IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1244

Filed: 16 August 2016

Johnston County, No. 12 E 332

IN THE MATTER OF THE ESTATE OF CHARLES E. SANDERS, SR., deceased.

Appeal by caveators from judgment entered 24 March 2015 by Judge R. Frank Floyd in Johnston County Superior Court. Heard in the Court of Appeals 29 March 2016.

Terry F. Rose for caveator-appellants.

John A. Whitley for propounder-appellees.

BRYANT, Judge.

Where there was insufficient evidence to support a finding of undue influence, we affirm the trial court's ruling to grant propounders a directed verdict on the issue of undue influence. And where on appeal caveators raise an argument regarding a shift in the burden of proof based on a fiduciary relationship between propounder and testator, an argument that was conceded before the trial court, we dismiss the argument as not preserved for our review.

Charles Edwin Sanders Sr. (decedent) signed his Last Will and Testament on 17 August 2004 and, on 25 April 2012, died from Alzheimer's disease, with

approximately one year between onset and death. On 23 May 2012, Charles Sanders Jr. was qualified as executor of decedent's estate by the Johnston County Clerk of Superior Court, the ex officio Judge of Probate. In the Last Will and Testament, decedent left a gift of all tangible property and a gift of the residuary estate to his son Charles Sanders Jr.; then to Glenn Alexander Sanders, should Charles Sanders Jr. not survive; and then to Gerald Lewis Sanders, if Glenn Alexander Sanders did not survive. Tim Sanders Sr., filed a caveat to the will in Johnston County Superior Court. In the caveat, Tim Sanders listed the names and relationships of the alleged devisees and legatees under Charles Sanders Sr.'s Last Will and Testament: Charles E. Sanders Jr. (son), Glenn Sanders (son), Gerald L. Sanders (son, deceased), Cedrick Leon Sanders (grandson), Robin Sanders (son), Larry Sanders (son), Leamon Sanders (son), and Tim Sanders Sr. (son). Tim claimed that Charles Jr. exerted undue influence over their father, that Charles Jr. convinced their father "to completely ignore other biological children and name[] himself as the sole heir." Tim also claimed that his father lacked testamentary capacity on 17 August 2004; *i.e.*, that decedent had previously been diagnosed with dementia and did not comprehend the natural objects of his bounty, did not understand the kind, nature, and extent of his property, did not know the manner in which he desired his act to take effect, and did not realize the effect his act would have upon his estate.

The matter came on for trial during the 16 March 2015 civil session of Johnston County Superior Court, the Honorable R. Frank Floyd, Judge presiding. There the parties were aligned as caveators Tim Sanders Sr., Leamon Sanders, Larry Sanders, Robin Sanders, and Cedric Sanders. Respondent propounders were aligned as Charles Sanders Jr. and Glenn Sanders.

The evidence at trial tended to show that Charles E. Sanders Sr. had seven sons: Tim, Charles Jr., Robin, Gerald, Leamon, Larry, and Glenn. Willie Mae Sanders, Charles Sr.'s wife of twenty-two years, died in 2002. Following her death, Charles Sr. lived alone in his home at 299 Ranch Road, Clayton. In October 2003, Charles Sr. executed a durable power of attorney in favor of Charles Jr., who was unaware of its existence for some time thereafter. In November of that year, Charles Sr. was reported missing. When found by law enforcement officers in South Carolina, Charles Sr. requested that they contact his son Charles Jr. Charles Jr. later testified that his father simply got lost while attempting to visit some of his former co-workers, but other testimony indicated that Charles Sr. became disoriented and unintentionally drove a great distance. Later in 2003, Charles Sr. wrecked his car, but could not remember what he hit. By 2004, his children had removed the license plates from decedent's vehicle and cancelled the insurance. Leamon testified that Charles Jr. encouraged him to move in with Charles Sr. and promised to pay Leamon for providing his care, as well as for food and utilities. While there was conflicting

testimony as to when Leamon and his girlfriend, Priscilla Price, moved into Charles Sr.'s home (either in 2004 or 2008), Leamon stayed in the home until after his father's death in 2012. Leamon testified that when he moved in,

> [Charles Sr.] couldn't do for hisself. He couldn't cook, he couldn't remember nothing. And then one night we were back there in the room asleep, woke up the next morning and he had stopped up the sink. The water just flooded the whole living room. He's walking around in the water. He don't even know it's on. The sink's just running. And then one time he got up and cut on all the eyes on the stove. He don't know it's on.

Robin, who worked nearby, testified he visited his father daily. After Willie Mae Sanders died, Robin noticed that decedent would say things that were not normal for his father and that his behavior changed. Decedent would talk about children that were not present as if they were living in the house, would not dress the way he would normally dress, and would not take a bath. Robin further testified that after Leamon moved into the home, decedent's physical appearance improved, "physically he perked up[.]" "[B]y [Leamon and Priscilla] being there all day, 24 hours a day, someone to talk to, to mingle with, it's like he came alive again. . . . But before then it was like he was fading away." Robin, Leamon, Priscilla, and Tim each testified that decedent's mental condition deteriorated after his wife's death. In 2009, when Tim was released from prison, he too moved into Charles Sr.'s house. Larry also moved into the residence when he lost his home.

Contrary to testimony that Charles Sr. was mentally incapacitated, Charles Jr. testified that in 2003, he observed "a little change in [his father]" following the death of Willie Mae Sanders, "but not that much that he was incompetent." In 2003, Charles Sr. was still driving his truck and meeting Charles Jr. two or three times a week for coffee. Charles Jr. testified that his father continued to live by himself until Leamon and Priscilla moved in with him in 2008. By 2008, Charles Jr. did notice a change in his father's behavior. A doctor informed him that decedent was having "a little lack of memory."

On 17 August 2004, Charles Sr. executed his Last Will and Testament. To draft the will, he hired the Law Offices of Tom Berkau. Charles Jr. learned of the will when he received a phone call from the Berkau Law Office, informing him that the will had been drafted. Charles Jr. testified that upon receiving the phone call, he took his father to meet with Attorney Berkau, but he remained in the waiting room while Charles Sr. and Tom Berkau spoke in a conference room. Though the will was executed in 2004, Charles Sr.'s remaining sons didn't learn about the will until near the time of his death in 2012.

At the close of the evidence, propounders moved for a directed verdict on the issue of undue influence, and the trial court granted the motion. The jury was instructed on the issue of whether Charles Sr. lacked sufficient mental capacity to make and execute a will at the time he signed his last will and testament. The jury

found that decedent did not lack sufficient mental capacity, and the trial court entered an order in accordance with the jury verdict. Caveators appeal.

I

Caveators first argue that the trial court erred in granting the propounders' motion for a directed verdict on the issue of undue influence where sufficient evidence was presented at trial to warrant submitting the issue to the jury. We disagree.

> [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 . . . [that] 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).

> In passing on [a motion for a directed verdict under N.C.G.S. § 1A-1, Rule 50] the trial court must consider the evidence in the light most favorable to the nonmovant, resolving all conflicts in the evidence in his favor and giving him the benefit of all favorable inferences that may be reasonably deduced from the evidence. If the evidence is sufficient to support each element of the nonmovant's case, the motion for directed verdict should be denied. The credibility of the testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived.

In re Will of Jarvis, 334 N.C. 141, 143, 430 S.E.2d 922, 923 (1993) (citation omitted). The standard of review of directed verdict is de novo. *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013).

> When a paper writing purporting to be a will is presented to the Judge of Probate he takes proof with respect to its execution. . . . It stands as the testator's will, and his only will, until challenged [by caveat] . . . . Upon the filing of the caveat the proceeding is transferred to the civil issue docket for trial before a jury.

In re Will of Charles, 263 N.C. 411, 415–16, 139 S.E.2d 588, 591–92 (1965).

> In a caveat proceeding, the burden of proof is upon the propounders to prove that the instruments in question were executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence.

In re Andrews, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980) (citation omitted).

"To constitute undue influence within the meaning of the law, there must be more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action." *Id.* at 53, 261 S.E.2d at 199 (citation omitted).

> Undue influence is defined as a 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. There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.

In re Will of Dunn, 129 N.C. App. 321, 328, 500 S.E.2d 99, 103–04 (1998) (internal citations and quotation marks omitted).

> [However,] [t]he battle by one person to overpower and

> overcome the free will, agency, wishes and voluntary action of another is very often difficult to prove[.] . . . After [the] testator's death, only circumstantial evidence remains from which the trier of fact must decide whether the battle in fact occurred and whether testator was on the losing side. Caveator must rely on inferences from the surrounding facts and circumstances that arise on the evidence in his effort to prove that undue influence existed at the time testator executed his last will and testament thereby causing him to execute a will that he otherwise would not have executed.

Andrews, 299 N.C. at 54, 261 S.E.2d at 199. Our Supreme Court has identified seven factors that often support a finding of undue influence.

> 1. Old age and physical and mental weakness;
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;
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> 3. That others have little or no opportunity to see him;
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> 4. That the will is different from and revokes a prior will;
>
> 5. That it is made in favor of one with whom there are no ties of blood;
>
> 6. That it disinherits the natural objects of his bounty;
>
> 7. That the beneficiary has procured its execution.

In re Will of Jones, 362 N.C. 569, 575, 669 S.E.2d 572, 577 (2008) (quoting *Andrews*, 299 N.C. at 55, 261 S.E.2d at 200) (quotation marks omitted). In the brief before this Court, caveators submit there was evidence to support factors 1, 2, 6, and 7.

As to factor one (old age and physical and mental weakness), caveators contend that the will was executed in August 2004, two years after Charles Sr.'s wife of twenty-two years passed away and his mental capacity began to decline. Caveators point to the incident that Charles Sr. got lost in South Carolina as evidence of his impaired mental condition. This incident occurred in November 2003, ten months prior to the date Charles Sr. executed his will; however, there is no evidence to indicate Charles Sr. was mentally impaired at the time the will was executed in August 2004. Tom Berkau, the attorney who drafted Charles Sr.'s will, testified to his impression of Charles Sr. made during conversations occurring while Charles Sr. was giving direction as to how his will should be drafted.

> Q. Okay, what, if any, practice and procedure or habit and custom, if you will, do you use in a normal course of events to establish if someone is competent in your observation and experience . . . ?
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> A. Well, what I usually do is when I have the people come into my office and I start talking to them, I talk to them in general. And if they're having trouble carrying on a conversation or if I feel they're not sure they fully understand what we're talking about . . ., then I'll usually ask them questions that deal with knowing who the president is, what day it is. A lot of the questions that you use to ask if someone's competent or incompetent.
>
> I've got a lot of those questions. I represent the Johnston County Mental Health Center and the doctors there and they've provided me a list of questions a lot of times that they feel indicate whether someone really knows what they're doing or

not doing.

Berkau specifically questioned Charles Sr. about his intent to leave his entire estate to one child out of seven. Charles Sr. "clearly knew what he wanted to do, and I questioned him about it. . . . And I didn't suspect anything from my general conversation with him that he had any problems with dementia or anything of that nature."

As to factor two (the person signing the testamentary paper is subject to the beneficiary's constant association and supervision), caveators point to testimony that Charles Jr. saw his father several times a week but acknowledge that with the exception of Tim, who was incarcerated during the relevant time period, all Charles Sr.'s children saw him frequently.

As to factor six (the will disinherits the natural objects of the testator's bounty), caveators point to testimony that Charles Sr. loved all of his children equally and tried to do for each as he did for the others, but in death left his entire estate to one son, Charles Jr. Berkau testified that he questioned Charles Sr. about his intent to leave his entire estate to one child. Berkau noted that Charles Sr. had a lot of confidence in Charles Jr.: "[H]e said that he wanted Charlie Junior to have everything and to take care of the homeplace. And, of course, he said he hoped he would keep it in the family as long as possible."

As to factor seven (the beneficiary procured the execution of the will), caveators point out that Charles Sr. retained the services of Attorney Berkau to draft his will, an attorney that Charles Jr. had known for two decades, an attorney who had previously sat on a hiring committee that selected Charles Jr., and an attorney whose law office called Charles Jr. to inform him that Charles Sr.'s will had been drafted. The evidence presented indicates that Berkau sat on the hiring committee for his church and that the committee had hired Charles Jr. as the church custodian. Furthermore, Charles Jr. had been hired as the custodian for a law firm at the same time Berkau was an attorney in the firm. In his testimony, Berkau stated that he did not note any symptoms indicative of undue influence upon Charles Sr. by Charles Jr.: "I saw no indication of that. That's why I always interview my clients independently of any children."

Upon review of the evidence presented in support of the factors for undue influence, we find no single factor or group of factors that would support a conclusion Charles Sr. was subject to undue influence or that Charles Jr. had a disposition to exert influence. *See Will of Dunn*, 129 N.C. App. at 328, 500 S.E.2d at 103–04 (listing four general elements of undue influence). Thus, there was insufficient evidence to support a conclusion of undue influence upon Charles Sr. by Charles Jr. *Id.* Therefore, we affirm the trial court's ruling to grant a directed verdict on the issue of

undue influence in favor of propounders. Accordingly, caveators' argument is overruled.

II

Caveators argue that on the issue of undue influence the burden of proof should have been shifted to propounder and that the trial court erred by concluding there existed no fiduciary relationship between Charles Jr. and Charles Sr. Caveators contend that the durable power of attorney by Charles Sr. in favor of Charles Jr. executed prior to the time Charles Sr. signed his will created a fiduciary relationship between the two and shifted the burden of proof on the issue of undue influence from caveators to propounders. We dismiss this argument as not properly before us.

The record before us shows that Charles Sr. executed a durable power of attorney in favor of Charles Jr. on 21 October 2003 and executed his will on 17 August 2004. However, following the close of the evidence, caveators acknowledged there was no evidence of delivery of the power of attorney to Charles Jr. and that Charles Jr. did not act with the power of attorney before 2005.

> The Court: What's your opinion of the evidence in regard to whether . . . Mr. Charles Sanders, Jr. knew of the – is there any evidence that he knew of the existence of the power of attorney at the time of the execution of the will or had acted on it?
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> [Counsel of caveators]: There's no evidence that he – the only evidence is that he said he did not know about it.

> The Court: Is there any evidence he acted on it?
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> [Counsel of caveators]: There's no evidence that he acted on it prior to 2005.
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> . . .
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> The Court: Any argument then that the burden shifts to the propounder with regard to the issue of undue influence?
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> [Counsel of caveators]: Based on that, Your Honor, no. No argument.

As caveators have conceded there was no evidence presented that Charles Jr. knew about the power of attorney executed on his behalf prior to the time the will was executed and failed to present an argument that the burden of proof on the issue of undue influence shifted to propounders on the basis of a fiduciary relationship between Charles Jr. and Charles Sr., caveators may not raise this argument now on appeal. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ."). Accordingly, this argument is dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).