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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0944**

In re the Estate of: Erna M. Wingen, Deceased.

**Filed June 9, 2009
Reversed and remanded
Johnson, Judge**

Blue Earth County District Court
File No. 07-PR-07-2623

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Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

An elderly woman died and left a will that purports to bequeath her estate to only two of her four surviving children. The two disinherited children brought a motion for court-ordered discovery relating to their allegation that the will was executed because of undue influence. The district court denied the discovery motion and probated the will. We conclude that the disinherited children should not have been prohibited from conducting discovery within the probate proceeding and, therefore, reverse and remand.

FACTS

Erna Wingen, a resident of the city of Mankato, died in July 2007 at the age of 92. She was survived by four children: Francis Wingen, Phillip Wingen, Alonzo Wingen, and Kathryn Stencel.

On August 8, 2007, Stencel filed a petition for formal probate of a will and for the appointment of herself as the personal representative of the estate. With her petition, Stencel filed the last will and testament of Erna Wingen and the first codicil to the last will and testament.¹ The will, signed in 2003, nominates Stencel to serve as personal representative, devises the majority of the estate to Stencel and Francis Wingen, and expressly makes no provision for Phillip Wingen and Alonzo Wingen.

On September 12, 2007, Phillip Wingen and Alonzo Wingen (hereinafter “the objectors”) filed objections to the probate of the will and to the appointment of Stencel as personal representative. They alleged that Erna Wingen “was unduly influenced in the making of the Will by Ms. Stencel.” The parties appeared for a hearing on the objections later the same month. Thereafter the objectors informally obtained from Stencel’s counsel copies of notes that he had made during conversations with Erna Wingen regarding her decision to exclude two of her children from her will. The objectors also obtained copies of Erna Wingen’s prior wills. Stencel’s counsel refused, however, to agree to the production of Erna Wingen’s medical records and certain financial records.

¹Stencel contends that the objectors did not object to the codicil in the district court and, thus, forfeited their challenge to the codicil. We reject the contention. The objections refer to the “Purported Will,” which term is defined in the objections to include both the will and the codicil.

A hearing on the objections was scheduled for December 13, 2007. Prior to the hearing, the objectors brought a motion for an order permitting subpoenas to be served on third parties possessing Erna Wingen's medical and financial records. According to the objectors, they sought agreement from Stencel to postpone the December 13 hearing, but Stencel refused. At the hearing, Stencel's counsel argued orally that the objectors' requests for court-ordered discovery were improper. Counsel argued that the objectors were conducting a "fishing expedition." Counsel also argued that the objectors' arguments for invalidating the will should be "frame[d] with pleadings" that state a factual basis of their claims so as to provide Stencel with "some direction . . . as to where we are going." Counsel argued further that the objectors should not be permitted to conduct the sought-after discovery unless and until they commenced a separate action. In response, the objectors' counsel argued that the objectors had a right to do discovery in this action and that discovery was necessary to develop their objections.

The district court was convinced by Stencel's argument. The district court noted that "obviously there hasn't been discovery served because there hasn't been any sort of action commenced." The district court also reiterated Stencel's argument by saying that, without formal pleadings stating the objections in greater detail, "we will be out there flaying around to see what they want next and when they want it." At the conclusion of the hearing, the district court warned counsel for the objectors, "you better get your lawsuit going if that is what you want to [do] because I am not inclined to grant you the relief that you are asking for [within this case]. . . . I will issue my order in due course but . . . you pretty much know what I am going to do now."

On January 10, 2008, the district court issued a two-page order concerning the objections to the probate of the will and the appointment of a personal representative. The order states that the objectors “asked this Court for an order granting limited, court supervised discovery,” that there is “no basis in either law or statute for this Court to grant the relief requested,” that objectors “are free to begin a formal action against Decedent’s estate if they so choose,” but that until such time, “this Court will not order more discovery than has already been provided.”

On February 4, 2008, the district court issued an order probating the will and appointing Stencel to be the personal representative. On February 20, 2008, the objectors commenced a separate action against Stencel and Francis Wingen, alleging that Erna Wingen lacked capacity to sign her will and that Stencel and Francis Wingen caused her to sign the will under undue influence. The objectors timely appealed from the February 4 order in this action. At oral argument, counsel indicated that neither party has pursued a resolution of the separate action during the pendency of this appeal.

DECISION

The objectors argue that the district court erred by denying their motion for court-ordered discovery. In response, Stencel argues that a district court should be allowed to determine the appropriate procedures for discovery in this situation. Discovery rulings are reviewed for abuse of discretion and will not be disturbed on appeal unless the district court “exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law.” *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 723 N.W.2d 270, 275 (Minn. 2006) (quotation omitted).

The district court denied the objectors' motion on the ground that the proposed discovery was improper in this action and would be proper only in a separate action commenced by a summons and complaint. The text of the probate code reveals that the district court's reasoning is incorrect. The code provides, "Any party to a formal proceeding who opposes the probate of a will for any reason shall state in pleadings the objections to probate of the will." Minn. Stat. § 524.3-404 (2008). "Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." Minn. Stat. § 524.3-407 (2008). Most important for purposes of this appeal is the following provision: "Unless inconsistent with the provisions of this chapter or chapter 525, pleadings, practice, procedure and forms in all probate proceedings shall be governed insofar as practicable by [the] Rules of Civil Procedure" Minn. Stat. § 524.1-304 (2008).

Prior decisions of this court provide further support for the proposition that a party objecting to the probate of a will may conduct discovery within a probate proceeding. In *In re Estate of Smith*, 444 N.W.2d 566 (Minn. App. 1989), this court held that a district court erred by denying motions to compel discovery brought by a party objecting to probate of a will. *Id.* at 568. We applied the Minnesota Rules of Civil Procedure in that proceeding, noting that the rules "permit parties to obtain discovery of any matter relevant to the subject matter of a dispute as long as the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Id.* (quoting Minn. R. Civ. P. 26.02(a)). Similarly, in *In re Estate of McCue*, 449 N.W.2d 509 (Minn.

App. 1990), this court affirmed the grant of a motion to vacate an order formally probating a will, without a hearing on claims of undue influence and lack of testamentary capacity, and we stated that, upon remand, the appellant should be allowed to conduct discovery. *Id.* at 513; *see also In re Conservatorship of Smith*, 655 N.W.2d 814, 818 (Minn. App. 2003) (holding that conservatorship proceedings under chapters 524 and 525 are subject to discovery portion of rules of civil procedure).

In addition, other opinions of this court indicate that a separate action is not necessary to contest a will. *See In re Estate of Sullivan*, 724 N.W.2d 532, 534 (Minn. App. 2006) (considering propriety of settlement agreement in will contest initiated by objection to probate of will); *In re Estate of Torgersen*, 711 N.W.2d 545, 550 (Minn. App. 2006) (reviewing merits of judgment rendered after five-day trial concerning validity of will initiated by objection to probate of will), *review denied* (Minn. June 20, 2006); *In re Estate of Evenson*, 505 N.W.2d 90, 91-92 (Minn. App. 1993) (affirming award of attorney fees for defending will contest in trial following objection to probate of will).

We are aware that, at some times and in some places within the state, it has been the practice of district courts and litigants to determine a will contest in a separate action rather than in a pending probate proceeding. We are unable to identify any basis in the probate code or in the applicable caselaw for a principle of law providing that a party pursuing a will challenge must conduct discovery or must prove up the challenge in a separate action. Naturally, if there is consent to multiple actions among all parties concerned and the district court, there is no issue. If, however, persons objecting to the

probate of a will seek to conduct discovery within a pending probate proceeding, they may do so within the probate proceeding pursuant to rules 26 through 37 of the rules of civil procedure.

Thus, the objectors have a right to conduct discovery in the probate proceeding, so long as the discovery sought is consistent with the rules of civil procedure. The district court's denial of the objectors' discovery motion was based on "an erroneous view of the law" and, thus, was an abuse of its discretion. *EOP-Nicollet Mall, L.L.C.*, 723 N.W.2d at 275 (quotation omitted). Accordingly, we reverse the district court's order denying the objectors' motion for discovery, reverse the order probating the will, and remand for further proceedings consistent with this opinion.

Reversed and remanded.