

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1677

SUCCESSION

OF

THERESA M. MARTIN

***DATE OF JUDGMENT:***      **JUN 05 2015**

ON APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT  
NUMBER 21078, PARISH OF TERREBONNE  
STATE OF LOUISIANA

HONORABLE RANDALL L. BETHANCOURT, JUDGE

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

**Disposition: AFFIRMED.**

CHUTZ, J.

Appellants, Marie Louise Landry and Troy, Todd, and Robert Sobert (the Sobert brothers) appeal the trial court's judgment, which concluded that an olographic will of decedent Theresa Marie Martin was proven and probated by appellee, Michael A. Sobert. The trial court's judgment dismissed with prejudice the claims of Landry and the Sobert brothers that the will was: (1) inauthentic; and, (2) alternatively, executed by Martin under undue influence by Michael. We affirm.

### **PROCEDURAL AND FACTUAL BACKGROUND**

Martin died on May 10, 2012. She had never married and had no children. The parties are her surviving heirs. Landry and Michael, who are sister and brother, were Martin's niece and nephew. The Sobert brothers were Martin's grand nephews and the sons of Robert Paul Sobert, who was a brother of Landry and Michael.

On May 22, 2012, Landry filed a petition seeking appointment as the administratrix of Martin's succession and, by order signed on May 22, 2012, was duly appointed. On January 2, 2013, Michael filed a petition to probate Martin's olographic will, which was dated January 24, 2007, and opposed the appointment of his sister as administratrix. Michael averred that as Martin's sole legatee under the will, he was the proper person to administer her estate. Martin's will was probated on January 14, 2013.

Landry subsequently filed an answer to Michael's petition, asserting an action to nullify the will on the basis that the will was inauthentic and, alternatively asserting it was executed under undue influence by Michael. She averred that the property of Martin's estate should be distributed under the law governing intestate successions. The Sobert brothers, through representation of their father Robert

Paul, subsequently intervened in the lawsuit asserting the same claims against their uncle Michael that their aunt levied.

On December 18, 2013, the trial court issued an order rescinding Landry's appointment as administratrix of Martin's estate and appointing Vincent Dagate, Jr., as an independent administrator. A two-day trial on the merits followed on May 28 and 29, 2014. The trial court subsequently concluded that Martin's will was authentic and that Landry and the Sobert brothers had failed their burden of proving Martin's will was made under Michael's undue influence. On August 6, 2014, the trial court issued a judgment dismissing their claims. This appeal followed.

#### **AUTHENTICITY OF THE WILL**

Whether an olographic will is authentic such that it was properly probated by the trial court is a question of fact. See *In re Succession of Etienne*, 2012-1120 (La. App. 4th Cir. 6/5/13), 118 So.3d 1224, 1226. A court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. Under the manifest error standard, in order to reverse a trial court's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State through Dep't of Transp. and Dev.*, 617 So.2d 880, 882 (La. 1993). On review, an appellate court must be cautious not to reweigh the evidence or to substitute its own factual findings just because it would have decided the case differently. *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 1993-3099 (La.7/5/94), 639 So.2d 216, 221.

A reasonable factual basis exists to support the trial court's conclusion that the will is authentic. See La. C.C. art. 1575A (setting forth the requirements of form of an olographic will); see also La. C.C.P. arts. 2883 (providing the

requirements of proof necessary to probate an olographic will) and 2932A (stating the burden of proof required in an action to annul a probated testament).

The trial court had many samples of Martin's handwriting to examine alongside the January 24, 2007, olographic will. These included a promissory note prepared by Martin in support of a loan she made to Roy Aucoin. Additionally, the record contains numerous other writings, identified by Michael, his wife Caroline, and their son Stuart, as the handwriting of Martin. Also admitted into evidence were six documents from the successions of Louise Martin Sobert (Michael and Landry's mother), Della Martin Moosa, and Ann Martin Conrad, all of whom were Martin's sisters, which contained Martin's signature in her capacity of administratrix (executrix) of their respective successions.<sup>1</sup> Finally, the record contained copies of two powers of attorney executed on January 24, 2007, in favor of Michael bearing Martin's signature. One power of attorney was from Ann Conrad to Michael in which Martin appeared as a witness; and the other was from Martin to Michael giving him broad delineated powers. With the exception of Robert "Rob" Sobert, all the other witnesses that testified could not deny that the January 24, 2007, olographic will had been written entirely in Martin's handwriting. This evidence sufficiently supports the trial court's finding that the January 24, 2007, olographic will was authentic.

