IN THE COURT OF APPEALS OF IOWA

No. 0-169 / 09-0761
Filed July 28, 2010

ROBERT GOCHE and JAY GOCHE,
Plaintiffs-Appellees,

vs.

JOSEPH GOCHE, RENEE AFSHAR, and MARIANNE SWITZER,
Defendants-Appellants,

Appeal from the Iowa District Court for Kossuth County, Don E. Courtney, Judge.

Appeal from the district court's grant of summary judgment in a will contest. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Stephen F. Avery and Jill M. Davis of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellees.

Heard by Sackett, C.J., and Vogel, Doyle, Danilson, and Tabor, JJ.

SACKETT, C.J.

This appeal comes from a (1) finding on summary judgment that a will and two codicils executed by decedent Richard Goche were not the subject of undue influence and (2) a jury's finding Richard had testamentary capacity when they were executed. We affirm.

SCOPE OF REVIEW. This is a law action. Iowa Code section 633.33 (2007), provides in applicable part: "Actions to set aside or contest wills, . . . shall be triable in probate as law actions." Section 633.11 provides in applicable part: "An action objecting to the probate of a proffered will, or to set aside a will, is triable in the probate court as an action at law." Our review, therefore, is for correction of errors at law. Iowa R. App. P. 6.907.

THE PARTIES. *a. Proponents.*[1] Robert and Jay are Richard's first cousins once removed. The will and codicils provided that they should be executors of Richard's estate and that all of decedent's property save a specific bequest to Mary Schmitt[2] should go to them.

b. Objectors. The objectors[3] are Richard's heirs at law. Richard never married and is not known to have children. At the time of Richard's death his parents had died in about 1977, but his three siblings: William Goche, Kenneth Goche, and Shirley Davis survived. William and Shirley, after the proceedings were filed, disclaimed any interest they might have in Richard's estate. The

---

[1] The parties are given a variety of designations in the pleadings and record. We have adopted the designations "proponents" and "objectors" for clarity.

[2] Mary Schmitt is Richard's cousin. Though given a special bequest, she has not been involved in the litigation.

[3] The original objectors were siblings who subsequently disclaimed, so their children stand in their stead.

children of William, namely Jean Horihan, Michael Goche, Joseph Goche, and Renee Alshar, and Shirley's only child, Marianne Switzer, either were allowed to intervene or were made parties. Kenneth, at the time of Richard's death, was under a conservatorship, and the Farmers & Traders Savings Bank of Bancroft, Iowa, was his conservator. Only Marianne Switzer, Joseph Goche, and Renee Alshar have appealed.

PROCEEDINGS. Richard, a resident of Kossuth County, Iowa, died on October 30, 2007. On the same date, his brother William, an objector, filed with the Kossuth County Clerk an objection to any document purporting to be the Last Will and Testament of Richard A. Goche.[4] On November 19, 2007, proponents Robert and Jay filed a petition for declaratory judgment, naming Richard's siblings, Kenneth's conservator, and Mary Schmitt as defendants. The petition stated that Richard, at death, left a will and two codicils and that he died owning farm real estate and other assets. Proponents asked that the will and codicils be admitted into probate and that they be named the executors of Richard's estate. William and Shirley responded to the petition, alleging they were Richard's siblings and heirs at law and contending that Richard, at the time the will and codicils were executed, lacked testamentary capacity and the will and codicils were produced by undue influence. The claim of undue influence was dismissed by the district court on summary judgment. After a lengthy trial in which the jury

---

[4] He filed it under Iowa code section 633.310, which provides:

> Nothing herein contained shall prevent any interested person from filing objections to probate of a proposed will prior to probate thereof. If such objections are filed prior to the admission of the will to probate, the will shall not be admitted to probate pending trial and determination as to whether or not said instrument is the last will of decedent.

found Richard had testamentary capacity, the will and two codicils were found valid.[5] A motion for new trial was timely filed and subsequently denied. This appeal follows.

WILL AND CODICILS. The will at issue was signed by decedent on December 7, 2004. The first article provided:

> At the present time, my immediate family consists of my sister Shirley Davis, and my brothers, Kenneth Goche and William Goche. I have made no provision for any of my immediate family since I feel that they are adequately provided for.

Richard then made provisions for payment of expenses and debts, a reference to a list disposing of tangible personal property in compliance with Iowa Code Section 633.276, and payment of taxes before providing:

> all the rest, residue and remainder of my Estate I give, devise and bequeath equally to Robert Goche and Jay Goche.

Richard next provided that if a beneficiary did not survive, their share should go to their spouse if living, and if not living, to their lineal descendants, and that if one beneficiary did not have a living spouse or descendents, that share would lapse and the shares of the other living beneficiaries would increase proportionally. He nominated the Farmers & Traders Savings Bank of Bancroft as his executor to serve without bond.

On March 28, 2007, Richard executed a codicil wherein he substituted a new paragraph for the one nominating the bank as executor and nominating

---

[5] The matter came on for a jury trial on February 10, 2009. Evidence was taken and the matter was submitted to the jury at 9:00 a.m. on February 19, 2009. The jury took an hour and five minutes for a lunch break and returned at 1:30 p.m. The jury answered three interrogatories, finding that Richard had the mental ability to make the will and the two separate codicils. The district court subsequently found the will and two codicils to be the valid will and codicils of Richard and taxed costs against objectors.

Robert Goche and Jay Goche as co-executors to serve without bond, and if one could not act then the remaining should act alone. In all other respects he ratified, confirmed, and readopted all the provisions of his December 7, 2004 will.

On April 1, 2007, Richard signed a second codicil amending Article III of his December 7, 2004 will to add:

> I hereby specifically give, devise and bequeath to Mary Schmitt of Algona, Iowa, my 2005 Buick LeSabre and all of the shares in Principal Financial Group, Inc., that I own at the time of my death.

He then ratified, confirmed, and readopted all other provisions of his December 7, 2004 will.

The will and codicils were prepared by Gregg Buchanan as Richard's attorney. He testified as to their drafting and execution.

RICHARD. Richard was born in January of 1939, one of the four children of Agnes and Art Goche. He was raised in Kossuth County, Iowa, and graduated from St. John's Bancroft High School. He then attended the University of Iowa. In 1961 as a freshman medical student there, he suffered what has been referred to as a nervous breakdown. On January 16 of that year he was admitted to the Psychopathic Hospital at the University, having been taken there by the assistant dean of the medical school. His admission note provided:

> This 21[6] year old white male is admitted for evaluation. He exhibits inappropriate affect, tangential and completely disorganized thought, blocking, paranoid ideas, and hostility when crossed.

The history provided was that he had used his time almost exclusively in his fall semester for study, formed few if any friendships, and led an isolated existence.

---

[6] He would not be twenty-one until January 30, 1961.

His peers reported a dramatic and sudden change in his behavior, the dean was called, and Richard was taken to the hospital. It was recommended that he immediately be hospitalized. The initial diagnostic impression was "Schizophrenic Reaction, type to be determined." He remained hospitalized until his discharge on April 26, 1961. The discharge staff notes said:

> Mr. Goche's course during hospitalization was reviewed with Dr. Pepernik presiding. Although the patient was considered as recovered from the acute psychotic breakdown, it was felt that he did still manifest some residual of a schizophrenic nature which made it imperative to follow this patient during summertime and discourage his premature reintegration into medical school. He did in fact appear somewhat shallow, distant, quite elusive, and slightly withdrawn. It is recommended that phenothiazine medication be continued after his discharge from the hospital. Diagnosis: Schizophrenic Reaction, Acute undifferentiated type.

In August of 1961, William Moeller, M.D.[7] wrote to the Kossuth County Selective Service System. He related the facts about Richard's hospitalization and the fact he had some improvement but was not considered totally well at time of discharge and was still taking drugs. It was further noted at the time of his discharge that, while it was suggested Richard return to the clinic for follow up every three weeks, the records there did not indicate he had been seen since his April 1961 discharge, and the writer did not know Richard's present status and was unable to give a prognosis.

In February of 1962, P.R. Huston, M.D.[8] wrote to the dean of the College of Veterinary Medicine in Ames, Iowa, relating that Richard had requested that

---

[7] It appears that the writer was on staff at the Psychopathic Hospital at the State University of Iowa, but because it was a carbon copy it does not bear the University letterhead.

[8] See preceding footnote.

Huston advise the dean of his hospitalization. The letter noted that Richard had been discharged in April of 1961 and, in the writer's opinion, had recovered from his illness and at no time since had shown symptoms of his previous illness.

Richard never returned to medical school nor did he enter the school of veterinary medicine at Ames or military service. He went home to live with his parents, who wanted little said about Richard's problem. Shortly after returning home, according to William, Richard attacked him. After that happened, the two brothers had little contact with each other. Richard continued to live with his parents until their deaths. Then he remained in that home until his health required that he seek nursing help in March of 2007. His brother Kenneth lived with him from about 1969 until the summer of 2006, when Kenneth went into a nursing facility. Kenneth had been in a serious automobile accident in his youth and apparently was the beneficiary of a trust that Richard apparently administered. Richard entered the same nursing facility as Kenneth on March 22, 2007. At the time of Richard's admission, Kenneth was named as his emergency contact and guarantor. Richard and Kenneth were to room together in the facility. Proponents and their families appeared to have a constant presence in the facility. It also appears they made an effort not to support visits by Richard's siblings and his siblings' children. On April 17, 2007, Richard became a hospice patient. He listed Robert, Jay, his brother Kenneth, and his sister Shirley as family on his application.

In December of 2004 Richard signed a Durable Power of Attorney for Health Care Decisions and designated Jay and Robert to serve in that capacity.

SUMMARY JUDGMENT. The objectors contend that the district court erred in granting summary judgment on the claim of undue influence.

a. Scope of Review. We review a district court's summary judgment ruling for errors at law. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008); *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000). A party is entitled to summary judgment when the record shows no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The court views the record in the light most favorable to the nonmoving party. *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005) (citation omitted). "In deciding whether there is a genuine issue of material fact, the court . . . afford[s] the nonmoving party every legitimate inference the record will bear." *Id.*

b. Preservation of Error. Objectors resisted the motion for summary judgment and the district court ruled on it. They again claimed summary judgment was improper in their motion for new trial. For the reasons stated below, we do not believe error was preserved on the argument objectors now make.

On March 24, 2008, proponents filed a motion for summary judgment, asking that the court enter a summary judgment in their favor and dismiss the objection filed by William E. Goche on October 30, 2007. Hearing on the motion was set for April 28, 2008. Objectors sought additional time to respond and more time before the hearing. The hearing was held as scheduled and the district court, in a June 2008 order, determined there was an insufficient foundation to

establish facts to create an issue of undue influence, as the record did not contain more than a mere scintilla of evidence of undue influence and therefore did not create a genuine issue of material fact. The court next found there was a genuine issue of material fact regarding Richard's testamentary capacity. The motion was granted in part and denied in part.

In addressing a claim of undue influence in *In re Estate of Dankbar*, 430 N.W.2d 124, 128 (Iowa 1988), the court said:

> The elements necessary to sustain a finding of undue influence in the execution of a will are: (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.

(Citations omitted.)

Because direct proof is rarely available in such contests, undue influence may be proved by circumstantial evidence. Unnatural, unjust, or unreasonable distributions may be properly considered. As the court observed in *Olsen v. Corp. of New Melleray*, 245 Iowa 407, 416, 60 N.W.2d 832, 838 (1953), "conduct which might be insufficient to influence unduly a person of normal mental strength might be sufficient to operate on a failing mind." (Citation omitted).

> While the burden of proof remains with the contestant, the law is well settled that, in considering the sufficiency of the evidence to support the finding of the jury, the evidence must be viewed in the light most favorable to the contestant, who is given the benefit of all permissible inferences.

Dankbar, 430 N.W.2d at 128.

The objectors had the time and opportunity to supply some evidence in response to the motion for summary judgment. This is illustrated by the district

court's finding there was an issue of material fact regarding Richard's testamentary capacity. There, the district court noted the evidence supplied by objectors it considered in ruling on the motion. This included (1) the fact that in high school, Richard would not make a date with a girl without asking his mother, (2) he was violent with his family, including William and Arthur, (3) he needed help in making farming decisions, (4) he signed a fifteen-year farm lease, (5) he threatened to kill one Barry Christenson, (6) in explaining why he disinherited his siblings' children he had delusional reasons (for example one child waved at him in the wrong way), (7) he forgot to mention William's daughter Renee, (8) he sent a letter to his sister Shirley warning she should not let William scare her from doing business on his Minnesota farm, but because William never dealt with the Minnesota farm, the statement was delusional, (9) in the 1960s he wrote on a photograph of William "lunatic" and "Mexican," (10) in June of 1998 he threatened to kill William and his wife Mary, (11) in June of 1995 he wrote an incoherent five-page letter to Union Slough, (12) his medical records indicate different information of how he was related to Robert and Jay, (13) evidence from a farm tenant on a farm Richard purchased that Richard told him he was pressured by Robert and Jay into terminating the farm tenant's tenancy and that Richard was a lonely man looking for family, and (14) Robert and Jay influenced Richard to purchase land so they could farm it.

Objectors contend that they should have been able to conduct discovery as they did not have an opportunity to depose the proponents of the will and they had not had the opportunity to conduct any discovery beyond trying to obtain

psychiatric records, which were not obtained until late 2008, after the time the motion was ruled on.

The proponents' motion for summary judgment was filed on March 25, 2008. Hearing on the motion was set for April 28. On April 14, 2008, objectors asked for an extension of time to resist the motion. They noted that the Farmers & Traders Savings Bank was not appointed as administrator of the estate until February 19, 2008, and did not receive letters of appointment until February 21, 2008. They further noted that on March 7, 2008, plaintiff sent to Gregg Buchanan, the attorney for the administrator, an authorization to allow them to obtain medical records of Richard. They opined that the records were necessary, especially records from University Hospitals in Iowa City with reference to a 1961 hospitalization where Richard had a mental breakdown and was diagnosed as schizophrenic. The resistance further noted the attorney's opinion that sometimes, in medical records requests to the University Hospital, it may take several months to receive the records. They further contended that they had propounded discovery to proponents, which responses were due April 26, 2008, and that they had made a request to take Robert and Jay's depositions, but preferred to have medical records and discovery responses prior to the depositions, and they had sought to serve a subpoena on Farmers & Traders Savings Bank, which had served as a lender for Robert, Jay, and Richard. They further indicated, and it is supported by correspondence, that they requested an extension from proponents until discovery was completed and they had received records from the University Hospitals, and proponents agreed to

their request to extend time to resist the motion but were unwilling to reschedule the hearing on the motion set for April 28, 2008.

While claiming error in not granting them additional time, objectors have not preserved error. There was no ruling on the motion for continuance. Error was not preserved.

FAILURE TO INSTRUCT. Objectors contend the district court should have given their proposed instruction on mental illness and insane delusion.

a. Preservation of Error. Objectors contend error was preserved because they requested the instruction and their motion for new trial cited it as a ground supporting the motion. Proponents agree, as do we.

b. Scope of Review. We review a court's refusal to give an 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). When a requested instruction states a correct rule of law having application to the facts of the case and the concept is not otherwise contained in other instructions, the court is required to give the requested instruction. *Kiesau*, 686 N.W.2d at 175; *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). A trial court is not required to word jury instructions in a particular way and is free to draft instructions in its own way if it fairly covers the issues. *Schuller v. Hy-Vee Food Stores, Inc.*, 407 N.W.2d 347, 351 (Iowa Ct. App. 1987). The jury must consider the instructions as a whole, and if the instructions do not mislead the jury, there is no reversible error. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

The requested instruction was:

> 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 Richard Goche suffered from mental illness, and that his mental illness was a permanent condition. Proponents and Contestants dispute the significance of the effect of Richard Goche's mental illness on his mental ability to make a Will. You may consider Richard's Goche's mental illness, including whether he suffered delusions, and whether it would affect any one or more of the elements of mental ability to make a Will.
>
> In considering whether Richard Goche had the mental ability to make a Will, you may consider whether he 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.

Objectors contend this instruction correctly states the law and argue that Iowa recognizes that mental illness affects capacity and that a person who makes a will based on an insane delusion may lack testamentary capacity, even if the person understands the four traditional elements necessary to show mental capacity.

Objectors argue their position is supported by *Dankbar*, 430 N.W.2d at 130. There the court considered whether there was sufficient evidence to sustain a finding of undue influence in the execution of a will. The court observed that conduct that might be insufficient to influence unduly a person of normal mental strength might be sufficient to operate on a failing mind. *Dankbar*, 430 N.W.2d at 128; *Olsen*, 245 Iowa at 416, 60 N.W.2d at 838. In *Dankbar* the court noted certain expert opinions it found to support a finding that the decedent lacked testamentary capacity, namely that (1) the decedent suffered from schizophrenia, paranoid sub-type, a chronic mental illness evident in her medical records for some years; (2) decedent's psychiatric history, despite scattered periods of

lucidity, indicated she was never free from the effects of the illness from its onset to the time of her death; (3) that a significant feature of decedent's illness was a fixed, false belief her father (her heir at law) emotionally abused her as a child despite the lack of evidence of a rational basis for such belief; (4) this delusion was described by a doctor as typical of schizophrenic paranoid sub-type, a product of the brain disease, which led the doctor to conclude decedent did not have the capacity to recall the natural objects of the decedent's bounty; (5) in the doctor's opinion, a characteristic of decedent's illness was the inability to make decisions that would naturally lead her to be easily influenced by one who would set out to do so; and (6) decedent's indecisive behavior was the product of "delusions and influenceability tied together." *Dankbar*, 430 N.W.2d at 130.

Objectors contend that Richard made a decision to disinherit Marianne Switzer based on his delusional belief his brother William was intending to entrap him, and William's sister Shirley, Marianne's mother, was complicit in this scheme. They note testimony that after the death of Richard's parents, Richard went to William's home to discuss something about a Minnesota farm. William's daughter-in-law alerted the sheriff about Richard because of Richard's prior confrontation with William. Richard wrote Marianne a rambling letter relating, among other things, his belief that William knew if William provoked Richard to fight in William's home Richard could be charged with burglary and sentenced to twenty-five years in prison.[9] Richard also wrote to Shirley, with a copy to

[9] Richard included copies of a newspaper article concerning Jeff Berryhill, a young man who kicked in the door of a former girlfriend's apartment, punched a man in the face, and was sentenced to twenty-five years in prison.

Marianne, a rambling letter relating that Shirley had in essence accepted William's version of the events, that he, Richard, was no longer her brother, and that he had told her he would remove Marianne as his sole heir.

Proponents argue the district court did not abuse its discretion in refusing to give the requested instruction. They contend that the issue objectors raise here was adequately covered in the instructions given, particularly in the following instruction:

> A person has the mental ability to make a will if he:
> 1. Knows a will is being made;
> 2. Knows the kind and extent of his property;
> 3. Is able to identify and remember those persons he would naturally give his property to; and
> 4. Knows how he wants to distribute his property.
>
> A will is valid if the person making the will meets the above tests, even if his 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 a person has the mental ability to make a will.

Proponents further argue, citing *State v. Proost*, 255 Iowa 628, 635-36, 281 N.W. 167, 170-71 (1938), that to give objectors' proposed instruction on an insane delusion would unduly magnify the importance of the trait and lead the jury to believe it was specially selected for specific mention and should be given more weight than other evidence.

The *Dankbar* court reviewed a claim that there was insufficient evidence to support a finding of undue influence and found the claim was supported by evidence that included, among other evidence, the fact decedent had delusions and that decedent's indecisive behavior was the result of delusions and influenceability tied together. We note that there is authority for consideration, in

a will contest, of insane delusion where it is shown decedent's delusion materially affected the terms and provisions of his will. *See In re Estate of Schnell*, 683 N.W.2d 415, 420 (S.D. 2004);[10] *In re Estate of Breedin*, 992 P.2d 1167, 1170 (Colo. 2000).

We have affirmed the dismissal of the claim of undue influence so need only address the requested instruction on the remaining claim that decedent did not have the mental ability to make a will. The requested instruction is overbroad and may unduly emphasize the importance of the alleged trait and lead the jury to believe it should be given more weight than other evidence. *See Dickman v. Truck Transp., Inc.*, 224 N.W.2d 459, 464 (Iowa 1974).[11] We affirm on this issue.

EVIDENCE OF A FAMLY AGREEMENT. Objectors contend the district court erred in not allowing them to introduce evidence of a family agreement or understanding.

---

[10] The South Dakota court adopted a definition of insane delusion from *In re Estate of Flaherty*, 446 N.W.2d 760, 763 (N.D. 1989), which said:

> An insane delusion is insanity upon a single subject. An insane delusion renders the person afflicted incapable of reasoning upon that particular subject. He assumes to believe that to be true which has no reasonable foundation in fact on which to base his belief. A person persistently believing supposed facts which have no real existence against all evidence and probability, and conducting himself upon the assumption of their existence, is so far as such facts are concerned, under an insane delusion.
>
> An insane delusion may exist even though there was some evidence from which the person afflicted might have formed his belief of judgment. It is a belief which is not based upon reasonable evidence, or at least without any evidence from which a sane man could draw the conclusion which form the delusion.

