

Introduction

On April 18, 2002, one day after her 87th birthday, Harriet Cole (“Mrs. Cole”) executed a Last Will and Testament that left her entire estate to her son Richard Cole (“Richard”) except for 18 shares of General Motors Corporation (“GM”) stock which were to be divided equally between her remaining children, Ernest Cole (“Ernest”) and Lucille Whitlock (“Lucille”). After Mrs. Cole’s death on April 4, 2008, Lucille contested the will, alleging lack of testamentary capacity and undue influence. In her petition, Lucille also sought to invalidate certain beneficiary designations on life insurance policies allegedly made while Mrs. Cole was incompetent. A two-day trial took place in June and July 2009. This is my draft report in which I conclude that Lucille has failed to demonstrate by the preponderance of the evidence that Mrs. Cole lacked testamentary capacity or was unduly influenced by Richard at the time she executed her will.

Factual Background

Mrs. Cole served in the Army Air Corps during World War II and, after the war, she was able to purchase some land on Odessa Street in Minquadale, Delaware. Mrs. Cole built a house on that land with the help of her father and her husband. The Coles subsequently had three children: Ernest, Richard and Lucille. Mrs. Cole became quite depressed when Mr.

Cole died in 1994, but she remained in her home despite her inability to drive. Her daughter Lucille, who was married and had two sons, took her mother shopping and to medical appointments, and had Mrs. Cole to her house for holidays. Ernest occasionally dropped off groceries at his mother's house. Richard, who was also married and had three children, had a drinking problem for which he underwent treatments during 2000 and 2001. While Richard was in four-month recovery program in Maryland, his mother asked Richard to come home and live with her. Richard moved into his mother's home in the spring of 2001. Mrs. Cole was then 86 years old, and was taking medications for osteoporosis, post-mastectomy breast cancer, and degenerative arthritis pain. According to Richard, Mrs. Cole was able to handle her own bills, but he helped her with the yard work.

On May 23, 2001, Mrs. Cole was examined at the Osteoporosis Center of Delaware. Clinical notes indicate that Mrs. Cole was living with an alcoholic son, which was causing stress, and that she did not want him around. On October 9, 2001, Mrs. Cole was seen by her family physician, Dr. Gregory Papa, for a regular check-up. Dr. Papa's notes on this date indicate that Mrs. Cole's memory loss was getting worse. He conducted a mini-mental exam, and concluded that she had a significant impairment of recent memory capacity. Dr. Papa's notes on this date include a diagnosis of

senile dementia, and an order to start a drug that is used for dementia. On October 21, 2001, Mrs. Cole fell and hit her head. She suffered a mild concussion. After Mrs. Cole's fall, Richard quit work to stay home with his mother because he was afraid that she might fall again. Richard's wife, Patricia, who had been living with her own mother since Richard had sought treatment for his alcoholism, moved into Mrs. Cole's home some time in early 2002.

On March 15, 2002, Mrs. Cole met with Anthony Longo, Esquire, about changing her will. Mrs. Cole had a previous will dated January 8, 1997, which left her entire estate to her three children in equal shares, and named Lucille as her personal representative. According to contemporaneous notes written by Mr. Longo, he met on March 15 with Mrs. Cole, Richard, and Patricia. Mrs. Cole informed him that she wanted to leave her house and its contents to Richard and Patricia. She also wanted to appoint Richard as her executor, and Patricia as contingent executor. When the attorney asked Richard and Patricia to leave and met privately with Mrs. Cole, she told him that if Richard predeceased her, she did not want the house and its contents to go to Patricia. Instead, she wanted the house to go to Lucille and Ernest. In addition, she wanted a blood relative to be the executor, but not her daughter Lucille. That left her son Ernest as

contingent executor in the event Richard was unable to serve. Mrs. Cole told Mr. Longo that she was aware that Richard was getting a disproportionate amount of her estate, but she did not want the house to be sold because it had been built by a family member after the war. Mrs. Cole thought that Lucille or Ernest would be inclined to sell the house immediately after her death.

Mrs. Cole could not tell Mr. Longo how many shares of stock she owned, or the approximate value of her house, or the beneficiaries of any life insurance policies she had. He asked for that information to be brought to their next meeting on March 22, 2002, but on March 22, Mrs. Cole was unable to provide Mr. Longo with the information he had requested. Instead, he was told that Ernest and Lucille had drained approximately \$30,000 of Mrs. Cole's funds. The attorney thought it prudent not to execute the will without the testatrix knowing the full extent of her estate, so he wrote a list for Mrs. Cole of the financial information that he needed, and a third meeting was scheduled.

On March 31, 2002, Lucille invited her mother to her home for Easter, but her mother refused the invitation. It was the first Easter that Mrs. Cole had not gone to Lucille's house since the death of Mrs. Cole's husband. Lucille fixed a plate of food and took it to her mother's house. Lucille at

first could not enter the house because Richard had put an extra lock on the door. After that occasion, Lucille found it difficult to visit her mother's house if Patricia was not present because she had to bang on doors and windows in order to wake her brother. On April 8, 2002, Lucille called her mother and asked if she wanted to go for a ride. Mrs. Cole said, "Not today." On April 10, 2002, Lucille and her husband took Mrs. Cole's tax returns to Mrs. Cole to be signed. According to Lucille, Richard said that Mrs. Cole did not need to pay taxes, so Lucille left the forms at her mother's house. On April 17, 2002, Lucille called her mother to wish her a happy birthday, but someone picked up the telephone, and put it back down.

On April 18, 2002, Mrs. Cole returned to the lawyer with the information he had requested. Mrs. Cole had about \$5000 in her checking and savings accounts, a life insurance policy in the amount of \$5000 that listed Richard as the primary beneficiary, and 18 shares of GM stock. According to the attorney's notes of that meeting, Mrs. Cole told him that a family member had built the house, and she did not want it sold. She was leaving the house to Richard because she did not think he would sell it. She also listed Ernest as contingent beneficiary because she felt that he would be more inclined to keep the house than Lucille. She said that Lucille had tried to sell the house already, so she did not want Lucille to get the house. After

the will was executed, Mrs. Cole executed a durable power of attorney naming Richard as her attorney-in-fact. Mrs. Cole told Mr. Longo that she did not want anyone but Richard making decisions about what would happen to her if she became incompetent.

Richard and Patricia continued to live with and take care of Mrs. Whitlock for the rest of her life. By the end of 2004, Mrs. Cole was unable to walk, and had to be lifted out of her bed and into her wheelchair. Hospital records from 2005 indicate that she was then apparently suffering from severe dementia. By 2006, Mrs. Cole had to be bathed and toileted by her son and daughter-in-law. Mrs. Cole resided in her own home until her death on April 4, 2008, shortly before her 93rd birthday.

Analysis

The law presumes that a duly executed will is valid and that the testatrix had the testamentary capacity to execute it. *In re Szewczyk*, 2001 WL 456448, at *3 (Del. Ch. April 26, 2001). Therefore, the person challenging the validity of such a will has the burden of showing by a preponderance of the evidence that the testatrix either lacked the requisite testamentary capacity or was unduly influenced by another at the time the will was executed. *In re Melson*, 711 A.2d 783, 786 (Del. 1998) (citing

Matter of Langmeier, 466 A.2d 386, 389 (Del. Ch. 1983)); *In re West*, 522 A.2d 1256, 1263 (Del. 1987).

Lucille first argues that Mrs. Cole lacked sufficient testamentary capacity to execute a will on April 18, 2002 because she was suffering from Alzheimer's type dementia. The level of competence a testatrix needs in order to possess testamentary capacity is quite modest. *In re Estate of Justison*, 2005 WL 217035, at *7 (Del. Ch. Jan. 21, 2005). A testatrix "must be capable of exercising thought, reflection, and judgment and possess sufficient memory and understanding to comprehend the nature of the will and how she is disposing of her property." *Sloan v. Segal*, 2009 WL 1204494 (Del. Ch. April 24, 2009) (citing *West*, 522 A.2d at 1263). Put more simply, a testatrix must know that "she is disposing of her estate by will, and to whom." *West*, 522 A.2d at 1263.

Lucille based her case on Mrs. Cole's medical records and expert medical testimony from Mrs. Cole's board-certified family physician. Dr. Papa testified that he had treated Mrs. Cole since 1985, and by the time her family brought Mrs. Cole to see him on October 9, 2001, complaining of increasing memory loss, he was easily able to make a presumptive diagnosis of Alzheimer's disease. During his examination, Dr. Papa performed an informal cognitive assessment of Mrs. Cole and, based upon her memory

and responses to his questions, he concluded that she was definitely in the early stages of the disease. He started her on a drug designed to slow down the progression of the disease and to make the brain function better. On November 13, 2001, Dr. Papa's notes also described some inappropriate behavior by Mrs. Cole, i.e., laughing for no apparent reason, and a CAT scan taken after her fall that showed some atrophy of her brain matter. According to Dr. Papa, Mrs. Cole's dementia was mild in late 2001, but he did not know whether she was competent when she executed her will in April 2002. Dr. Papa testified that Mrs. Cole's lawyer should have been informed of her medical history, and that the lawyer should have determined her competency before allowing Mrs. Cole to sign a will.

Richard presented his own medical expert, Dr. Stephen Mechanick, a board-certified psychiatrist. Based upon his review of Mrs. Cole's medical records, Dr. Mechanick concluded that there was no evidence that Mrs. Cole suffered from memory impairment or dementia during the relevant period of time. Hospital records from November 2001 indicated that Mrs. Cole was oriented times three, that is, she knew her name, the date, and where she was, even after falling and bumping her head. Dr. Mechanick noted that some of the drugs Mrs. Cole was taking at that time had the potential to cause confusion or cognitive difficulties in an elderly person. Even mild

dementia, according to Dr. Mechanick, did not mean that a person was incapable of understanding and signing legal documents. Dr. Mechanick also reviewed the attorney's detailed notes of his three meetings with Mrs. Cole. At trial, Dr. Mechanick opined to a reasonable medical certainty that Mrs. Cole had adequate testamentary capacity when she executed her will on April 18, 2002.

Mr. Longo testified at trial. Although Mr. Longo was never informed that Mrs. Cole had been diagnosed as having mild dementia or Alzheimer's disease by her family physician, she appeared fine on the three occasions that they met. Before becoming an attorney, Mr. Longo had dealt with people with dementia when he worked at a residential treatment center for mentally ill adults. He testified that nothing presented itself that would have prompted him to look into Mrs. Cole's medical history. He had spoken with her at length during their three meetings. Mrs. Cole had talked about Lucille, describing how Lucille had taken money out of a joint account they owned without Mrs. Cole's consent. Mrs. Cole was aware that she was disinheriting her daughter. She was also very clear about blood relatives inheriting her property. She wanted the house to remain in the family because it had been built by a relative, but she felt that Lucille would be likely to sell the house. She informed the attorney that she wanted Lucille

and Ernest to receive something, but not a lot. When advised that they might receive nothing after the funeral expenses were paid because her residuary estate was so small, Mrs. Cole told her attorney that Richard should pay the funeral expenses with his own money. At their third meeting, after Mrs. Cole had provided the requested financial information, Mr. Longo carefully reviewed every aspect of the will with Mrs. Cole before she signed it. According to Mr. Longo, Mrs. Cole was competent. She knew her natural heirs. She knew what her assets were, what she was doing, and what the consequences would be, i.e., that Richard was to receive the bulk of her small estate, when she signed the will.

As between the two medical experts, I give more weight to the testimony of Dr. Papa, who had personally known and treated Mrs. Cole for many years, than to the testimony of Dr. Mechanick, who had only reviewed documents concerning Mrs. Cole. Nevertheless, Dr. Papa could offer no opinion about Mrs. Cole's capacity on the date she executed her will. While Dr. Papa questioned her competency in light of his opinion that she was suffering from mild dementia, he nonetheless testified that individuals with mild to moderate dementia can still make some decisions. On the other hand, Mr. Longo, who met with Mrs. Cole on three different occasions during the process of the drafting and execution of her will, had no doubt

that Mrs. Cole knew exactly what she was doing at the time she executed her will. Although Mr. Longo is not a board-certified physician or psychiatrist, I give his opinion as great deal of weight. I conclude, therefore, that Lucille has not satisfied her burden of demonstrating by the preponderance of evidence that Mrs. Cole lacked sufficient testamentary capacity on the date that she executed her will.