### **Spoliation of Evidence:**

On appeal, Landry and the Sobert brothers contend the trial court erred in failing to apply an adverse presumption based on spoliation of evidence by

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<sup>1</sup> Contained in this record are two documents signed by Martin as administratrix/executrix of the succession of Louise Martin Sobert on March 23, 1993 and July 30, 1999 (R-44, 55); two documents signed by her as administratrix/executrix of the succession of Della Moosa on September 21 and 24, 2007 (R-156, 158), and two documents signed on September 21, 2007 in the succession of Ann Conrad (R-180, 184). We note that Landry and the Sobert brothers stipulated that every signature of Martin's contained in the Louise Martin Sobert succession record is hers. And while the entire succession records of Louise Martin Sobert and Della Moosa were admitted into evidence, neither was transmitted in its entirety with this appellate record. Thus, we are unable to determine whether the trial court had more examples of Martin's handwriting to compare to the will.

Caroline with Michael's consent. With an application of the adverse presumption, these parties maintain the trial court's conclusion that the will was authentic is erroneous.

Spoliation of evidence generally refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use. When a litigant fails to produce evidence within his reach, a presumption that the evidence would have been detrimental to his case is applied, unless the failure to produce the evidence is adequately explained. One explanation for failure to produce evidence that has been deemed reasonable is the situation where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, such that the need for the evidence was not foreseeable. Under those circumstances, the theory of spoliation of evidence does not apply. On the other hand, when a party has notice that certain evidence within its control is relevant to pending or imminent litigation, the party has an obligation to preserve the evidence. The appellate standard of review for a trial court's decision of whether an adverse presumption for spoliation of evidence should be imposed is whether the trial court abused its discretion. *BancorpSouth Bank v. Kleinpeter Trace, L.L.C.*, 2013-1396 (La. App. 1st Cir. 10/1/14), 155 So.3d 614, 639-40, writ denied, 2014-2470 (La. 2/27/15), 159 So.3d 1067.

The trial court's implicit determination denying an application of the adverse presumption based on spoliation of the evidence was not an abuse of discretion. The evidence showing when Michael knew of his sister's intent to open an intestate succession for their aunt and seek an appointment as administratrix was conflicting.

Michael's testimony established the following. A couple months before his aunt died, he changed the locks to her house. He explained that he was not sure who had a key to the house but that he changed the locks to ensure privacy once it

was determined that he and Caroline, along with a friend of hers, were going to move into Martin's home and provide around-the-clock care rather than putting his aunt into a nursing home. He agreed with his attorney that changing the locks to Martin's house was within the scope of the powers expressly given to him in the January 24, 2007 power of attorney.

Michael testified that he learned his sister had filed a petition for appointment as administratrix of Martin's estate in July 2012. He recalled that attorney Doug Authement had phoned and advised that he had been retained by Landry to pursue the appointment. Michael stated that he advised Authement that he had a will and sent a copy to Authement soon after. Authement, according to Michael, had said that if Michael had the will, Authement was "out of it." Michael assumed that after delivery of the will to Authement, that was the end of his sister's interest in the appointment since the will had left everything Martin owned to Michael. Sometime between July and December 2012, Michael received reports from tenants of some of Martin's properties that a lady was claiming to be administratrix of Martin's estate and trying to enter the premises. He figured it was his sister. According to Michael, the Houma police were called and Landry was told she needed a court order to access premises.

According to Caroline's testimony, in August 2012, in an attempt to get Martin's home ready to rent out to a family who was interested in moving into their deceased aunt's home, she called Crosscut Shredders. Caroline stated that Martin was a meticulous bookkeeper. Martin had kept many documents in her home including some with social security numbers; medical records, not only those of Martin but also of her sisters and brothers; time cards and payroll documents for the businesses that Martin owned over the years; past paid bills from 1980 until the date of Martin's death in 2012; and utility bills for all the siblings she had taken care of over the years. Caroline stated that seven canisters -- smaller than a

curbside garbage can but larger than a kitchen garbage can -- had been shredded. Caroline believed this information needed to be removed before a tenant was in the home and indicated that it was her idea to hire the shredding service. She stated that she believed that under the will, which she first saw after Martin's death, Michael had inherited everything. Michael was aware that she was shredding documents, and Caroline admitted some of the documents probably contained Martin's signature. She said that at the time that she called the shredding service, she had no idea that Landry had been appointed administratrix. Caroline pointed out that there were additional documents still in the house Martin had inherited from Della that may have contained Martin's signature. She also understood that in a storage building, on the property Martin had inherited from Ann and that Caroline had never touched, were documents that contained Martin's handwriting.

Although the record contains evidence to the contrary, the trial court was free to disregard that testimony in making its findings. See Stobart, 617 So.2d at 882. Thus, the record supports the following findings. Landry was the administratrix of the Martin's estate from May 22, 2012, until she was removed in December 18, 2013. Although Michael acknowledges having known in July 2012 that his sister intended to seek an appointment as administratrix of their aunt's succession, from May 10, 2012, when his aunt died, until he filed the petition to probate the olographic will on January 2, 2013, Michael operated under the belief that as the sole legatee of Martin's will he owned all of his aunt's property including her house. The record contains his testimony that he was not aware of Landry's appointment until he deduced from reports from his tenants that Landry was asking to access Martin's properties. There is no service of process on Michael or any other pleading that apprised Michael of litigation before Caroline shredded the documents in Martin's home. The documents were shredded by Michael's wife in an attempt to protect the privacy of Martin (and her siblings) and

to prepare the house for rental. Accordingly, the record contains a reasonable factual basis to support a finding that Michael did not have sufficient notice that the documents that were shredded were relevant to a pending or imminent litigation at the time they were shredded. Thus, Michael had no obligation to preserve the evidence, and the trial court did not abuse its discretion in denying an application of the adverse presumption based on spoliation of the evidence.

Moreover, the record establishes that there were other documents available that Landry and the Sobert brothers never requested. Landry and the Sobert brothers failed to show that they asked Dagate, as the duly appointed independent administrator of the estate, to permit them access to the various properties that Martin had, specifically those that Caroline identified as containing Martin's records. And they failed to use the public records of the numerous successions for which Martin had been administratrix (executrix), which clearly contained numerous documents with her handwriting. Where the trial court had numerous samples of Martin's handwriting, including two powers of attorney and documents from three separate successions for which Martin was the administratrix (executrix), there was no error in its factual conclusion that the January 24, 2007, holographic will was authentic.

#### UNDUE INFLUENCE

As with authenticity, the trial court's finding of, or failure to find, undue influence is fact intensive, and such a finding cannot be disturbed on appeal in the absence of manifest error. See *In re Succession of Gilbert*, 37,047 (La. App. 2d Cir. 6/5/03), 850 So.2d 733, 735-36, writ denied, 2003-1887 (La. 11/7/03), 857 So.2d 493. Reversal is warranted only if the appellate court finds that no reasonable factual basis for the trial court's finding exists in the record, and that the finding is clearly wrong. *Mart v. Hill*, 505 So.2d 1120, 1127 (La. 1987).



The trial court concluded that Landry and the Sobert brothers failed their burden of proving by clear and convincing evidence that Michael used undue influence over his aunt such that her volition was substituted by his. See La. C.C. arts. 1479 (nullity of donation procured through undue influence) and 1483 (proof of undue influence). Thus, it dismissed their claims to nullify the January 24, 2007 olographic will. There is no manifest error.

The record clearly supports the finding that Martin was of sound mind in 2007 when the will was executed. She was by all accounts a strong, independent woman who kept meticulous records. According to Dr. Russell Henry, who treated her since 1978, Martin was alert, active, and had good hearing in 2006-2007. Dr. Henry stated that between 2007 and 2012, Martin's medical condition deteriorated. Michael accompanied her to her appointments and, at Martin's insistence, Dr. Henry explained to Michael what it was she was to do. Dr. Henry recalled that in the last months of her life, after she had become debilitated due to falls, Martin had periods of confusion that he attributed to vascular dementia. But he was certain that in 2007, Martin was not confused.

The trial court found that the execution of the olographic will on January 24, 2007, in favor of Michael was consistent with the broad power of attorney Martin had given Michael on that same day. Michael expressly stated he had not exerted undue influence over his aunt. He indicated that he respected her privacy when she wished to speak with an attorney. Caroline testified that Michael was concerned that Martin had left her entire estate to him and that he expressed that it would have been better if Martin had made specific bequests to Landry and Robert Paul's wife.

The record showed that after his brothers died in the 1990's, Michael was the last surviving member of the older generation of males. He stated that his aunts, four of whom were living at the time, depended on him. As they aged, they

were unable to drive, so Michael did that for them. He did a lot of chores at their various houses: dealt with the curbside garbage, changed light bulbs and air conditioner filters, unclogged toilets, and fixed leaks. After 2005, Michael was at the aunts' daily lunch most days. In January 2007, shortly before Ann Conrad died, she gave him a broad power of attorney similar to that which Martin gave him that same day.

Although Landry and the Sobert brothers ask that this court give more weight to the testimony of those witnesses, particularly Landry, who indicated that Martin was afraid of Michael, this is not our province to do. And as noted by the trial court, statements about Michael's anger and Martin not having a will were allegedly made by Martin well after the execution of the olographic will on January 24, 2007. While Authement and attorney Matt Lofaso testified that Martin had indicated that she wanted to draft a statutory will, both admitted this was never done. Based on the testimonial and documentary evidence, we cannot say the trial court erred in concluding that Landry and the Sobert brothers failed to prove by clear and convincing evidence that in 2007 when Martin executed her will, Michael used undue influence over his aunt such that her volition was substituted by his. Accordingly, there is no error in the trial court's dismissal of their claims to nullify Martin's January 24, 2007, olographic will.

#### **DECREE**

The trial court's judgment is affirmed. Appeal costs are assessed against appellants, Marie Louise Landry and Troy, Todd, and Robert Sobert.

**AFFIRMED.**