STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0448

In re the Estate of Thomas D. Riley, Decedent

Filed December 15, 2014
Affirmed
Rodenberg, Judge

Nobles County District Court
File No. 53-PR-12-543

C. Thomas Wilson, Reed H. Glawe, Sara N. Wilson, Gislason & Hunter LLP, New Ulm, Minnesota (for appellants Frank Riley, Mary C. Riley, Rose Riley)

Douglas R. Peterson, Wade S. Davis, Bryce A. Young, Stinson Leonard Street, LLP, Minneapolis, Minnesota (for respondents Colleen Bowman, Peter Riley)

Erica Stein Rosenhagen, Stacy Kabele, Morrison Sund, PLLC, Minnetonka, Minnesota (for respondent Bank Midwest)

John M. Riedy, Maschka, Riedy & Ries, Mankato, Minnesota (for respondents Michael J. Riley, Patrick Riley)

Jill Baker, Blethen, Gage & Krause, PLLP, Mankato, Minnesota (for respondent Mary R. Riley)

Considered and decided by Peterson, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellants challenge the district court's grant of summary judgment in favor of respondents, arguing that there are genuine issues of material fact concerning the testator's capacity, undue influence, and mistake. We affirm.

FACTS

This appeal arises from a will contest involving the surviving children of Thomas D. Riley (testator), who died testate on May 1, 2012. He is survived by nine children born to his first wife, Catherine Riley and him: Frank, Mary C., Daniel, Michael, Peter, Patrick, Ann, Colleen, and Rose.[1] Catherine died in 2006. In March 2008, testator married Mary Royer Riley, with whom he lived until his death in 2012. The interested parties are testator's nine surviving children and testator's second wife, the validity of a will executed in February 2012 being the focus of this litigation. Appellants Frank, Mary C., and Rose (appellants) claim that the February 2012 will should not be admitted to probate. Respondents Colleen and Peter (respondents) are the nominated personal representatives under the 2012 will.

Riley Family Businesses

Testator and his first wife, Catherine, owned and operated over 1,000 acres of farmland located mostly in southwest Minnesota, with 80 acres located in northwest Iowa. Testator also owned and operated two John Deere implement dealerships—one in

[1] We will refer to testator's children by their first names for ease of explanation and understanding.

Tracy, Minnesota and the other in Sheldon, Iowa. When she was alive, Catherine primarily managed the farming operation while testator primarily focused on operating the John Deere businesses.

Peter managed his own personal farm implement store in Sheldon, Iowa until December 28, 2012, while also managing testator's John Deere dealership in Sheldon, Iowa since 1996. Peter also owns and farms an 80-acre parcel near Sheldon, Iowa. Testator owned an 80-acre tract adjacent to Peter's property. Peter farmed that land for testator from 1992 until testator's death, charging testator nothing for his time and labor.

Michael and Patrick are testator's youngest children. Both spent their adult lives managing the family farm. Both lived in the Nobles County family home with their mother until she died, and Michael continues to live in the home.

Catherine entered into a partnership with Michael and Patrick to run the family farm in 1995. Upon the formation of this partnership, Daniel and Frank were informed that they would not be allowed to farm their parents' land or use their parents' machinery. Although Daniel and Frank believed that Michael and Patrick were being treated preferentially, they did not further dispute the arrangement.

Catherine died testate on January 25, 2006, with her will providing testator a life estate in her 1,000 plus acres of farmland, with the remainder interest in that property going to her nine children in equal shares. After Catherine died, testator as life tenant rented the farmland to Michael and Patrick, who had been running it with Catherine while she lived. Michael and Patrick were 50/50 partners concerning the farming of that land.

Testator's other children were not involved in the family farming operation or the John Deere dealerships during their adulthood. Mary C. became an engineer. She lives in the Twin Cities area. Ann and Rose both became dentists, residing in South Dakota and Oklahoma respectively. Colleen works as a school counselor in Iowa. Frank is a farmer and solo practicing attorney in Worthington, Minnesota. He currently farms 950 acres of farmland in Nobles and Jackson Counties, of which he owns approximately 430 acres and rents the rest. Daniel also farms land in the Worthington area.

Testator married Mary Royer Riley in March 2008 and lived with her until he died in May 2012. Testator's children were aware that testator guaranteed Mary Royer Riley an income stream of $100,000 per year should he die before her. The financial security was provided, in part, because Mary Royer Riley agreed to assist in caring for testator in the years following their marriage.

1975 Wills

Over his lifetime, testator executed numerous wills and other estate planning documents and had several draft documents prepared for him that were never signed. In 1975, testator and Catherine executed mirrored wills, drafted by attorney Arnold Brecht, each leaving the other a life estate in all of their real property, with the remainder interest divided equally among the nine Riley children. These wills were signed.

1998 Wills

In 1998, at the request of testator, Frank prepared wills for both testator and Catherine that modified the scope of their life estates to each other from "all real property" to "agricultural real property." The remainder interest remained divided

equally among the children. Frank did not discuss other estate planning options with his parents. Rather, he used the Brecht-drafted wills as a template. These wills were signed.

2003 Wills

In 2003, Frank prepared new wills for testator and Catherine, which limited the life estate each would leave the other to "farm real estate." The remainder interest remained divided equally among the children. The will also added the designation of Mary C. as a contingent personal representative. These wills were signed. Catherine's 2003 will was probated after her death in 2006.

2006 Draft Will and Estate Planning

After Catherine died, testator consulted attorney Bruce Kness, who drafted a will for testator in 2006. This draft will departed from the 2003 will in two respects: First, it provided that Michael and Patrick would each receive specifically designated 80-acre parcels of farmland; second, it named Peter and Colleen as co-personal representatives. There is no record of testator signing the 2006 draft will.

In May 2006, testator also met with Marv Siechman, a business-planning consultant at AgStar, to discuss the best way to structure his estate to meet and achieve his estate planning expectations and minimize financial burdens. No documents appear to have been prepared or signed as a result.

2008 Will

Testator executed a new will after he married Mary Royer Riley in 2008. The will, again prepared by son Frank, gave Mary Royer Riley a life estate in testator's farmland, with the remainder interest to testator's children in equal shares. The will

appointed Peter and Colleen as his co-personal representatives. Frank did not discuss other estate planning options with testator, did not mention the possibility of a postnuptial agreement, and did not discuss creating a trust.

Testator and Frank had a falling out in 2008, related to what testator thought was Frank's excessive request for legal fees for handling Catherine's estate. The billing dispute fractured the relationship between Frank and testator until testator's death.[2]

2010 Draft Will and Other Estate Planning Consultations

After 2008, testator resumed his estate planning consultations with Kness. In November 2009, Kness met with testator. When Kness asked about his estate planning priorities, testator explained that he wanted to ensure that Mary Royer Riley was provided for, that the farmland was kept together, that his children continued in the John Deere business, and that he wanted to "give the home 80 to Pat and Mike[,] the north half of the northeast quarter" of testator's property. At this meeting, Kness also suggested to testator that he consider using a revocable living trust rather than a will, to avoid probate expenses and delays.[3]

In January 2010, testator directed Kness to draft a revocable living trust giving Michael and Patrick the option to purchase the identified 80 acres outright, before the

[2] Testator also had strained relationships with the other appellants, Mary C. and Rose, both of whom had limited communication with testator during the last few years of his life.

[3] Earlier in 2000, testator had sought advice from Erlin Weness, a professor with the University of Minnesota agricultural extension services. Testator identified to Weness that one of his estate planning goals was keeping the farmland in the family and available for Michael and Patrick to continue farming. Weness suggested that testator consider a revocable living trust. The record reveals no estate planning documents signed in 2000.

remaining land was distributed among the nine Riley children. Testator did not sign the draft of the trust.

Testator also sought estate-planning advice from an attorney located in Red Wing, Minnesota in July 2011. The Red Wing attorney suggested that testator consider a revocable living trust to simplify the administration of his estate and avoid probate. None was created or signed in July 2011.

October 2011 Discussion

On October 20, 2011, Kness met with testator, Mary Royer Riley, Colleen, Peter, and Michael. The purpose of the meeting was to provide a general framework for testator's estate plan. At the meeting, Kness explained that testator intended to give Mary Royer Riley a life estate in the farmland and distribute his remaining assets equally among the children. The meeting also involved discussion of specific parcels being bequeathed to Peter, Michael, and Patrick, but those assets were to be accounted for in the equal division of the estate among the children. There was also discussion of an irrevocable QTIP trust at this meeting.[4] No will or trust was signed in October 2011.

February 2010 Will and Estate Documents

In February 2012, testator believed he might die soon, as his health was failing. He requested that Kness prepare the necessary documents to put his estate in order. On

[4] "QTIP" is an acronym for "qualified terminable interest property" and is a commonly used estate planning tool when a spouse has children from another marriage. Property placed in a QTIP trust for a spouse can earn income for the spouse during her lifetime, which is treated as exempt from gift and estate tax. *See* 26 U.S.C. § 2056, subd. b(7)(i)-(ii) (2012). The property may then pass to another recipient, such as children from another marriage, after that spouse is deceased. *Id.*

February 10, 2012, testator and Kness discussed the estate plan via telephone. At testator's direction in a phone conference involving only the two of them, Kness prepared a will, an irrevocable QTIP trust for Mary Royer Riley, a postnuptial agreement with Mary Royer Riley, and a revocable living trust.

As part of this estate plan, Mary Royer Riley, by postnuptial agreement, disclaimed her right to elect against testator's will, disclaimed her homestead rights, and disclaimed any rights to maintenance or support. In exchange, the QTIP trust would provide for her maintenance while ensuring that testator's appointed trustee(s) would maintain control over the Riley farm.

The will and revocable living trust governed the distribution of testator's remaining assets. The will named Colleen and Peter as personal representatives. The revocable living trust named testator as trustee and, upon his death, appointed Patrick and Michael as trustees. The trust further specified that "[t]he trustee shall distribute to the Settlor's sons, Patrick Riley and Michael Riley, real property legally described as the Northeast Quarter (NE1/4) of Section 26, Township 102, Range 39, Nobles County, Minnesota, share and share alike." Further, "[t]he trustee shall distribute to the Settlor's son[] Peter J. Riley, real property legally described as the East half of the Southwest Quarter (E1/2SW1/4) of Section 27, Township 97, Range 42, O'Brien County, Iowa, outright." The last relevant provision of the trust states that "[t]he trustee shall distribute all remaining trust assets not effectively distributed under the preceding provisions of this agreement to my children, in equal shares . . . ."

During a February 10 phone call, Kness confirmed with testator three times that testator intended to bequeath to Michael, Peter, and Patrick certain specified parcels and before the equal property distribution among the nine children. Testator answered in the affirmative each time.

Kness and his secretary immediately began preparing the documents for testator. The following day, and at testator's request, Michael flew the documents from Minnesota to Arizona, where testator was then residing.

On February 13, 2012, testator signed the documents before a notary, two nonfamily witnesses, and Mary Royer Riley. When questioned by the notary, testator answered that he knew what he was signing and that he was signing the estate documents because he wanted to do so.

During the time period surrounding testator's signing of the estate planning documents, there were a number of witnesses to his mental and physical capacity. These individuals included Mary Royer Riley; a friend who lived with testator; Kness; testator's home health care nurse, who met with testator weekly; testator's primary care physician, with whom testator met several times over the winter; testator's children who visited him; the director of clinical services of testator's hospice program; the chaplain who met with testator after he started hospice; and the two notaries public who notarized testator's estate documents. Each of these individuals was deposed and all testified that testator was of sound mind when he executed the February 2012 estate documents.

On February 20, 2012, testator signed a Do Not Resuscitate Directive (DNR). Testator's capacity to sign the DNR is not contested.

February 23, 2012 Amendment To Trust

After he had signed the estate planning documents on February 13, testator instructed Kness to prepare an amendment to the revocable trust, again making specific land bequests to Michael, Peter, and Patrick, and adding funds from an investment account into the revocable trust to cover potential estate taxes. The amendment to the trust was signed and notarized on February 23, 2012.

Testator's Death and Will Contest

Testator died on May 1, 2012. After his death, Colleen and Peter petitioned the district court to formally admit the 2012 will to probate and appoint them co-personal representatives. Michael, Patrick, and Mary Royer Riley supported the probate of the 2012 will.[5] Frank, Mary C., Ann, Daniel, and Rose (will contestants) objected to the probate of the 2012 will and sought to have the district court instead admit testator's 2008 will to probate.

The will contestants' primary issue with the substance of the 2012 will was testator's distribution of 80-acre parcels of farmland to Michael, Peter, and Patrick before the equal division of the remainder of the estate among the nine Riley children. The will contestants argue that the additional acreage devised to Michael, Peter, and Patrick should have been included in the total estate to be divided equally among the nine children as had been the case in the earlier estate plans. The will contestants further contended that testator lacked capacity at the time the 2012 will was executed, was

[5] We collectively refer to Colleen, Peter, Michael, Patrick, and Mary Royer Riley as "will proponents."

unduly influenced in the execution of the will, and executed the will while under duress, as the 2012 estate plan was the first and only plan to deviate from testator's history of equal treatment of his children.

