SUCCESSION OF DORIS LAVNER FEINGERTS	*	**NO. 2017-CA-0265**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-09918, DIVISION "A"
Honorable Tiffany G. Chase, Judge

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Judge Daniel L. Dysart

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(Court composed of Judge Daniel L. Dysart, Judge Paula A. Brown, Judge Marion F. Edwards, Pro Tempore)

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AFFIRMED

DECEMBER 21, 2017

Bruce L. Feingerts appeals a summary judgment granted in favor of the Succession of Doris Lavner Feingerts (Succession), dismissing his Motion to Annul Probate of Will for Undue Influence. For the reasons that follow, we affirm.

BACKGROUND:

Doris Lavner Feingerts died testate on September 13, 2011, and her Succession was opened shortly thereafter. In 2012, Mr. Feingerts filed a Proof of Claim against the succession asserting that he was owed $103,313.01 from the estate, an amount he calculated as his naked ownership in the succession of his father.[1] He also filed a Motion to Traverse the Second and Amended Usufructuary Accounting, a Motion to Traverse the Amended Estimative Descriptive List of Assets and Liabilities, and a Motion to Annul Judgment of Partial Possession and Return of Particular Legacies. The trial court denied all of the motions on October 13, 2013, and granted the Executrix's Petition to Homologate the Second Amended Usufructuary Accounting and Petition for Partial Possession. Mr. Feingerts's Motion for New Trial was denied.

Mr. Feingerts appealed that ruling to this Court, arguing in part that the judgment of the trial court should be reversed and remanded, as based on newly discovered evidence, his mother had been unduly influenced into signing her last testament. He also alleged that his mother had possibly committed fraud.

This Court declined to consider Mr. Feingerts's allegations of undue influence and fraud, as those matters were not considered previously by the trial court.[2] We further affirmed the trial court's order approving an amended estimative

[1] Maurice Feingerts died testate in 1967, leaving his estate in separate trusts for his three children. His wife, Doris, was granted a lifetime usufruct, and was designated as the trustee for each trust.

and descriptive list of assets and liabilities, and a ruling that the debts owed by Bruce Feingerts to his mother could be used to offset sums due him from his mother's or father's succession, and the Supreme Court denied his writ of review.

After this Court rendered its opinion in Appeal No. 2014-0140,[3] the executrix for the succession filed a Motion for Summary Judgment in the trial court seeking to dismiss Mr. Feingerts's Motion to Annul Probate for Undue Influence. As explained *infra*, the motion was eventually heard on June 16, 2016. The trial court ruled in favor of the succession and this appeal followed.

DISCUSSION:

Mr. Feingerts has made three assignments of error. In his third assignment, he argues that the trial court erred in not granting him a continuance of the hearing on the Succession's motion for summary judgment. We address this issue first.

On June 2, 2016, Mr. Feingerts filed a motion to continue the hearing on the subject Motion for Summary Judgment set for June 10, 2016, arguing that he had not yet recovered from his previous attorney the documents and files he needed to challenge the summary judgment. Also, he desired a continuance because he wanted to have his "ethics counsel" testify at the hearing, but the attorney was unavailable on the hearing date. Further, Mr. Feingerts alleged that discovery was incomplete and that complex conflicts of interest needed to be examined.

In its Reasons for Judgment, the trial court explained that the first hearing on the Motion for Summary Judgment was set for October 9, 2015, but was continued by the consent of all parties to October 30, 2015. The trial court also allowed Mr. Feingerts time to file an opposition to the summary judgment motion.[4] On October

[2] Mr. Feingerts filed his Motion to Annul Probate of Will for Undue Influence in the trial court while the previous appeal was already pending in this Court.
[3] 162 So.3d 1215 (La.App. 4 Cir. 3/18/15), *writ denied*, 15-0754 (La. 6/1/15), 171 So.3d 936.

30, the trial court granted another continuance and allowed Mr. Feingerts's attorney, Sidney Shushan, to withdraw as counsel. The matter was reset to December 4, 2015.

On December 4, the matter was continued to February 20, 2016, to allow Mr. Feingerts to secure new counsel and to file a supplemental opposition. On February 19, 2016, the court again granted Mr. Feingerts a continuance as he had not yet hired new counsel. The hearing was reset for June 10, 2016. On that date, the trial court denied Mr. Feingerts's motion to continue, but left the record open for an additional seven days for him to supply the court with depositions or any other evidence he had to oppose the summary judgment. The trial court ordered counsel for the Succession to forward a copy of the unfiled opposition prepared by attorney Shushan (see fn. 1), which Mr. Feingerts claimed he had never received. Counsel for the Succession was also ordered to submit to the court and to send to Mr. Feingerts the deposition of Rene Lehmann, Mrs. Feingerts's longtime attorney, which Mr. Feingerts requested the trial court to consider as part of his opposition.

A trial court has vast discretion in controlling its docket and in determining whether motions to continue should be granted. *Rowley v. Eye Surgery Center of La., Inc.,* 06-1243, pp. 4-5 (La.App. 4 Cir. 4/4/07), 956 So.2d 680, 683; *Crawford v. City of New Orleans,* 01-0802, p. 4 (La.App. 4 Cir. 1/23/02), 807 So.2d 1054, 1056. An abuse of discretion occurs when such discretion is exercised in such a way that a litigant is deprived of his day in court. *Howard v. Lee*, 50,366, pp. 6-7 (La.App. 2 Cir. 1/13/16), 185 So.3d 144, 149. A trial court must weigh the particular facts of each case in deciding whether or not to grant a continuance,

[4] The Clerk of Civil District informed this Court that the opposition was filed and fees were paid; however, the original was "walked" to the judge's chambers and never returned to the clerk's office for filing. Thus, the opposition is not physically in the record before us.

considering factors such as diligence, good faith, and reasonable grounds. *Id.,* 50, 366, p. 7, 807 So.2d at 149. A trial court should also consider the opposing party's right to have his case heard as soon as practicable. *Id.*

A continuance should be granted if the party applying for the continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case; or that a material witness has absented himself without the contrivance of the party applying for the continuance. La. Code Civ. Proc. art. 1602. The discharge or withdrawal of an attorney is not by itself grounds for the postponing of another party's access to the courts. The unrepresented party bears the burden of showing additional reasons for a continuance. In this case, Mr. Feingerts was granted several continuances, each time based on his lack of representation, starting in October of 2015. We cannot say that the trial court abused its discretion in denying him another continuance in June of 2016, particularly in light of the fact that the trial court allowed Mr. Feingerts additional time to submit evidence. Considering the foregoing, we do not find that the trial court erred in denying Mr. Feingert's motion to continue.

Mr. Feingerts's first and second assignments of error are intertwined. In his first assignment, he argues that the trial court erred in granting summary judgment as there remain contested issues of fact regarding whether his mother was unduly influenced by others when she executed her 2009 will and the 2011 codicil to that will. In his second assignment of error, he argues that the trial court applied an incorrect burden of proof in deciding whether Mrs. Feingerts was unduly influenced.

We agree with Mr. Feingerts that the proper burden of proof in this matter is a preponderance of the evidence. Louisiana Civil Code art. 1483 provides:

> A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if, at the time the donation was made, or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

The alleged "wrongdoers" are not related to the donor by affinity, consanguinity or adoption; therefore, the lesser burden of proof is applicable.

Turning to his first assignment of error concerning the grant of summary judgment, the issue is whether there exist material issues of fact which would preclude a finding of summary judgment as to whether Doris Lavner Feingerts was unduly influenced when she executed a 2009 will and 2011 codicil to that will, requiring that the probate of her will be annulled.

Mr. Feingerts argues that his ex-wife, her current husband, and Max Nathan, an attorney hired by them, pressured Mrs. Feingerts into changing her previous will so as to deny him his legacy from his father's succession.

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. Code Civ. Proc. art. 966 B(2). The movant bears the burden of proof. La. Code Civ. Proc. art. 966 C. "However, if the movant will not bear the burden of proof at trial …, the movant's burden" is "to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense." La. Code Civ.

Proc. art. 966 C(2). "Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact." La. Code Civ. Proc. art. 966 C(2).

To determine whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria employed by the trial court. *Hayes v. Sheraton Operating Corp.,* 16-0038, pp. 2-3 (La.App. 4 Cir. 5/25/16), 195 So.3d 563, 565, *writ denied,* 16-1212 (La. 10/17/16), 207 So.3d 1064; *Maradiaga v. Doe,* 15-450, p. 4 (La.App. 4 Cir. 11/25/15), 179 So.3d 954, 957, *writ denied*, 15-2361 (La. 2/26/16), 187 So.3d 470; La. Civ. Proc. art. 966.

Mr. Feingerts originally filed his Motion to Annul Probate of Will for Undue Influence in October of 2014, while the previously rendered judgment was on appeal to this Court. It was not set for hearing as the trial court lacked jurisdiction due to the pending appeal. He re-filed the motion in November of 2014. On January 23, 2015, the trial court issued an order continuing all matters in this case until such time as the appeal process was concluded. This Court rendered an opinion on the prior appeal on March 18, 2015, and the Supreme Court denied Mr. Feingerts's writ on June 1, 2015. On September 15, 2015, the Succession filed the subject Motion for Summary Judgment seeking dismissal of Mr. Feingerts's Motion to Annul.

In its motion, the Succession argues that Mr. Feingerts is again challenging his mother's 2009 will and 2011 codicil which instruct that his inheritance be offset by the debts Mr. Feingerts owed his mother during her lifetime. As set forth by the Succession, this Court previously affirmed the trial court judgment allowing

the executrix to offset his loan debts against the usufructuary accounting, and that decision is now final.

Finally, considering the allegations of undue influence made by Mr. Feingerts, La. Civ. Code art. 1479 provides:

> A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.

Further, jurisprudence instructs that it is insufficient to merely demonstrate that there was **some** degree of influence over the donor. Rather, the challenger must show that the donee's influence was so substantial that the donee substituted his or her volition for that of the donor. *Succession of Berman,* 05-0641, p. 8 (La.App. 4 Cir. 7/26/06), 937 So.2d 437, 441, *quoting Succession of Gilbert,* 37,047 (La.App. 2 Cir 6/5/03), 850 So.2d 733, 736. Comment (b) to Article 1479 explains that this article presumes testamentary capacity. Although Mr. Feingerts argues that his mother was on her death bed and heavily medicated when executing the 2009 will and 2011 codicil, the record contains no proof of his allegations. The comment continues:

> No single definition of "undue influence" has been found acceptable in all of the relevant legal writings….[E]veryone is more or less swayed by associations with other persons, so this Article attempts to describe the kind of influence that would cause the invalidity of a gift or disposition….The more subtle influences, such as creating resentment toward a natural object of a testator's bounty by false statements, may constitute the kind of influence that is reprobated by this Article….Mere advice, or persuasion, or kindness and assistance, should not constitute influence that would destroy the free agency of a donor and substitute someone else's volition for his own.

The Succession argues that Mrs. Feingerts's intent to have her son repay or reimburse to her estate monies which she loaned her son during her lifetime has not changed since her 2001 will, long before the time period Mr. Feingerts alleges the undue influence began. The Succession submitted all of the wills and codicils with its motion, as well as excerpts of depositions and correspondence.

In the 2001 will, Mrs. Feingerts left particular legacies to her three children. Mrs. Feingerts's legacy to her son was the forgiveness of the debts owed to his mother at the time of her death. The legacies to her two daughters were for "an amount equal to the amount of Bruce's debts to me which is being cancelled" pursuant to her particular legacy to Mr. Feingerts.

In a codicil to her 2001 will, Mrs. Feingerts declared that she had given Mr. Feingerts 3,000 shares of stock valued at $63,000. The codicil provided that her two daughters shall receive particular legacies of $63,000 as equalizing payments.

Mrs. Feingerts executed a new will in 2008, again canceling all debts that Mr. Feingerts owed at the time of her death, and providing to her two daughters equalizing payments in the amount of Mr. Feingerts's debts to her.

In 2009, Mrs. Feingerts executed another will, this time making special legacies to her two daughters in the amount of $250,000 each. She left one-third of her remaining estate to each of her two daughters, and one-third in trust to Mr. Feingerts's three children. She named the children's mother as trustee. Mrs. Feingerts exempted from collation any gifts or advantages given to each of her children, designating such items as extra portions. However, she specifically noted in Article VI of the will:

> I intentionally and expressly leave no part of my estate to my son, Bruce, because, in addition to numerous gifts and donations that I have given him over the years, I

> have advanced funds to him as loans, and not as gifts. If Bruce (1) accepts all provisions of this Testament and refrains from challenging its validity in any way, and (2) expressly waives and relinquishes any claim or right against me or my estate that he might otherwise be entitled to assert as naked owner and/or trust beneficiary under the will of my late husband, Maurice Feingerts, then the aggregate amount of all of the debts that he owes to me shall be forgiven; but if Bruce (1) challenges this Testament or contests the validity or interpretation of any provision hereof, or asserts any impediment to it for any reason (such as undue influence or lack of testamentary capacity), (2) contests any action taken by the executrix, or (3) asserts any claim against my estate or against me as usufructuary or as trustee under my late husband's will in connection with Bruce's naked ownership interest, then, regardless of *Article V* above, all gifts that I have made to him, and all advantages I have bestowed on him, whether as loans or otherwise, shall be subject to collation; and all debts owed by Bruce to my estate, including those for loans that I made to him, shall remain due and owing and shall be payable in full and collectible for my estate by my Succession Representative. [5]

The 2011 codicil to her last will indicates that Mrs. Feingerts increased the special legacies to her two daughters to $300,000 each. She further altered her 2009 will by deleting the trust provision (Article IV) for her three grandchildren, instead leaving a third of her estate, to be divided equally among them, in full ownership. Last, she amended Article VI of the 2009 will (cited above) to explicitly state that Mr. Feingerts would receive nothing from her estate. Article IV of the codicil reads:

> I hereby amend Article VI of my said Last Will and Testament by inserting the following provision immediately following the first sentence of that Article as though this provision had been originally incorporated therein:

[5] A subsequent paragraph provides that if Mr. Feingerts asserts a claim to be recognized as a forced heir, and is determined to be a forced heir, any amount due him is to be left in a spendthrift trust, from which no distributions may be made from the principal during Mr. Feingerts's lifetime.

> 'Additionally, although my estate would owe a usufructuary debt due to BRUCE for the portion of the proceeds that I received upon the sale of the flooded family property on Bellaire Drive, New Orleans, Louisiana, that would be attributable to BRUCE's one-sixth (1/6) naked ownership interest in that property, that amount to which BRUCE would otherwise be entitled must first be applied to his indebtedness to me, which indebtedness is substantially larger than my estate's usufructuary debt to BRUCE; thus, no amount will remain due and payable to BRUCE.'

In addition to the wills and codicils submitted in support of its Motion for Summary Judgment, the Succession submitted excerpts of the deposition of Rene Lehmann, Mrs. Feingerts's longtime attorney. While Mr. Lehmann admits that he had telephone contact with Jacques Wiener and Max Nathan, he definitively stated that they (or Mr. Feingerts's ex-wife, Sandy) were never present at Lambeth House[6] when the 2009 documents were signed. Additionally, the witnesses to the signing of the 2009 will were a neighbor friend of Mrs. Feingerts at Lambeth House, and Mr. Lehmann's son, who was visiting his dad and accompanied him to the signing. Last, Mr. Lehmann admitted that he knew Max Nathan, but had never met either Jacques Wiener (other than by telephone) or Sandy (Feingerts) Wiener. He affirmed that the 2008 will was signed in his office and that two of his staff members acted as witnesses, and that no other people were present.

Mr. Lehmann testified that on January 25, 2011, he received a letter from Mrs. Feingerts terminating their professional relationship and asking him to send her current will to Carole Neff.[7] Throughout his deposition, Mr. Lehmann referred to notes he had made while conferencing with Mrs. Feingerts going back to the early 2000's. He specifically remembered her comments to him about "not letting

[6] Mrs. Feingerts resided at Lambeth House after her family home was destroyed in Hurricane Katrina.
[7] Ms. Neff is an attorney in the same firm as Max Nathan.

Bruce destroy her." He also had notes indicating that Mrs. Feingerts kept a list of the debts Bruce owed to her in a safety deposit box at the Whitney National Bank on Tchoupitoulas Street. Mr. Lehmann was adamant that if he had any doubt as to Mrs. Feingerts's mental capacity, he would not have allowed her to sign the wills and codicils he prepared.

In addition to the opposition to the summary judgment that was hand delivered to the judge's chambers (see, fn. 1, *ante)*, the trial court allowed Mr. Feingerts to file exhibits into the record. Mr. Feingerts filed his mother's financial records from 1996 to 2004, and an opinion letter, memo and curriculum vitae of an attorney hired by Mr. Feingerts in connection with another lawsuit.

In his brief to this Court, Mr. Feingerts argues that he submitted extensive evidence of undue influence in the form of attachments to his Motion to Annul. However, attachments to motions are not evidence. When a motion that must be proven is presented to the court, the mover bears the burden of presenting the evidence. *Landis Const. Co., LLC v. State, Dep't of Workers' Compensation Admin.*, 15-1167, p. 3 (La.App. 1 Cir. 2/29/16), 199 So.3d 1, 2. A court may not consider exhibits filed in the record which were not filed and admitted into evidence at a hearing. Moreover, it is axiomatic that "[a]ppellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence." *Denoux v. Vessel Mgmt. Servs., Inc.* 07-2143, p. 6 (La. 5/21/08), 983 So.2d 84, 88; *Hoddinott v. Hoddinott*, 16-1059, p. 2 (La.App. 4 Cir. 4/19/17), 217 So.3d 540, 541. Accordingly, evidence that has not been "properly and officially offered and introduced" in the { "pageset": "S50 district court cannot be

considered by this court "even if it is physically placed in the record." *Denoux, supra.*

Our review of the record indicates that Mrs. Feingerts's intent never changed in all of her wills and codicils. Mr. Lehmann revealed in his testimony that Mrs. Feingerts was troubled about the loans to her son as far back as 2001, and that she always intended for her children to receive equal inheritances. The fact that she chose to leave a third of her estate to Mr. Feingerts's children, as opposed to him, is not indicative of undue influence. Further, the persons Mr. Feingerts accuses of influencing his mother do not benefit from the legacies. Particularly compelling is Mr. Lehmann's testimony that Mrs. Feingerts's would not allow her son to "destroy her."

Accordingly, after review, we find that no genuine issues of fact remain, and that summary judgment in favor of the Succession of Doris Lavner Feingerts is appropriate. The judgment of the trial court is affirmed.

AFFIRMED