IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 08, 2015 Session

IN RE ESTATE OF LEONARD MALUGIN

Appeal from the Chancery Court for Hickman County
No. 13CV5064 Michael Binkley, Judge

No. M2014-01535-COA-R3-CV – Filed May 29, 2015

This is a will contest case. The Decedent executed a will in 2006 and a codicil to the will in 2012. The will specifically disinherited the Appellant, and the codicil removed one of the Decedent's children as co-executor of the estate. Appellant contested the will, arguing both that the Decedent lacked the testamentary capacity to execute either the will or the codicil and that the will was executed under undue influence. The trial court found that the Decedent possessed the testamentary capacity necessary to execute both the will and the codicil and that the Decedent did not execute the will or codicil under undue influence. On appeal, Appellant only challenges the trial court's findings regarding the Decedent's testamentary capacity. Because the evidence does not preponderate against the trial court's findings, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which ARNOLD B. GOLDIN, J. and BRANDON O. GIBSON, J., joined.

David H. King and Jacob A. Vanzin, Franklin, Tennessee, for the appellant, Wanda Garland Bradley.

William E. Porter, Nashville, Tennessee, for the appellee, Billy Joe Malugin.

OPINION

I. Background

In 1995, Leonard Malugin ("the Decedent") and his wife, Mildred Irene Malugin (together, "the Malugins"), executed reciprocal wills. The Malugins had five children: Carolyn Ann Potts, Harold Wayne Malugin, Lloyd Allen Malugin, Wanda Bradley ("Appellant"), and Billy Joe Malugin ("Appellee"). The Malugins' respective wills provided that four-fifths of their estate would be divided equally among Carolyn Potts, Harold Malugin, Lloyd Malugin, and Billy Joe Malugin, and one fifth of the estate was to be placed in trust for Wanda Bradley. Because the Malugins did not approve of Mrs. Bradley's husband, their wills required that Mrs. Bradley divorce, separate from, or otherwise leave her husband before she could receive the assets in the trust.

Sometime in 2004, Mrs. Malugin's mental condition began to deteriorate, and Mrs. Potts was appointed as her conservator. Mrs. Potts also assumed the duty of writing checks for her father. Prior to her incapacity, Mrs. Malugin had written all the checks on the Malugins' behalf because Mr. Malugin was illiterate. Mrs. Potts testified that Mr. Malugin could read and write his "kids" names, and some of his friends' names, and he could recognize those names in writing. Mr. Malugin could also read numbers, but he could not read any words he did not recognize by sight.

Although Mr. Malugin did not write checks, he continued to disburse funds with Mrs. Potts's help. On August 15, 2006, Mr. Malugin disbursed $10,000 to Billy Joe Malugin ("Appellee"). On August 17, 2006, Mr. Malugin disbursed the same amount to Lloyd Malugin and Harold Malugin, and he gave $10,100 to Carolyn Ann Potts. Mrs. Bradley, however, did not receive a disbursement from Mr. Malugin at that time, ostensibly because she still refused to leave her husband.

On August 22, 2006, Mr. Malugin executed a new Last Will and Testament, specifically revoking any and all of his previous wills. This will was prepared by Donald W. Schwendimann, an attorney practicing in Hohenwald, Tennessee. The will bequeathed $1,000 to Mrs. Bradley and directed that the remainder of the Decedent's estate be divided equally among his other children. Despite the fact that Mrs. Malugin was still alive at the time, the will makes no mention of her. Mrs. Malugin passed away on March 10, 2009.

On August 21, 2012, Mr. Malugin executed a codicil to his will, amending his will to state that the Appellee would be the sole executor of his estate and naming Harold Wayne Malugin as alternate executor. The codicil also stated that, other than removing Mrs. Potts as co-executor of the estate, "I [Mr. Malugin] ratify and confirm all of the provisions of my said will dated August 22, 2006." The codicil was prepared by Melanie Cagle, an attorney practicing in Hickman County. Also, on August 21, 2012, Mr.

Malugin revoked Mrs. Potts's power of attorney.

