STATE OF MINNESOTA
IN COURT OF APPEALS
A09-941

In re the Estate of:
Raymond J. Stanley, Deceased

Filed December 22, 2009
Affirmed; motion granted
Schellhas, Judge

Ramsey County District Court
File No. 62-PR-08-637

Beverly Reimann (pro se appellant)

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Considered and decided by Schellhas, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

SCHELLHAS, Judge

In this probate case, appellant Beverly Reimann challenges the district court's order granting summary judgment to respondents, dismissing appellant's objection, and admitting decedent's will for formal probate. Because appellant's objection has no basis

in Minnesota law, we affirm. We also grant respondents' motion to strike portions of appellant's brief and appendix.

FACTS

This case arises out of a petition for formal probate of decedent Raymond J. Stanley's last will, executed October 17, 2000. The will devised decedent's entire estate to his spouse, Phyllis Stanley, if she survived him. If Phyllis Stanley did not survive decedent, his will devised to respondents Stephen Muehlberg (Muehlberg), Virginia Muehlberg, Gretchen Clark, Paul Clark, Messiah Lutheran Church of Minneapolis, and Augustana Home of Minneapolis[1] equal 1/6 shares of the estate. The will nominated Phyllis Stanley as decedent's primary personal representative and Muehlberg as alternate personal representative in case Phyllis Stanley was unable to exercise her duties. Phyllis Stanley executed a reciprocal will, also naming Muehlberg as alternate personal representative.

Respondents are not related to decedent by blood. Muehlberg and Gretchen Clark are brother and sister and were Phyllis Stanley's first cousins once removed. Virginia Muehlberg is Muehlberg's wife. Paul Clark is Gretchen Clark's husband. Muehlberg had known decedent since Muehlberg was 12 years old. Though Muehlberg was not decedent's blood relative, he told people that he was part of decedent's family. Similarly, Paul Clark told people that he was decedent's cousin, "[p]erhaps for simplicity's sake."

[1] Messiah Lutheran Church of Minneapolis and Augustana Home of Minneapolis did not participate in the district court proceeding and are not participants in this appeal. In this opinion, the term "respondents" is used to refer to the Muehlbergs and Clarks.

The reciprocal wills made no mention of decedent's siblings or other family members. The lawyer who drafted the wills, Ralph Tully, testified at his deposition that decedent was "definite in saying" and "adamant" that he did not want anything to go to his siblings.

Muehlberg is a retired Minnesota district court judge. He was the Stanleys' attorney in fact since the mid-1990s and was decedent's healthcare proxy. Although Tully expressed concern to the Stanleys that nominating Muehlberg as alternate personal representative gave "some appearance of impropriety" because Muehlberg was a beneficiary under the will and a judge, the Stanleys insisted on nominating Muehlberg.

On October 2, 2001, Phyllis Stanley died. Upon her death, the Muehlbergs: provided comfort and assistance to decedent; brought decedent to their home to stay because he did not want to be alone in his apartment in Minneapolis; completed the funeral arrangements for Phyllis Stanley, much of which Phyllis Stanley and decedent had already arranged before Phyllis Stanley's death; planned and facilitated Phyllis Stanley's funeral reception at decedent's apartment in Minneapolis; explored assisted-living facilities for decedent, selected Croixdale, a facility in Bayport, and moved decedent to Croixdale; held an estate sale of the Stanleys' personal property; and assisted decedent in the hiring of an attorney in connection with the probate of Phyllis Stanley's will.[2]

[2] As the named alternate in Phyllis Stanley's will, Muehlberg was appointed personal representative of her estate because decedent did not exercise his power to become personal representative. Muehlberg testified at his deposition that he spoke to decedent about hiring an attorney and decedent "didn't seem to care" and asked Muehlberg to