In light of that conclusion, I must turn to Lucille's second argument that Mrs. Cole's will was the product of undue influence by Richard. Undue influence by a beneficiary over a testatrix "must be such as to subjugate [her] mind to the will of another, to overcome [her] free agency and independent volition, and to compel [her] to make a will that speaks to the mind of another and not [her] own." *West*, 522 A.2d at 1263 (quoting *Langmeier*, 466 A.2d at 403)). The essential elements of undue influence are: (1) a susceptible testatrix; (2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual exertion of such influence; and (5) a result demonstrating its effect. *In re Estate of Konopka*, 1988 WL 62915 (Del. Ch. June 23, 1988) (citing *Nardo v. Nardo*, 209 A.2d 905, 912-13 (Del. 1965); *Langmeier*, 466 A.2d at 403).

Lucille testified that from the time Richard moved into their mother's house, her close and loving relationship with her mother changed. Lucille

kept a diary starting around 2001-2002 that documented her frustration at being unable to see or speak with her mother. Not only did Richard install an extra lock on the door, so that Lucille could not use her key to enter her mother's house, Lucille's telephone calls were not always answered, or if the telephone was picked up, her call was immediately disconnected. Although Lucille testified that she did not have any problems visiting her mother when Patricia was home, Lucille was reluctant to visit her mother's house because she was afraid of Richard, whom she accused of intimidating her whenever she tried to visit her mother. Two of Lucille's friends testified that she had asked them to accompany her on visits to Mrs. Cole's house because of Lucille's expressed fear of her brother. Lucille testified that she believed her brother Richard had influenced their mother because he had influence over herself. Furthermore, Lucille testified that about a year or two after Mrs. Cole had executed the will and power of attorney, Richard told her: "he got the will changed, that I wasn't getting nothing and he was taking me down."

Richard testified that his mother had asked him to move in with her because she no longer wanted to live alone and she wanted someone to take care of her. She also had told him that Lucille and Ernest were taking advantage of her by taking her money, her furniture, and items out of her yard. According to Richard, his mother's main complaint was her

osteoporosis. Her bones ached all the time. Richard testified that it was not until 2003 or 2005 that Dr. Papa said his mother may have had a “touch of Alzheimer’s.”

Richard denied that he ever discouraged Lucille from coming to the house. After he moved in, Lucille made unannounced visits to the house about once a month, whereas Ernest came over rarely and usually at night. According to Richard, Ernest visited fewer than five times from 2001 to 2008. Richard denied that he had ever hung up the phone when it rang. He denied threatening Lucille although he admitted having called the police when his brother came to the house late at night.

Richard also denied ever persuading or influencing Mrs. Cole about her will. He knew that she was leaving the house to him. His mother had told him that she did not want the house sold, and he intended to live there. According to Richard, in April 2002, Mrs. Cole decided that she wanted to change her will, and she selected the law firm because she was familiar with the Social Security building in which it was located. Richard denied being present at the first meeting with the lawyer, but recalled being present at the second and third meetings. He denied giving the lawyer any information during those meetings.

Patricia testified that Mrs. Cole had told her that she was being pressured by Lucille to live with her. Mrs. Cole loved her daughter, but she wanted to stay in her own home. Patricia described the mother-daughter relationship as “needy” in that Lucille always wanted something from her mother for herself or her children. According to Patricia, in April 2002, Mrs. Cole said that if Richard would “stand by” her to the end, she would leave the house to him. After Patricia moved in with Richard and Mrs. Cole, Lucille and Ernest never offered to help with Mrs. Cole.

I will assume without deciding that the first four elements of undue influence have been established by the preponderance of the evidence. That is, I will assume that Mrs. Cole’s physical condition, coupled with her memory impairment made her susceptible to undue influence. Second, I will assume that Mrs. Cole’s relative isolation in her home, with Richard and his wife having constant access to her establishes the opportunity to exert undue influence. Third, I will assume that Richard was disposed to influence his mother for an improper purpose. Not only did the April 18, 2002 will eliminate Lucille and Ernest as equal beneficiaries of Mrs. Cole’s estate in favor of Richard, there was also evidence that Richard had told Lucille he was “taking [her] down”, an expression I interpret as meaning that he wanted to punish or harm her. Fourth, the purported admission by Richard

that he “got the will changed” would be direct evidence of the actual exertion of influence if Lucille’s testimony is to be believed. However, the fifth element is pivotal here. The lawyer’s testimony and notes regarding his meetings with Mrs. Cole demonstrate that Mrs. Cole’s will was not the product of undue influence.

The will that was executed on April 18 reflected the intentions of Mrs. Cole, and no other. The lawyer’s notes and testimony indicate that during their first meeting, Mrs. Cole initially told the attorney that she wanted the house and its contents to go to her son and daughter-in-law, and she wanted to appoint her son as executor and her daughter-in-law as contingent executor of her estate. However, once Mrs. Cole had the opportunity to speak privately with the attorney, out of the presence of Richard and Patricia, she outlined a different testamentary scheme. Instead of Patricia being named as contingent executor, Mrs. Cole expressed her desire for a blood relative, i.e., Ernest, as contingent executor of her estate. And, if Richard predeceased her, Mrs. Cole told the attorney that she did not want the house and its contents to go to Patricia, but rather to Lucille and Ernest. At a subsequent meeting, Mrs. Cole changed her mind again and wanted the house and its contents to go to Ernest in the event Richard predeceased her because she thought Ernest would be less likely to sell the house than

Lucille. This evidence demonstrates that, whatever influence Richard may have exerted to change his mother's will, it was not undue influence such as to overcome Mrs. Cole's free agency and independent volition. Therefore, Lucille's contention that Mrs. Cole's will was the product of undue influence must fail.

Apart from undue influence, several witnesses, including Lucille and Richard, testified that Mrs. Cole's home was very important to her. This was property she had purchased with her own money and titled in her sole name. The house itself had been built by her father and husband. She wanted the property to remain in the family. Mrs. Cole stayed in her home after her husband's death despite her infirmities, and resisted Lucille's efforts to persuade her to move into Lucille's own home. Although Lucille could not leave her own family to care for her mother, Richard was in a position to do so because he had left his rented residence to enter an extended recovery program. He quit his job after his mother's fall, his wife had previously worked as private duty nurse, and thus both Richard and his wife were able to care for Mrs. Cole as her physical and mental conditions worsened. This evidence provides a possible explanation for Mrs. Cole's disinheriting Lucille and Ernest to benefit Richard who, with his wife, cared for Mrs. Cole until she passed away.

The last issue concerns Lucille's request to void certain beneficiary designations on life insurance policies. There was little evidence presented at trial concerning Mrs. Cole's life insurance policies. Mr. Longo testified, and his notes reflect, that on April 18, 2002, Mrs. Cole had a life insurance policy with a cash value of approximately \$5000, which named Richard as the primary beneficiary. Richard testified that he used the life insurance proceeds to pay his mother's funeral expenses. Lucille, however, presented no evidence that showed when Mrs. Cole had designated Richard as the primary beneficiary of her life insurance policy. Without a specific time frame, I cannot evaluate Mrs. Cole's mental competency when she made that designation. This claim must therefore be dismissed.

Conclusion

Lucille has failed to demonstrate by the preponderance of evidence that her mother's will was executed at a time when Mrs. Cole lacked sufficient testamentary capacity or was the product of undue influence. Lucille has failed to demonstrate that the beneficiary designation on Mrs. Cole's life insurance policy was made at a time when Mrs. Cole was incompetent. Therefore, Lucille's request to have the Last Will and Testament of Mrs. Cole declared invalid must be denied.