On September 21, 2012, Billy Joe Malugin filed a "Petition to Appoint Conservator," alleging that the Decedent's "health has diminished to the point…where he can no longer take care of his business affairs or his own personal needs." Attached to Appellee's petition for conservatorship was a letter dated September 4, 2012 written by Dr. Hrishi M. Kanth, stating that "[The Decedent] is deteriorating with his mentation. He is in his late 80s and…would not be able to make medical or financial decisions." Another letter accompanying the petition, also dated September 4, 2012, written by James R. Kirkpatrick, M.D., stated that Mr. Malugin had a "history of diabetes mellitus, Alzheimer's, anxiety, hypertension, atrial fibrillation with previous embolic event to his left leg, osteoarthritis, depression and hearing loss." This letter also stated that the Decedent "really needs 24 hour a day caregiver [sic]," that the Decedent "really cannot take care of himself," and that "with [the Decedent's] dementia, he seems not able to follow instructions given orally as well."

On October 11, 2012, Mrs. Bradley and Mrs. Potts filed a petition to be named co-conservators over the Decedent. This petition alleged that Mr. Malugin had "Alzheimer's Dementia," that he could not "prepare food for himself," that he suffered from "memory loss and forgetfulness," and that "he is confused and many times does not make sense." The petition included a report by Dr. Hrishi Kanth, dated September 24, 2012, recommending that a conservator be appointed for Mr. Malugin because of Mr. Malugin's "advanced dementia" which "precludes good mental decisions."

Before the issue of his conservatorship was resolved, Mr. Malugin died on January 29, 2013. On February 11, 2013, Billy Joe Malugin submitted the Decedent's 2006 will and 2012 codicil for probate. Mrs. Bradley filed a complaint to contest the will on June 20, 2013, alleging that the will was executed under undue influence and that the Decedent lacked the requisite testamentary capacity to execute either the will or the codicil. On July 30, 2013, the Appellee filed a "Motion to Dismiss or in the Alternative for a More Definite Statement." The parties subsequently filed several amended petitions and motions, which are immaterial to this appeal. The trial court heard the will contest on April 30, 2014. In an order dated July 8, 2014, the trial court found that Mr. Malugin had the testamentary capacity to execute both the 2006 will and the 2012 codicil, that neither were made under undue influence, and that Mr. Malugin expressly disinherited Wanda Bradley by bequeathing her only $1,000 from the estate. The appeal was timely filed.

II. Issues

We restate the issues on this appeal as follows:

1. Whether the trial court erred in finding that the Decedent possessed the testamentary capacity to execute his will dated August 22, 2006.

2. Whether the trial court erred in finding that the Decedent possessed the testamentary capacity to execute the codicil dated August 21, 2012.

III. Standard of Review

This will contest was tried before the trial court without a jury. When a case is tried without a jury, we review the findings of fact made by the trial court *de novo*, with a presumption of correctness unless the preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. 2008). We employ these standards in a will contest tried without a jury. *See* ***In re Estate of Price***, 273 S.W.3d 113, 135 (Tenn. Ct. App. 2008).

IV. Analysis

A. Will

Appellant challenges the trial court's finding that, on August 22, 2006, the Decedent possessed the requisite testamentary capacity to execute his will. Specifically, Appellant claims that the evidence presented at trial demonstrates that the Decedent lacked the testamentary capacity and the trial court's determination was incorrect in light of that evidence. Appellant argues that the medical reports regarding the Decedent's mental condition demonstrate that he could not understand the contents of the will, or appreciate its effects, at the time of execution.

"The law requires that the testator's mind, at the time the will is executed, must be sufficiently sound to enable him or her to know and understand the force and consequence of the act of making the will." ***In re Estate of Elam***, 738 S.W.2d 169, 171-72 (Tenn. 1987). "The testator must have an intelligent consciousness of the nature and effect of the act, a knowledge of the property possessed and an understanding of the disposition to be made." ***Id.*** at 172.

