to fair market value);
2. Giving the 160 acres to Gary subject to a life estate for LaVerne and reducing the equalization payments to a total of $75,000 to be paid $7,500 per year with such payments going to Dennis's wife Marcia T. Turner or alternatively to the Workman Family Trust;
3. Gary's interest will pass to his surviving decedents, per stirpes, subject to the obligation to pay $7,500 per year;
4. The Codicil then divides the residue of the estate, in the even that LaVerne predeceases Margaret, 1/3 to Gary, 1/3 to Cynthia and 1/3 to the Workman Family Trust.

(Trial Exhibit 7, App. 850)

This Codicil was apparently also prepared by Eric J. Thomsen of Stanley, Lande & Hunter. (Trial Exhibit 7, App. 850).

In 2006, Margaret apparently executed a second codicil to her 2001

Will. (Trial Exhibit 8, App. 854). In this second codicil Margaret reduces Gary's equalization payments from $75,000 to $25,000 to be paid $2,500 per year over a 10 year period. (Trial Exhibit 8, App. 854).

In 2007, Margaret apparently executed a brand new Will. (Trial Exhibit 9, App. 857). Stanly, Lande & Hunter prepared this Will as well. (Trial Exhibit 9, App. 857). The 2007 Will changes the specific bequests of cash to include an additional $10,000 to Jason Workman, the adopted son of Dennis Workman. (Trial Exhibit 9, App. 857). The 2007 Will then gives the homestead to the Workman Family Trust, subject to a life estate for LaVerne and subject to a right of first refusal for Gary to purchase the homestead. (Trial Exhibit 9, App. 857). The farm ground is then distributed as follows:

1. The 160 acres goes to LaVerne in a life estate and then to Gary subject to $25,000 in total payments to be made at $2,500 per year for 10 years. If Gary does not survive then the remainder interest passes to his surviving descendants, per stirpes, subject to the same $2,500 per year payments.
2. The 40 acres go to Gary's children Jeffrey and Christine.

(Trial Exhibit 9, App. 857).

In 2008, Margaret apparently executes a Codicil to this Will. (Trial Exhibit

10, App. 865). The 2008 Codicil apparently adds a provision that prevents a sale of the farm ground for a period of three years. (Trial Exhibit 10, App. 865). If the farm ground was sold within 3 years of Margaret's death then the person selling the ground would have to contribute any proceeds in excess of $5,000 per acre 1/3 to: (1) Gary Workman; (2) Cynthia Noggle; and (3) The Workman Family Trust. (Trial Exhibit 10, App. 865).

In particular the evidence at trial demonstrates that the final distribution of the decedent's assets results in a sharply disproportionate amount of money and assets going to Gary and his heirs. (Trial Exhibit 9 and 10, App. 857 and 865). The estimates of value show that Gary and his heirs are receiving 200 acres of farmland valued at $12,500 per acre. (Trial Transcript 165 and Trial Exhibits 9 & 10, App. 299, 857 and 865). This is a total of $2,500,000 to Gary and his heirs. The remaining children and grandchildren receive approximately $56,000 plus any residue of a family trust. (Trial Exhibits 9 & 10, App. 857 and 865). The evidence demonstrates that Gary Workman makes his living off the 200 acres of farm ground and has done so for a considerable period of time. (Trial Transcript 148-149, App. 392-393). In fact, Gary has been farming that ground for 34 years. (Trial Transcript p. 137, App. 381). Gary saw his parents on an almost daily basis as he was farming their farm. (Trial Transcript p. 138,

App. 382). Gary was his mother's power of attorney. (Trial Transcript p. 150, App. 394). A review of the decedent's Wills during that 34 year period demonstrates a steady attrition of Dennis's inheritance in favor of Gary and his heirs. (Trial Exhibit 1-10, App. 815-865). Gary admits that he was constantly having discussions with Margaret about Dennis's financial troubles. (Trial Transcript p. 156, App. 300). Gary would search the internet in order to provide his parents with information on Dennis's issues. (Trial Transcript p. 156, App. 300). Gary testified that he was instrumental in setting up the trust. (Trial Transcript p. 162-163, App. 306-307).

ARGUMENT

ISSUE I: THE DISTRICT COURT ERRED IN DETERMINING IN ITS SUMMARY JUDGMENT RULING THAT THE BURDEN OF PROOF DID NOT SHIFT TO GARY WORKMAN AS A RESULT OF A CONFIDENTIAL RELATIONSHIP AND UNDUE INFLUENCE

A. Preservation of error and standard of review.

This issue was preserved by Plaintiffs when resisting the Motion for Summary Judgment. (See Plaintiffs' Resistance to Motions for Summary Judgment, App. 42-244). The District Court specifically ruled on these issues. (Order on Motion for Summary Judgment, App. 797).

In a recent case, *Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011), the Iowa Supreme Court stated the standard of review on a motion for summary

judgment is for correction of errors at law. *Id.* at 542-543.

B. Argument.

The District Court ruled in its motion for summary judgment on the relationship between a confidential relationship and undue influence. (Order on Motion for Summary Judgment pp. 6-8, App. 803-805). In particular the District Court quoted the Iowa Supreme Court as stating:

> A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another, and so it has been said that all the variety of relations in which dominion may be exercised by one person fall within the general term "confidential relationship." *Matter of Herm's Estate*, 284 N.W.2d 191, 199 (Iowa 1979) (quoting *Dibel v. Meredith*, 10 N.W.2d 28, 30 (Iowa 1943).
>
> "Where such confidential relationship exists, a transaction by which the one having the advantage profits at the expense of the other will be held presumptively fraudulent and voidable." Id. (citations removed). Further, the Court explained that when such confident relationship exits, "[t]he burden of proceeding with the evidence then shifts to the claimant to establish by clear and convincing proof that the advantage was procured without undue influence." Id. (citations removed). However, it appears as if this analysis is only considered when inter vivos transfers are involved. See In the Matter of Estate of Todd, 585 N.W.2d 273, 277 (Iowa 1998) (the more stringent inter vivos transfer standard overruled in Jackson v. Schrader, 676 N.W.2d 599 (Iowa 2003)). The court further noted that "a suspicion of overreaching may arise where the dominate party has participated in the actual preparation or execution of the will." Id. (citing In re Estate of Bayer, 574 N.W.2d 667, 675 (Iowa 1998)). Here, we only have testamentary transfers at issue and thus the burden shifting does not appear to apply. It remains for the Plaintiff to establish at trial the Defendant unduly influenced Mrs. Workman and there is a fact question

precluding summary judgment on that issue.

(Order on Motion for Summary Judgment, App. 803-805)

The issue presented on this appeal is whether this should continue to be the standard for cases involving a confidential relationship and undue influence in the State of Iowa.

The Restatement (Third) of Property rejects a formulation of confidential relationships and undue influence that turns on whether the transaction was inter vivos or testamentary. The Restatement sets out the basic rule explaining: "A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud." Restatement (Third) of Property: Wills & Donative Transfers § 8.3(a). The first party of the commentary to this section explains "This section applies to all donative transfers, whether inter vivos or testamentary." Restatement (Third) of Property: Wills & Donative Transfers § 8.3 comment a. Comment b explains that: "The burden of establishing undue influence, duress, or fraud (referred herein as the "wrong") is on the party contesting the validity of a donative transfer. In some circumstances the contestant's case may be aided by a presumption of invalidity. See Comment f." Restatement (Third) of Property: Wills & Donative Transfers § 8.3 comment a.

In the commentary to Restatement (Third) of Property: Wills &

Donative Transfers § 8.3[1] the treatise explains undue influence:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption. See Comment *g* for what constitutes a confidential relationship, and see Comment *h* for what constitutes suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer.
>
> The presumption is strengthened if the beneficiary of the alleged wrongdoing was not a natural object of the testator's bounty (for discussion of the term "natural object of the testator's bounty," see § 8.1, Comment *c*). Because generous donative transfers to the donor's spouse or surviving spouse are not unnatural, such transfers are rarely the result of undue influence. Under § 8.1, Comment *c*, a testator's domestic partner as defined in § 6.03 of the Principles of the Law of Family Dissolution: Analysis and Recommendations is as much a natural object of the testator's bounty as a donor's spouse. So also is the donor's unmarried partner under any other relationship entitling that person to intestacy rights under applicable law, such as a civil-union relationship or a relationship based on the partners' signed reciprocal beneficiary designation. A testator's decision to leave a substantial devise or even the bulk or all of his or her estate to his or her unmarried partner is not a basis for invalidating a will on the ground of undue influence. A dispositive plan favoring either spouse or partner is not considered unnatural. Thus, to invalidate such a

[1] The Restatement (Third) of Property: Wills & Trusts presents a new approach to the undue influence question. *See* Walker, James. *The Protective Doctrine of Undue Influence*, Colorado Lawyer (June 2009).

> plan on the ground of undue influence requires strong evidence that the will was not the result of the testator's free and independent judgment.
>
> A will or other donative transfer that favors persons who are in a confidential relationship but who are not natural objects of a testator's bounty is not necessarily unnatural when considered in the light of all the surrounding circumstances. For example, when all the circumstances are considered, it might be natural for someone to make a relatively small donative transfer to a hired caregiver.
>
> Restatement (Third) of Property: Wills & Donative Transfers § 8.3, comment f.

The commentary also explains:

> The existence of a confidential relationship is not sufficient to raise a presumption of undue influence. There must also be suspicious circumstances surrounding the preparation, execution, or formulation of the donative transfer. Suspicious circumstances raise an inference of an abuse of the confidential relationship between the alleged wrongdoer and the donor.
>
> In evaluating whether suspicious circumstances are present, all relevant factors may be considered, including: (1) the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence; (2) the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute; (3) whether the donor received independent advice from an attorney or from other competent and disinterested advisors in preparing the will or will substitute; (4) whether the will or will substitute was prepared in secrecy or in haste; (5) whether the donor's attitude toward others had changed by reason of his or her relationship with the alleged wrongdoer; (6) whether there is a decided discrepancy between a new and previous wills or will substitutes of the donor; (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a settled intent in the disposition of his or her

> property; and (8) whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.
>
> Restatement (Third) of Property § 8.3, comment h.

This standard requires the District Court to make a determination as to whether the presumption of undue influence arises. The District Court found that the presumption should not apply in the case of a testamentary transfer and thus made no findings on the issue. (Order on Motion for Summary Judgment p. 8, App. 805). Instead, the District Court determined that the burden of going forward with the evidence remained with the contestant. (Order on Motion for Summary Judgment p. 8, App. 805).

Other jurisdictions have rejected drawing a distinction between inter vivos and testamentary transfers when it comes to undue influence. The Kansas Court of Appeals considered this issue and discussed the difference between inter vivos transfers and testamentary transfers. The Court explained:

> The guiding principles applicable to a claim of undue influence contesting contracts, inter vivos gifts, and wills are nearly identical. All share certain rules applicable to this action whether the POD accounts are considered "will substitutes," contracts, or a gift.
>
> …

Undue influence, in order to overcome a testamentary act, "must directly affect the testamentary act itself." *In re Estate of Bennett*, 19 Kan.App.2d 154, 163, 865 P.2d 1062 (1993), *rev. denied* 254 Kan. 1007 (1994). Similarly, it must directly affect the execution of a contract. 201 Kan. at 467, 441 P.2d 829.

Undue influence is a species of fraud. Fraud is never presumed but must be shown by clear, satisfactory, and convincing evidence. *In re Estate of Bennett*, 19 Kan.App.2d 154, Syl. ¶ 2, 865 P.2d 1062.; see also *In re Adoption of Irons*, 235 Kan. 540, 684 P.2d 332 (1984) (action to set aside consent to adoption); *Curtis v. Freden*, 224 Kan. 646, 652, 585 P.2d 993 (1978) (action to set aside deed); *Nelson, Administrator v. Dague*, 194 Kan. 195, 196, 398 P.2d 268 (1965) (action to set aside inter vivos transfer).

The existence of a confidential or fiduciary relationship would have the same effect irrespective of whether the POD accounts are considered "will substitutes" or contracts.

"A presumption of undue influence is not raised and the burden of proof shifted by the mere fact that the beneficiary of a will occupied a confidential or fiduciary relationship with the testator or testatrix. Such a presumption is raised and the burden of proof shifted, however, when, in addition to the confidential relationship, there exists suspicious circumstances." *Bennett*, 19 Kan.App.2d 154, Syl. ¶ 4, 865 P.2d 1062.
See *In re Adoption of Irons*, 235 Kan. 540, Syl. ¶ 4, 684 P.2d 332; *In re Estate of Brown*, 230 Kan. 726, 732, 640 P.2d 1250 (1982).

A confidential or fiduciary relationship refers to *" 'any relationship of blood, business, friendship, or association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party.' "* *Bennett*, 19 Kan.App.2d at 167, 865 P.2d 1062.

Heck v. Archer, 927 F.2d 495, 499-500 (Kansas App. 1996).

In Nevada the Supreme Court held:

> In order to establish undue influence under Nevada law, "it must appear, either directly or by justifiable inference from the facts proved, that the influence ... destroy[ed] the free agency of the testator." *In re Estate of Hegarty*, 46 Nev. 321, 326, 212 P. 1040, 1042 (1923). The influence that may arise from a family relationship is only unlawful if it overbears the will of the testator. *Id.* at 328, 212 P. at 1042. Moreover, the fact a beneficiary merely possesses or is motivated to exercise influence is insufficient to establish undue influence. *Id.* at 326, 212 P. at 1042. Finally, a will cannot be invalidated simply "because it does not conform to ideas of propriety." *Id.* at 327, 212 P. at 1042.
>
> We have held that "[a] presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction." *In re Jane Tiffany Living Trust 2001*, 124 Nev. 74, 78, 177 P.3d 1060, 1062 (2008) (addressing undue influence in the context of an attorney receiving an inter vivos transfer from a client). Once raised, a beneficiary may rebut such a presumption by clear and convincing evidence. *Id.* at 79, 177 P.3d at 1063. Undue influence may also be shown in the absence of a presumption. *See generally* *In re Estate of Hegarty*, 46 Nev. at 327, 212 P. at 1042. However, we have not previously determined the appropriate burden and quantum of proof required to establish undue influence in the absence of a presumption. Because neither the probate commissioner nor the district court found that a presumption of undue influence was raised in this case, we now discuss the burden and quantum of proof necessary to establish undue influence in the absence of a presumption.
>
> *In re Estate of Bethurem*, 313 P.3d 237 (Nev. 2013).

The Kansas Supreme Court also discussed the issue stating:

> But the very nature of a person exerting undue influence in a confidential relationship makes proving that situation with direct evidence a rarity; it is more commonly proved by

circumstantial evidence. *Brennan v. Dennis*, 143 Kan. 919, 954, 57 P.2d 431 (1936); *Ginter*, 79 Kan. at 741, 101 P. 634 (" '[t]he evidence of undue influence will generally be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it may be directly proved.' ") (quoting *Nelson's Will*, 39 Minn. 204, 206, 39 N.W. 143 [1888]; see also *Mendenhall v. Judy*, 671 N.W.2d 452, 454 (Iowa 2003)) ("[U]ndue influence may be and usually is proven by circumstantial evidence."); *Blumer v. Manes*, 234 S.W.3d 591, 594 (Mo.App.2007) (case-by-case analysis required in undue influence cases because they are often proved by circumstantial evidence); *Knowlton v. Schultz*, 179 Ohio App.3d 497, 508, 902 N.E.2d 548 (2008) (undue influence usually proved by circumstantial evidence); *In re Estate of Johnson*, 340 S.W.3d 769, 777 (Tex.App.2011) (exertion of undue influence is subtle and usually involves extended course of dealings and circumstances; usually established by circumstantial evidence).

