IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-72

Filed: 31 December 2020

Wake County, No. 16 E 327

In the Matter of the Will of ALEXANDER PETER SABOL, Deceased.

Appeal by caveators-appellants from order entered 22 July 2019 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 7 October 2020.

*Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia J. Jurney and John W. Narron, for caveators-appellants.*

*Oak City Law LLP, by Robert E. Fields, III, for propounder-appellee.*

*Anderson D. Cromer for propounder-appellee.*

BERGER, Judge.

On July 22, 2019, the trial court granted Sheila Sabol Duncan's ("Sheila" or "Propounder") motion for summary judgment. Stuart Brian Sabol ("Stuart") and Graham Wade Sabol ("Graham") (collectively, "Caveators") appeal, arguing that genuine issues of material fact exist concerning whether (1) Alexander Peter Sabol ("Decedent") had the requisite testamentary capacity at the time he signed the 2015

will; and (2) Propounder exercised undue influence over Decedent to procure execution of the 2015 will.

Factual and Procedural Background

Decedent was born November 18, 1921 and died January 21, 2016. Decedent was married to Peggy Sabol ("Mrs. Sabol"), now deceased, and had three children of the marriage: Sheila, Stuart, and Graham.

On July 24, 2004, Decedent and Mrs. Sabol executed reciprocal wills (the "2004 Will") in which each spouse (1) bequeathed all of his or her personal property and residuary estate to the other spouse; (2) named the other spouse as his or her personal representative; (3) in the event that the other spouse did not survive the testator spouse or upon the death of the surviving spouse, bequeathed all of his or her property to Sheila, Stuart, and Graham to be divided equally; and (4) in the event that the other spouse did not survive the testator spouse, appointed Graham as his or her personal representative.

On or about June 4, 2013, after the death of Mrs. Sabol, Sheila spoke to Samuel Piñero about preparing a new will for Decedent. Decedent first met with Mr. Piñero on June 12, 2013, at Decedent's apartment in Abbottswood, an assisted living facility in Raleigh, North Carolina.

On June 26, 2013, Decedent executed a new will (the "2013 Will"). The 2013 Will changed his estate plan in the 2004 Will in that it provided: (1) Stuart would

only receive $10.00; (2) if both Graham and Sheila survived him, Decedent's personal property and residual estate would be divided equally between the two; (3) if Graham predeceased Decedent, Graham's share of his estate would go to Sheila; and (4) if Sheila predeceased Decedent, Sheila's share of his estate would go to Genesis II Church of Health and Healing ("Genesis"), a non-religious organization.

Over the next two years, Graham and Sheila's relationship deteriorated due to disagreements regarding the management of PieBird[1] and Sheila's repayment of her loans to Graham and his wife, Leslie.[2]

On November 17, 2015, Decedent wrote the following letter to Graham:[3]

> Dear Son Graham,
>
> I loaned you $70,000.00 in order for you to buy a share of PieBird. I understand that you have received $70,000.00 from the sale of Sheila's house to satisfy that loan. I would like you to return the $70,000.00 to me as soon as possible.
>
> Sincerely, your father,
> Al Sabol

Sheila wrote Graham's address on an envelope and mailed it to him on November 20, 2015. Graham testified that he was "in shock" when he received the

[1] PieBird, a restaurant in Raleigh, North Carolina, was operated by Sheila. Sheila, Graham, and Graham's wife, Leslie, were shareholders in PieBird.

[2] Between March 2011 and September 2012, Graham and Leslie loaned a combined total of $71,713.50 to Sheila and PieBird. The $71,713.50 loan was secured by two promissory notes totaling $220,000.00, an interest in Fraisage, L.L.C. (the entity that did business as PieBird), and a deed of trust against the personal residence of Sheila and her husband, George.

[3] Sheila testified that Decedent wrote the letter and asked her to mail it.

letter because he believed that Sheila had told Decedent "a huge lie" in order to discredit him. Graham did not immediately contact Decedent regarding the letter and planned to discuss the letter with Decedent in person when Graham visited North Carolina in March of 2016.

Prior to December 10, 2015, Mr. Piñero met with Decedent to discuss changes to the 2013 Will. Mr. Piñero testified that he met with Decedent at Decedent's residence and that Sheila was present in Decedent's apartment but in another room during the meeting. Following Mr. Piñero's meeting with Decedent, Mr. Piñero drafted a new will (the "2015 Will"). Mr. Piñero engaged another attorney, Jonathan Anderson, to meet with Decedent when he signed the will. Mr. Piñero testified that he believed it was likely the will would be challenged and that it would be "cleaner" for Mr. Anderson to meet with Decedent when the will was signed, because Mr. Piñero represented Sheila in matters related to PieBird at the time he drafted the 2015 Will and had previously represented Graham as a shareholder of PieBird.

