NO. COA07-425

NORTH CAROLINA COURT OF APPEALS

Filed: 06 May 2008

IN THE MATTER OF:
THE ESTATE OF
CHARLES LEE DIGMAN

Guilford County
No. 04 CVS 5366

Appeal by Propounder Roberta Digman Loy, Linda Lee Digman and Steven L. Loy from judgment entered 9 November 2006 and orders awarding attorneys' fees entered 7 and 15 December 2006 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 13 November 2007.

Douglas, Ravenel, Hardy, Canfield & Hoyle, LLP, by Robert D. Douglas, III for caveators-appellees.

Mary K. Nicholson for propounders-appellants.

STEELMAN, Judge.

The trial court correctly granted a directed verdict in this case, dismissing the contentions that the testator executed his 2001 will as a result of undue influence or without testamentary capacity. The trial court did not abuse its discretion in awarding attorneys' fees in this matter.

I. Factual and Procedural Background

This case arises out of a will caveat. Charles Lee Digman (Mr. Digman or testator) died on 12 March 2004, leaving two surviving daughters, Roberta Digman "Bobbi" Loy and Linda Lee

Digman, and two surviving grandsons, Steven L. Loy and Bryan Eugene Loy, sons of Bobbi Loy. A 24 June 2004 Order of Alignment named both daughters and grandson Steven as propounders of a 1995 Will (hereinafter collectively referred to as Appellants or Propounder-Appellants). Caveators Bryan Eugene Loy and his wife, Juliet Marie Loy, ("the Loys") were named as propounders of a will executed by the testator on 20 February 2001 (the "2001 Will").

On 15 March 2004, on application by Bobbi Loy, the Clerk of the Superior Court of Guilford County admitted the 1995 Will to probate in common form and issued letters of administration, naming Ms. Loy as Administratrix CTA. On 26 March 2004, Bryan and Juliet Loy filed a caveat to the 1995 Will, alleging that the 2001 Will was the Last Will and Testament of Charles Digman and asserting that the 1995 Will had been expressly revoked by the subsequent 2001 Will. The caveat requested a jury trial upon the issue of *devisavit vel non* in Superior Court. A pre-trial order was entered in which the parties stipulated that both wills were executed in accordance with all statutory formalities.

When the caveat came on for trial on 18 September 2006, Propounder-Appellants sought a continuance, or, in the alternative, to have the caveat dismissed on the basis that the 2001 Will was void as a matter of law. Both motions were denied.

Based upon the stipulations in the pre-trial order, Propounder-Appellants presented evidence on the issues of undue influence by the Loys and Mr. Digman's lack of testamentary capacity in 2001. At the close of Propounder-Appellants' evidence,

the trial court granted the Loys' motion for a directed verdict and filed a written order to that effect on 9 November 2006. The order stated that the evidence presented, taken in the light most favorable to Propounder-Appellants, was insufficient as a matter of law to sustain a jury verdict in their favor.

On 17 November 2006, the trial court denied Propounder-Appellants' motion for a new trial and directed both sides to submit proposed orders allowing their own motions for attorneys' fees and costs. On 7 December 2006, Propounder-Appellants gave notice of appeal of both the judgment and the 17 November order. The court entered orders on 7 December, awarding attorneys' fees to the Loys, and on 15 December, awarding $12,500 in attorneys' fees to Propounder-Appellants.

II. The 1995 and 2001 Wills

Evidence presented at trial tended to show that in December 1995, Charles Digman and his wife Louella executed reciprocal wills that devised and bequeathed their respective estates to each other, with their two daughters as secondary beneficiaries. When Louella Digman died in 1997, her estate passed to Charles under the terms of her will. Under the provisions of the 1995 Will, Mr. Digman's estate would pass in equal shares to his children, with the share of any child who pre-deceased him to be distributed *per stirpes* to her surviving issue; but if a child predeceased the testator leaving no issue, her share would go to the surviving sister.

On 20 February 2001, Mr. Digman met with his attorney and executed a will that devised and bequeathed his entire estate to

the Loys and specifically left no property to Linda L. Digman ("Linda"), Roberta Jane Loy ("Bobbi") and Steven L. Loy ("Steven") and their heirs. This will expressly revoked all earlier wills.

III. Caveat Proceeding

In light of the stipulations in the pre-trial order, Propounder-Appellants presented evidence that the 2001 Will was the result of undue influence and that Mr. Digman lacked testamentary capacity at the time of its execution.

The evidence tended to show that Mr. Digman was increasingly difficult to deal with following the death of his wife and that he and his daughter Linda, who both lived in Digman's house, suffered from health issues. Bobbi Loy served as principal caregiver for both Mr. Digman and Linda until a dispute in January 2001, after which she continued to care for her sister but had little contact with her father.

Propounder-Appellants presented evidence through several witnesses, including family members, a bank employee who assisted Mr. Digman with some financial transactions, and the paralegal who met with Mr. Digman prior to the execution of the 2001 Will and also witnessed its execution. The paralegal testified that Mr. Digman: (1) "was friendly, decisive, very well-spoken as far as what he wanted," giving her "no reason to question anything;" (2) was sufficiently aware of the 1995 Will and familiar with the process to ask questions of his attorney regarding the nature of probate and will contests; and (3) wanted to be sure that what he

was signing reflected his intent to change beneficiaries. Juliet Loy was present at both meetings.

IV. Analysis

Several issues raised by Propounder-Appellants are grounded in an argument that they were not caveators in these proceedings. The filing of a caveat necessitates a formal probate proceeding with a jury trial on the issue of *devisavit vel non*. *In re Will of Ellis*, 235 N.C. 27, 32, 69 S.E.2d 25, 28 (1951). In the caveat proceeding, the burden is ordinarily first upon the propounder to demonstrate that the will is valid. *Mayo v. Jones*, 78 N.C. 402, 1878 LEXIS 237 (1878). Once the propounder establishes the validity of the challenged will, the burden shifts to the caveator to prove the grounds upon which the caveat is based. *Id.*

In the instant case, the parties stipulated in a pre-trial order to limit the issue of *devisavit vel non* to two questions, both of which related to the 2001 Will: (1) whether Charles Digman lacked testamentary capacity at the time of the execution of the 2001 Will and (2) whether the 2001 Will was procured by undue influence. The trial court correctly concluded that Propounder-Appellants were propounders of the 1995 Will and caveators to the 2001 Will.

A. Directed Verdict

In their first argument, Appellants argue that the trial court erred in granting a directed verdict because the evidence on testamentary capacity and undue influence, when viewed in the light

most favorable to the non-movant, was sufficient to overcome the motion. We disagree.

"A motion for directed verdict . . . presents the question whether as a matter of law the evidence is sufficient to entitle the nonmovant to have a jury decide the issue." *In re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993) (citation omitted). The standard of review for these motions is "whether the evidence was sufficient to submit the issue to the jury." *In re Will of McDonald*, 156 N.C. App. 220, 228, 577 S.E.2d 131, 137 (2003).

> The standard is high for the moving party as the motion should be denied if there is more than a scintilla of evidence to support the [non-movant's] prima facie case. Further, the non-movant's evidence must be taken as true, with all contradictions, conflicts, and inconsistencies resolved in the non-movant's favor, giving him the benefit of every reasonable inference.

Id. (internal quotations and citations omitted, alteration in original).

Although the issue of *devisavit vel non* is traditionally reserved for a jury, this Court has upheld decisions by the trial court to grant a directed verdict.

> [A]lthough motions for directed verdict have not generally been granted in caveat proceedings, our Courts have carved out exceptions to this traditional rule, including: . . . the propounders may move for directed verdict on the issue of undue influence and testamentary capacity at the close of all the evidence[.]

In re Will of Smith, 159 N.C. App. 651, 655, 583 S.E.2d 615, 619 (2003).

1. Undue Influence

Appellants argue that there was sufficient evidence to create an issue of fact regarding undue influence, specifically that Charles Digman executed the 2001 Will while under the undue influence of Bryan and Juliet Loy. Appellants contend that they met the burden of proof established by *In re Will of Priddy*, 171 N.C. App. 395, 614 S.E.2d 454 (2005), which required the trial court to deny the motion for directed verdict.

"The influence necessary to nullify a testamentary instrument is the fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *Id.* at 399, 614 S.E.2d at 458 (internal quotations and citations omitted). Because the nature of undue influence makes it impossible to establish an exacting test, caveators "must rely on inferences from the surrounding facts and circumstances that arise on the evidence." *In re Will of Andrews*, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980). This Court has noted the difficulties of the burden of proof on this issue, stating: "Without evidence that the testator is susceptible to fraud or undue influence, evidence of undue influence itself is often too tenuous for consideration." *In re Will of Campbell*, 155 N.C. App. 441, 457, 573 S.E.2d 550, 562 (2002), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 278 (2003) (citations omitted).

In challenging the 2001 Will, Appellants were required to establish facts and circumstances from which a jury could

reasonably find that Mr. Digman executed the 2001 Will not of his own free will, but as the result of influence that was "overpowering" and "fraudulent . . . to the extent that [it was] not freely done" and was instead "the act of" Bryan and Juliet Loy. *Priddy*, 171 N.C. App. at 399, 614 S.E.2d at 458. Their evidence falls short of this burden because it is insufficient to show that Mr. Digman did not freely execute the 2001 Will.

Viewed in the light most favorable to Propounder-Appellants, the evidence tended to show that Charles Digman suffered from asbestosis and other illnesses, and eventually developed cancer. Following the death of his wife in 1995, he continued to live independently but his personality was affected by personal and family circumstances, causing bouts of crankiness and forgetfulness. Following Bryan and Juliet Loy's separation in April 2000, Ms. Loy stayed in Mr. Digman's home, but she was no longer living there at the time that the 2001 Will was executed. Family disputes resulted in alienation among family members. Upset with one of his daughters, Mr. Digman made the decision to rewrite his will in favor of one grandson and that grandson's wife.

The record is devoid of evidence that Mr. Digman was susceptible to undue influence at the time he executed the 2001 Will or that Juliet Loy had either the opportunity or the disposition to exert influence over him. *Priddy*, 171 N.C. App. at 399, 614 S.E.2d at 458. Mr. Digman's bank statements remained in his name and were delivered to his address until his death. Two disinterested witnesses who testified to Mr. Digman's financial

transactions provided evidence that he changed a beneficiary on a Certificate of Deposit in January 2001 but provided no evidence that Juliet Loy was handling his finances. Ms. Loy was present at the attorney's office on two occasions, but there was no evidence of influence, undue or otherwise. Rather, the evidence showed that she did not speak or participate in the proceedings in any way and stayed in the room only at Mr. Digman's request. Appellants' evidence, even when taken as true, fails to make out a *prima facie* case of undue influence.

The mere fact that Mr. Digman executed a will that disinherited his daughters in favor of a grandson and his wife is not sufficient to prove that Juliet Loy or her husband exerted undue influence. *See In re Broach's Will*, 172 N.C. 520, 523-24, 90 S.E. 681, 683 (1916). We hold that Appellants' evidence was insufficient as a matter of law to create an issue of material fact regarding undue influence.

This argument is without merit.

2. Testamentary Capacity

Appellants next argue that sufficient evidence was presented at trial to create an issue of fact as to Mr. Digman's lack of testamentary capacity to execute the 2001 Will. Appellants contend that a note in Mr. Digman's handwriting, asserting an inability to pay bills at a time when he had over $50,000 in bank accounts "under his control," demonstrates that he lacked testamentary capacity.

