COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2704 **Cir. Ct. No. 2003CV701**

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

MARY LA COURT, AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF DELMAR L. SECOR, LILA LA COURT, MARY LA COURT AND WOMEN'S CLUB OF DE PERE,

PLAINTIFFS-RESPONDENTS,

JANETTE JOHNSON,

INVOLUNTARY-PLAINTIFF,

V.

DEAN D. KRAUSE,

DEFENDANT-APPELLANT,

DANIEL KRAUSE AND TODD M. KRAUSE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dean Krause appeals a judgment entered upon a jury verdict. Krause raises issues of standing, timeliness of the lawsuit, and public policy. We reject Krause's claims and affirm.[1]

Background

¶2 On January 27, 1988, Delmar Secor executed a will prepared by attorney Thomas Keidatz, providing specific bequests to Mary La Court, Lila La Court and Janette Johnson,[2] and the residue to the Women's Club of DePere (collectively referred to as "La Court"). These beneficiaries were not Secor's blood relatives and would not inherit from him under intestacy laws.

¶3 On February 16, 2001, Secor executed a will prepared by his neighbor Krause, naming Krause as beneficiary. Secor also signed a quit claim deed Krause drafted, transferring the title of his home to Krause and his wife for no consideration. On that same date, Secor also appointed Krause his durable power of attorney.

¶4 The 1988 will remained in Keidatz's possession until April 5, 2001, approximately three weeks prior to Secor's death. Shortly prior to April 5, Krause telephoned Keidatz and advised him that Secor wished him to draft a power of

[1] To a large extent, the parties' briefs were unhelpful to this court. In particular, La Court's statement of fact contains emotional facts that were irrelevant to the issues before the court and the argument section lacks citation to the record for factual assertions.

[2] Janette Johnson is not a respondent in this appeal. It appears she did not participate in the circuit court proceedings. She is nevertheless a beneficiary under the 1988 will.

attorney for health care naming Krause as health care agent, and also asked him to deliver Secor's 1988 will.

¶5 Keidatz made arrangements to bring the documents to Secor. Due to mobility restrictions, however, Keidatz was not able to enter Secor's house when he delivered the 1988 will. For that reason, Keidatz went next door to Krause's home where he was able to get onto the porch. At Keidatz's request, Secor walked over to Krause's house and they had a private conversation on Krause's porch. At that time, Secor signed a receipt acknowledging acceptance of the 1988 will. Secor also "asked what he should do to revoke the 1988 Will." Keidatz indicated, "the 1988 Will would certainly be revoked if he destroyed it with the intention of revoking it." When they met on April 5, Keidatz was aware of the new will "although I had not seen it and was not aware of its particular provisions." Keidatz was satisfied after talking with Secor that he was competent to revoke the 1988 will. The original 1988 will has not been found and was last known to be in Secor's possession.

¶6 Secor died on April 26, 2001. On that same date, Krause petitioned the Brown County Register in Probate without notice and filed the 2001 will. The probate court issued an order appointing Krause as special administrator with specific powers. *See* ***Estate of Secor***, case No. 2001PR110. An order of discharge was entered on June 5, 2001.[3]

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[3] On March 20, 2003, Krause was charged in Brown County with negligently subjecting a vulnerable adult to maltreatment, contrary to WIS. STAT. § 940.285(2)(a)3. ***State v. Krause***, case No. 2003CF234. Krause represents in his reply brief to this court that he pled guilty "to a Class A misdemeanor for his alleged actions against Delmar Secor."

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶7 In April 2006, La Court obtained an order of special administration from the Brown County Register in Probate to pursue a negligence claim against Krause. *See* ***Estate of Secor***, case No. 2006PR100. La Court filed a civil lawsuit in Brown County alleging undue influence, accounting, negligence as power of attorney, fraudulent transfer of property and punitive damages.

¶8 Krause filed a motion for summary judgment alleging the lawsuit was improper on the grounds of standing, and untimeliness under WIS. STAT. §§ 806.07 and 871.31. The circuit court denied the summary judgment motion and the causes of action for undue influence, negligence as power of attorney and punitive damages proceeded to trial.[4] The jury found the 2001 will resulted from undue influence and, further, that Krause was negligent in providing services to Secor. The jury awarded compensatory and punitive damages to La Court. The court denied a motion for judgment notwithstanding the verdict and entered judgment on the verdict. La Court filed a new petition for administration in the

[4] La Court represented in her trial brief to the circuit court that two other causes of action would be voluntarily dismissed. La Court also asserted in the trial brief,

> There will be no damages per se for the claim of undue influence. Rather, pursuant to case law, should the jury determine that Mr. Krause exerted undue influence on Mr. Secor regarding the execution of the will he authored for Mr. Secor, then the remedy would be for a judicial revocation of that will.

The second amended complaint alleges that as a result of the breaches regarding the negligence claim, "Delmar Secor and his estate incurred physical pain and suffering, mental anguish, funeral and burial expenses, and other economic loss to be determined at trial." This raises questions as to the judgment, which states, "judgment on the verdict be entered for the above-named plaintiffs…." The plaintiffs include the individual La Court plaintiffs, as well as the estate and the Women's Club of DePere. The 1988 will provides for specific monetary bequests to the individual La Court plaintiffs and the residue of the estate to the Women's Club of De Pere. We also note the multiple plaintiffs appear to have been jointly represented throughout the proceedings. However, because these issues have not been raised by the parties, we do not address them further.

Brown County probate court on October 2, 2007. *See* ***Estate of Secor***, case No. 2007PR155. On May 1, 2008, a copy of the 1988 will was admitted into probate.[5]

Discussion

¶9 On appeal, Krause argues the circuit court erred by denying his motion for summary judgment. Krause insists La Court lacked standing to commence the civil lawsuit. Krause asserts La Court's undue influence and negligence claims "rested upon the existence of Delmar Secor's 1988 Will, in which the La Court plaintiffs were named beneficiaries." According to Krause, "[i]f that Will did not exist, due to revocation by Delmar Secor, then the La Court plaintiffs no longer were beneficiaries; they would not inherit under intestacy law in that none was a blood relative of Delmar Secor."

¶10 Krause further argues that a prima facie presumption of revocation existed because the 1988 will was last known to be in Secor's possession but could not be found upon his death. Krause claims La Court's opposition to summary judgment failed to overcome the presumption of revocation and therefore he was entitled to judgment on the claims related to undue influence and negligence as a matter of law.[6] We disagree.

[5] On February 20, 2008, the probate court determined Krause was not an interested party in that case.

[6] We note negligence is ordinarily an issue for the fact-finder and not for summary judgment. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶2, 241 Wis. 2d 804, 623 N.W.2d 751.

¶11 We review summary judgments de novo. ***Spring Green Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well-established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. ***Kramer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

¶12 Once it is established that a missing will was last in the possession of the testator, a presumption arises in favor of revocation. *See* ***Fonk v. Zastrow***, 51 Wis. 2d 339, 341-42, 187 N.W.2d 147 (1971). At that point, both the burden of persuasion and the burden of going forward with the evidence shift to the opponent to establish that the will was not revoked. *See* Judicial Council Committee's Note to WIS. STAT. § 903.01, 59 Wis. 2d R50, (2)(c) *Determination When the Basic Facts Are Established But There Is Evidence Directly Disputing the Presumed Fact*. Thus, it must be established that the will was lost, destroyed by accident or destroyed without the testator's consent. The trier of fact decides the probative value of evidence disputing the presumption. ***Fonk***, 51 Wis. 2d at 341-42.

¶13 As stated in Robert C. Burrell and Jack A. Porter, *Lost Wills: The Wisconsin Law*, 60 MARQ. L. REV. 351, 358 (1977):

> The Wisconsin Supreme Court has consistently held in many lost will cases over the years that the presumption of revocation can be and often is easily overcome by evidence demonstrating that the testator did not intend that his will be revoked. Of course, this may be established by evidence that the testator lacked the capacity to revoke the will. More likely, however, the evidence will relate to the testator's affirmations of the existence of the will, to his propensity not to retain or properly care for valuable documents, to the access of adverse parties affording them

> an opportunity to cause the disappearance or destruction of the will, to the testator's history of relying on written wills and to the relationship between the testator and his heirs-at-law and the beneficiaries of his will. … Each case will usually involve several factors and it is fair to say that no single factor has controlled the court's decisions. (Footnote omitted.)

¶14 Here, evidence in the record relating to the above factors raised a factual dispute over Secor's intention to revoke the 1988 will. First, reasonable minds could differ as to whether Secor lacked the capacity to revoke the will. Keidatz submitted an affidavit in support of summary judgment stating his opinion that Secor was competent to revoke a will in April 2001. However, evidence was also submitted in opposition to summary judgment demonstrating that Secor suffered from significant cognitive impairment, exacerbated by profound malnutrition, dehydration and inanition. This evidence included a medical expert's affidavit and also the medical examiner's sworn testimony from the preliminary hearing in Krause's criminal case, regarding maltreatment of a vulnerable adult. Taken in the light most favorable to the party opposing summary judgment, this evidence permits an inference that Secor lacked the capacity to revoke a will.

¶15 In addition, Secor's character traits, habits or behavior patterns were of such a nature as to raise a material issue of fact as to whether he accidentally misplaced or lost the 1988 will. It is irrefutable that Secor's home was in utter disarray and his belongings and garbage were piled throughout the house. The medical examiner emphasized the "filth" in describing "the most memorable thing about him…." It is therefore reasonable to infer that Secor did not make suitable provisions for the safekeeping of any valuable property, including important documents.