That necessity of establishing undue influence through circumstantial evidence gave rise to the "suspicious circumstances doctrine" in a common-law claim of undue influence. See Feeney and Carmichael, *Will Contests in Kansas*, 64 J.K.B.A. 22, 27 (September 1995); see also *In re Estate of Maddox*, 60 S.W.3d 84, 88 (Tenn.App.2001) (recognizing that in most cases, proving undue influence must be done circumstantially through the existence of suspicious circumstances). Over a century ago in this state, *Sellards v. Kirby*, 82 Kan. 291, 295–96, 108 P. 73 (1910), discussed the role of "suspicious circumstances" in creating a presumption of undue influence, to-wit:

> "Perhaps an unnecessary difficulty is created by an effort to say at just what point the union of a number of suspicious circumstances, no one of which is enough in itself to defeat probate, shall be deemed to give rise to an actual presumption that a will was the result of undue influence. The real question in each case is whether all the circumstances so far as shown are such as to lead the court to believe that in fact the will does not

> actually express the voluntary purpose of the testator."

Later, *In re Estate of Brown*, 230 Kan. 726, 732, 640 P.2d 1250 (1982), further clarified the doctrine of suspicious circumstances, declaring that

> " 'a presumption of undue influence is not raised and the burden of proof is not shifted by the mere fact that a beneficiary occupies, with respect to the testator, a confidential or fiduciary relation....' Such a presumption is raised and the burden of proof shifted, however, 'when, in addition to the confidential relation, there exist suspicious circumstances....' 94 C.J.S., Wills § 239, pp. 1091–93."
>
> Therefore, a person contesting a testamentary document without direct evidence that it was the product of undue influence can nevertheless establish a presumption of undue influence by showing that (1) "the person who is alleged to have exerted undue influence was in a confidential and fiduciary relationship with the [person executing the testamentary document]"; and (2) "there were 'suspicious circumstances' surrounding the making of the [testamentary document]." *Farr*, 274 Kan. at 70–71, 49 P.3d 415.

As noted above, after the proponent has proffered a prima facie case for validity, the burden has shifted to the contestant to show the requisite relationship and suspicious circumstances to create the presumption of undue influence. But then, upon the successful creation of the presumption of undue influence, the burden shifts back to the proponent of the testamentary document to rebut the presumption. See *Farr*, 274 Kan. at 71, 49 P.3d 415; *Haneberg*, 270 Kan. at 375, 14 P.3d 1088; *Brown*, 230 Kan. at 732, 640 P.2d 1250.

Cresto v. Cresto, 358 P.3d 831, 833-834 (Kansas 2015)

In New Jersey the law explains:

> Ordinarily, the burden of proving undue influence falls on the will contestant. Nevertheless, we have long held that if the will benefits one who stood in a confidential relationship to the testator and if there are additional "suspicious" circumstances, the burden shifts to the party who stood in that relationship to the testator. *In re Rittenhouse's Will*, 19 *N.J.* 376, 378–79, 117 *A.*2d 401 (1955); *see In re Blake's Will*, 21 *N.J.* 50, 55–56, 120 *A.*2d 745 (1956); *In re Davis's Will*, 14 *N.J.* 166, 170, 101 *A.*2d 521 (1953). In general, there is a confidential relationship if the testator, "by reason of ... weakness or dependence," reposes trust in the particular beneficiary, or if the parties occupied a "relation[ship] in which reliance [was] naturally inspired or in fact exist[ed]." *In re Hopper*, 9 *N.J.* 280, 282, 88 *A.*2d 193 (1952). Suspicious circumstances, for purposes of this burden shifting, need only be slight. *Rittenhouse's Will*, *supra*, 19 *N.J.* at 379, 117 *A.*2d 401.
>
> When there is a confidential relationship coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the will proponent to overcome the presumption. Although that burden of proof is usually discharged in accordance with the preponderance of the evidence standard, *In re Catelli's Will*, 361 *N.J.Super.* 478, 487, 825 *A.*2d 1209 (App.Div.2003), if the presumption arises from "a professional conflict of interest on the part of an attorney, coupled with confidential relationships between a testator and the beneficiary as well as the attorney," the presumption must instead be rebutted by clear and convincing evidence. *Haynes*, *supra*, 87 *N.J.* at 183, 432 *A.*2d 890. An attorney-client relationship is inherently a confidential relationship, *see In re LiVolsi*, 85 *N.J.* 576, 588, 428 *A.*2d 1268 (1981); *Davis's Will*, *supra*, 14 *N.J.* at 169, 101 *A.*2d 521, and because suspicious circumstances need only be slight, the existence of that relationship alone often results in both the shifting of the burden of proof and in the imposition of the heavier burden of clear and convincing evidence to rebut the presumption.

In re Estate of Stockdale, 953 A.2d 454, 470 (N.J. 2008).

Likewise, other jurisdictions hold that a confidential relationship plus suspicious circumstances shifts the burden to the proponent to overcome the presumption of undue influence in a will contest. *See Kelley v. Johns*, 96 S.W.2d 189 (Tenn. App. 2002); *In re Moses' Will*, 227 So.2d 829 (Miss. 1969); *In re Fechter's Estate*, 277 N.W.2d 143 (Wis. 1979); *In the Will of Faulks*, 17 N.W.2d 423, 440 (Wis. 1945); *Matter of Estate of Gersbach*, 960 P.2d 811 (New Mexico 1998); *In re Estate of Holcomb*, 63 P.3d 9 (Okla. 2002); *In re Estate of Novak*, 458 N.W.2d 221 (Neb. 1990); *In re Aldrich's Estate*, 3 So.2d 856 (Florida 1941); *In re Estate Luongo*, 823 A.2d 942 (Penn. 2003); *In re Lobb's Will*, 145 P.2d 808 (Oregon 1944); *Eckstein v. Estate of Dunn*, 816 A.2d 494 (Ver. 2002); *Howard v. Nasser*, 613 S.E.2d 64 (S.C. 2005); *Ayers v. Shaffer*, 748 S.E.2d 83 (Vir. 2013); *In re Last Will and Testament of Melson*, 711 A.2d 783 (Del. Sup. 1998).