This Court summarized our case law on the burden of proof on this issue in *Priddy*, *supra*, as follows:

> A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate. The law presumes that a testator possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that he lacked such capacity. However, to establish testamentary incapacity, a caveator need only show that one of the essential elements of testamentary capacity is lacking. . . . A caveator needs to present specific evidence relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made.

Priddy, 171 N.C. App. at 397, 614 S.E.2d at 457 (internal quotations, citations, and alterations omitted).

The sole evidence on which Appellants rely is a January 2001 handwritten note where Mr. Digman expressed frustration over a number of matters. By Appellants' own admission, Mr. Digman's bank accounts were "under his control" during that time. Appellants' other claims based on general testimony concerning Mr. Digman's declining health and interactions with his family in the months preceding the execution of the 2001 Will are similarly unpersuasive. Such claims do not meet the requirement of specific evidence establishing that Mr. Digman did not understand his property, to whom he wished to give it, and the effect of his act in making the will at the time the 2001 Will was executed. *Id.* We hold that Appellants' evidence was insufficient as a matter of law

to create an issue of material fact regarding testamentary capacity.

This argument is without merit.

3. Timing of the Motion

Appellants next argue that the court "prematurely" granted the Loys' motion for a directed verdict because judgment can only be entered after the close of all the evidence and the Loys had not presented any evidence.

When the parties stipulated that both the 1995 and 2001 wills were executed in accordance with all statutory formalities, it became incumbent upon Appellants to show that the 2001 Will was the product of undue influence or that Mr. Digman lacked testamentary capacity to execute the 2001 Will. *Smith*, 159 N.C. App. at 657, 583 S.E.2d at 619 ("[C]aveators in a will [contest] . . . bear the burden of proof on the issue of undue influence despite any presumptions that may arise in their favor.")(citation omitted). We have determined that Appellants failed to meet that burden. Consequently, there were no "material controversies" regarding the 2001 Will to be determined by a jury. *In re Will of Dunn*, 129 N.C. App. 321, 325, 500 S.E.2d 99, 102 (1998). Under these circumstances, we hold that granting the motion at the close of Appellants' evidence was not premature, and the trial court did not err by granting the Loys' motion for a directed verdict.

This argument is without merit.

B. Attorneys' Fees and Costs

In their second and third arguments, Appellants contend that the trial court erred in awarding attorneys' fees and costs to the Loys and limiting Appellants' attorneys' fees in the amount of $12,500. We disagree.

N.C. Gen. Stat. § 6-21 provides that the trial court has discretion to tax costs, including attorneys' fees, against either party, or apportioned among the parties, in caveat proceedings. In relevant part, the statute reads:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

N.C. Gen. Stat. § 6-21 (2005).

1. Caveator's Attorney's Fees and Costs

Propounder-Appellants argue the trial court erred in awarding costs and attorneys' fees to the Loys because they failed to demonstrate "substantial merit." We disagree.

We note at the outset that both parties misstate the standard of review established by our Courts for awards of attorneys' fees under this provision. The parties cite *Dyer v. State*, 102 N.C. App. 480, 402 S.E.2d 464 (1991), *reversed*, 331 N.C. 374, 416 S.E.2d

1 (1992), for the proposition that an award of attorneys' fees is reviewed *de novo*. In reversing the decision of this Court, the Supreme Court quoted language from *In re Ridge*, 302 N.C. 375, 275 S.E.2d 424 (1981), interpreting the previous version of the statute and setting forth the appropriate standard of review as follows:

> "The findings of the trial judge are conclusive on appeal if there is competent evidence in the record to support them. . . . This is true even though there may be evidence in the record which could sustain findings to the contrary. . . . We must therefore determine whether the trial judge's award of caveators' attorneys' fees and costs from the estate constituted an abuse of discretion. In order to make that determination we must first consider whether there is competent evidence in the record before us to support the findings and conclusion of the trial judge." *In re Ridge*, 302 N.C. at 380, 275 S.E.2d at 427.
>
> Although N.C.G.S. § 6-21(2) has been amended so that it now provides that the court must find that a caveat proceeding has substantial merit before it may award an attorney's fee, the standard of review of an order made under the section has not been changed. If the findings of the superior court are supported by the evidence we cannot disturb them.

