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IN THE
COURT OF APPEALS OF INDIANA

ALBERTA WELSH TURNER, as Personal Representative of the Estate of Gaylord Turner,	)	
Appellant-Defendant,	)	
vs.	)	No. 44A03-0703-CV-135
CASSANDRA E. WELLS,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAGRANGE CIRCUIT COURT
The Honorable Robert C. Probst, Senior Judge
Cause No. 44C01-0507-MI-17

December 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Alberta Welsh Turner (Alberta), the personal representative of the estate of Gaylord Turner (Turner), appeals the trial court's judgment ordering the estate's distribution according to the terms of Turner's will dated October 10, 2002, as opposed to Turner's will dated October 26, 2004.

We affirm.

ISSUES

Alberta presents four issues, which we consolidate and restate as the following three issues:

(1) Whether the trial court's designated findings of fact are in reality a summary of testimony that require a remand for findings of fact;

(2) Whether the trial court's findings of isolation and undue influence are supported by sufficient evidence; and

(3) Whether the complaint filed by Appellee-Plaintiff, Cassandra Wells (Cassandra), satisfied the requirements of Ind. Code § 29-1-7-17.

FACTS AND PROCEDURAL HISTORY

In 1993, Turner told his long-time friend, Eldon Ralston (Ralston), that he wanted to make a will. Ralston and his wife took Turner to their attorney, and a will was prepared. Turner had this will amended by codicil on January 14, 1998. Turner met Alberta sometime after entering into the 1993 will, and then married her on March 17, 2000.

In August of 2002, Turner had heart surgery. On October 10, 2002, he entered into another will, which revoked both the 1993 will and codicil. The October 10, 2002 Will

granted Alberta a life estate in his sixty-acre farm and the residual of his estate, with the remainder interest of the sixty-acre farm to his daughter, Cassandra. Additionally, the October 10, 2002 Will named Alberta as the executrix of Turner's estate.

Cassandra is Turner's only living child, and was born of his marriage to his first wife who died in 1983. Cassandra was divorced in 1986, and has lived in a mobile home on Turner's property since the 1990s. Cassandra visited Turner daily at the hospital after his heart surgery, but Alberta controlled contact between Cassandra and Turner after he returned home from his hospital stay. Cassandra would come to the door of Turner's house to see her father, but Alberta would refuse her visitation claiming Cassandra had been drinking. In July of 2004, Turner suffered a stroke. After his stroke, Alberta continued to control Turner's contact with Cassandra, to the point that she was limited to only brief contacts with her father when he was in his yard.

On September 24, 2004, Turner had his attorney prepare another will, which revoked the October 10, 2002 Will. Sometime prior to the creation of this will, Turner sold fifty acres of his sixty-acre farm to a conservancy. Additionally, Turner cashed in certificates of deposit. Thereafter, Alberta made two real estate purchases, buying land and a house trailer, and then a cottage on Wall Lake. Turner gave her over two hundred thousand dollars to make these purchases. The September 24, 2004 Will named Turner's youngest grandson, Cassandra's youngest son, as the residuary beneficiary of the remaining 10-acre farm, and gave everything else to Alberta.

A mother later, on October 26, 2004, Alberta and Turner met with an attorney and Turner executed yet another will, which "intentionally omitted" all persons not specifically

mentioned. (Appellant's App. p. 18). This will devised all of Turner's property, "both real and personal, both tangible and intangible, of whatever kind and wheresoever located" to Alberta. (Appellant's App. p. 18).

Turner died on March 13, 2005. On July 18, 2005, Cassandra filed her initial Complaint to Contest the Validity of Will, which challenged the validity of the October 26, 2004 Will. Cassandra's Complaint named only Alberta in her capacity as the personal representative of Turner's estate as a defendant. On July 22, 2005, Alberta filed a motion to dismiss, arguing that since she had not been named personally as a defendant, Cassandra's Complaint was legally insufficient.

On July 27, 2005, Cassandra responded to Alberta's motion to dismiss by filing an Amended Complaint naming Alberta in her capacity as the personal representative of Turner's estate, and in her personal capacity. Alberta filed another motion to dismiss, this time arguing that after a responsive pleading has been filed, a pleading cannot be amended without approval from the trial court, and Cassandra had not received such approval. On December 8, 2005, Alberta withdrew her objections to the Amended Complaint. Thereafter, Cassandra filed a Second Amended Complaint. Cassandra's Second Amended Complaint named only Alberta in her capacity as the personal representative of Turner's estate as a defendant. Alberta did not object to the Second Amended Complaint.

On December 6, 2006, a bench trial took place. The trial court entered judgment for Cassandra finding that Alberta had controlled Turner's contact with Cassandra and others for a period of two years, and this control resulted in undue influence over Turner. The trial court found that the October 10, 2002 Will is free from undue influence and accurately

represents the free act and deed of Turner, and ordered Turner's estate to be distributed according to its terms.

Alberta now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Summary of Evidence*

Alberta contends that purported findings by the trial court are not findings, but rather summaries of the testimony given during the bench trial, and therefore this matter should be remanded. Judge Sullivan, in his concurring opinion in *Sordelet v. Golsteyn*, 697 N.E.2d 943 (Ind. Ct. App. 1998), *trans. denied*, explained that, "[a] summary of testimony or a 'finding' that a particular witness testified to thus and so is not a finding that the content of the testimony is a fact. This deficiency, in itself, would support a remand for findings of fact." *Id*. at 948 (internal citations omitted).

We agree that many of the purported findings in the trial court's Order are really summaries of testimony. However, when reviewing the trial court's Order closely, we note there are substantial findings, which are not summaries of the witnesses' testimony. Most importantly, the trial court made the following specific findings, which support its judgment:

> 35. Alberta claims that Cassandra was eliminated from the last two wills because of Cassandra's drinking. However, the [trial court] finds that the evidence established that [Turner] drank beer with [Ralston] and Alberta. That he met Alberta in a bar. There was no evidence that Cassandra's use of alcohol in 2004 was any different than it was in 2002 when he included her in his will. There was no evidence that Cassandra's conduct as it related to the use of alcohol, was any different after October of 2002 and until September and October of 2004, or [Turner's] death on March 13, 2005. [Turner] had little contact with Cassandra after his stroke in July of 2004, because of Alberta.

36. The only evidence of [Turner's] reasons for having his wills prepared as he did in September and October 2004, came from Alberta, the sole beneficiary of the last will.

37. [Turner] excluded Cassandra, his only child from his will only after his stroke, when Cassandra described him as "different" at the time she saw him in the hospital following the stroke, and after Alberta had cut off contact between [Turner] and Cassandra.

38. The [trial court] finds that [Turner's] conduct in making a substantial change to his October 10, 2002, will by leaving out his only child, an event that occurred two months after his stroke, and then changing his will again thirty[-]two days later, is evidence of substantial confusion on the part of [Turner] that was the result of Alberta's influence through isolating him from his child and his friends, [Ralston] and Darlene, over a period of time in excess of two years. The [trial court] finds that this influence was undue influence.

39. The [trial court] finds that the evidence has established that Alberta was substantially in control of [Turner's] life after his heart surgery, and fully in control of [Turner's] life after his stroke. The [trial court] further finds that Alberta became the dominant person in their marital relationship thereby giving her the power to exert undue influence over [Turner] leading her to eventually become the sole beneficiary of his entire estate.

40. The [trial court] further finds that [it] can reasonably infer from the evidence that Alberta's contention that Cassandra was drinking at the various events described in these [findings of fact], which drinking was specifically denied by Cassandra, was information that Alberta furnished to [Turner] during the period of time she isolated him from Cassandra, and thereby [unduly] influenced him to conclude that Cassandra would 'drink it up,' as Alberta testified, if he left the balance of the land, the 10 acres, to Cassandra. The [trial court] finds the evidence that [Turner] still had a desire to leave the land to some offspring from his first marriage since he replaced his daughter with his youngest grandson in the September 24, 2004, will. The [trial court] finds that having no contact with anyone else in his family, because of Alberta, the [trial court] can also reasonably infer that the undue influence of Alberta resulted in [Turner] removing that grandson thirty[-]two days later thereby giving her the full inheritance of clear title to the only asset she had not yet received, the remaining 10 acres, without her being restricted to a life estate in that remaining 10 acres.

(Appellant's App. pp. 13-14). We conclude that these findings sufficiently support the trial court's judgment, and to any extent that the trial court's summary of testimony given during trial may be characterized as error, that error was harmless.

II. *Sufficiency of the Evidence*

Alberta also contends that the evidence was not sufficient to support the trial courts findings. The trial court entered findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52. Therefore, we must determine whether the evidence supports the findings, and whether the findings support the judgment. *Webb v. Webb*, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007).

> The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Id. (internal citations omitted). In addressing Alberta's argument that the trial court's finding were summaries of testimony, we determined that the trial court's findings supported its judgment. Thus, we address only whether the evidence supports the findings here.

a. *Isolation*

First, Alberta contends that the evidence does not support the finding by the trial court that she kept Turner isolated from friends and family. Alberta directs our attention to evidence that Turner had the ability to drive and that Cassandra and Ralston actually did have contact with Turner at times relevant to the trial court's determination that Alberta kept Turner isolated. However, we note that there was evidence that Alberta limited Turner's

contact with Cassandra and Ralston by not answering the door or by refusing their phone calls. Accordingly, the trial court did not find that Alberta kept Turner in total isolation. Rather, the trial court acknowledged that Turner had some contact with Cassandra after his heart surgery and stroke. The evidence Alberta points to is not inconsistent with the trial court's findings. Therefore, we conclude the trial court's findings are not clearly erroneous. *See Webb*, 868 N.E.2d at 592.

b. *Undue Influence*

Alberta also challenges the trial court's finding of undue influence. Undue influence has been defined as "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." *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1037 (Ind. Ct. App. 2006) *reh'g denied, trans. denied* (quoting *In re the Estate of Wade*, 768 N.E.2d 957, 962 (Ind. Ct. App. 2002) *trans. denied*). Where an individual enters into the roll of caregiver for an ailing relative, the caregiver is characterized as the dominant individual and as having a fiduciary relationship with the ailing relative. *Supervised Estate of Allender v. Allender*, 833 N.E.2d 529, 534 (Ind. Ct. App. 2005). Typically, such a fiduciary relationship, coupled with the transfer of substantial assets, raises a presumption of undue influence. *Id*. However, we do not recognize a presumption of undue influence in a transaction between spouses. *Hamilton*, 858 N.E.2d at 1037.

Upon review of the record, we find evidence which supports the trial court's finding that Alberta exercised undue influence. There was testimony from both Cassandra and Ralston that Alberta limited Turner's contact with both of them. Further, the trial court found

that Turner had shown a desire to leave at least some property to his offspring from his first marriage, which was supported by the provisions in his October 10, 2002, and September 24, 2004 Wills. The trial court explained that Alberta's stated reason for Turner's change of mind was due to Cassandra's drinking. However, Cassandra denied that she had been drinking on occasions when Alberta refused her visitation with Turner. Additionally, the trial court noted there was no evidence that Cassandra's drinking was different in 2002, when Turner granted Cassandra the residual interest in the farmland, as compared to 2004. Accordingly, the trial court interpreted Turner's acts of changing his will twice in just over one month's time as evidence of his confused state of mind, and as actions which he would not have taken without undue influence. Thus, we cannot say that the trial court's finding that Alberta exercised undue influence over Turner was clearly erroneous.

III. *Failure to Name Alberta Individually*

Alberta contends that Cassandra's Second Amended Complaint did not comport with the requirements of Ind. Code § 29-1-7-17, and therefore was not a valid objection to the October 26, 2004 Will. Specifically, Alberta argues that Cassandra's Complaint was insufficient for failing to name her individually as a defendant and for failing to name Cassandra's youngest son who had a beneficial interest in the September 24, 2004 Will. Cassandra responds by explaining, although Alberta moved to dismiss the initial Complaint filed by Cassandra, she did not object to or move to dismiss the Second Amended Complaint. Thus, she argues, Alberta has waived this issue for appeal.

Essentially, Alberta's argument is one of statutory construction. A matter of statutory interpretation is a matter of law to be determined *de novo* by this court. *Stuller v. Daniels*,

869 N.E.2d 1199, 1209 (Ind. Ct. App. 2007), *reh'g denied*. Indiana Code section 29-1-7-17, which defines the requisites for contests of wills, requires in pertinent part that: "The executor and all other persons beneficially interested in the will shall be made defendants to the action." Our courts have consistently stated that, as long as one defendant required by I.C. § 29-1-7-17 has been named within the statute of limitations, parties challenging the validity of a will have opportunity to name any additional interested persons by submitting amended complaints. *See State ex rel. Matheny v. Probate Court of Marion County*, 159 N.E.2d 128 (Ind. 1959);[1] *Moll v. Goedeke*, 25 N.E.2d 258 (Ind. Ct. App. 1940); *Estate of Kitterman v. Pierson*, 661 N.E.2d 1255 (Ind. Ct. App. 1996), *reh'g denied, trans. denied* (holding, where the defendant had named no defendants and made no effort to comply with the statutory requirements within the statute of limitations, the court never obtained jurisdiction).

Our supreme court clarified the nature of will contest proceedings in *Matheny*, by stating:

> The interest of the parties is held joint and inseparable, and as such proceeding is substantially one in rem, the court cannot take jurisdiction of the subject matter by fractions. So where a petition to contest a will is filed within the statutory period of limitations, although a part only of the persons interested are made parties thereto, the right of action is saved as to all who may ultimately be made parties to such action, notwithstanding the fact that some of them are not brought into the case until after the period of limitation has expired.

Id. at 130.

[1] Our court has also identified this case by the name "*In Re Estate of Frank R. Smith.*" *See Estate of Kitterman v. Pierson*, 661 N.E.2d 1255 (Ind. Ct. App. 1996).

In the case before us, we are presented with no dispute as to whether Cassandra filed a complaint identifying Alberta, the executor of Turner's Estate, as a defendant. Therefore, we conclude Cassandra's Complaint was sufficient to initiate the proceedings. Moreover, Cassandra's failure to name additional defendants required by I.C. § 29-1-7-17 was a procedural error, not a jurisdictional error as the trial court had subject matter jurisdiction, and Alberta submitted herself to the jurisdiction of the trial court by participating in the bench trial without objection. *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006). Any claim of procedural error by Alberta is untimely because she did not object to Cassandra's Second Amended Complaint. *Id*.

CONCLUSION

For the foregoing reasons, we conclude that, any error on the part of trial court for summarizing testimony is harmless because the trial court's judgment is supported by sufficient findings, the trial court's findings are not clearly erroneous, Cassandra's Complaint was sufficient to initiate the proceedings, and Alberta's claim of procedural error is untimely.

Affirmed.

FRIEDLANDER, J., and SHARPNACK, J., concur.