¶16 It is also reasonable to infer from the record that an adverse party had access to the will, another factor to be given weight regarding Secor's intent to revoke. Due to restrictions on his mobility, Keidatz was not able to enter Secor's house on April 5, 2001, and for that reason went next door to Krause's home where he was able to get onto the porch. The 1988 will was delivered to Secor at Krause's house. The 1988 will has not since been found. There is also no dispute Krause had access to Secor's home and documents. Prior to the delivery of the 1988 will, Krause was appointed Secor's power of attorney and evidence showed Krause exercised that authority almost immediately.

¶17 Krause argues the circuit court erred by considering undue influence as a factor in analyzing intent to revoke. We see no legitimate reason to preclude evidence of undue influence to overcome a presumption that a prior will was destroyed with the intent to revoke it. Here, the court correctly observed that issues of fact existed as to whether Krause had unduly influenced Secor by the time Keidatz delivered the 1988 will. Keidatz's affidavit stated Krause initially telephoned him. It was Krause who informed him that Secor "had made a new Will and wanted to get possession of the 1988 Will.…" It was also Krause who authored the 2001 will and positioned himself as durable power of attorney. Further, Krause indicated Secor wanted Keidatz to prepare a power of attorney for health care in which Krause would be named as his health care agent. Keidatz advised Krause he would prepare the power of attorney for health care, but that he would first have to talk to Secor. Krause then informed Keidatz by letter that Secor would call him, but that Secor "did not want to see anyone or have anyone come to his house." Krause also contacted Mary La Court in early 2001 and advised that she and her sister "were not to attempt to contact Delmar, and the only contact [they] could have with Delmar was through Mr. Krause."

¶18 We cannot accept Krause's contention that, as a matter of law, the presumption was not overcome. Secor's mental state, combined with his character traits, habits or behavioral patterns, Krause's access, and the evidence of undue influence, created material issues of fact regarding the intent to revoke the 1988 will. More than one reasonable inference could be drawn from the credible evidence, and summary judgment was properly denied. We therefore reject Krause's contention that a presumption of revocation entitled him to summary judgment.[7]

¶19 Krause next argues the civil lawsuit was untimely under WIS. STAT. § 856.05 because La Court did not inform the probate court about the existence of the 1988 will "within 30 days after [she had] the information." *See* WIS. STAT. § 856.05(2).[8] This argument is difficult to discern but appears to again relate to

[7] La Court argues in her response brief that she had standing to bring the independent claims against Krause irrespective of the revocation issue. La Court relies upon ***Buffington's Estate***, 249 Wis. 172, 174, 23 N.W.2d 517 (1946), where the court stated:

> The appellant, however, was not an heir at law of Fannie E. Buffington. She also would have been entitled to object to the will and codicil offered for probate had she been able to offer a prior will to probate containing a more favorable provision for her.

Krause does not attempt to address ***Buffington's Estate*** in his reply brief. Arguments not refuted are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We therefore decline to address this issue further.

[8] WISCONSIN STAT. § 856.05(2) provides:

(continued)

Krause's argument that La Court was required to "prove up" the 1988 will as a prerequisite to the civil suit. Regardless, we conclude the issue was improperly preserved. In his brief in support of summary judgment, Krause alleged La Court's action was untimely under WIS. STAT. §§ 879.31 and 806.07.[9] Krause did not raise the applicability of § 856.05.

¶20 Krause insists the "Wis. Stat. 856.05 argument was presented to the trial court by Krause's brief." However, Krause cites his reply brief supporting a motion for judgment notwithstanding the verdict. We decline to address an argument alleging untimeliness of a lawsuit first raised in a reply brief on motions after a jury verdict.[10]

> **(2) Duty of person with information.** Any person having information which would reasonably lead him or her to believe in the existence of any will of a decedent of which he or she does not have custody and having information that no more recent will of the deceased has been filed with the court and that 30 days have elapsed after the death of the decedent, shall submit this information to the court within 30 days after he or she has the information.

[9] On appeal, Krause does not argue the applicability of WIS. STAT. §§ 871.31 and 806.07. These issues are deemed abandoned. ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

[10] Even if we were to consider the argument, Krause would not prevail. In oral argument on the motion for judgment notwithstanding the verdict, Krause asserted, "It's a doctrine of laches, Judge." Here, Krause filed the petition for special administration, without notice, on April 26, 2001. La Court was thus not a party to the proceedings. The order discharging Krause as special administrator was entered six weeks later, on June 5, 2001. On April 25, 2006, the probate court granted La Court an order of special administration to pursue a negligence action against Krause. After the motion for summary judgment was denied, the civil suit proceeded to trial, and a verdict was reached on January 26, 2007. These events all occurred prior to Krause raising the WIS. STAT. § 856.05(2) issue on March 8, 2007, in his reply brief on the motion for judgment notwithstanding the verdict. Under these circumstances, Krause will not be heard to argue "a doctrine of laches" required the lawsuit be dismissed because La Court did not inform the probate court of the 1988 will within thirty days.

¶21 Finally, Krause argues public policy necessitates that La Court "prove up" the 1988 will prior to commencing the civil lawsuit. This argument is underdeveloped and we will not consider it. *See* ***M.C.I., Inc. v Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.