On December 10, 2015, attorneys Jonathan Anderson and Dean Achterman met with Decedent to execute the 2015 Will. Specifically, the 2015 Will provided that: (1) Stuart would receive $10.00; (2) Graham would receive $1.00; and (3) Sheila would receive all of Decedent's investments, furniture, and residuary estate. In the event that Sheila predeceased Decedent, Genesis would receive all of Decedent's investments, furniture, and residuary estate. Mr. Anderson asked Decedent whether

he had any other wills, and Decedent replied that he did not. Decedent, who was lying on his bed because he had thrown out his back, first attempted to sign the will but was unsuccessful because "[i]t didn't hit the mark exactly where the signature block was indicated" and was illegible. Decedent successfully signed the will on his second attempt. Mr. Achterman and two witnesses then signed the will in the kitchen area of Decedent's apartment, and Mr. Anderson notarized their signatures.

On January 21, 2016, Decedent died. Propounder was notified of Decedent's death that same day, and she notified Caveators approximately 36 hours later. At Caveators' request, Duke University Health Systems performed an autopsy, which showed that Decedent had advanced prostate cancer, heart disease (including clogged arteries, advanced stenosis, enlarged heart, and that he had a heart attack approximately two (2) months before his death), bronchitis, gastritis, vascular disease, gallstones, arthritis, and possible scoliosis in his spine.

On January 27, 2016, Propounder submitted the 2015 Will to probate. On February 5, 2016, Caveators filed a caveat to the 2015 Will asserting that the 2015 Will was not Decedent's last will and testament. Caveators argued that Decedent lacked testamentary capacity at the time Decedent signed the 2015 Will, and that Decedent executed the 2015 Will as a result of duress, coercion, and undue influence by Propounder. Caveators specifically argued that Decedent lacked capacity because he was 94 years old, was in poor health, exhibited confusion, belonged to Genesis, and

failed to acknowledge that he had a prior will. Further, Caveators claimed Propounder unduly influenced Decedent to execute the 2015 Will because following disputes between Propounder and each of the Caveators, they were then subsequently disinherited in the Decedent's next will.

On May 16, 2019, Propounder filed a notice of hearing and amended motion for summary judgment, seeking dismissal of the Caveators' complaint. On July 22, 2019, the trial court granted Propounder's motion for summary judgment.

Caveators timely appealed, and argue that genuine issues of material fact exist concerning whether (1) Decedent had the requisite testamentary capacity at the time he signed the 2015 Will; and (2) Propounder exercised undue influence over Decedent to procure execution of the 2015 Will.

Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

*In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). "Summary judgment may be entered in a caveat proceeding in factually appropriate cases." *In re Estate of Phillips*, 251 N.C. App. 99, 104, 795 S.E.2d 273, 278 (2016). However, "[b]ecause of the factual nature of issues presented during caveat proceedings, summary judgment should be entered cautiously." *Id.* at 104, 795 S.E.2d at 278. Summary judgment should be denied when "there is any question as to the weight of evidence[.]" *In re Will of Jones*, 362 N.C. at 573-74, 669 S.E.2d at 576 (citation omitted).

Analysis

On appeal, Caveators argue that genuine issues of material fact exist concerning whether (1) Decedent had the requisite testamentary capacity at the time he signed the 2015 Will; and (2) Propounder exercised undue influence over Decedent to procure execution of the 2015 Will.

I. Testamentary Capacity

Caveators first argue that the trial court erred when it granted summary judgment because genuine issues of material fact exist as to whether Decedent had the requisite testamentary capacity when he signed the 2015 Will. We disagree.

> The presumption is that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting. 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.

*In re Estate of Phillips*, 251 N.C. App. at 110, 795 S.E.2d at 281-82 (citations and quotation marks omitted).

> It is not sufficient for a caveator to present only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which a caveator based [his] opinion as to the testator's mental capacity. 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.

*In re Will of Priddy*, 171 N.C. App. 395, 397, 614 S.E.2d 454, 457 (2005) (*purgandum*).

Here, Caveators have presented no evidence that "at or near the time [Decedent] executed [the 2015 Will that he] was mentally unequipped to do so." *In re Estate of Whitaker*, 144 N.C. App. 295, 299, 547 S.E.2d 853, 857 (2001) (citation omitted). Caveators contend that a jury could infer that Decedent lacked an essential element of testamentary capacity because Decedent did not think he had a prior will, or that by executing the 2015 Will he was in fact revoking his 2013 Will. *See In re Will of Buck*, 130 N.C. App. 408, 412, 503 S.E.2d 126, 130 (1998) (stating that in order for a testator to possess the capacity to make a will, he must "realize[] the effect his

act will have upon his estate"). However, Decedent's apparent lack of knowledge of the 2013 Will "fails to set forth specific facts showing that [Decedent] was incapable of executing [the 2015 Will] at the time." *In re Estate of Whitaker*, 144 N.C. App. at 300, 547 S.E.2d at 857. Such a claim, standing alone, does not meet the requirement of specific evidence establishing that Decedent did not understand the effect of his act in making the 2015 Will. Decedent's answer that he did not have a prior will could be interpreted to mean many things. It is simply speculation to conclude that Decedent did not understand the effect that executing the new will would have on his estate based on his vague answer that he did not have a prior will, and Caveators provide no further evidence that Decedent did not know the effect his act would have on his estate.

To the contrary, Mr. Achterman, an attorney who witnessed the 2015 Will, stated by affidavit that Decedent provided verbally and physically appropriate responses to pertinent questions; understood he was signing his last will and testament; and spoke of the natural objects of his bounty, the general scope of that bounty, and his desire for the disposition of his assets. Based on a review of the evidence presented, it cannot be said that Decedent's vague statement defeats the presumption of testamentary capacity. *See In re Will of Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000) ("[A] presumption exists that every individual has the requisite capacity to make a will, and those challenging the will bear the burden

of proving, by the greater weight of the evidence, that such capacity was wanting." (citation omitted)).

Further, the evidence tended to show that from 2013 through 2015 Decedent recognized his children, engaged in conversations about his children, and discussed distribution of his estate to the children. Graham acknowledged that in 2015, Decedent could carry on conversations about subjects that interested him. Further, in 2015, Decedent had an email exchange with Stuart concerning publication of Stuart's manuscript in which he referred to Stuart as "Professor Sabol." In addition, Decedent sent handwritten notes to Graham and his granddaughter in August and November 2015 that were thoughtful and coherent.

Caveators further contend that there are genuine issues concerning Decedent's testamentary capacity because Decedent was 94 years old and in poor health. Specifically, Caveators introduced Decedent's autopsy report which showed that Decedent was suffering from prostate cancer, heart disease, bronchitis, gastritis, vascular disease, gallstones, arthritis, and possible scoliosis in his spine. Despite the evidence in the autopsy report, Caveators failed to specifically argue why this evidence would be sufficient to withstand a motion for summary judgment. *See In re Will of Smith*, 158 N.C. App. 722, 725, 582 S.E.2d 356, 359 (2003) (*purgandum*) (requiring a caveator to present more than "general testimony concerning testator's

deteriorating physical health and mental confusion in the months preceding the execution of the will").

Accordingly, Caveators' evidence and arguments are speculative, and they have failed to set forth specific facts to establish that Decedent lacked testamentary capacity to make the 2015 Will. While their evidence concerning Decedent's physical and mental health at or near the time the 2015 Will was executed may be relevant to testamentary capacity, Caveators failed to satisfy their burden, and the trial court properly granted summary judgment on this issue.

II. Undue Influence

Caveators next argue that the trial court erred when it granted summary judgment because genuine issues of material fact existed concerning undue influence in procuring execution of the 2015 Will. We agree.

To survive a propounder's motion for summary judgment, the caveator must present "evidence of a prima facie case of undue influence[.]" *In re Will of Jones*, 362 N.C. at 574, 669 S.E.2d at 577. "Undue influence is 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." *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974) (citations omitted).

> [W]hile undue influence requires more than mere influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action, it does not require moral turpitude or a bad or improper

> motive. Indeed, undue influence may even be exerted by a person with the best of motives. Nevertheless, influence is not necessarily undue, even if gained through persuasion or kindness and resulting in an unequal or unjust disposition . . . in favor of those who have contributed to the testator's comfort and ministered to his wants, so long as such disposition is voluntarily made.

*In re Will of Jones*, 362 N.C. at 574, 669 S.E.2d at 577 (*purgandum*). "Undue influence is an inherently subjective term, and finding its existence thus requires engaging in a heavily fact-specific inquiry." *Id*. at 575, 669 S.E.2d at 577. "Direct proof of undue influence is not necessary and is rarely available; circumstantial evidence may be considered. In fact, the more adroit and cunning the person exercising the influence, the more difficult it is to detect the badges of undue influence and to prove that it existed." *In re Will of Everhart,* 88 N.C. App. 572, 574, 364 S.E.2d 173, 174 (1988) (*purgandum*).

"In order to state a *prima facie* case on the issue of undue influence, a caveator must prove the existence of four factors: (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 McDonald*, 156 N.C. App. 220, 228, 577 S.E.2d 131, 137 (2003) (citation and quotation marks omitted). Our Supreme Court has set forth the following factors which are relevant to inquiries concerning 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 [her] constant association and supervision;
3. That others have little or no opportunity to see him;
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 Andrews*, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (citations and quotation marks omitted). "A caveator need not demonstrate every factor named in *Andrews* to prove undue influence, as undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence[.]" *In re Will of Jones*, 362 N.C. at 576, 669 S.E.2d at 578 (*purgandum*).

If the questioned last will and testament "is not the product of the testator's free and unconstrained act, but is rather the result of overpowering influence . . . sufficient to overcome the testator's free will and agency, then the case must be submitted to the jury for its decision." *Id.* at 576, 669 S.E.2d at 578 (*purgandum*).

Here, it is undisputed that the 2015 Will "is different from and revokes" the 2013 Will, in that, the 2015 Will changed Graham's inheritance and removed him as executor. Further, it is undisputed that the 2015 Will effectively disinherited Graham and Stuart. Because the fourth and sixth *Andrews* factors are undisputed, we focus our analysis on the remaining factors.

As to the first factor – old age and physical and mental weakness[4] – the record shows that Decedent was a 94-year-old man who suffered from a host of health issues, including prostate cancer and a deteriorating back which prevented him from getting out of his bed when the 2015 Will was executed. Moreover, twelve days after executing the 2015 Will, Decedent demonstrated signs of confusion which may have been innocuous, but viewed in the light most favorable to the non-moving party, may have also been some evidence of deteriorating mental health.

Considering the second factor – that the person signing the paper is in the home of the beneficiary and subject to her constant association and supervision – Caveators contend that although Propounder did not live in the same home as Decedent, she visited or communicated with Decedent every day. In addition, Caveators' evidence shows that Decedent relied on Propounder to pay bills, check mail, take him to medical appointments, and review letters he drafted. Propounder was also a joint accountholder on Decedent's financial accounts. *See In re Will of Priddy*, 171 N.C. App. at 399-400, 614 S.E.2d at 458 (reversing summary judgment where although the "[p]ropounder did not live with [t]estator for several years, she was in contact by phone, purportedly had the [w]ill prepared and drafted for him, and dominated his financial affairs."). When viewed in the light most favorable to the

[4] Although we concluded that the trial court properly granted summary judgment as to testamentary capacity, this conclusion does not "necessarily preclude a finding of mental weakness on the issue of undue influence." *Caudill v. Smith*, 117 N.C. App. 64, 69, 450 S.E.2d 8, 12 (1994).

non-moving party, the evidence demonstrates that Decedent was in communication with Propounder on an almost daily basis and that Decedent relied on Propounder for medical and financial matters.

The third factor – that others have little or no opportunity to see the testator – weighs in favor of Caveators. It is uncontroverted that due to Decedent's advanced age and limitations, he rarely left his assisted living facility, and when he did, it was primarily with Propounder. According to Propounder's testimony, Decedent was visited by other family members approximately once every six months, and by all accounts, Propounder looked after Decedent's well-being during the last months of his life.

As to the fifth *Andrews* factor – the will is made in favor of one with whom there are no ties of blood – the 2015 Will was made in favor of Propounder, who is Decedent's daughter. However, Genesis was named as the alternate beneficiary if Propounder died before Decedent. Viewed in the light most favorable to the non-moving party, there is a provision in Decedent's will which, when drafted, could have favored Genesis to the exclusion of Decedent's issues.

Finally, as to the last *Andrews* factor – the beneficiary procured the will's execution – Propounder acknowledges that she contacted Mr. Piñero to draft the 2015 Will. At the time the 2015 Will was executed, Mr. Piñero was representing Propounder in unrelated matters.

In addition, the evidence tended to show that in late 2015, Propounder was displeased with Graham because Graham received approximately $70,000.00 from the sale of her home as repayment for certain loans Graham had made to Propounder. Caveators each testified that Propounder threatened to talk to Decedent about the situation unless Graham gave her a portion of the proceeds.

There was also evidence of a letter allegedly written by Decedent to Graham, on or about November 17, 2015, indicating that Propounder not only spoke with Decedent about her disagreement with Graham but also misled Decedent to believe that Graham had stolen the $70,000.00 from Decedent.

When viewed in the light most favorable to the non-moving party, Decedent was a person who was subject to influence, and Propounder had the opportunity to exert influence. Further, there was some evidence that Propounder had the motive and disposition to exert influence, and that the effective disinheritance of Graham and Stuart was a result which could indicate possible undue influence. *See In re Will of McDonald*, 156 N.C. App. at 228, 577 S.E.2d at 137.

"Regardless of which interpretation hews most closely to the truth, the evidence reflects that a genuine issue of material fact remains." *In re Will of Jones*, 362 N.C. at 579, 669 S.E.2d at 580. Therefore, we reverse the trial court's order of summary judgment as to whether Propounder exercised undue influence over Decedent.

Conclusion

We affirm the trial court's order of summary judgment on the issue of testamentary capacity. We reverse the trial court's order on the issue of undue influence and remand to the trial court.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ZACHARY and BROOK concur.

Report per Rule 30(e).