By way of contrast, the Iowa law on the subject does not allow for burden shifting in an undue influence case based on a confidential relationship and suspicious circumstances. The current state of Iowa law is as follows:

> To summarize, contestants seeking to set aside a will based on undue influence carry the burden of proving the essential elements of the action by a preponderance of the evidence.[4] Persons seeking to set aside inter vivos transfers carry a higher

> burden of proving their cause of action by clear, satisfactory and convincing evidence. Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefitted parties to prove—by clear, satisfactory, and convincing evidence—their freedom from undue influence.[5] No such presumption of undue influence exists in the case of a will contest, even where the testator and beneficiary stand in a confidential relationship. *Bayer*, 574 N.W.2d at 675. But a suspicion of overreaching may arise where the dominant party has participated in the actual preparation or execution of the will. *Id.*
>
> *Matter of Estate of Todd*, 585 N.W.2d 273, 277 (Iowa 1998).

In *Matter of Estate of Bayer*, 574 N.W.2d 667 (Iowa 1998) the Supreme Court cited 79 Am.Jur.2d *Wills* § 428 for the proposition that "mere existence of a confidential relations between testator and beneficiary under will does not raise presumption that beneficiary exercised undue influence over testator." *Bayer* at 675. However, the current version of the 79 Am.Jur.2d Wills § 394 (2016) makes it clear that a presumption of undue influence can be raised and shift the burden to a proponent in a will contest. 79 Am.Jur.2d Wills § 394 (2016).

This Court should adopt as Iowa law the "suspicious circumstances doctrine" as set forth in the Restatement (Third) of Property: Wills and Trusts § 8.3 and shift the burden to the proponent in those circumstances where a confidential relationship exists and there are suspicious circumstances concerning the execution of the will. The best reason for

adopting this rule is that the person in the confidential relationship enjoys a serious advantage when it comes to the evidence of their dealings with the testator or testatrix. The beneficiary that can unduly influence a testator or testatrix can easily chose the time and place they exercise their influence. A reasonably careful person could influence the testator or testatrix outside the present of witnesses, family members and attorneys. As a result the beneficiary can victimize both the donor and the other beneficiaries without much fear that legal action will be successful against them. When the improper beneficiary has no obligation to come forward with evidence rebutting the presumption they can simply sit back and watch a will contestant flounder based on a lack of evidence.

Obviously, the law should not shift the burden in every will contest where a confidential relationship exists. If that were the case then every person that is close to the testator or testatrix would have the burden with proving a lack of undue influence. However, this does not mean that Iowa law should state that never does the presumption arise. The numerous jurisdictions and the Restatement (Third) of Property described above have set forth standards for fairly evaluating these issues. In particular the Restatement (Third) standard is designed to require more than just a confidential relationship and provides significant guidance on what

constitutes "suspicious circumstances." This Court should adopt those standards and provide adequate protection to unduly influenced donors and the impacted beneficiaries.

The different standard would significantly impact this case. The evidence demonstrates that Dennis Workman was kept from returning to work on the farm on numerous occasions. Gary testified about regular interactions with his mother but offered no substantive testimony about the nature of those interactions. (Trial Transcript pp. 183-185, App. 427-429). Instead he simply stated that he had not coerced his mother into writing these Wills. (Trial Transcript pp. 183-185, App. 427-429). In a situation of such disparity of information the correct standard is to require a contestant to make a showing of a confidential relationship and suspicious circumstances and then shift the burden to the proponent to demonstrate a lack of undue influence. If Gary had the burden of coming forward with evidence to refute or rebut a presumption of undue influence then he would have every incentive to testify as fully as possible on the subject.

Instead of a jury making a decision against Dennis based on a failure to meet the burden of proof there is a significant likelihood that a jury would find a failure in Gary's evidence to rebut the presumption. For instance, Gary testified and presented evidence about his conversations with Margaret

about Dennis's financial troubles. Gary offered the evidence clearly for the purpose of offering a competing theory as to his mother's state of mind. Gary's presentation of this evidence is much more detailed than the evidence concerning their discussions about estate planning. Dennis was at a significant disadvantage because he was not present for those conversations. He was simply unable to develop or present evidence on the effect of those conversations that occurred outside his presence, but in the presence of Gary. A jury, faced with applying the burden of proof to Dennis's case, most likely would hesitate to rule in his favor in such a situation. The lack of evidence can be fatal when a party bears the burden of proof. Conversely, if Gary had to rebut the presumption then his reticence about his involvement with estate planning would be a serious strike against him.

It is important to remember how impactful the burden of proof is on jurors in a jury trial. Anyone that has spent a significant period of time listening to closing arguments knows that the burden of proof is often the defendant's best friend. In general, defendant's counsel spend significant portions of their closing argument emphasizing the word "prove" as if the plaintiff were required to scientifically or mathematically prove a theorem. This leads many jurors to conclude that if they are not 100% convinced of the plaintiff's position that they must rule in favor of the defendant's

position. In particular the burden of proof requires that the jury find against a plaintiff if they are unable to determine where the truth lies. Presumptions are designed to assist a jury in those circumstances.

This Court should adopt the formulation of undue influence and confidential relationships set forth in Restatement (Third) of Property: Wills and Trusts § 8.3.

ISSUE II: THE DISTRICT COURT ERRED IN DENYING A MOTION TO AMEND THE PLEADINGS TO CONFORM WITH THE EVIDENCE

A. Preservation of error and standard of review.

The Plaintiff made a motion to amend his petition to include a contest to the Wills contained in Trial Exhibits 1-10. (Trial Transcript 207-212, App. 451-456). The District Court denied that motion to amend. (Trial Transcript 212-213, App. 456-457).

The standard of review for the denial of a motion for leave to amend is for an abuse of discretion. *Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59 (Iowa 2004). A court abuses its discretion when it bases its decision on untenable grounds or for reasons that are clearly unreasonable. *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761 (Iowa 2002).

B. Argument.

The District Court held that the motion to amend the case to conform

to the proof offered at trial was untimely. (Trial Transcript 212-213, App. 456-457). The District Court determined that: (1) the evidence would have been significantly different if the other wills were pleaded into the case; and (2) case law prevented contest to the validity of other wills in this case. The District Court erred in both conclusions.

The Iowa rules concerning amendment make it clear that the law is to be read liberally to allow trial of cases on the merits. The Iowa Supreme Court explained:

> Our rule permitting amendments to conform to the proof always has received liberal interpretation. *Smith v. Village Enters., Inc.*, 208 N.W.2d 35, 37 (Iowa 1973). " 'To allow such amendments is the rule, not the exception.' " *Twin Bridges Truck City, Inc. v. Halling*, 205 N.W.2d 736, 739 (Iowa 1973) (quoting *W. & W. Livestock Enters., Inc. v. Dennler*, 179 N.W.2d 484, 488 (Iowa 1970)). Although the decision whether to grant such an amendment is within the sound discretion of the trial court, *Gosha v. Woller*, 288 N.W.2d 329, 332 (Iowa 1980), when parties voluntarily offer evidence on an issue, a denial of a subsequent motion to conform will constitute an abuse of discretion, *see Dulin v. Washington Nat'l Ins. Co.*, 257 Iowa 1007, 1012-14, 135 N.W.2d 635, 638 (1965); *see also B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 283-84 (Iowa 1976); *Laverty v. Hawkeye Security Ins. Co.*, 258 Iowa 717, 725, 140 N.W.2d 83, 88 (1966) ("Where the parties voluntarily offer evidence on an issue the denial of an amendment to conform to such proof would be beyond fair discretion.").
>
> *Barnhouse v. Hawkeye State Bank*, 406 N.W.2d 181, 187 (Iowa 1987).

The question in this case is thus whether the parties voluntarily presented

evidence concerning the testatrix's intent in drafting the various wills from 1983 through 2007.

The Defendant offered evidence of the testatrix's reasoning for each of the wills subsequent to 1983. Defendant's attorney offered into evidence testimony concerning a letter that Dennis Workman wrote about having a purpose in California and spinning his wheels in Iowa. (Trial Transcript p. 42, App. 286). Defendant's attorney questioned Dennis about his conversations with his father about estate planning in the 1970s. (Trial Transcript p. 44-45, App. 288-289). Defendant's attorney questioned Dennis about his conversations with his mother and her intent to leave the property equally to the children. (Trial Transcript p. 45, App. 289). Defendant's attorney then directed Dennis to review the entirety of her wills and codicils in evidence for purposes of showing that she did not leave the property in such a fashion in "any" of her wills. (Trial Transcript p. 45, App. 289). Defendant's attorney asked "Do you believe that in any of her Wills or Codicils you were treated as well with respect to your mother's disposition of her estate as Gary was?" (Trial Transcript p. 46, App. 290). Defendant offered evidence of a letter demonstrating Dennis's difficulties with his father in 1989. (Trial Transcript p. 46-48, App. 290-292). In fact, Defendant requested that Dennis read the entire letter to jury. (Trial

Transcript p. 46-48, App. 290-292).

Defendant offered into evidence the salacious details of Dennis's various financial difficulties in the 1980s and 1990s and then attempted to specifically tie those various difficulties to the wills and codicils drafted at the time. First, Defendant pointed out the terms of the 1983 Will. (Trial Transcript p. 51-52, App. 295-296). The Defendant then pointed out that "Five months after Golden Bear filed for bankruptcy your mother changed her 1983 Will by filing a Codicil?" (Trial Transcript p. 53, App. 297). In particular, the Defendant pointed out that the Codicil transferred Dennis's 1983 share to a spendthrift trust by requiring that Dennis to read that portion of the Codicil to the jury. (Trial Transcript p. 53, App. 297).

Defendant next turned to the fact that a Colorado Court granted Radio Denver a judgment against Dennis and Golden Bear in the amount of $1,174,000. (Trial Transcript p. 54, App. 298). Dennis then filed personal bankruptcy in Iowa in 1987. (Trial Transcript p. 54, App. 298). Defendant pointed out that Margaret changed her will again in 1987. (Trial Transcript p. 54, App. 298). Defendant again made a point of explaining that Dennis's share changed and was to go into a spendthrift trust. (Trial Transcript p. 55-56, App. 299-300).

Defendant then questioned Dennis about a bankruptcy ruling in 1989

and the ruling's aftermath. (Trial Transcript p. 57, App. 301). Defendant offered evidence that in the aftermath of the bankruptcy ruling Dennis and his attorneys contacted his parents looking for money. (Trial Transcript p. 58-59, App. 302-303). Defendant also offered evidence that Dennis's creditor were calling his parents seeking payment on the judgment. (Trial Transcript p. 57-58, App. 301-302). Defendant pointed out that Dennis discussed these problems with his parents. (Trial Transcript p. 59, App. 303).

Defendant then turned his focus to Dennis moving to Kansas in 1991. (Trial Transcript p. 59, App. 303). Defendant elicited testimony that Dennis listed his parents as shareholders for a corporation he started in Kansas and that he was not honest in doing so. (Trial Transcript p. 60-62, App. 304-306). Defendant made a point of demonstrating that Dennis failed to file a certificate of reinstatement for his corporation in 1995 and then his mother changed in her Will the same year. (Trial Transcript p. 67, App. 311).

Next, Defendant questioned Dennis about the various work that Gary did to justify the 1995 Will. (Trial Transcript p. 68, App. 312). In particular, Defendant put into the record that Dennis had been in Kansas for the past four to five years. (Trial Transcript p. 68, App. 312). Defendant also pointed out that Dennis could not have known how much work Gary did

for his parents during that period of time. (Trial Transcript p. 68, App. 312).

The Defendant then turned to question about whether the Kansas Department of Revenue attempted to collect money from Dennis's parents in 1997. (Trial Transcript p. 68-69, App. 312-313). Defendant then attempted to tie those events to Margaret's 1999 Will. (Trial Transcript p. 71, App. 315).

Defendant also offered testimony that the Kansas Department of Revenue sought to collect $400,000 and $200,000 from Margaret and LaVerne. (Trial Transcript p. 73-74, App. 317-318). Defendant then offered testimony that Dennis's parents were not happy about this situation. (Trial Transcript p. 75, App. 319). Defendant entered into evidence letters from Margaret and LaVerne dealing with those issues. (Trial Transcript p. 77, App. 321). This issue arose in 2000 and Defendant attempted to tie the 2001 Will to that conduct. (Trial Transcript p. 77, App. 321).

Defendant then offered explanations for the two subsequent Codicils to the 2001 Will. (Trial Transcript p. 80-81, App. 324-325).

Defendant sought and received testimony from Dennis concerning whether he made suggestions to his parents about their estate planning. (Trial Transcript p. 81, App. 325). Defendant also questioned Dennis about whether his mother trusted people other than Gary. (Trial Transcript p. 82,

App. 326). Defendant went so far as to suggest that Margaret left her property to the people she trusted. (Trial Transcript p. 82, App. 326). In support of this proposition the Defendant asked "Your mother in fact told you that Gary could be totally trusted and relied upon to administer her estate as she wrote it?" (Trial Transcript p. 82, App. 326). Defendant asked Dennis "And you never once called Gary or told Gary that, hey, mom says you are coercing her to do stuff or making her do stuff that she doesn't want to?" (Trial Transcript p. 84, App. 326). Defendant asked "You never once told Gary that dad is making mom do things she doesn't want?" (Trial Transcript p. 84, App. 328). Defendant asked "Did your mom express she was concerned about your debts?" (Trial Transcript p. 84, App. 328).

At the same time the Defendant attempted to claim that the only issues it was trying were whether the 2007 Will and 2008 Codicil were the product of undue influence. (Trial Transcript p. 86, 208-210, App. 330, 452-454). The Defendant alleged that evidence concerning the previous wills would prejudice the jury through confusion. (Trial Transcript p. 208-210, App. 452-454). The Defendant had already offered all of that evidence through the agreed upon admission of exhibits of the prior wills and codicils and through the testimony Defendant elicited from Dennis Workman. (Trial Exhibit 1-10, App. 815-865). If the previous wills were going to confuse the

issue and therefore should not be contested the Defendant spent a lot of time discussing them and the circumstances of their making.

The legal basis for Defendant's contention starts with *Swartzenruber v. Lamb*, 582 N.W.2d 171 (Iowa 1998). (Trial Transcript p. 208, App. 452). In *Swartzenruber* the Iowa Supreme Court described the issue with trying multiple wills at the same time:

> We agree with the admonition in *Cocklin's Estate* that consideration of facts surrounding the execution of earlier wills can, in some instances, distract the jury's focus from the facts surrounding the execution of the will that has been admitted to probate. When that danger exists, separate actions should be required. We are convinced, however, that this is not the case with respect to the jury's consideration of the five wills that Hazel Lamb executed within a thirteen-month period. In presenting her theory of undue influence with respect to the May 25, 1993 will, Roberta necessarily had to place before the jury the facts surrounding the execution of the four earlier wills. This tightly linked chain of proof did not cloud the issues but rather illuminated them. It would have been a disturbing waste of judicial resources and litigation expenses to require her to present basically the same story in five successive jury trials. We hold that the procedure followed by the district court was not prohibited by statute and was permissible under the facts of this litigation.
>
> *Swartzenruber* at 175.

The Iowa Supreme Court also cited with approval cases from other jurisdictions and an interpretation of the Iowa Code that makes such consolidation appropriate. *Id.* at 174-175.

As a result the legal question that confronted the District Court was

whether a contest of wills prior to 2007 was necessary to the Plaintiff's theory of undue influence so that the inclusion of a challenge to the previous wills would have illuminated the jury rather than confused them. *Id.* at 175. The Defendant's own deep dive into the issues and circumstances alleging justifying the previous wills constitutes a virtual admission that the Defendant believes the history of the various documents is relevant to the theory presented in this case. If the issue were really limited to whether the 2007 Will and 2008 Codicil were the subject of undue influence then it would be wholly unnecessary to create a chronology in the record attempting to link Dennis's financial problems with certain prior wills and codicils.

Additionally, the Plaintiff's theory at trial was that Gary, since his return to farm in 1981, began to curry influence and favor with his mother. The theory is that over a long period of time Gary became indispensable to his mother and father and influenced an erosion of Dennis's share under the various wills. A chronological review of Dennis's share demonstrates he went from receiving farm ground valued at $1,000,000 to $25,000 to be paid in $2,500 increments over a period of 10 years.

Contrary to Defendant's protest that the amendment would lead to confusion, the trial transcript demonstrates that the Defendant attempted to use the ruling denying the amendment to confuse the jury in closing.

Defendant argued in closing:

> Under the 1999 Will, Gary received the entire 160 acres and see the last time that Dennis was getting anything. How many times it went into a Trust? In our trial we've been speaking of red herrings. Dennis is not challenging those documents, just the 2007 Will and 2009 Codicil. What changed before from the 2007 Will which was the 2001 as modified in 2003 and 2006? Well, no Jason was born so Dennis's son gets $10,000. What incentive would Gary have if he is so upset with his brother to say, yes, mom please give $10,000 to my new nephew. There was also a change, Gary still has to pay the same $25,000, now it's to the Trust instead of Marcia, he is still paying $25,000.
>
> …
>
> Second proposition, Dennis has to prove that Gary had the opportunity to exercise such influence and carry out a wrongful purpose. What wrongful purpose is evident in that 2007 Will and the 2001 as modified by2003 and 2006? I don't know what those changes are? The Jason change and then the change from Marcia to a Trust.
>
> Third proposition, Dennis has to prove that Gary was inclined to influence Margaret unduly for the purpose of getting an improper favor. What improper favor did he get in that 2007 Will?
>
> …
>
> Fourth, perhaps most important, Dennis has to prove that the result was clearly brought about by undue influence. What about Maragret's 2007 Will? What changed? It doesn't speak to influence in general let alone clearly the result of undue influence.
>
> Again, Margaret added Jason. How did any of those changes benefit Gary? What purpose would Gary have for Margaret do those changes?
>
> …
>
> The last Instruction I'll reference is Number 11. It states in part that undue influence means a person substitutes his or her intentions to the person making the Will or Codicil. The undue influence must be present at the time very time the Will or Codicil is signed and must be the controlling factor. What is the evidence of undue influence when the 2007 Will was

signed?
(Trial Transcript pp. 304-308, App. 548-552).

The Defendant, secure in the knowledge that the jury instructions were now favorably crafted, decided to cast the previous wills and codicils as "red herrings" and avoid argument about their creation or effect. Again, the Plaintiff's theory is that there was a slow erosion of his share in favor of Gary over the years 1983-2008. Defendant used the denial of the motion to amend as an excuse to create the exact confusion he claimed was the legal basis for denying the motion to amend. The end result is impermissible prejudice to the Plaintiff's case.

CONCLUSION

The Court should reverse the District Court Ruling on Summary Judgment and remand for a jury trial on the merits on all legal theories presented by the Plaintiff. The Court should reverse the denial of the motion to amend to conform to proof and remand for a jury trial on the merits on all legal theories presented by the Plaintiff.

REQUEST FOR ORAL ARGUMENT

Pursuant to I.R. App. P. 6.908, Plaintiff-Appellant's request to be heard in oral argument on this appeal.

Respectfully submitted,

By: /s/ Eric M. Updegraff

Eric M. Updegraff AT0008025
HOPKINS & HUEBNER, P.C.
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: (515) 244-0111
Fax: (515) 244-8935
Email: EUpdegraff@hhlawpc.com
ATTORNEY FOR PLAINTIFF/APPELLANT

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 11,342 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

By: /s/ Eric M. Updegraff .

CERTIFICATE OF SERVICE

I, Eric M. Updegraff, a member of the Bar of Iowa, hereby certify that on the 1st day of June, 2016, I served the above Appellant's Final Brief and Request for Oral Argument by mailing one (1) copy thereof to the following:

Daniel P. Kresowik
Stanley, Lande & Hunter, P.C.
201 West Second Street, Suite 1000
Davenport, Iowa 52807
ATTORNEY FOR GARY WORKMAN

By: /s/ Eric M. Updegraff .

CERTIFICATE OF FILING

I, Eric M. Updegraff hereby certify that I, or a person acting on my direction, did file the attached Appellants' Final Brief and Request for oral

Argument by hand delivering two copies (2) copies thereof to the Clerk of the Iowa Supreme Court at 1111 East Court Avenue, Des Moines, Iowa 50319 on this 1st day of June, 2016.

By: /s/ Eric M. Updegraff .

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Appellant's Final Brief and Request for Oral Argument was
$ _____.

By: /s/ Eric M. Updegraff .