Dyer v. State, 331 N.C. 374, 376-77, 416 S.E.2d 1, 2 (1992). We first review the trial court's findings of fact and conclusions of law to determine whether they are supported by competent evidence. *Id.* We then review any award for an abuse of discretion. *Id.; see also Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) ("An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.")(citations omitted).

In the order awarding costs to the Loys' attorney, the trial court made findings of fact, including:

> 3. . . . [T]he execution of the 2001 Will was stipulated by the parties to be proper in accordance with the law for the execution of a valid Last Will and Testament.
>
> . . .
>
> 8. The caveat proceeding brought by the [Loys] has substantial merit.
>
> 9. On and after the filing of this action, the attorney for the [Loys] has rendered valuable legal services to the [Loys] in connection with this proceeding and expended 35.9 hours in rendering such legal services. The said attorney further incurred reasonable expenses in the amount of $1,045.80 in connection with the litigation.
>
> 10. The legal services rendered to the [Loys] and [associated] expenses . . . are necessary to represent them in this action.
>
> 11. The background and qualification of the attorney for the [Loys] are set forth in the Application and supporting affidavit.
>
> 12. The amount sought in the [Loys'] Application and the hourly rate charged by the attorney for the [Loys] are reasonable for legal services rendered in this type of action in this Judicial District.

Having reviewed the record, we conclude that: (1) finding 3 is supported by the Pre-Trial Order; (2) finding 8 is supported by competent evidence in the record as previously discussed; and (3) findings 9-12 are supported by the Loys' Application and its supporting affidavit. Moreover, the trial court had the opportunity to "observe the attorney during the trial and could determine his skill in trying the case as well as the difficulty of the problems [he] faced[.]" *Id.* at 378, 416 S.E.2d at 3.

The trial court concluded as a matter of law that the Loys' attorney's fees and costs were reasonable and that the caveat had substantial merit. Because these conclusions are supported by the court's findings of fact, which in turn are supported by competent evidence in the record, we hold that the fee award was within the discretion of the trial court.

This argument is without merit.

2. Propounder's Attorney's Fees and Costs

Propounder-Appellants next argue that the trial court erred in finding that they were required to show "substantial merit" under N.C. Gen. Stat. § 6-21, or, in the alternative, that the trial court abused its discretion by limiting the award to $12,500. We disagree.

We note that Appellants do not assign error to any of the findings of fact contained in Judge Eagles' order awarding their attorney's fees. As such they are binding on this Court on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In its order, the court found that:

> [N]o later than January 5, 2006, it should have been clear to Propounder that their position in this caveat was not reasonable and did not have substantial merit.

The trial court concluded that:

> Under the circumstances, Linda Digmon & Roberta Loy have satisfied the Court that: 1.) They originally had reasonable suspicions concerning their father's will; 2.) This law suit reasonably appeared to have substantial merit up until January 5, 2006; 3.) On or around January 5, 2006, it became clear that the lawsuit did not have merit; 4.) Linda Digmon and Roberta Loy incurred reasonable

> attorneys fees before January 5, 2006 related to the caveat of $12,500. The Court will award an attorneys fee to [Propounder-Appellants] in the amount of $12,500, which the Court in its discretion determines to be a reasonable fee for time that could and should have been spent on this case up until January 5, 2006, fifty hours at $250 hour.

Having established that Appellants are caveators to the 2001 Will, we first hold that the trial court did not err in evaluating their challenge for "substantial merit." *See* N.C. Gen. Stat. § 6-21(2). We thus review the award for an abuse of discretion.

The record shows that Appellants sought $ 51,751.53 in fees and $ 1,305.80 for costs. The fees reflected over 200 hours spent to defend the 1995 Will and to contest the 2001 Will. Although Appellants assert that "at no time was any objection made as to the amount of attorney fees," the record reflects that an objection was filed on 1 November 2006, and the trial court granted a directed verdict against Propounder-Appellants, upholding the 2001 Will. Consequently, we cannot say that the trial court's "bifurcation" of fees is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley*, 348 N.C. at 547, 501 S.E.2d at 656. The trial court awarded fees for 50 hours, which is fourteen hours more than that expended by the Loys' attorney. We hold that the trial court did not abuse its discretion. *Id.* This argument is without merit.

C. Pretrial Motions

In their fourth and fifth arguments, Appellants contend that the trial court erred in denying pretrial motions to continue the caveat proceeding and to dismiss the caveat on the basis that the 2001 Will was invalid on its face. We disagree.

1. Propounder's Motion to Continue

Propounder-Appellants argue that the trial court abused its discretion in denying their motion to continue when medical witnesses were unavailable and the court had failed to hold a pretrial conference to determine the consolidation of related matters. Without contending prejudice, Appellants complain that, despite empaneling a jury and calling witnesses before noon on the Monday of calendar call, the court did not allow "additional time over lunch to bring the numerous exhibits" to court before proceeding.

Having reviewed the record, we find no basis for these claims. The caveat was filed on 26 March 2004 and heard on 18 September 2006, which gave both sides nearly eighteen months to prepare for trial. Medical evidence was admitted by the court, and Appellants do not assert prejudice. As noted by the trial court, Appellants chose to rely on subpoenas rather than deposing expert witnesses. We further note that a pre-trial order was entered by the court and signed by all parties without objection. Under these circumstances, we cannot say that the court's refusal to grant a continuance was arbitrary or manifestly unsupported by reason. *Briley*, 348 N.C. at 547, 501 S.E.2d at 656.

This argument is without merit.

2. Validity of the 2001 Will

Propounder-Appellants argue the trial court erred in denying their pre-trial motion seeking a determination that "irreconcilable and ambiguous provisions" invalidated the 2001 Will, contending that these provisions raise factual issues of *devisavit vel non*.

The record reflects that the trial court denied the pre-trial motion without prejudice to Appellants' raising the issue at trial. Appellants did not argue this issue before the trial court when given the opportunity to respond to the Loys' motion for a directed verdict. On 9 November 2006, the court entered a judgment that, *inter alia*, concluded that "the Will of Charles Lee Digman, dated February 20, 2001, is the Last Will and Testament of Charles Lee Digman." Appellants did not assign error to this portion of the 9 November judgment.

Because this issue was determined by a final judgment on the merits, the denial of the pre-trial motion is not reviewable on appeal. *See, e.g., Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E.2d 806, 807 (1987) (the denial of a motion for judgment on the pleadings is not reviewable on appeal after the case has been decided on the merits)(citing *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985) and *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E. 2d 755 (1986)).

This argument is without merit.

V. Conclusion

Upon review of the record and the arguments presented by the parties, we conclude the trial court did not err in granting directed verdict on the issues of undue influence, testamentary capacity, and *devisavit vel non*. Nor can we say that the court abused its discretion in its award of attorneys' fees or in denying Appellants' motion to continue the trial on the morning of the proceedings. The judgment and orders of the trial court are hereby affirmed.

Appellants' argument regarding the court's alleged error in failing to admit certain criminal records is dismissed. N.C. R. App. P. 10(b)(2007).

Appellants' brief addresses only 7 of 9 original assignments of error. Pursuant to N.C. R. App. P. 28(b)(6) (2007), the remaining assignments of error are deemed to be abandoned.

AFFIRMED.

Judges WYNN and GEER concur.

Report per Rule 30(e).