"A will may be challenged on the theory that at the time of the will's execution the testator lacked sufficient mental capacity." ***In re Estate of Smallman***, 398 S.W.3d 134,

159 (Tenn. 2013). "It is…the time of the will's execution that is the proper point of focus in assessing testamentary capacity." ***Id.*** "While proof of a testator's mental capacity 'before and after making the will, if not too remote in point of time may be received as bearing upon that question [of testamentary capacity,]' 'the mental condition of the testator at the very time of executing the will is the only point of inquiry.'" ***Id.*** (quoting ***In re Estate of Elam***, 738 S.W.2d at 172). "While evidence regarding factors such as…failing mind and memory is admissible on the issue of testamentary capacity, it is not conclusive and the testator is not thereby rendered incompetent if her mind is sufficiently sound to enable her to know and understand what she is doing." ***In re Estate of Elam***, 738 S.W.2d at 172.

Appellant argues that the Decedent's mental state had deteriorated to the point where he could not have had the capacity to execute the will. Appellant points to the fact that the will does not mention the Decedent's wife, who was living at the time the will was executed, as evidence that the Decedent lacked the capacity to execute a will. Appellant also argues that the Decedent had already been diagnosed with Alzheimer's by the time he executed the will, and, therefore, could not have had the requisite testamentary capacity to execute the will.

While the Appellant focuses on the Decedent's mental health surrounding the time of execution of the will, our inquiry focuses on the day the will was executed. *See* ***In re Estate of Smallman***, 398 S.W.3d at 159. The record contains little evidence regarding the day that Mr. Malugin executed his will in 2006. The only testimony regarding that day came from Mr. Larry Joe Hinson, Jr., who worked as an associate attorney in Donald W. Schwendimann's office at the time the will was executed. Although Mr. Hinson witnessed the 2006 will, he testified that he did not recollect the day the will was executed. Mr. Hinson testified that he would have remembered if there appeared to be a problem regarding the Decedent's understanding of the will. Mr. Hinson could not recall anything that would indicate that Mr. Malugin did not have the capacity to execute the will. Mr. Hinson also testified that the will was executed properly.

Even if the evidence in the record demonstrated that the Decedent's mental health may have begun to deteriorate at the time the will was executed, the only testimony regarding the particular day the will was executed does not demonstrate that the Decedent lacked the capacity to execute the will. Because the evidence does not preponderate against the trial court's finding, we affirm the trial court's judgment that the Decedent had the testamentary capacity to execute his 2006 will.

B. Codicil

Appellant challenges the trial court's finding that the Decedent had the capacity to execute the codicil on the ground that the evidence shows his mental condition had deteriorated to the point where he could not have had the requisite mental capacity to execute the codicil. This is the same ground on which she challenges the 2006 will. We resolve this issue in similar fashion to the issue of the execution of the 2006 will. Although the medical opinions regarding the Decedent's declining mental condition were issued much closer in time to the execution of the codicil than the will, the record contains testimony regarding the day the codicil was executed. As stated above, our inquiry must focus on the day the codicil was executed. ***In re Estate of Smallman***, 398 S.W.3d at 159.

Ms. Melanie Cagle, the attorney who drafted the codicil on the Decedent's behalf, testified that she spent an hour to an hour and a half with the Decedent on the day he executed the codicil. She also testified that, although the Appellee accompanied the Decedent to her office, the Appellee was not involved in the discussions regarding the codicil. When questioned about the Decedent's mental state on the day the codicil was executed, Ms. Cagle replied "So to me on that August…21st day of 2012, he was fine." When questioned about her interaction with the Decedent, Ms. Cagle responded that she was "comfortable" with the idea that Mr. Malugin understood the contents of his 2006 will, and she "hit the high points" of the 2006 will with the Decedent before executing the codicil. "The opinions of lay witnesses are admissible on soundness of mind if they are based on details of conversations, appearances, conduct or other particular facts from which the state of mind may be judged." ***In re Estate of Elam***, 738 S.W.2d at 172. Ms. Cagle testified that she was satisfied that Mr. Malugin understood what he was doing and that he was acting of his own volition. There is no evidence in the record to contradict Ms. Cagle's testimony regarding the Decedent's mental condition on the day the codicil was executed. Accordingly, the evidence does not preponderate against the trial court's findings, and we therefore affirm the judgment of the trial court's finding that the Decedent possessed the requisite testamentary capacity to execute the 2012 codicil.

V. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. The case is remanded for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are taxed to the Appellant, Wanda Garland Bradley, and her surety, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE