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STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF EDWARD H. BEAIRD.

JOHNNIE BEAIRD, Personal Representative of the ESTATE OF EDWARD H. BEAIRD,	UNPUBLISHED November 24, 2020
Appellee,	
v	No. 351968 Genesee Probate Court
POLLY BEAIRD,	LC No. 2019-212324-DE
Appellant.	

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Appellant appeals from an order of the probate court dismissing her petition to set aside the decedent's 2018 will and admit his 2003 will and to set aside certain ladybird deeds, for failure to create a genuine issue of material fact. MCR 2.116(C)(10). We affirm.

Appellant is one of three surviving children of Edward Beaird, along with Johnnie Beaird and Donnie Beaird. Decedent executed his last will in 2018, revoking a prior will from 2003. The 2018 will affirmatively made no dispositive provisions for appellant or her descendants. Ultimately appellant filed an amended petition alleging lack of incapacity by decedent and undue influence on decedent. Appellant requested that the 2003 will be admitted to probate in lieu of the 2018 will and that certain ladybird deeds executed in 2018 be set aside.

Appellant first argues that the trial court erred by dismissing her claim that the decedent lacked testamentary capacity. But the evidence proffered by appellant in support of her claim is insufficient. First, appellant offers an assessment from a medical record that McLaren Hospital in Flint created during a hospital stay by decedent twelve weeks before the will was executed. Appellant points to a passage in the report that states: "Psychology was consulted and Psych recommendation were followed. The patient was declared incompetent per Psych." Second, appellant refers to an affidavit by Lori Yost, appellant's high school friend, who states that, upon visiting decedent during that hospital stay, he was disoriented and confused. Yost further attests

that decedent was unable to recognize her, he had flashbacks, and that it was her lay opinion that he was not mentally competent. Third, appellant points to decedent having used her former married name, which she had changed 12 years before following a divorce, in the 2018 will in which she was disinherited.

Appellee's brief goes into considerable detail regarding the events leading up to the execution of the will and related documents. If accurate, those events certainly place in context why decedent may have chosen to act as he did in this regard. While helpful in setting that context, those details do not ultimately resolve the issue before us: whether appellant created a genuine issue of material fact regarding decedent's capacity and whether there was undue influence. One item that appellee points out that is relevant to the issue before us is that the will was witnessed by two attorneys, including the attorney who drafted the will, attesting that decedent was of "sound mind" and "under no constraint or undue influence." Appellee also references an affidavit by Johnnie Beaird in which he stated that neither he nor his brother Donnie were present at the signing of the will. Finally, we note that appellant did testify at her deposition, in response to hypothetical questions, that had her father named her as a beneficiary to a life insurance policy or investment account on the day he signed the will, that he would have had mental capacity to do so. Were we to conclude that appellant had created a genuine issue of material fact, the facts proffered by appellee would undoubtedly help appellee at trial. But the question before us is not the likelihood of appellee prevailing on the substance of the dispute, but whether appellant has offered sufficient evidence to avoid summary disposition. And on this point, we conclude that she has not.

We review a trial court's grant or denial of summary disposition de novo. *In re Mardigian Estate*, 312 Mich App 553, 557; 879 NW2d 313 (2015). We review a motion brought under MCR 2.116(C)(10) by looking at the evidence in the light most favorable to the non-moving party and determining whether it raises a genuine issue of material fact. *Id.* at 557-558. Moreover, it is presumed that a testator has the mental capacity to make a will. *In re Powers' Estate*, 375 Mich 150, 152; 134 NW2d 148 (1965). Additionally, "testamentary capacity is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution." *Id.* at 152. See also *Mardigian*, 312 Mich App at 558. And the burden is on the person who contests the will to establish the lack of testamentary capacity. MCL 700.3407(1)(c).

The test for mental capacity to make a will is set forth in MCL 700.2501(2):

> (2) An individual has sufficient mental capacity to make a will if all of the following requirements are met:
>
> (a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
>
> (b) The individual has the ability to know the nature and extent of his or her property.
>
> (c) The individual knows the natural objects of his or her bounty.
>
> (d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

Applying this to the first two of appellant's arguments, those arguments fall short. As to appellant's brief quotation from a medical record, that record was created 12 weeks before the decedent executed the will. And it merely references an assessment of the decedent while in the hospital. Not only does the passage quoted by appellant fail to establish whether the decedent had testamentary capacity at the time that he was in the hospital, it certainly does not establish whether, even if he lacked capacity at that time, he still lacked capacity 12 weeks later. Appellant overlooks an important principle, namely, that there is no rule that capacity once lost is lost forever. That is why the court must always look to the testator's capacity at the time the will is executed, not whether there was a lack of capacity at some other time. Moreover, appellant does not point to any evidence to suggest that the hospital's evaluation of decedent's competency during his hospitalization is relevant to any of the statutory factors for determining capacity to execute a will. That is, without more, the mere conclusion in the hospital report that decedent was incompetent would provide limited assistance to determining whether decedent lacked capacity to execute a will while in the hospital at that time, much less 12 weeks later.

As for the information provided by appellant's friend, Lori Yost, it is equally unhelpful. It merely provides Yost's lay observation and opinion of decedent's condition while in the hospital. It provides no assistance in judging his capacity 12 weeks later.

Finally, we turn to appellant's argument that decedent's reference to her by a prior married name in the will reflects a lack of capacity.[1] While this is perhaps a stronger argument than the previous two, we find it still to come up short. The only statutory factor that it even arguably relates to is MCL 700.2501(2)(c), whether decedent knew the natural objects of his bounty. While the use of one of appellant's prior married names, one that she had not used in a dozen years, may reflect some confusion by decedent, it nonetheless reflects that he was aware that she was his daughter. That is, he knew that she was a natural object of his bounty and the will reflects his decision to disinherit her.

Turning to the issue of undue influence, appellant again provides a scant basis to support her claim that her brother Johnnie exercised undue influence over their father. In her brief, she references portions of her deposition. First, she points to her brother being verbally abusive. She offers examples of him being abusive to her. She testified that "he was in my face threatening me" and that he "was going to tear my head off." She does additionally point to allegations of verbal abuse by Johnnie directed at their father including an incident where Johnie addressed his father using an an epithet and otherwise spoke to his father in disrespectful scatological terms noting, "What John wanted to say, he got away with." The affidavit of appellant's friend, Lori Yost, also details an incident when she was visiting that she heard Johnnie say " 'Arlene's going to be homeless and I'm going to jail…' I then hear Bud his father say.. 'No, we're not doing that right now Johnnie.' I then heard Johnnie Beaird say loudly 'shut the f—k up' to his father."

[1] In her deposition, appellant identified a number of names that she had previously gone by, including "Dianna Paulette Galat." Appellant's argument is based on her position that her father knew that she was no longer a Galat and was once again a Beaird and that her father never referred to her as "Dianna." With respect to this latter point, her given name at birth was Dianna Paulette Beaird.

She also testified that her brother was what she describes as "domineering." One example that she points to in her brief is that "there were times when my dad called me that I could hear his mouth." Her other example is that she responded "Yes, he's screaming" to the question "So Johnnie said that to your father, I'm your best friend, you better make sure I'm your best friend?"

Appellant also points to the fact that Johnnie lived with his father after the hospitalization and appellant having moved out. Appellant argues that this provided Johnnie with the opportunity to influence his father. But mere opportunity does not establish that undue influence existed. Similarly, even accepting appellant's characterization of her brother as "domineering," she does not bring forth actual evidence that he dominated his father to the point of engaging in undue influence to change his will. The closest that appellant comes to making such a showing is the statement by Johnnie to his father that decedent "better make sure I'm your best friend," but that too falls short of the mark. Appellant provides us with no evidence to tie that comment to a demand that Johnnie be favored in the will.[2] It might well be a reference to Johnnie continuing to act as his father's caregiver.[3]

And as for Johnnie's allegedly abusive nature, this too fails to establish a basis to conclude that he exercised undue influence. First, we fail to see how abusive comments made by Johnnie to appellant would constitute undue influence over decedent. Second, as for abusive comments directed towards decedent, appellant again fails to make a connection to it achieving undue influence to change the will. Appellant does not point to anything in the comments commanding decedent to change his will, or threats if decedent failed to do so. Indeed, the general nature of the comments would seem more likely to motivate decedent to disinherit his son rather than favor him at appellant's expense.

While undue influence may be established by indirect or circumstantial evidence, there must be more than mere suspicion. *In re Langlois' Estate*, 361 Mich 646, 652; 106 NW2d 132 (1960). To establish undue influence, it must be shown that the "deceased's free agency was destroyed and he acted under such coercion, compulsion, or constraint that the will did not truly proceed from him according to his wishes, which is the test of undue influence." *In re Fay's Estate*, 197 Mich 675, 686-687; 164 NW 523 (1917); see also *Langlois' Estate*, 361 Mich at 652-653. None of the evidence to which appellant directs our attention would allow a reasonable trier of fact to reach such a conclusion.

With respect to appellant's challenge to the ladybird deeds and transfer on death provisions of certain bank accounts, appellant provides no separate argument or analysis, mentioning them only in the context of her challenge to the will. Accordingly, we can only assume that appellant

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[2] We note too that the will did not favor Johnnie to the exclusion of both of his siblings, as only appellant was excluded.

[3] In fact, appellee's brief goes into detail regarding the context of these various statements, which does not support the implications that appellant ascribes to them. But we need not delve into that discussion as it is more important at this juncture that appellant fails to provide a context that favors her interpretation.

believes that her argument with respect to those items must succeed or fail along with her challenge to the will. And because her challenge to the will fails, so do these other arguments.

Affirmed. Appellee may tax costs.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering