COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2428 **Cir. Ct. No. 2002PR84**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF SARA A. SHORT, DECEASED:

SONYA THEIS, CLAIRE JACKSON, ED SHOLTES AND DIANE SHOLTES,

APPELLANTS,

V.

JOHN H. SHORT, JOHN W. SHORT AND JULIE A. SHORT,

RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: MARK GEMPELER, Judge. *Reversed and cause remanded for further proceedings*.

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 DYKMAN, J. Sonya Theis, Claire Jackson, Ed Sholtes and Diane Sholtes (Theis) appeal from an order of the probate court granting John H. Short, John W. Short and Julie A. Short's (the Shorts) motion to dismiss Theis's petition for formal administration of her mother's estate. The trial court concluded that the doctrine of law of the case applied and that under WIS. STAT. § 802.09(1) (2003-04),[1] because Theis had previously amended a petition, she could not do so again, absent leave of the court or consent of the Shorts.[2]

¶2 We conclude that the doctrine of law of the case is inapplicable, and that we need not decide whether WIS. STAT.§ 802.09(1) applies to probate petitions. We therefore must consider whether Theis's petition pleaded undue influence with particularity. We conclude that it does. We therefore reverse and remand for further proceedings consistent with this opinion.

¶3 John H. Short, an attorney, and Sara A. Short were married in 1985. It was a second marriage for both. John had two children from a prior marriage. Sara had four children from a prior marriage, the petitioners here. Theis asserts that beginning in 1994, when Sara was fifty-four years old, Sara became

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] WISCONSIN STAT. § 802.09(1) provides in pertinent part:

> Amendments. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party;

Theis also asserts that the doctrine of issue preclusion is inapplicable to her petition. Because the trial court did not dismiss her petition as barred by issue preclusion, we do not consider that doctrine.

increasingly forgetful, confused and unable to do many of the tasks or projects that she had been able to do previously. Theis contends that Sara was in the early stages of Alzheimer's disease. In July 1995, Sara's husband drafted wills, revocable living trusts and a marital property agreement which he and Sara signed.

¶4 Sara died in March 2002 of complications due to Alzheimer's disease. In December 2002, Theis filed a petition for formal administration of Sara's estate. The petition contained an allegation that Sara signed her will, revocable living trust and marital property agreement as a result of undue influence exercised by her husband. Theis amended her petition in March 2003. In September, the trial court dismissed both petitions without prejudice. In the meantime, Theis had filed a second amended petition in May 2003, which the trial court also dismissed without prejudice in September 2003. The court concluded that the second amended petition was filed without the consent of the Shorts and without leave of court, requirements of WIS. STAT. § 802.09(1).

¶5 Theis chose not to ask for leave of court to file a second amended petition and not to appeal, and instead filed a new petition on October 25, 2003. The petition contained an expanded version of the facts allegedly showing John H. Short's undue influence of Sara. The trial court dismissed this petition, reasoning that Theis was required to obtain consent of the Shorts or leave of court before filing the petition, that the court's earlier rulings were the law of the case, and that the petition failed to state the circumstances constituting fraud with particularity. Sonya appeals.

¶6 The Shorts defend the trial court's dismissal of Theis's October 25, 2003 petition by asserting that "the court's earlier ruling that § 802.09(1) Wis. Stats. applied was the law of the case." The "earlier ruling" was the court's

response to Theis's second amended petition of May 2003, in which the trial court concluded that because Theis had amended her petition once as a matter of right, she needed consent of the Shorts or leave of the court to file the second amended petition.

¶7 The Shorts' argument assumes that Theis filed only one special proceeding. We conclude that she filed two.[3] The key lies in the trial court's orders which dismissed the first three petitions without prejudice. The phrase "without prejudice" carries significant meaning. In ***State ex rel. B.S.L. v. Lee***, 115 Wis. 2d 615, 620-21, 340 N.W.2d 568 (Ct. App. 1983), we said: "When the dismissal is prior to the taking of testimony, it is not on the merits and is not a bar to another action for the same cause." In ***Interest of Jason B.***, 176 Wis. 2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993), we held that "'Dismissal' without prejudice," by definition, permits 'the complainant to sue again on the same cause of action,'" quoting BLACK'S LAW DICTIONARY 469 (6th ed. 1990). When the trial court dismissed Theis's second amended petition, the first special proceeding ended. The order was final and appealable. WIS. STAT. § 808.03(1). At that point, Theis was free to begin another special proceeding. She did so.

¶8 The Shorts' contention that law of the case bars Theis's second special proceeding fares no better.[4] The decision whether to dismiss with or without prejudice, though it arises in several contexts, is described as a

[3] Having concluded that Theis filed two petitions, we need only review the October 25, 2003 petition. Thus, we need not decide whether WIS. STAT. § 802.09(1) applies to probate proceedings.

[4] The Shorts do not assert other reasons why Theis should be prevented from bringing a second special proceeding.

discretionary one. *See* ***Haselow v. Gauthier***, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997); ***Badger Bearing v. Drives and Bearings***, 111 Wis. 2d 659, 678, 331 N.W.2d 847 (Ct. App. 1983); ***Rode v. Sealtite Insulation Mfg. Corp.***, 3 Wis. 2d 286, 288, 88 N.W.2d 345 (1958). When an appellate court affirms a discretionary ruling, its decision does not reflect the law of the case unless a question of law is resolved. ***State v. Wurtz***, 141 Wis. 2d 795, 800, 416 N.W.2d 623 (Ct. App. 1987). We see no reason why this rule should not apply to trial courts when they examine prior cases which were dismissed without prejudice. The Shorts argue, and the trial court concluded that its dismissal was on the merits, describing the merits as whether Theis's petition stated a claim. But dismissal without prejudice is not on the merits. ***State v. Miller***, 2004 WI App 117, ¶27, 274 Wis. 2d 471, 683 N.W.2d 485. If "merits" is described as the reason a trial court dismisses a case, all dismissals would be on the merits and there would be little meaning to the term "without prejudice." Finally, "law of the case" requires a single action or special proceeding, not multiple ones. ***State v. Brady***, 130 Wis. 2d 443, 448, 388 N.W. 151 (1986) (citing ***White v. Murtha***, 377 F.2d 428, 431-32 (5th Cir. 1967)). As we have already concluded, Theis commenced a second special proceeding.

¶9 The Shorts' final assertion is that Theis's October 25, 2003 petition alleging undue influence failed to plead a claim with particularity. We review this issue de novo. ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. Both parties rely on ***Putnam v. Time Warner Cable of Southeastern Wisconsin, Limited Partnership***, 2002 WI 108, ¶26, 255 Wis. 2d 447, 649 N.W.2d 626, for its discussion of the special pleading requirements of a complaint alleging fraud, and both agree that undue influence is a species of fraud. *See* ***In Matter of Estate of Kennedy***, 74 Wis. 2d 413, 423, 247 N.W.2d 75 (1976).

Neither disputes that fraud must be pleaded with particularity. *See* WIS. STAT. § 802.03(2). Accordingly, we will assume without deciding that a petition for formal administration asserting undue influence must plead the claim with particularity. We turn to the parties' dispute whether Theis's petition states its claim of undue influence with particularity.

¶10 ***Putnam*** notes: "[A]llegations of fraud must specify the particular individuals involved, where and when misrepresentations occurred, and to whom misrepresentations were made." ***Putnam***, 255 Wis. 2d 447, ¶26. "This detailed pleading protects persons from casual allegations of serious wrongdoing and puts defendants on notice so that they may prepare meaningful responses to the claim. ***Id***. (citations omitted).

¶11 Theis's petition contains an "Attachment A," which asserts the facts upon which Theis relies. The petition alleges the following: Sometime in 1994, Sara Short was in the early stages of Alzheimer's disease, causing her to become forgetful, confused and unable to handle mental tasks and projects as she had before. Examples included inability to sew, baby sit her grandchildren, read books and use an elevator. She became more dependent on her husband, John, for assistance and advice. John was aware of her financial assets and goals. By 1995, she became completely dependent on John. She would not make large or small decisions without John's approval. After 1994, there were no instances where Sara did not do what John wanted to do.

¶12 Theis's petition continues, alleging that in July 1995, John created his and Sara's wills and living trusts. He also created a marital property agreement. John made the decision to establish the trust with both his and Sara's assets. The assets were to be available to the surviving spouse, and upon the

survivor's death, the value of the remaining estate would be split equally among his and Sara's children. However, before and after 1995, Sara told her children that her liquid assets, including money she had inherited from her father, and family heirlooms and family articles, would be distributed to each of her children upon her death, with a few items retained by John to be distributed to them upon John's death.