[11] The proposed instruction is also not in accord with the instruction approved in *Hardenburgh v. Hardenburgh,* 133 Iowa 1, 3, 109 N.W. 1014, 1015 (1906) or the instructions adopted by the South Dakota or Colorado Courts should our supreme court give approval to their versions. *See Schnell*, 683 N.W.2d at 420; *Breedin*, 992 P.2d at 1170.

a. Preservation of Error. To predicate error upon a ruling that excludes evidence, it must be shown that a substantial right of the objecting party is affected and the substance of the evidence was made known to the court by an offer of proof. Iowa R. Evid. 5.103(*a*)(2). The objectors made an offer of proof through the testimony of Joseph Goche. Joseph was asked about a discussion as to who would inherit Richard's property. Joseph recalled discussions at the home of Art and Agnes Goche, Richard's parents, while they were alive. When asked as to the context of the discussions he answered:

> Basically the context of the discussions was that if Bill[12] would trade his closer properties or properties that Richard wanted of Bill's, that it didn't make any difference anyway because in the long run it would end up in the grandchildren's hands of Art and Agnes.

Joseph further related the discussions probably were taking place in the 1980s, during a time period his father was trading land with Richard, Shirley was making trades as well, and Kenneth's land was being traded as well. He said when these discussions took place in his grandparent's home, generally his grandfather, grandmother, and Richard would be present and there was never any indication that Richard did not agree to what was discussed.

b. Scope of Review. We review for an abuse of discretion. *CPT v. John Deere Healthcare*, 714 N.W.2d 603, 615 (Iowa 2006).

Objectors contend the evidence is relevant because it shows that Richard did not have the ability to identify and remember those persons to whom he would normally give his property. In support of this argument objectors point to

---

[12] Bill is later identified as William Goche, the brother of Richard and the father of Joseph.

trial testimony of Robert that Richard, during the time Robert knew him, did not ever indicate he knew about William's daughter Renee. They further point to trial testimony of Jay that Richard mentioned to him William's three children: Joseph, Michael, and Jeannie, but he did not recall Richard ever mentioning Renee.

There is evidence that Richard started obtaining land in about 1972 when he purchased a farm with his father. He continued to accumulate additional land from that time until March 7, 2007, just before he was diagnosed with terminal cancer. The acquisitions were made from additional purchases by Richard as well as other purchases with his father, gifts from his parents, trades with his sister Shirley and his parents, a purchase with his father and nephew Joseph, a trade with his brother Kenneth's trust, and an exchange with his brother William.

The district court had initially denied proponents' motion in limine seeking to exclude the evidence but revisited the ruling during trial.[13] The court ruled:

> I don't think that a family understanding relates to capacity; that it is relevant to the extent that it would overcome the prejudice that would result and confusion that it would cause. I want to keep the trial as clean as possible on the issue of capacity. I now think that the issue of family agreements would be prejudicial and not relevant and I order that it be excluded.

Proponents had argued that the evidence was in violation of the statute of frauds and was used in an attempt to show a contract. They reiterate these arguments here. They further argue that the relationship between Richard's

---

[13] The ruling on proponent's second motion in limine limited the use of evidence of a family agreement to prove the third element of testamentary capacity, that is, who would be the natural objects of Richard's property. The objector's acknowledge in their brief that they were not attempting to introduce such evidence to set aside the will on the basis of a breach of contract, but only to support their claim that Richard lacked testamentary capacity.

acquaintance with Renee and the evidence of an oral agreement is vague. In addition, they contend that to allow testimony about the oral family agreement, in what they say would be in contravention of the statute of frauds, would create a previously unrecognized attack on wills. They also argue that the proffered evidence would confuse the jury because it is oral evidence contrary to the will, and the jury would not differentiate between the evidence being offered to show capacity as opposed to being offered to show a contract or agreement; consequently, the evidence of the family agreement would be confusing and prejudicial. They also contend objectors were able to show Richard did not remember Renee by Robert and Jay's statements.

The balancing of probative value against the grounds for exclusion in Iowa Rule of Evidence 5.403 rests in the trial court's discretion. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). Reversal is warranted only if the trial court has abused its discretion. The evidence tendered through the offer of proof was arguably cumulative on the issue of Richard's knowledge of his natural objects and the family discussions were remote in time to the date the will was executed. We agree with proponents' arguments that the district court did not abuse its discretion in this ruling.

AFFIRMED.