SUCCESSION OF DOROTHY HILLER BAND, WIDOW OF DAVID BAND	*	**NO. 2000-CA-0645**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-12868, DIVISION "A-5"
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay, III)

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AFFIRMED

The plaintiff, David Band, appeals the trial court's granting of summary judgment in favor of Lawrence S. Kullman, executor of the estate of Dorothy Hiller Band, and John Band, the sole legatee. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 30, 1998, Dorothy Hiller Band died after a long bout with cancer. Ten days before that, Mrs. Band wrote, signed, and dated two olographic wills. Although Mrs. Band had five adult children, in these wills, which are identical, she left her entire estate to her son, John, who has cerebral palsy and who lived with her until her death. Before her death, Mrs. Band had made her intention to leave everything to John known to several family members as well as to two of her bookkeepers, Irene Mackenroth and Susan Poindexter.

In April of 1998, Mrs. Band's son-in-law, Mark Borenstein, an attorney practicing in California, ascertained from Mrs. Band that she did not have a will. Over the course of April and May, Mr. Borenstein spoke with Mrs. Band several times regarding the preparation of a will. Mr.

Borenstein maintains that during one of these conversations his mother-in-law asked him to assist her in preparing a will leaving all of her property to her son John. Mr. Borenstein looked into Louisiana law and determined that an olographic will would be acceptable. Mr. Borenstein wrote down the text of a will and gave it to his wife, Ellen. Ellen Borenstein, in turn, called her sister, Merrie McMahon, and read to her the text of the will that Mr. Borenstein had prepared. On May 20, 1998, Merrie McMahon, along with her friend, Livia Pirsalehy, went to Mrs. Band's home. Merrie McMahon gave her mother the text of the will that Mr. Borenstein had prepared. Mrs. Band then proceeded to write out her will which she signed and dated in the presence of Merrie McMahon, Livia Pirsalehy, and John Band. After examining the will, Merrie McMahon was concerned about the quality of penmanship and had her mother rewrite the will.

On June 11, 1998, Mr. Kullman, as executor, sent a copy of Mrs. Band's will to her son David Band. On July 22, 1998, Mr. Kullman presented both wills to the court for probate. The wills were probated by order of the court on the same day.

On January 14, 1999, David Band filed a petition seeking a

declaration of invalidity of his mother's will on the grounds of lack of testamentary capacity and/or undue influence. On May 13, 1999, the defendants, Mr. Kullman and John Band, filed a motion for summary judgment. The motion was supported by affidavits as well as the deposition testimony of the plaintiff, David Band. On October 8, 1999, after considering the motion, the trial court determined that there was no genuine issue of material fact and rendered judgment in open court granting defendants' motion and dismissing plaintiff's petition to annul. A final judgment was signed on October 11, 1999. Thereupon, the plaintiff moved for a new trial. The trial court denied this motion. The plaintiff now appeals the trial court's granting of the defendants' motion for summary judgment.

DISCUSSION

At issue in this appeal is whether it was appropriate for the trial court to grant the defendants' motion for summary judgment.

Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Patterson v. Al Copeland Enterprises, Inc., 95-2288 (La. App. 4 Cir. 1/19/96), 667 So.2d 1188, 1190, remanded, 96-0723

(La. 11/22/96), 683 So.2d 1196. In determining whether summary judgment is appropriate, the appellate court reviews evidence de novo; under such standard, the appellate court looks at pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, in making an independent determination that there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Marigny v. Allstate Ins. Co., 95-0952 (La. App. 4 Cir. 1/31/96), 667 So.2d 1229, 1231, writ denied, 96-0693 (La. 4/26/96), 672 So.2d 910.

In pertinent part, Louisiana Code of Civil Procedure article 2932 provides: "The plaintiff in an action to annul a probated testament has the burden of proving the invalidity thereof, unless the action was instituted within three months of the date the testament was probated." Louisiana Civil Code article 1482 further provides that a person who challenges the capacity of a donor "must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation *inter vivos* or executed the testament." In the instant case, Mr. Kullman presented the wills to the court for probate on July 22, 1998. The plaintiff, David Band, did not file his petition to annul until January 14, 1999. More than three

months passed between the time the wills were presented for probate and the time Mr. Band filed his suit. Therefore, Mr. Band had the burden of proving the invalidity of his mother's will by clear and convincing evidence.

The defendants supported their motion for summary judgment with the affidavits of Merrie McMahon and Livia Pirsalehy to establish that Mrs. Band was competent when she executed both olographic wills in the presence of Merrie McMahon, Livia Pirsalehy, and John Band. The affidavits of Irene Mackenroth and Susan Poindexter established that Mrs. Band had intended to leave everything to her son John before she had even executed these wills. David Band, to the contrary, has produced no evidence to contradict these facts. In fact, in his deposition, he conceded that his mother probably did write the wills. Furthermore, the existence of testamentary capacity is presumed. Succession of Braud, 94-0668 (La. App. 4 Cir. 11/17/94), 646 So.2d 1168, 1170, writ denied, 95-0383 (La. 3/30/95), 651 So.2d 841. These facts do not seem to indicate that Mrs. Band was incompetent, nor do they seem to indicate that she was under any duress. David Band certainly did not prove that she was incompetent or under duress by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, we find no error in the trial court's granting of summary judgment. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED