STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of EUGENE FORFA, Deceased.

ROBERT TURNER and PAMELA T. PRINCE,

Petitioners-Appellants,

v

HENRY FORD COMMUNITY COLLEGE FOUNDATION and COMERICA BANK,

Respondents-Appellees.

UNPUBLISHED
November 22, 2002

No. 234609
Wayne Probate Court
LC No. 99-610225-IE

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Petitioners appeal as of right from a probate court order granting respondents' motion for summary disposition pursuant to MCR 2.116(C)(10) and admitting the Last Will and Testament (hereinafter the will) of the decedent, Eugene Forfa, to probate. We affirm.

I. Facts and Procedural History

This appeal arises from a will contest brought by petitioners. Petitioners are Forfa's nephew and niece and only living heirs at law. In early August 1999, Forfa was admitted to Oakwood Hospital, having been diagnosed with terminal lung cancer. On August 12, 1999, Forfa requested to meet with Angela Brown, a personal trust officer at Comerica Bank with whom Forfa was familiar. On August 13, 1999, Forfa met with Brown. Forfa told Brown that he wanted to draw up a will with Comerica Bank as the executor. Brown referred Forfa to attorney Joseph Bonaventure. Bonaventure spoke with Forfa and prepared the will that day. Forfa executed the will with Bonaventure and Bonaventure's wife, Joyce Bonaventure, serving as witnesses. Forfa died on August 22, 1999. In his will, Forfa named respondent Henry Ford Community College Foundation (hereinafter the Foundation) as the sole residuary beneficiary of his estate and left a $5,000 bequest to each of petitioners. Forfa also appointed Comerica Bank to serve as personal representative of his estate. It is estimated that the residue of Forfa's estate is in excess of two million dollars.

Petitioners filed suit, objecting to the admission of the will to probate and claiming that the will was invalid due to Forfa's lack of testamentary capacity and undue influence on the part

of Bonaventure and Brown. Thereafter, respondents filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issues of material fact existed with regard to whether Forfa possessed the requisite testamentary capacity to make a will. Respondents further argued that there existed no facts to substantiate a claim of undue influence. Respondents concluded that summary disposition was therefore appropriate as a matter of law. In response to respondents' motion, petitioners argued that genuine issues of material fact did exist where the evidence established that at the time of making the will Forfa was heavily drugged and suffering from insane delusions concerning the parentage of petitioners.[1] Petitioners also argued that there was evidence to support and satisfy each of the elements of undue influence, as Brown and Bonaventure were both in a fiduciary relationship with Forfa, both benefited under the will, and both had the opportunity to influence Forfa when they visited him in the hospital. As a result, petitioners requested that respondents' motion for summary disposition be denied.

Following a hearing on the matter, the trial granted respondents' motion for summary disposition, concluding that petitioners' failed to create any genuine issues of material fact with regard to their claims of lack of testamentary capacity and undue influence. The trial court found no evidence in the record to support petitioners' claim that Forfa lacked the capacity to make a will. The trial court also found that petitioners' failed to satisfy the elements of undue influence in that petitioners failed to establish that Bonaventure and Brown received any personal benefit under the will or had any opportunity to influence Forfa in his decision. Thereafter, the trial court admitted the will to probate. This appeal by petitioners followed.

II. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* It permits summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). In presenting a motion for summary disposition, the moving party has the burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence, and then the burden shifts to the opposing party to establish that a genuine issue of material fact exists. If the opposing party fails to present admissible documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999).

III. Testamentary Capacity

Petitioners first argue that the trial court erred in granting respondents' motion for summary disposition because the record contained sufficient evidence to create a genuine issue of material fact with regard to Forfa's testamentary capacity. We disagree. A person executing a

[1] Forfa indicated to Bonaventure and Brown that petitioners were adopted and that one of petitioners may have been the illegitimate child from an affair a Mr. Turner had with a secretary.

will must have testamentary capacity, *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001), and as a starting point, we presume each individual has such capacity. *In re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965). The requirements for testamentary capacity are well established. To have testamentary capacity, an individual must "'be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make.'" *Id*. (citations omitted). In other words, to be competent, a testator must know what property he owns, to whom he wishes to give the property, and how the will disposes of the property. The burden is on the person questioning the testator's competency to establish that the testator was incompetent at the time the will was executed. *In re Vollbrecht Estate*, 26 Mich App 430, 434; 182 NW2d 609 (1970).

Here, there are absolutely no material facts in the record to support petitioners' claim that Forfa lacked testamentary capacity. To the contrary, all the evidence establishes that at the time the will was executed Forfa was alert, coherent, and competent. It is clear that Forfa comprehended the nature of making a will and wished his estate to be left to the Foundation.[2] When questioned by Bonaventure, Forfa comprehended the nature and extent of his property as well as how he wished to dispose of it. Forfa recognized petitioners but clearly expressed his intent to disinherit them. When Bonaventure presented the will for execution, Forfa reviewed and acknowledged the will and even pointed out a typographical error in it. In light of this evidence, the trial court properly granted respondents' motion for summary disposition as petitioners failed to carry their burden and overcome the presumption of mental competency. See *Powers*, *supra*.

Although petitioners rely on the testimony of Dr. Gerald Shiener and an affidavit of Mary-Louise Moser to oppose Forfa's competence, petitioners can only speculate as to Forfa's mental state on the date the will was executed. Shiener opined that Forfa suffered from a significant impairment in his mental capacity on the date he executed the will. Shiener based his opinion on the "mind-altering" medications Forfa was taking and other documents, such as Brown's deposition, Forfa's past diary records, and the will. However, Shiener did not meet or treat Forfa at any time before his death, nor did Shiener speak with any of Forfa's treating physicians or nurses. Testamentary capacity must be judged by manifestations in conduct or language. *Fraser v Jennison*, 42 Mich 206, 234; 3 NW 882 (1879). Thus, we agree with the trial court that Shiener's opinion is "more akin to speculation." Speculation and conjecture are insufficient to show a genuine issue of material fact. *City of Detroit v General Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).[3]

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[2] The fact that Forfa expressed no previous interest in the Foundation, as coincidental and unbelievable as it may seem to Forfa's family and friends, is irrelevant and of no consequence to the analysis.

[3] We note that, contrary to plaintiff's argument, the trial court's determination that this evidence amounted only to speculation does not result from a weighing of the evidence. Rather, it is a recognition that the testimony offered is not based upon personal observations as to Forfa's then existing state of mind.

Moser stated that she spoke with Forfa on the telephone while he was in the hospital. She opined that at the time she spoke with Forfa, he was "delirious, confused, and out of his mind with pain." However, Moser's affidavit fails to state the dates on which she spoke with Forfa. Testamentary capacity is judged at the time of the execution of the will, and not before or after, unless the condition of the testator before or after the execution of the will is competently related to the time of execution. *Powers, supra*. Furthermore, the testator must only know the requisite factors "long enough to dictate his will without prompting from others." *In re Thayer's Estate*, 309 Mich 473, 476-477; 15 NW2d 712 (1944). Thus, Moser's statement does not negate Forfa's competence at the time of signing the will. Rather, every person who had contact with Forfa *on the date he executed his will*, including a hospital social worker, testified to his mental competence.

Petitioners further point to an alleged insane delusion Forfa suffered regarding petitioners' parentage as evidence of his mental incompetence. We hold that Forfa's will was not the product of an insane delusion.

> "An insane delusion exists when a person persistently believes supposed facts which have no real existence and so believes such supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts himself as if such facts actually existed. * * * If there are any facts, however little evidential force they may possess, upon which the testator may in reason have based his belief, it will not be an insane delusion, though on a consideration of the facts themselves his belief may seem illogical and foundationless to the court; for a will, it is obvious, is not to be overturned merely because the testator has not reasoned correctly." [*In re Sarras Estate*, 148 Mich App 171, 178; 384 NW2d 119 (1986), quoting *In re Solomon's Estate* (1952), 334 Mich 17, 27, 28.]

As such, petitioners have the burden of proving that the testator was the victim of an insane delusion and must show that the testator believed his statements, that he had no reasonable information or evidence supporting them, and that, but for such belief, he would not have excluded petitioners from his will. *Id.* at 176; see also *In re Karabatian's Estate*, 17 Mich App 541, 544; 170 NW2d 166 (1969).

Petitioners argue that Forfa's belief that they were of questionable parentage constitutes an insane delusion and invalidates the will. However, petitioners have failed to present any evidence showing that, but for such belief, Forfa would not have excluded petitioners from the will. The record does not show that Forfa's belief that petitioners were adopted in any way affected or influenced his decision regarding the disposition of his assets under the will. Forfa only indicated that petitioners did not "deserve anything." Thus, petitioners have failed to create any genuine issues of material fact with regard to the issue of Forfa's testamentary capacity. Accordingly, the trial court properly granted respondents' motion for summary disposition on this issue.

IV. Undue Influence

Petitioners next argue that the trial court erred in granting respondents' motion for summary disposition where the evidence established all three of the necessary elements giving

rise to the presumption of undue influence. We disagree. The petitioners challenged the will as unduly influenced by Brown and Bonaventure. To establish undue influence, "it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against his inclination and free will." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999); see also *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993); *In re Peterson Estate*, 193 Mich App 257, 259; 483 NW2d 624 (1991). However, a presumption of undue influence applies when the evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary, or an interest which he represents, benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. *Id.* at 259-260 (citations omitted).

In this case, petitioners have failed to establish that Forfa was subjected to undue influence. First, petitioners have presented no direct evidence of undue influence over Forfa. Instead, they rely on the presumption of undue influence. A fiduciary relationship certainly existed between Forfa and Bonaventure, as his attorney, and arguably between Forfa and Brown. See *In re Leone Estate*, 168 Mich App 321, 325; 423 NW2d 652 (1988) ("A fiduciary relationship is defined as one founded on trust and confidence by one person in the integrity and fidelity of another."); *In re Swantek Estate*, 172 Mich App 509, 514; 432 NW2d 307 (1988) ("A confidential relationship exists when a person enfeebled by poor health relies on another to conduct banking or other financial transactions."); *Vollbrecht*, *supra* at 435 (an attorney clearly acts as fiduciary). Nevertheless, petitioners have failed to show that Brown and Bonaventure stood to benefit from the will, or that Brown or Bonaventure had an opportunity to influence Forfa. Bonaventure and Brown did not receive any direct benefit under the will. The only benefit alleged to have inured to Brown and Bonaventure were the fees generated by the estate to Comerica Bank as executor and additional legal work for Bonaventure. However, such benefits are insufficient as a matter of law to raise the presumption of undue influence. See *id.* at 436 (where we held that the "[a]ppointment of scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence"). Petitioners have further asserted that Brown and Bonaventure represented interests of the Foundation, which directly benefited under the will.[4] We reject such an argument. Based on the record, we find no evidence to support petitioner's assertion that Brown or Bonaventure represented the interests of the Foundation.

Finally, petitioners have failed to establish that Bonaventure or Brown had an opportunity to influence Forfa's decision in leaving the residue of his estate to the Foundation. Rather, the evidence establishes that Brown and Bonaventure met with Forfa for only a brief period of time before executing the will and that Forfa had already determined that the Foundation would be the sole beneficiary under the will. Other cases discussing whether a defendant had the opportunity to influence the testator found that such opportunity existed where the defendant lived with the testator for a period of time before death or where there existed a pattern of conduct by the

[4] Petitioners argue that because Bonaventure taught classes for the Foundation in the past and Brown worked on other charitable trusts and held seminars for the Foundation, they represented the interests of the Foundation.

defendant designed to isolate the testator and influence his decisions. See *McPeak, supra; Peterson, supra*.[5] Clearly, this case does not present such a situation. Accordingly, the trial court did not err in granting respondents' motion for summary disposition with regard to the issue of undue influence.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

[5] For several reasons we reject plaintiff's reliance on *Tinsley v General Motors Corp*, 227 F3d 700 (CA 6, 2000). First, the court provided no elaboration as to what "poor health" the testator suffered from at the time at issue, and thus we cannot compare it to the facts of this case. *Id.* at 705. Second, in *Tinsley* there was evidence that the individual had some control over the testator's assets and neglected the testator. *Id.* We have no such facts in this case. Hence, *Tinsely* provides no useful guidance in our analysis of this particular case.