¶13 Copies of Sara's will, living trust and marital property agreement are appended to the petition. Schedule B, attached to the living trust, lists John's personal property (though "Sara," is handwritten at the top of the first page) which, if it exists after John and Sara's death, would be distributed to John's children. Schedule C, also attached, lists Sara's personal property which, if it exists after John and Sara's death, would be distributed to Sara's children. However, paragraph ten of Attachment A asserts that the living trust provided that the surviving spouse would have available to him or her all the assets of the trust. Also, the surviving spouse can amend the trust document.

¶14 Assuming that WIS. STAT. § 802.03(23) requires a probate petitioner to plead with particularity, Theis was required to assert facts which, if true, met the test for particularity outlined in ***Putnam***, 255 Wis. 2d 447, ¶26. Applying that test, we note that Theis's petition specified the individual involved, John H. Short, Sara's husband. The place was, as Sara's will states, Fort Atkinson, Wisconsin. The date asserted was July of 1995. The person to whom misrepresentations were made was Sara A. Short, John's wife. The misrepresentation was in drafting documents for Sara which were inconsistent with Sara's expressed wishes. We therefore conclude that Theis's pleading meets the requirements of particularity outlined in ***Putnam***.

¶15 Assuming that to plead with particularity, Theis was required to allege facts sufficient to meet one of the two tests for undue influence, we conclude that she has done so. The first test is a confidential or fiduciary relationship and suspicious circumstances surrounding the creation of a document. ***Glaeske v. Shaw***, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420. John H. Short was not only Sara Short's husband, he was her attorney. This is a confidential relationship. Suspicious circumstances were that he drafted his wife's trust and will, knowing that she had children from a prior marriage.[5] From the allegation that Sara had Alzheimer's disease, it is reasonable to infer that Short knew he would likely survive his wife.

¶16 Meeting one of the tests for undue influence is adequate to go to trial on an undue influence claim. Nonetheless, we recognize that this case is likely to be tried. We therefore consider the alternative test for undue influence. There are four elements here: Susceptibility to undue influence, opportunity to influence, disposition to influence and achievement of a coveted result. ***Glaeske***, 261 Wis. 2d 549, ¶27. We conclude that Theis pleads facts supporting these elements.

¶17 From the allegation that Sara Short was suffering from Alzheimer's disease and relied nearly exclusively on her husband's advice, it is reasonable to infer that she was susceptible to undue influence. It is reasonable to infer that

[5] The parties differ as to whether we can consider SCR 20:1.8(c), which prohibits lawyers from drafting instruments giving the lawyer a substantial gift, including a testamentary gift. *See* Preamble to SCR 20: **Scope**. (Supreme Court rules not a basis for civil liability). This rule has exceptions, some of which could be relevant here. We choose not to rely on SCR 20:1.8(c), and conclude that the drafter of a will, whether a lawyer or not, comes under suspicion when he or she is or can easily become the sole beneficiary of a testator for whom he or she prepares a will or trust and those who would normally receive a bequest are or can be disinherited.

John H. Short had the opportunity to unduly influence Sara because he was her husband, as well as her attorney and she relied upon him. It is also reasonable to infer that he had a disposition to unduly influence her from the allegation that he knew that she was suffering from Alzheimer's disease, and yet did not procure another attorney to represent his wife.

¶18 "Coveted result" is more than a result beneficial to the one accused of exerting undue influence. ***Estate of Kamesar***, 81 Wis. 2d 151, 162-63, 259 N.W.2d 733 (1977). This element goes to the naturalness or expectedness of the result. ***Id.*** Excluding a natural object of a testator's bounty is a red flag of warning. ***Id.*** But even that is not enough if the record shows a reason for excluding one who would be a natural beneficiary. ***Id.*** Here, the present record provides no reason why Sara would execute a trust that arguably gave John the power to disinherit her children should he survive her.

¶19 In summary, because the elements of undue influence were pleaded with sufficient particularity, the trial court erred. We therefore reverse the trial court's order dismissing the petition and remand for a trial on this claim. We have not concluded that Theis will recover on her claim of undue influence. That will be a decision for a fact finder who will not only consider the evidence provided by both parties, but the credibility of the witnesses. Accepting the facts in the petition as true, however, we have concluded that Theis's petition states a claim.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.