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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06-03-2010
PHILIP G. URRY, CLERK
BY: GH

In the Matter of the Estate) 1 CA-CV 09-0555
of:)
) DEPARTMENT A
ESPERANZA V. GOWAN,)
) **MEMORANDUM DECISION**
Deceased.) (Not for Publication -
) Rule 28, ARCAP)
_____)
ROSE MARY GRIEGER,)
)
) Petitioner/Appellant,)
)
) v.)
)
) JULIA GOWAN, as Personal)
) Representative of the Estate of)
) Esperanza V. Gowan,)
)
) Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB2007-090516

The Honorable Kirby D. Kongable, Commissioner

AFFIRMED

Dyer & Ferris, L.L.C. Phoenix
By Clare F. Black
Attorneys for Petitioner/Appellant

Law Offices of James B. Rolle Phoenix
By James B. Rolle, III
Attorneys for Respondent/Appellee

W I N T H R O P, Judge

¶1 Rose Mary Grieger ("Grieger") appeals from the trial court's denial of her motion for reconsideration challenging the court's order denying her motion to remove Julia Gowan ("Gowan") as the personal representative of the estate of Esperanza V. Gowan ("Decedent"), and finding Decedent's last will and testament ("the Will") to be valid. Grieger argues that the trial court erred in (1) holding that Gowan should not have been removed as the personal representative, (2) failing to hold Gowan to a higher standard given that she was a law school graduate, (3) relying on the fact that Gowan had retained counsel after the petition for removal was filed in finding that Gowan should not be removed, and (4) holding that the Will was valid. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On July 2, 2006, Decedent executed the Will, which was drafted by Gowan and witnessed by Gowan and her sister, Kathleen, and named Gowan as executor of the Will. Additionally, Gowan and Kathleen, as a result of the provisions of the Will, were to receive the majority interest in Decedent's estate. Approximately one month later, on August 4, 2006, Decedent died as the result of a progressive illness at the age of sixty-nine. Decedent was survived by seven children, including Grieger and Gowan.

¶13 On July 18, 2007, Gowan filed an application for informal probate of the Will and seeking informal appointment as the estate's personal representative. At the same time, the Will was filed and admitted to informal probate, letters of appointment as the personal representative were issued to Gowan, and an "Order to Personal Representative and Acknowledgement and Information to Heirs" ("the Order") was signed by Gowan and filed.

¶14 On September 25, 2008, Grieger filed a petition to remove Gowan as the personal representative, alleging she had breached her fiduciary duties in her capacity as the personal representative, and to set aside admission of the Will to probate, in effect seeking to invalidate the Will. An evidentiary hearing was ultimately set for November 26, 2008. On November 25, 2008, counsel filed a notice of appearance on behalf of Gowan, who had been unrepresented until that time.

¶15 On November 26 and December 17, 2008, the trial court held the evidentiary hearing. At the end of the hearing, the court directed counsel to file written closing arguments. Counsel complied, and on January 26, 2009, the court issued a signed minute entry order denying the petition and declaring the

Will to be valid. In pertinent part, the court ruled as follows:

2. Although Julia Gowan did not perform her duties perfectly, under the particular facts of this case, her actions/inactions did not rise to the level of breaching her fiduciary duties to the estate and to the beneficiaries. Further, she now has counsel to assist her in the future performance of her duties.

3. The Last Will is a valid document and accurately reflects the Decedent's wishes. No undue influence has been proven.

4. Julia Gowan shall continue as Personal Representative; All property shall be distributed according to the provisions of the Will

¶16 Grieger moved for reconsideration and to vacate the ruling pursuant to Rule 59(a)(8), Ariz. R. Civ. P. After the trial court denied Grieger's motion for reconsideration and affirmed its January 26 ruling, Grieger filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B), (C), and (F)(1) (2003).

ANALYSIS

¶17 In general, we review the trial court's determinations for an abuse of discretion, although we apply a *de novo* standard of review to questions of law, including questions of statutory interpretation. See *In re Estate of Newman*, 219 Ariz. 260, 271, ¶ 42, 196 P.3d 863, 874 (App. 2008); *In re Estate of Thurston*, 199 Ariz. 215, 221, ¶ 29, 16 P.3d 776, 782 (App. 2000) (citing *Gerow v. Covill*, 192 Ariz. 9, 18, ¶ 41, 960 P.2d 55, 64 (App.

1998)). In our review, we examine the record to determine whether substantial evidence exists to support the trial court's decision, and we accept the court's factual findings unless they are clearly erroneous. See *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999); *Newman*, 219 Ariz. at 265, ¶ 13, 196 P.3d at 868. It is not our function to reweigh the evidence or second-guess the credibility determinations of the trial court, which had the opportunity to evaluate each witness's demeanor and make informed credibility determinations. *Newman*, 219 Ariz. at 271, ¶ 40, 196 P.3d at 874.

I. Removal of Gowan as Personal Representative

¶18 Grieger contends that the trial court erred in holding that Gowan should not be removed as the personal representative of the estate because Gowan breached multiple fiduciary duties and disregarded the Order.¹

¹ Specifically, Grieger argues that Gowan failed to prove that she timely and properly sent the Order and provided notice of the informal probate to heirs and devisees as provided by A.R.S. § 14-3705 (2005); failed to timely file a proof of compliance showing that she had properly mailed the Order; failed to timely prepare and file or send a proper inventory and appraisal as provided in A.R.S. § 14-3706 (2005); failed to expeditiously publish a notice to creditors as provided in A.R.S. § 14-3801 (2005) or obtain an affidavit of publication to file with the court; failed to obtain an appraisal for and properly market the commercial property, including employing a qualified commercial realtor for the sale of the property and diligently following up with potential buyers of the property; failed to open a separate estate bank account and obtain a tax identification number for the estate; commingled estate assets with personal assets and misused funds; failed to properly file,

¶9 Under A.R.S. § 14-3611(A) (2005), “[a] person interested in [an] estate may petition for removal of a personal representative for cause at any time.” Several possible grounds for removal of a personal representative exist, including “[i]f removal would be in the best interests of the estate,” or “[i]f it is shown that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of that office, has mismanaged the estate or has failed to perform any duty pertaining to that office.” A.R.S. § 14-3611(B)(1), (3). Nonetheless, in most states, including Arizona, a decedent’s preference for a personal representative is given great deference. *Newman*, 219 Ariz. at 270, ¶ 39, 196 P.3d at 873.

¶10 In this case, the trial court heard extensive testimony from all of Decedent’s children before holding that Gowan’s actions and inactions as personal representative did not rise to the level of breaching her fiduciary duties to the estate and beneficiaries. The court recognized that Gowan “did not perform her duties perfectly,” but concluded that her

manage, and/or pay estate and income taxes; failed to pay expenses in the priority set forth in A.R.S. § 14-3805 (2005) pursuant to the Order; failed to sell estate property (a 1974 truck) as directed in the Will; failed to properly notice parties and counsel of her motion to continue the evidentiary hearing; improperly attempted to evict her sister, Gloria, from the commercial property; failed to provide a proper accounting, see A.R.S. §§ 14-3703 (Supp. 2009), -10813(C) (Supp. 2009); and failed to timely open probate.

performance did not rise to a level of a breach of fiduciary duties. We find substantial evidence in the record to support the court's conclusion.

¶11 Although Grieger and her sister, Gloria, testified as to their dissatisfaction over the way Gowan had carried out her duties as personal representative, and Gowan herself admitted that she had failed to timely or fully perform several of the duties outlined in the Order and otherwise expected of her, other witnesses' testimony indicated that Gowan's performance did not rise to the level of a breach of her fiduciary duties such that her removal was necessary. Grieger's own witness - her brother, James - testified that he believed Gowan was a capable personal representative and that "she's done a good job," although certain aspects, such as the sale of real estate, were "out of her lane." James further testified that he foresaw no other problems with Gowan as the personal representative, and stated that he trusted her, did not believe she would try to mismanage the property or hide assets, and believed she would follow the advice of her attorney in providing legal notices and distributing the assets according to the terms of the Will. He stated that he and his brother, Thomas, were "completely against" Grieger's petition and the current proceedings because "[i]t leaves me and my brother in the middle of sisters, and it's destroying our family. It's ridiculous." He also opposed

appointment of an independent personal representative, characterizing the idea as "a waste of time."

¶12 Thomas, Decedent's oldest son and the person named in the Will as the alternate personal representative, characterized Gowan as a good personal representative of the estate and testified that Gowan is an honest person who follows through on her promises and would not try to deprive any of her siblings of any property or rights under the Will. Thomas also stated that he believed it would be a poor investment and "a waste of money" to appoint a private fiduciary as the estate's personal representative, and he believed Gowan was capable of hiring a real estate agent or coordinating the sale of the commercial property to Gloria, who had previously expressed interest in purchasing it if she obtained financing. Thomas described Grieger's petition as "[f]oolish" and denied it was a good investment of estate money to be "[p]utting everybody through all this." Both brothers also noted that much of Gowan's difficulty in selling the estate's commercial property, which appeared to be the primary issue, had to do with the extremely poor condition of the building, which was in need of numerous repairs that the brothers were willing to eventually undertake to make the property saleable. James explained that he believed "the building can't be sold [to anyone outside the family] in the condition it's in."

¶13 Decedent's daughter, Kathleen, also testified that Gowan was a good person to be personal representative, she was honest and could be trusted, she would do as promised, she would not attempt to evade the law, and she would distribute the estate proceeds as instructed by Decedent.

¶14 The trial court made no finding of willful misconduct, waste or placement in jeopardy of any assets, or any substantial act or omission by Gowan as the personal representative that rose to the level of cause for removal for breach of fiduciary duty, and we find no error in that determination. *See generally In re Estate of Hartt*, 295 P.2d 985, 1002-06 (Wyo. 1956) (discussing cases from numerous states). Consequently, we conclude that the trial court did not err in holding that Gowan should not be removed as the personal representative.

II. Gowan's Status as a Law School Graduate

¶15 Grieger also argues that the trial court erred in failing to hold Gowan to a higher standard because she was a law school graduate who had taken a course in wills and trusts and studied that topic in preparing for the Arizona bar exam.

¶16 An executor or administrator must act as a "reasonably prudent" person and exercise any skill that she may have beyond that of a person of ordinary prudence. *See In re Sullenger's Estate*, 2 Ariz. App. 326, 328, 408 P.2d 846, 848 (1966).

¶17 In this case, Gowan testified that she graduated from Capital University Law School in Columbus, Ohio, in 1998, but had never practiced law. After graduation, she moved back to Arizona, taught as a substitute teacher, and eventually sat for the Arizona bar examination on several occasions, the last being approximately four to six years before the hearing on Greiger's petition for removal. No dispute appears to exist that Gowan has not passed the Arizona bar examination or any other bar examination. Thus, little in the record suggests that Gowan has much skill beyond that of a person of ordinary prudence, and we conclude that the trial court did not err in not holding Gowan to a higher standard simply on the basis that she was a law school graduate.

III. Gowan's Retention of Counsel

¶18 Noting that a person acting without an attorney is entitled to no more consideration from the court than a party represented by counsel and is held to the same standards expected of a lawyer, *Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793 (App. 2000), Grieger argues that the trial court erred in relying on the fact that Gowan had retained counsel after the petition for removal was filed in finding that Gowan should not be removed.

¶19 Concluding that Greiger's citation to *Kelly* is a non sequitur, we find no error in the trial court's consideration

whether Gowan had retained counsel to assist her in the future performance of her duties. Gowan testified that she had retained counsel and intended to rely on the assistance of counsel to perform her duties in accordance with the Order if allowed to remain as the estate's personal representative. Further, as we have recognized, Decedent's son, James, testified that he believed Gowan would follow the advice of her attorney in providing legal notices and distributing the assets according to the terms of the Will. Given this testimony, we conclude that the trial court did not err in considering the fact that Gowan had retained counsel after the petition for removal was filed in determining whether she should be removed as the estate's personal representative.

IV. Validity of the Will

¶20 Noting that the Will was drafted by Gowan, witnessed by Gowan, and left the largest portion of the estate to Gowan, Grieger argues that the trial court erred in holding that the Will was valid.

¶21 In an argument raised for the first time on appeal, Gowan responds that the trial court lacked jurisdiction to hear the Will contest because Grieger did not file her petition contesting the Will until more than two years after Decedent's death and twelve months after commencement of the informal probate. See A.R.S. § 14-3108(3) (2005); *In re Estate of Wood*,

147 Ariz. 366, 367, 710 P.2d 476, 477 (App. 1985); see also *Bates & Springer of Ariz., Inc. v. Friermood*, 109 Ariz. 203, 204, 507 P.2d 668, 669 (1973) (recognizing that an appellate court may consider jurisdictional questions even when raised for the first time on appeal). Citing A.R.S. § 14-3306(B) (2005), Grieger replies that she did not timely receive notice of the informal probate proceeding, and therefore "the time to commence a petition to contest Decedent's will had not passed." In effect, Grieger argues that the statutory limitation period contained in A.R.S. § 14-3108(3) is tolled. Even assuming *arguendo* that Grieger is correct, however, we find no error by the trial court requiring invalidation of the Will.

¶122 Generally, the burden lies on the party contesting a will to show by clear and convincing evidence that it should be declared invalid. *Evans v. Liston*, 116 Ariz. 218, 219-20, 568 P.2d 1116, 1117-18 (App. 1977). In determining whether undue influence has occurred, a court may consider: (1) whether the person made fraudulent representations to the deceased, (2) whether the will was hastily executed, (3) whether such execution was concealed, (4) whether the person benefitted was active in securing the drafting and execution, (5) whether the will was consistent with the testator's prior declarations, (6) whether the provisions were reasonable rather than unnatural in view of the testator's attitude, views, and family, (7) whether

the testator was susceptible to undue influence, and (8) whether there existed a confidential relationship between the testator and the person allegedly exerting undue influence. *Id.* at 220, 568 P.2d at 1118.

¶23 "A presumption of undue influence arises when one occupies a confidential relationship with the testator and is active in preparing or procuring the execution of a will in which he or she is a principal beneficiary." *Mullin v. Brown*, 210 Ariz. 545, 547, ¶ 4, 115 P.3d 139, 141 (App. 2005) (citation omitted). The presumption of undue influence shifts the burden of persuasion to the proponent of the will. *Id.* at 550, ¶ 17, 115 P.3d at 144. In fact, where a confidential relationship is shown, the presumption of invalidity can be overcome only by clear and convincing evidence that the transaction was fair and voluntary. *Id.* at 549, ¶ 11, 115 P.3d at 143 (citations omitted).

¶24 Nonetheless, if the trial court was not requested to and did not make findings of fact and conclusions of law, we will view the evidence and reasonable inferences therefrom in a light most favorable to the party in whose favor the judgment was rendered, and if evidence exists to support the judgment, it will be affirmed. See *Bates*, 109 Ariz. at 206, 507 P.2d at 671; *Balon v. Hotel & Rest. Supplies, Inc.*, 103 Ariz. 474, 477, 445 P.2d 833, 836 (1968); see also *Feffer v. Newman*, 17 Ariz. App.

273, 275, 497 P.2d 389, 391 (1972) (stating that where conflicting evidence has been presented to the trial court, this court will accept as true that evidence which most strongly supports the judgment and, rather than reciting the details of evidentiary conflict, will recite the facts in a light most favorable to supporting the court's conclusions). In this case, neither party requested findings of fact or conclusions of law, and none were made by the trial court. Further, we find that Gowan presented clear and convincing evidence from which the trial court could have found that Decedent's execution of the Will was fair and voluntary.

¶25 At the evidentiary hearing, the parties presented controverting evidence as to many of the factors outlined in *Evans*. In support of Gowan's position, Decedent's daughter, Kathleen, who witnessed Decedent sign the Will more than one month before her death, testified that Decedent "was a strong woman" who "was focused and knew what she was all about," and that "she was lucid and straight on" when she signed the Will. Kathleen also testified that the Will was prepared by Gowan "with my mom's guidance" and "[a]bsolutely" expressed Decedent's intentions and desires, which she had held for at least the previous "couple of years." Gowan also presented evidence tending to show that the Will was substantially consistent with Decedent's prior wills and declarations, with the exception of

the residential property passing jointly to Gowan and Kathleen rather than just Kathleen, who witnessed the execution of the Will and did not challenge it. In addition to Kathleen, James and Thomas, neither of whom was to receive anything of substance in the Will, both testified that the contents of the Will afforded no major surprises and the Will was consistent with their understanding of Decedent's wishes. Thomas further testified that Decedent had discussed provisions of the Will with him "a couple to three months before her passing," and that it was her custom to discuss such things with her children. Further, no testimony was presented that Gowan had more of a confidential relationship with Decedent than did Decedent's other children. Additionally, Gowan testified that, before filing the petition to become personal representative and open probate, she sent each of her siblings a copy of the Will, and no one objected at that time to its contents. Each of her siblings also signed a consent to waiver of bond, and the consents were filed with the application for informal probate.

¶26 That Grieger presented some conflicting evidence is of no significance because there is substantial evidence to support the trial court's findings. In other words, it is not the function of this court to reweigh the facts or second-guess the credibility determinations of the trial court. *Newman*, 219 Ariz. at 271, ¶ 40, 196 P.3d at 874; *Feffer*, 17 Ariz. App. at

275, 497 P.2d at 391. Consequently, we conclude that the trial court did not err in holding that the Will was valid.

V. *Costs and Attorneys' Fees*

¶27 Both Grieger and Gowan request an award of attorneys' fees on appeal. Grieger cites no basis for her request and is not the prevailing party; accordingly, we deny her request for attorneys' fees. Gowan cites Rule 21, ARCAP, as the basis for her attorneys' fees request. ARCAP 21, however, only sets forth the procedure for requesting attorneys' fees and may not be cited as a substantive basis for an award of fees. *See Tilley v. Delci*, 220 Ariz. 233, 239, ¶ 19, 204 P.3d 1082, 1088 (App. 2009). Gowan also has not shown and the trial court made no finding that Grieger filed her petition in bad faith. Further, Gowan has admitted that she "failed many of her duties as Personal Representative," prompting Grieger to file the petition to remove Gowan as the personal representative. Accordingly, we deny Gowan's request for attorneys' fees as well. Because Gowan is the prevailing party, however, we award her costs upon compliance with ARCAP 21.

CONCLUSION

¶28 For the aforementioned reasons, the trial court's rulings are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
DANIEL A. BARKER, Judge