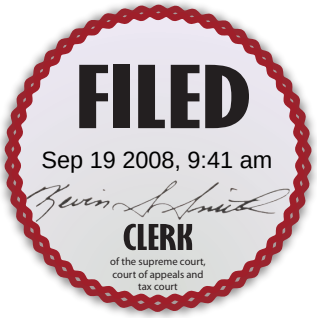

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IN THE
COURT OF APPEALS OF INDIANA

KIMBERLY A. HYDER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 53A01-0712-CV-556
	)	
LOIS A. HEMPFLING, as Personal Representative of the Estate of Suzanne Menaugh and as Trustee of a Testamentary Trust f/b/o Matthew James Hyder, and CATHERINE ANN SOLTYS,	)	
	)	
Appellees.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable David L. Welch, Judge
Cause No. 53C07-0508-PL-1557

September 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Kimberly Hyder ("Hyder") appeals a grant of summary judgment in favor of Appellees-Defendants Lois Hempfling ("Hempfling"), as the personal representative of the Estate of Suzanne Menaugh ("Menaugh"), and Catherine Soltys ("Soltys") (collectively, "the Estate"), upon Hyder's complaint to contest Menaugh's will. We affirm the grant of summary judgment and reverse the award of attorney's fees.

Issues

Hyder presents two issues for review:

I. Whether the Estate is entitled to summary judgment; and

II. Whether the Estate was properly awarded attorney's fees.

Facts and Procedural History

Hyder was the only child born to Suzanne and Larry Menaugh ("Larry"). Larry died in 2000. During 2002, Hyder and Menaugh argued about the adequacy of Menaugh's care of Larry during his last illnesses. Hyder and Menaugh did not speak again, although Menaugh spoke at least once via telephone with Hyder's son Matthew.

Menaugh executed a Last Will and Testament dated December 18, 2002 ("the Will"). Menaugh also executed a Durable Power of Attorney appointing her sister, Hempfling, to conduct Menaugh's affairs in the event of her disability or incapacitation as determined by her regular physician.

Menaugh died on April 28, 2005. On May 9, 2005, the Will was admitted to probate. The Will provided that Hyder was to receive $10,000.00 and Matthew was to benefit from a $10,000.00 educational trust. The remainder of Menaugh's $400,000.00 probate estate was

bequeathed to Hempfling's daughter, Soltys.[1] Hempfling was appointed to be the personal representative of the estate.

On August 3, 2005, Hyder filed her complaint to contest the Will. Therein, Hyder alleged that Menaugh was of unsound mind and that the Will was the product of undue influence.

The parties filed cross-motions for summary judgment and various motions regarding the submission of summary judgment materials. The Estate petitioned for attorney's fees, alleging that Hyder had pursued a frivolous claim. On March 10, 2006, the trial court conducted a hearing upon the pending motions and the matter was taken under advisement. On August 1, 2007, the trial court issued an order denying Hyder's motion to strike affidavits and her motion for summary judgment, granting the Estate's motion for summary judgment, and ordering Hyder to pay attorney's fees of $500.00.

Hyder filed a motion to correct error, which was deemed denied. This appeal ensued.

Discussion and Decision

A. Summary Judgment Standard of Review

Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Relying upon specifically designated evidence, the moving party bears the burden of showing prima facie that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Estate of Verdi ex

[1] Hyder received property outside the probate estate consisting of a bank account and an investment account in the aggregate amount of $120,000.00.

rel. Verdi v. Toland, 733 N.E.2d 25, 28 (Ind. Ct. App. 2000), trans. denied. If the moving party meets these requirements, the burden shifts to the non-movant to set forth specifically designated facts showing that there is a genuine issue for trial. Id.

When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). We consider only those facts that the parties designated to the trial court. Id. The Court must accept as true those facts alleged by the non-moving party, construe the evidence in favor of the non-movant, and resolve all doubts against the moving party. Id.

A trial court's order on summary judgment is cloaked with a presumption of validity; the party appealing from a grant of summary judgment must bear the burden of persuading this Court that the decision was erroneous. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied. We may affirm the grant of summary judgment upon any basis argued by the parties and supported by the record. Payton v. Hadley, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004).

Although the appellant bears the burden of persuasion, we will assess the trial court's decision to ensure that the parties were not improperly denied their day in court. Indiana Health Ctrs, Inc. v. Cardinal Health Sys., Inc., 774 N.E.2d 992, 999 (Ind. Ct. App. 2002). A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. U-Haul Int'l, Inc. v. Nulls Mach. & Mfg. Shop, 736 N.E.2d 271, 274 (Ind. Ct. App. 2000), trans. denied. The fact that cross-motions are filed

does not alter our standard of review. KPMG, Peat Marwick, LLP v. Carmel Fin. Corp., Inc., 784 N.E.2d 1057, 1060 (Ind. Ct. App. 2003).

B. Will Contest Standard of Review

We presume that every person is of sound mind to execute a will until the contrary is shown. Gast v. Hall, 858 N.E.2d 154, 165 (Ind. Ct. App. 2006), trans. denied. In order to rebut the presumption, a party must show that the testator lacks mental capacity at the time of executing her will to know: (1) the extent and value of her property; (2) those who are the natural objects of her bounty; and (3) their deserts, with respect to their treatment of and conduct toward her. Id. Although it is the testator's soundness of mind at the time of executing the will that is controlling, evidence of the testator's mental condition prior to the will execution is admissible, as it relates to the testator's mental state when executing her will. Id.

Similarly, the exercise of undue influence is never presumed. Kronmiller v. Wangberg, 665 N.E.2d 624, 628 (Ind. Ct. App. 1996), trans. denied. The real question is the mental soundness of the testator, whether her mind was, in fact, unduly influenced in the making of a will. Id. However, in a will contest, where the plaintiff establishes that: (1) a relationship of confidence and trust existed between the testator and the defendant, and (2) the defendant benefited from the will, a presumption of undue influence arises and shifts the burden of going forward to the dominant party. Villanella v. Godbey, 632 N.E.2d 786, 790 (Ind. Ct. App. 1994).

Undue influence is "the exercise of sufficient control over the person, the validity of whose act is brought into question, to destroy his free agency and constrain him to do what

he would not have done if such control had not been exercised." In re Estate of Wade, 768 N.E.2d 957, 962 (Ind. Ct. App. 2002), trans. denied. Undue influence is an intangible thing that may be proven by circumstantial evidence. Gast, 858 N.E.2d at 166. It is appropriate to consider the character of the proponents and beneficiaries, motive to unduly influence the testator, and the facts and surroundings giving them an opportunity to exercise such influence. Id. Undue influence is essentially a question of fact that should rarely be disposed of via summary judgment. Id.

C. Analysis

Hyder contends that she presented sufficient evidence to create genuine issues of material fact as to whether Menaugh had sufficient testamentary capacity when she executed the Will and whether she acted under undue influence from Hempfling.

To show the absence of a genuine issue of material fact, the Estate designated the Will, which contained a self-proving clause in accordance with Indiana Code Section 29-1-5-3.1. The Estate's designated materials also included the affidavits of several of Menaugh's friends attesting to her mental acuity and business acumen.

Additionally, the Estate designated affidavits from Robert Delano Jones ("Jones"), Menaugh's attorney, and Carol Tolliver ("Tolliver"), a law firm employee who witnessed the Will. Jones averred that a partner in his law firm had represented Menaugh for many years before Jones was asked to draft the Will. According to Jones' affidavit, he met privately with Menaugh and she expressed her intention to change her will to leave the bulk of her estate to Soltys instead of her daughter and grandson. "[I]t is proper to consider any declaration made by the testator prior to making his will, in regard to the disposition he intends to make."

Farner v. Farner, 480 N.E.2d 251, 260 (Ind. Ct. App. 1985).

Jones further averred that Menaugh appeared to be capable of understanding the disposition of assets, unimpaired, and free from undue influence. Tolliver made the following averments. Menaugh executed her will in the presence of Jones, Tolliver, and C.T. Anderson, a law clerk. No other person was present. Menaugh did not appear to be impaired or under undue influence from another individual. Additionally, Jones and Tolliver each represented that they had confirmed, at the time of execution of the will, the following: Menaugh executed the instrument as her will; Menaugh signed in the presence of both witnesses; Menaugh executed the will as a free and voluntary act; each witness signed in the presence of each other and in the presence of Menaugh; Menaugh was of sound mind; and Menaugh was at least eighteen years old.

As such, the Estate demonstrated prima facie the absence of genuine issues of material fact as to Menaugh's testamentary capacity and the voluntariness of her actions. It was then incumbent upon Hyder to designate evidence that Menaugh was of unsound mind when she executed the Will or was then under undue influence. Hyder's designated summary judgment materials included her deposition testimony and an affidavit from Menaugh's friend and neighbor, Lewis Villanyi ("Villanyi").

Hyder testified in her deposition that Menaugh "was a very heavy drinker" and "was of unsound mind when she drank." (App. 133.) However, she designated no evidence that Menaugh was under the influence of alcohol when she executed the Will. Moreover, not all mental weakness or infirmity is enough to set aside a will. Farner, 480 N.E.2d at 259. "'Case upon case can be cited which go to the extent of deciding that unless the failure of

understanding be quite total, reaching to the testator's forgetfulness of his immediate family and property, he is not disqualified from making a will[.]'" Id. (quoting Bundy v. McKnight, 48 Ind. 502, 514 (1874)). Menaugh did not forget her immediate family members, but provided for them modestly as compared to the total estate.

Villanyi averred that Menaugh had a drinking problem and was forgetful. He further averred that Menaugh told him several times of Hempfling's suggestion that Menaugh leave her property to Soltys. Villanyi concluded that Hempfling engaged in behavior he would characterize as "brainwashing." (App. 127.) He offered no knowledge of the circumstances surrounding the actual execution of the Will. Villanyi's offer of hearsay and his speculation as to "brainwashing" were properly disregarded by the trial court, as the trial court in ruling on a motion for summary judgment may consider only properly designated evidence that would be admissible at trial. See Hays v. Harmon, 809 N.E.2d 460, 464 (Ind. Ct. App. 2004), trans. denied. Inadmissible hearsay statements cannot create a genuine issue of material fact. Id. at 466. Moreover, it is uncontroverted that Hempfling was not a beneficiary of the Will.

Nonetheless, Hyder argues that undue influence may be presumed from the relationship between Menaugh and Hempfling. She contends that Hempfling became Menaugh's attorney-in-fact when Menaugh executed the Durable Power of Attorney. She then extrapolates that Hempfling should be held to the ethical standards of attorneys or trustees and none of her affiliates can benefit from a financial transaction involving Menaugh's assets.

Hyder's reasoning has neither evidentiary support in the record nor a basis in the law.

First, the designated materials reveal that the Durable Power of Attorney was not effective when Menaugh executed the Will. Menaugh made a contemporaneous request to her attorney to prepare the Will and the Durable Power of Attorney. The Durable Power of Attorney was to become effective only if Menaugh should become disabled or incapacitated "as determined by [Menaugh's] regular physician." (App. 81.) Second, even if Hempfling had then acted as Menaugh's attorney-in-fact under the Durable Power of Attorney, Hyder lacks authority for the propositions that an attorney-in-fact is subject to the ethical rules that pertain to practicing members of the bar and that no "affiliate" of the attorney-in-fact may benefit from a transaction.

Hyder failed to produce evidence from which it could be reasonably inferred that Menaugh lacked testamentary capacity or was unduly influenced when she executed the Will. As there are no genuine issues of material fact and the Estate is entitled to judgment as a matter of law, the summary judgment order was not erroneous.

II. Attorney's Fees

The Estate sought attorney's fees from Hyder on the basis that Hyder brought a frivolous claim.[2] The trial court awarded the Estate $500.00.

Indiana adheres to the "American Rule" with respect to the payment of attorney fees, which requires each party to pay his or her own attorney fees absent an agreement between

[2] Indiana Code Section 34-52-1-1(b) provides:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
>
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
>
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or

the parties, statutory authority, or rule to the contrary. Courter v. Fugitt, 714 N.E.2d 1129, 1132 (Ind. Ct. App. 1999). Indiana Code Section 34-52-1-1(b) provides for the payment of attorney fees when a litigant has pursued a claim or defense that is frivolous, unreasonable or groundless.

We review de novo the trial court's legal conclusion that a party litigated in bad faith or pursued a frivolous, unreasonable or groundless claim or defense, and then review the trial court's decision to award attorney fees and the amount thereof under an abuse of discretion standard. Kahn v. Cundiff, 533 N.E.2d 164, 167 (Ind. Ct. App. 1989), aff'd, 543 N.E.2d 627 (Ind. 1989). A claim or defense is "frivolous" if it is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. A claim or defense is "unreasonable" if, based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim or defense was worthy of litigation. A claim or defense is "groundless" if no facts exist which support the legal claim presented by the losing party. Id. at 170-71.

A trial court is not required to find an improper motive to support an award of attorney fees; rather, an award may be based solely upon the lack of a good faith and rational argument in support of the claim. Id. at 171.

Here, Hyder presented some evidence in support of her claim, albeit evidence that would have been partially inadmissible had the case proceeded to trial. Nevertheless, Hyder

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(3) litigated the action in bad faith.

was not required to present her entire case at the summary judgment stage. Nor is an entitlement to summary judgment equivalent to an entitlement to attorney's fees. Generally, attorney's fees should be cautiously awarded because of the potential chilling effect upon the rights of litigants and parties to appeal. See Lakes and Rivers Transfer v. Rudolph Robinson Steel Co., 795 N.E.2d 1126, 1134 (Ind. Ct. App. 2003). The threat of attorney's fees should not be used to diminish the right of a descendant to bring a will contest unless the action is wholly without merit and pursued for the purpose of harassment. We therefore reverse the award of attorney's fees in this instance.

Affirmed in part and reversed in part.

RILEY, J., and BRADFORD, J., concur.