After extensive discovery, Peter and Colleen moved for summary judgment. After service of the summary judgment motion, the will contestants moved to amend their petition to include mistake as an additional basis for objecting. The will contestants resisted the summary judgment motion, asserting that genuine issues of material fact remained.

The district court granted summary judgment in favor of the will proponents, determining that the will contestants did not present facts sufficient to establish a genuine dispute of material fact that testator was incompetent, subject to undue influence, or mistaken when he executed his estate documents in February 2012. Three of the will contestants—Frank, Mary C., and Rose—appeal from the summary judgment.

D E C I S I O N

Appellants argue that the district court erred in concluding that appellants failed to raise genuine issues of material fact regarding testamentary capacity, undue influence, and mistake, and therefore improperly granted summary judgment. On appeal from summary judgment, we review de novo whether the district court erred in its application of the law and whether there were any genuine issues of material fact, viewing the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). "[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d

60, 71 (Minn. 1997). No genuine issue for trial exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 69 (quotation omitted). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.* at 71. Although the district court may not weigh the evidence in considering a motion for summary judgment, the district court "is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *Id*. at 70.

To validly make a will, a testator must have had testamentary capacity at the time of the will's execution and the will must not have been the product of undue influence or mistake. *See In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986) (testamentary capacity); *In re Estate of Rechtzigel*, 385 N.W.2d 827, 832 (Minn. App. 1986) (undue influence). Will contestants have the burden of establishing lack of testamentary capacity, undue influence, and mistake at the time of the execution of the will. Minn. Stat. § 524.3-407 (2012). But in the context of a summary judgment motion, the nonmoving party need only raise a genuine issue of material fact.

Testamentary capacity exists when "the testator understands the nature, situation, and extent of his property and the claims of others on his bounty or his remembrance, and he is able to hold these things in his mind long enough to form a rational judgment

concerning them." *In re Congdon's Estate*, 309 N.W.2d 261, 266 (Minn. 1981) (quotation omitted). "It is the generally recognized rule that testamentary capacity requires only that the testator have capacity to know and understand the nature and extent of his bounty, as distinguished from the requirement that he have actual knowledge thereof." *In re Estate of Jenks*, 291 Minn. 138, 141, 189 N.W.2d 695, 697 (1971).

Similarly, the testator must also not have been subject to undue influence at the time of the will's execution in order to admit a will to probate. *Anderson*, 384 N.W.2d at 520. To establish undue influence, the will contestant must show that another person influenced the testator at the time the testator executed the will "to the degree that the will reflects the other person's intent instead of the testator's intent." *In re Estate of Torgersen*, 711 N.W.2d 545, 550 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Our supreme court has also stated that, to demonstrate that a will was the result of undue influence:

> The evidence must go beyond suspicion and conjecture and show, not only that the influence was in fact exerted, but that it was so dominant and controlling of the testator's mind that, in making the will, he ceased to act of his own free volition and became a mere puppet of the wielder of that influence.

Congdon, 309 N.W.2d at 268 (citation omitted). "Contestant[s] must prove that the improper influence operated at the very time the will was signed and dominated and controlled its execution." *In re Estate of Anthony*, 265 Minn. 382, 386-87, 121 N.W.2d 772, 777 (1963).

Similarly, "[c]ontestants of a will have the burden of establishing . . . mistake." Minn. Stat. § 524.3-407. While appellants' mistake claim was presented to the district

court in the context of a motion to amend, made in response to respondents' summary judgment motion, the district court "should deny a motion to amend a complaint where the proposed claim could not withstand summary judgment." *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). The district court denied the motion to amend, concluding that the claim of mistake could not survive summary judgment. We review appellants' mistake claim by the same summary judgment standard that we review the capacity and undue influence claims: a de novo standard. Because of the similarity of appellants' claims, and the identical standard of review applicable to each, we consider appellants' claims collectively.

Appellants' primary argument on appeal is that the district court engaged in impermissible fact-finding and weighing of the evidence in the summary judgment context. Upon careful review of the extensive record, we are convinced that the district court painstakingly scoured the record before it and correctly concluded that appellants were unable to identify a genuine issue of material fact warranting trial, even considering the facts and inferences in the light most favorable to them. The district court, in its detailed legal and factual analysis, did not err.

Appellants contend that testator's health and deteriorated mental state render the 2012 estate documents invalid. As factual support, appellants claim that testator sounded "groggy" and had a difficult time forming words during a phone conversation after the execution of the estate documents, was considered legally blind, and was in a substantial amount of physical pain that required daily doses of medication. But the existence of such physical maladies does not necessarily create a fact issue regarding testator's

capacity. *In re Bakke's Will*, 160 Minn. 56, 60, 199 N.W. 438, 440 (1924) ("There is no question of the testamentary capacity of a blind person in the full possession of his normal faculties otherwise."). All of the witnesses to testator's will—his attorney, his doctor, his nurse, his pastor, and two notaries public—testified that testator was competent and was not unduly influenced on February 13, 2012. No witness who saw or spoke with testator concerning the estate planning documents thought him incompetent or under the influence or control of another person. And will contestants themselves acknowledged, in discovery, that testator was a strong and willful person—even stubborn—to the end.

Testator signed a DNR on February 20, several days after executing the will and other documents. While signing a DNR is not identical to, and may not be as complicated as, executing estate documents, validly signing a DNR is a matter of great importance and requires a capacity analogous to a testamentary capacity. And everyone agrees that testator had sufficient capacity to validly sign the DNR.

Appellants also argue that the record fails to definitively establish that testator read the estate documents (or had them read to him) before their execution. But all of the witnesses to the signing of the will and other documents testified that testator seemed to know what he was signing. And the documents were prepared by attorney Kness consistent with testator's explicit instructions, according to Kness's uncontroverted testimony. During his deposition, Kness testified that, during the February 10, 2012 phone call with testator, he requested that testator confirm three times his bequest of the 80-acre parcels to Michael, Peter, and Patrick before the equal distribution of the

residuary of his estate to ensure testator understood the estate plan. The documents prepared by Kness in conformity with these instructions were duly executed in the presence of two disinterested witnesses and a notary only one day later. Moreover, this property distribution was later reconfirmed by testator in the February 23, 2012 notarized amendment to the trust. There is no genuine issue of fact concerning whether testator understood the disposition he made in the 2012 estate documents.

The record does not support appellants' assertion that Michael actively participated in the drafting and execution of testator's estate documents so as to amount to the undue influence of testator. Although Michael had a family and business relationship with testator, Michael's participation was, by all accounts, at the direction of testator. And, as noted above, all of the witnesses saw no evidence of any undue influence. Appellants have produced no evidence of undue influence of testator by Michael so as to warrant a trial.

All of appellants' arguments misstate the burden on the moving party in the summary judgment context. The essence of all of their arguments is that, because they question testamentary capacity, summary judgment may not be granted. But, in a will contest, the testator is presumed to have capacity, not to have been unduly influenced in the will's execution, and not to have been mistaken. *See Anderson*, 384 N.W.2d at 520 ("Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, . . . [or] mistake."). Thus, the burden is on appellants to produce evidence sufficient to create a genuine issue of material fact. In this, they have failed. Appellants suppose and speculate that testator lacked testamentary capacity, that

he was unduly influenced, or that he was mistaken. But their arguments are based on all children not having been treated equally. A fact issue sufficient to avoid summary judgment, however, must be genuine and not merely hypothetical. Tellingly, objector Mary C. testified that, "if there's nine dollars left, I want one dollar. It's the symbolism of it." There is no doubt of appellants' sincerity in disliking testator's estate plan at the time of his death. But not liking the unequal distribution creates no issue of fact concerning capacity, undue influence, or mistake.

And we observe that, while the distribution of the estate is unequal under testator's estate plan, that plan considered in its entirety makes perfect sense. The estate planning tools implemented minimized the financial burdens on the estate. Testator was further able to provide for Mary Royer Riley through the QTIP trust, while ensuring that his property was managed by and distributed to his children. While each child does not receive an equal portion of testator's property, the estate plan provides for all of his children. There is nothing unreasonable or suspicious about testator deviating from earlier estate plans to bequeath 80-acre parcels to the sons who cultivated those specific parcels of land.

In sum, the district court did not err in concluding that appellants have failed to establish a genuine issue of material fact regarding testamentary capacity, undue influence, or mistake in the execution of testator's estate documents. Its grant of summary judgment was proper.

Affirmed.