Some of decedent's family members were unhappy about the Muehlbergs' involvement because: the family members were not involved in Phyllis Stanley's funeral arrangements or decedent's care; before Phyllis Stanley's funeral, they were not informed of decedent's whereabouts and did not know where to visit him until the funeral; they were not involved in the decision-making about decedent's move to Croixdale, a location they considered inconvenient to them; they believed that Croixdale's nursing director was aligned with Muehlberg and suspicious of anything that they suggested for reasons that they attribute to Muehlberg; family photographs in decedent's Croixdale apartment were removed and replaced with Muehlberg family photographs, with one picture of decedent's sister being "taped over" by a photograph of Muehlberg's family; Croixdale denied their request for information about decedent, saying that the requested information could only be provided to decedent's "next of kin," which Croixdale allegedly said meant Muehlberg; they believed that decedent's residence at Croixdale was contrary to decedent's wishes; the Muehlbergs did not invite decedent's siblings to the sale of the Stanleys' personal property; respondents purchased items of personal property without using a broker;[3] Muehlberg did not allow decedent to attend a family event to honor

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suggest "some names." Muehlberg gave decedent "the names of three or four law firms and [decedent] chose [attorney James] Lammers." Muehlberg suggested other lawyers instead of Tully because Tully was in Edina, which was not convenient for Muehlberg. Muehlberg filed the final account of Phyllis Stanley's estate, listing Lammers as "attorney for personal representative." But Muehlberg testified that, despite this description, he hired Lammers to be decedent's lawyer, not his own.

[3] The Muehlbergs and Clarks purchased some items at their appraised value less the percentage that the appraiser would have charged had the items been sold at the appraiser's store. Respondents could not locate notes showing the appraisal values of the items they purchased.

Tadeusz Majewski, a relative and nationally renowned musician, unaccompanied by Muehlberg; Muehlberg and decedent left the family event to honor Majewski after a short stay because Muehlberg "had other things to do"; they believed that Muehlberg fought their attempts to arrange overnight visits with decedent; Muehlberg did not oblige their request for an accounting of decedent's finances; when they asked to meet with Muehlberg to discuss decedent's affairs, Muehlberg asked them to meet in his chambers at the Washington County Courthouse; and Muehlberg's representation to the Board of Judicial Standards that decedent was estranged from his family was not true.

Because the Stanleys' wills were reciprocal, decedent was the primary beneficiary under Phyllis Stanley's will, and the other beneficiaries were the same six named in decedent's will. Muehlberg testified at his deposition that Lammers told him that, because of the size of the Stanleys' estate, it would be wise for estate-tax purposes for decedent to disclaim $1,000,000 under Phyllis Stanley's will and allow it to pass to the other six beneficiaries, including the Muehlbergs. Muehlberg made an appointment for decedent to talk to Lammers about this disclaimer but did not attend the meeting between Lammers and decedent. Decedent ultimately made the disclaimer.

Although Muehlberg was already decedent's attorney in fact, on November 8, 2002, Muehlberg sought permission from the Board of Judicial Standards to act as decedent's conservator. Muehlberg represented to the board that there was no one else close to decedent who was reasonably able to serve as conservator. Muehlberg did not think any of decedent's siblings would be appropriate to act as conservator because of their health and lack of experience. The Board of Judicial Standards approved

Muehlberg's request on May 1, 2003, noting that although the Minnesota Code of Judicial Conduct generally prohibits a judge from acting as conservator, there is an exception for family members, which is defined broadly to include any non-family person with whom the judge "maintains a close familial relationship." Muehlberg served as conservator until June 2, 2005, when the probate court, in a separate proceeding, appointed Mary McKendrick to replace him.

McKendrick claimed that after her appointment as decedent's conservator, Muehlberg attempted to control decedent's healthcare. According to David Stanowski, Croixdale never gave McKendrick the same access to decedent as Muehlberg had. And, unlike decedent's other family members, Muehlberg had a key to decedent's Croixdale residence. David Stanowski alleged that Muehlberg "was well known to the Croixdale staff and was referred to as 'the Judge.'" McKendrick agreed that "Muehlberg, as a judge, was considered a 'celebrity' at Croixdale."

In 2005, McKendrick arranged to have decedent examined by Dr. James Gilbertson for the purpose of determining his testamentary capacity. Dr. Gilbertson referred decedent to a neuropsychologist for a neuropsychological assessment. The neuropsychologist concluded that decedent's performance was "moderately/severely impaired," that the pattern presented suggested "progressive cortical dementia such as Alzheimer's Disease," and that decedent was "functionally disabled." The neuropsychologist also noted that decedent's "ability to consistently make adequate decisions in his own best interest is . . . significantly impaired," and that decedent did not have "the capacity to make complex financial and self care decisions." Based on the

neuropsychologist's conclusions and his own diagnosis, Dr. Gilbertson opined on December 30, 2005, that decedent "does not have the requisite cognitive awareness or working memory sufficient to freely and knowingly draft a will at this point in time."

Nonetheless, in December 2006, McKendrick petitioned the court to change decedent's will because "it was clear to [her] after discussion with [decedent] that [he] wanted to benefit his family under his Will." Respondents objected to McKendrick's petition and she ultimately "withdrew [the petition] at the recommendation of [her] then new attorney to prevent the threatened imposition of sanctions and fees against [her] personally, as those were presented to [her] attorney by the attorney for [respondents]." McKendrick states that it was "made clear" to her that if she resigned as conservator and guardian, respondents would not seek sanctions against her personally.

On December 19, 2007, in the presence of Ray Davy, the husband of decedent's niece, Henry Stanowski, decedent's brother, and David Stanowski, decedent's nephew, decedent signed a will that distributed all of his assets to his surviving siblings. Appellant admits that there were concerns about decedent's capacity, and the Stanowskis did not submit this will for probate. But the Stanowskis and Davy alleged that decedent told them "on several occasions" that his estate should benefit his siblings. David Stanowski, without providing any point in time, also noted that "neutral professionals" made a video of decedent in which he expressed his wish that his siblings be his beneficiaries. Don Lattimore, an attorney who represented decedent while he was subject to McKendrick's conservatorship, also stated that decedent "made it clear" that he wanted to financially benefit his family members in his estate planning documents. In

March 2008, Lattimore prepared a will for decedent that would have benefitted decedent's family. But Lattimore did not have decedent sign the will even though he believed decedent's intent to benefit his family was clear.

Henry Stanowski stated that the Stanley/Stanowski family was always close and loving and stuck together through difficult times. McKendrick observed that decedent had a very close relationship with Henry Stanowski and that it was apparent that decedent loved his family. Henry Stanowski stated that decedent was always a very trusting man who was impressed by authority figures, that he learned to survive in World War II by obeying orders and deferring to people in positions of authority and power, and that he retained that trait long after his time in the service. When David Stanowski asked decedent what he thought of a judge managing his affairs, decedent responded, "Isn't that what Judges are supposed to do?" And when Henry Stanowski's wife asked decedent whether he trusted Muehlberg, decedent replied, "of course I trust him, he's a judge."

Henry Stanowski stated that decedent appeared to always try to be agreeable, especially as his dementia worsened, which made him vulnerable to manipulation. And, in her capacity as conservator, McKendrick reported that decedent "was by nature a very trusting man and was particularly vulnerable to Mr. Muehlberg because of his complete trust in someone who was a representative of justice. Therefore, [decedent] would sign any document presented to him by Mr. Muehlberg without question."

Muehlberg agreed that decedent was someone who liked to please people. And Paul Clark testified that decedent was the kind of man who did things to get along with people and did not challenge people. Paul Clark acknowledged that decedent was very

susceptible to influence. Paul Clark testified that decedent was extremely impressionable, suggesting that it was "entirely possible" that if decedent had been asked if he wanted his will to benefit someone he did not know, he would have said yes.

Decedent died on April 6, 2008. On May 21, 2008, Lake Elmo Bank petitioned the district court for formal probate of decedent's will and appointment of a personal representative. On behalf of appellant and other objectors, Henry Stanowski filed an objection to formal probate of the will. The objection states, "I object to the probate of the Purported Will of Decedent for the following reasons: The decedent lacked the requisite testamentary capacity and was unduly influenced in the preparation of the Will."

On February 24, 2009, respondents moved the probate court for summary judgment. The objectors conceded in their responsive memorandum that there was no evidence to support their contention that decedent lacked testamentary capacity or was unduly influenced at the time he prepared his 2000 will. Instead, for the first time, they asserted that respondents "unduly controlled [decedent] after his wife's death and undertook a concerted course of action to prevent [decedent] from revoking his will and executing a new will." The objectors did not seek permission of the probate court to amend their objection to reflect this new theory until after the hearing on respondents' motion for summary judgment.

In an order filed on March 23, 2009, the district court granted summary judgment to respondents, dismissing appellant's objections and admitting decedent's will for formal probate. Although the probate court noted that the attempt to amend the objection was untimely, "in the interests of judicial economy," it considered and rejected the merits

of the objectors' claim that respondents unduly influenced decedent to prevent him from revoking his will. This appeal follows.

D E C I S I O N

As a threshold matter, respondents argue that appellant's claim that their undue influence prevented decedent from revoking his will was never properly before the district court, because it was not raised in the original objection. Respondents emphasize the district court's characterization of appellant's objection as untimely. But because the court considered the merits of appellant's amended objection "in the interests of judicial economy," implicitly allowing the amendment, we will consider the merits of appellant's claim.

On appeal from summary judgment, this court reviews the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002).

I. Undue Influence

Appellant first argues that summary judgment was inappropriate because there are material issues of fact on the question of whether, but for respondents' undue influence, decedent would have revoked his 2000 will and executed a new will in favor of his other family members. The party contesting a will has the burden of establishing undue

influence by clear and convincing evidence. Minn. Stat. § 524.3-407 (2008); *In re Estate of Peterson*, 283 Minn. 446, 448, 168 N.W.2d 502, 504 (1969). Courts look for the following factors indicating undue influence in the context of a will:

> (a) an opportunity to exercise such influence; (b) a confidential relationship between the testator and the person purportedly exercising undue influence; (c) active participation in the preparation of the will by the person purportedly exercising undue influence; (d) disinheritance of those who would likely have been named in the will; (e) singularity of the will's provisions; and (f) the use of influence or persuasion to induce the testator to make the will in question.

Norwest Bank Minn. N., N.A. v. Beckler, 663 N.W.2d 571, 580 (Minn. App. 2003). The evidence must "go beyond suspicion and conjecture" and show that the influence exerted "was so dominant and controlling of the testator's mind that . . . [the testator] ceased to act of [his or her] own free volition and became a mere puppet of the wielder of that influence." *In re Estate of Congdon*, 309 N.W.2d 261, 268 (Minn. 1981) (quotation omitted). "Evidence which raises merely a suspicion and shows no more than a motive for exerting and an opportunity to exert undue influence is insufficient," even when "coupled with proof of inequality in the terms of the will." *In re Marsden*, 217 Minn. 1, 10, 13 N.W.2d 765, 770 (1944).

The objectors, including appellant, abandoned their claim that decedent was subject to undue influence at the time he prepared and executed his 2000 will, but appellant argues that an analysis of the above factors show that there was undue influence to prevent decedent's revocation of the 2000 will. Appellant acknowledges that Minnesota has not extended the doctrine of undue influence to a case such as this

involving a failure to revoke a will. But appellant asserts that there is sufficient precedent for this claim under *Graham v. Burch*, 53 Minn. 17, 55 N.W. 64 (1893).

In *Graham*, the testator attempted to destroy his will by placing it in an envelope in the stove, expecting it to be destroyed the next time the fire was lit. 53 Minn. at 22, 55 N.W. at 65. The defendant, who was a beneficiary under the will, fraudulently induced the testator to believe that his will had been destroyed by removing the will from the envelope before it could be burned and replacing the envelope in the stove. *Id.* at 21, 55 N.W. at 65. But the *Graham* court affirmed the district court's decision that the testator later ratified the defendant's act, never reaching the question of whether the defendant's conduct invalidated the will. *Id.* at 22, 55 N.W. at 65. Thus, *Graham* does not provide support for appellant's claim.

Appellant also argues that her undue-influence claim should be allowed by analogy to tortious interference with inheritance, which is a claim recognized by the Restatement (Second) of Torts and some foreign jurisdictions. The restatement provides that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." Restatement (Second) of Torts § 774B (1979).

Appellant cites two foreign cases, one from Oregon and one from Pennsylvania, recognizing this tort. In *Allen v. Hall*, the testator, who was elderly and dependent on the defendants, executed a will leaving two homes to the defendants. 974 P.2d 199, 201 (Or. 1999). A few days later, he instructed his lawyer to prepare a second will leaving one of

the homes to the plaintiffs. *Id.* One of the defendants became aware of the unexecuted second will, and took testator to the hospital, falsely informing the hospital that the testator had been confused during the previous two weeks. *Id.* The defendant also told the testator's lawyer that the testator was not lucid enough to sign a will and that she would inform the lawyer when he became lucid. *Id.* She never did so. *Id.* A few days later, she falsely informed the hospital staff that she had a power of attorney to decide whether the testator should be given life support and instructed the hospital not to provide such support to the testator. *Id.* The testator died two days later, without having executed the second will. *Id.* The Oregon Supreme Court determined that the claim was actionable under "a reasonable and principled extension" of the Oregon tort of intentional interference with economic relations. *Id.* at 202.

In *Cardenas v. Schober*, the plaintiffs alleged that the testator made handwritten documents leaving personal property to one of the plaintiffs and that the testator expected the defendant to have these documents drafted as a new will for her. 783 A.2d 317, 320 (Pa. Super. Ct. 2001). The plaintiffs alleged that the defendant "failed to do so or failed to do so properly," and that he hid or destroyed some of the documents such that they could not be probated. *Id.* Applying the tort of intentional interference with an inheritance, the court reversed the lower court's dismissal for failure to state a claim. *Id.* at 327. The court also noted that 11 states have adopted restatement section 774B, and that 5 states, including Pennsylvania, recognize the tort without reference to the restatement. *Id.* at 325–26.

But Minnesota is not among these states, and we are not inclined to embrace the tort of intentional interference with an inheritance. Creating a new tort is a function reserved for the supreme court. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990). While this court has extended existing torts, *see, e.g.*, *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 107–09 (Minn. App. 1988) (recognizing causes of action for negligent and fraudulent transmission of genital herpes), *review denied* (Minn. Oct. 19, 1988), Minnesota's existing tortious-interference cause of action cannot be extended to cover the claim in this case. Minnesota law recognizes a claim for tortious interference with "prospective contractual relations," but has not yet recognized the broader claim of tortious interference with an economic expectancy. *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 n.4 (Minn. App. 2001). To make out a claim for tortious interference with prospective contractual relations, a plaintiff must prove that the defendant intentionally and improperly interfered with the plaintiff's prospective contractual relation. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982). In this case, appellant had no prospect of a contractual or business relationship with decedent. We therefore decline to extend Minnesota tort law to cover appellant's claim.

Even if appellant could make a claim for tortious interference with inheritance, her claim would fail. Under the restatement's version of the tort, a plaintiff must be able to show that the defendant intentionally prevented the plaintiff from receiving an inheritance that *he or she would otherwise have received*. Restatement (Second) of Torts § 774B. Appellant argues that decedent clearly expressed to several people his desire to

recognize his family in his will, but appellant has supplied no evidence that any such expressions were made prior to the determination that decedent lacked testamentary capacity. Decedent's family did not attempt to probate the will that he executed in 2007, and Lattimore did not have decedent execute the will that he prepared for him in 2008. Appellant relies on a characterization of decedent as vulnerable, trusting, and suggestible, but has presented no evidence that these very characteristics were not the cause for decedent's alleged statements to McKendrick, Lattimore, and his family that he wanted to benefit his family in his will. These alleged statements stand in stark contrast to the only evidence of decedent's intent at the time he possessed testamentary capacity—his 2000 will. And decedent's attorney at the time, Ralph Tully, testified that decedent was "definite" and "adamant" that his will should not recognize his family.

Appellant attempts to bolster her claim against respondents with evidence that respondents (1) cloistered decedent in an inconveniently located assisted-living facility; (2) enjoyed more access to decedent than appellant; (3) bought items at the Stanleys' estate sale without using a broker; and (4) allowed decedent to make a decision, in consultation with counsel, to disclaim a portion of his wife's estate. This evidence falls far short of the affirmative actions taken in *Graham*, 53 Minn. at 21–22, 55 N.W. at 65 (the defendant tricked the decedent into thinking his will was destroyed), *Allen*, 974 P.2d at 201 (the defendant falsely told the decedent's lawyer that the decedent was not lucid enough to execute a will and then prevented the decedent from receiving life support), and *Cardenas*, 783 A.2d at 320 (the defendant allegedly destroyed documents showing the decedent's true intent). In summary, appellant has failed to present a prima facie case

that, but for respondents' alleged interference, appellant would have been recognized in decedent's will.

II. Constructive Trust

Appellant also argues that if this court concludes, under a "strict construction of the law," that the district court correctly granted summary judgment on the undue-influence claim, there are genuine issues of material fact regarding appellant's constructive-trust claim. Appellant and the other objectors first raised the constructive-trust claim in their memorandum in opposition to respondents' motion for summary judgment. The district court implicitly rejected the claim in granting the summary-judgment motion and admitting the will for formal probate. *See Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 474 (Minn. App. 2005) (stating that request for additional discovery was implicitly denied by grant of summary judgment), *review denied* (Minn. June 14, 2005).

A constructive trust is an equitable remedy that is imposed to prevent unjust enrichment. *In re Estate of Savich*, 671 N.W.2d 746, 751 (Minn. App. 2003). A constructive trust may be imposed not only when there is fraud or wrongdoing, but also when it would be "morally wrong for the property holder to retain the property." *Id.* (quotation omitted). The party seeking a constructive trust must show by clear and convincing evidence that the remedy is necessary to prevent unjust enrichment. *In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983). A defendant is unjustly enriched when he or she receives "something of value for which [he or she] in equity and good

conscience should pay." *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (quotation omitted).

Here, appellant argues that "there are material issues of fact regarding whether Muehlberg's wrongful conduct requires this court to impose a constructive trust," implying that, since Muehlberg benefitted under decedent's will only because of his wrongful conduct, in equity and good conscience he should have paid for what he received. But appellant has not met her burden of presenting "clear and convincing evidence" of any wrongful conduct. The district court therefore correctly rejected this argument.

III. Motion to Strike

Respondents move this court to strike a portion of appellant's brief and appendix. In her brief, appellant refers to a letter from McKendrick to the district court judge, who presided over decedent's guardianship and conservatorship case—a case separate from the probate case that is the subject of this appeal. On May 10, 2008, portions of the letter were read into the record at a hearing in the guardianship and conservatorship case. In her appendix submitted to this court, appellant includes a portion of the transcript of the May 10 hearing. Neither the letter nor the transcript was made part of the record before the district court in this case, nor was the district court or this court asked to take judicial notice of the letter or transcript.

The record on appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. Because the transcript that is in appellant's appendix was not before the district court, we grant

respondents' motion to strike. *See id.*; *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 667 N.W.2d 447, 449 n.2 (Minn. App. 2003), *aff'd on other grounds*, 683 N.W.2d 274 (Minn. 2004).

Affirmed; motion granted.