An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-526

Filed 05 July 2023

New Hanover County, No. 16-E-1551

IN THE MATTER OF THE ESTATE OF: DAVID SCOTT CORBETT, Deceased.

Appeal by Executrix from orders entered 27 July 2021, 28 July 2021, and 12 October 2021 and judgment entered 9 August 2021, all by Judge J. Stanley Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 25 April 2023.

Moore & Van Allen PLLC, by Thomas D. Myrick, Caitlin N. Horne, and Elena F. Mitchell, for Executrix-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by James C. Adams, II, Thomas G. Varnum, and Daniel L. Colston, for Caveator-Appellee.

GRIFFIN, Judge.

Executrix Shannon Corbett Maus appeals from orders entered by the trial court, denying her motions for: directed verdict at the close of Caveator's evidence, directed verdict at the close of all evidence, and judgment notwithstanding the verdict, or, in the alternative, a new trial; and judgment entered upon a jury verdict finding the writing entitled "Last Will and Testament of David Scott Corbett" is not

the Last Will and Testament of David Scott Corbett.[1] Executrix contends the trial court erred in (1) submitting the issues of testamentary capacity, undue influence, and devisavit vel non to the jury; (2) declining to apply the doctrine of judicial estoppel; and (3) excluding financial evidence such that the jury was not able to consider the entirety of the estate plan. We hold the trial court did not commit reversible error.

I. Factual and Procedural Background

Testator David Scott Corbett and Caveator Diana Corbett were married on 14 October 1995. Sometime after, Testator contacted his lawyer, Morgan, and had a will drafted which left all of his assets, less his interest in Corbett Package Company which he left in trust, with income to Caveator and the remainder to his sisters ("Propounders")—including Executrix.

On 16 May 2012, Testator was diagnosed with metastatic colorectal cancer. Upon diagnosis, Testator was told he potentially had only six weeks to live. As such, Testator called Morgan and instructed him to prepare a will ("2012 Will") leaving all his assets to Caveator unless she failed to survive him, then to Propounders. The 2012 Will was executed 17 May 2012. Then, in May 2015, Warwick, a trusted accountant and financial advisor of the Corbett family, reached out to Morgan,

[1] Although Executrix notices appeal from orders entered 27 July 2021 and 28 July 2021, the Record does not contain such orders denying Executrix's motions for directed verdict. However, it is evident from the trial transcript that the trial court did deny Executrix's motions for directed verdict at the close of Caveator's evidence and at the close of all evidence.

advising him to prepare a new draft trust agreement for Testator.

On 6 September 2016, Testator was admitted to New Hanover Regional Medical Center with liver issues. On 12 September 2016, he was transferred to Duke University Medical Center. However, before his transfer, on 12 September 2016, Warwick and Morgan visited Testator and presented him with a newly drafted will ("2016 Will") and trust ("2016 Trust"). Testator executed the 2016 Will and 2016 Trust in the presence of Warwick; Morgan; Melton, a third-party who worked nearby and had never met Testator; and Lewis, Morgan's assistant. Under the 2016 Will and 2016 Trust, Caveator was the sole beneficiary of residuary assets held in the 2016 Trust during her lifetime, and, upon her death, any property remaining in the 2016 Trust would be evenly distributed between Propounders or their descendants.

Testator died on 16 October 2016. On 28 November 2016, Caveator and Executrix were named co-executrixes of Testator's estate and, together, filed an Application for Probate and Letters Testamentary, a copy of the 2016 Will, and an Oath or Affirmation where they swore the 2016 Will was Testator's Last Will and Testament.

On 17 September 2017, Caveator filed a caveat alleging the 2016 Will was invalid and void and resigned as executrix effective 3 October 2017. On 14 December 2017, Executrix filed a response. Judge Stanley Carmical heard motions in limine, granting Caveator's motion to exclude evidence of the 2016 tax return for Testator's estate and other evidence relating to any financials Caveator may have received

outside of probate. The matter came on for trial by jury in New Hanover County Superior Court on 12 July 2021. Executrix filed a motion for directed verdict both at the close of Caveator's evidence and at the close of all evidence which were denied. On 30 July 2021, the jury returned verdicts in favor of Caveator and on 16 August 2021, the trial court entered judgment consistent with those verdicts. On 25 August 2021, Executrix filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial which was denied.

On 8 November 2021, Executrix timely appealed.

II. Analysis

Executrix contends the trial court erred in denying her motions for directed verdict, judgment notwithstanding the verdict or for a new trial, and in entering final judgment as there was insufficient evidence to submit the issues of testamentary capacity, undue influence, and devisavit vel non to the jury; the trial court abused its discretion in declining to apply the doctrine of judicial estoppel; and the jury should have been allowed to consider the entirety of Testator's estate plan. We disagree.

A. Executrix's Motions for Directed Verdict and Judgment Notwithstanding the Verdict and the Trial Court's Entry of Judgment

Executrix argues the trial court entered final judgment in error after erroneously denying her motions for directed verdict and judgment notwithstanding the verdict as there was insufficient evidence to submit the issues of testamentary capacity, undue influence, and devisavit vel non to the jury.

1. Standard of Review

We review a trial court's denial of a motion for directed verdict in the same manner we review the denial of a motion for judgment notwithstanding the verdict—to determine "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citations omitted). *See also Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498–99, 524 S.E.2d 591, 595 (2000) ("On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury."). As to the motion for JNOV specifically, the motion "should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Clark v. Barrett*, 280 N.C. App. 403, 420, 867 S.E.2d 704, 718 (2021) (internal marks and citations omitted). A scintilla of evidence is very slight. *Clark v. Clark*, 280 N.C. App. 384, 393, 867 S.E.2d 743, 752 (2021) (citations omitted).

2. Sufficiency of the Evidence

Executrix argues there was insufficient evidence to submit the issues of testamentary capacity, undue influence, and devisavit vel non to the jury.

a. Testamentary Capacity

Executrix contends there was insufficient evidence to send the issue of Testator's testamentary capacity to the jury as four witnesses, who were present

when Testator executed the 2016 Will and 2016 Trust, testified Testator was coherent and acted voluntarily, and that they would not have proceeded with witnessing or notarizing the 2016 Will or 2016 Trust had Testator appeared otherwise incapacitated or incompetent.

A testator has testamentary capacity if: "[(1)] he comprehends the natural objects of his bounty; [(2)] understands the kind, nature and extent of his property; [(3)] knows the manner in which he desires his act to take effect; and [(4)] realizes the effect his act will have upon his estate." *In re Smith*, 158 N.C. App. 722, 725, 582 S.E.2d 356, 359 (2003) (citations omitted). Further, "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." *In re Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000) (citations omitted). While a caveator need only prove one of the essential elements of testamentary capacity was lacking at the time of execution, it is not sufficient to present "only general testimony concerning [the] testator's deteriorating physical health and mental confusion in the months preceding the execution of the will[.]" *In re Buck*, 130 N.C. App. 408, 413, 503 S.E.2d 126, 130 (1998). Instead, the caveator must present specific evidence relating to the testator's understanding as to one or more of the essential elements. *Sechrest*, 140 N.C. App. at 473, 537 S.E.2d at 517. "[E]vidence of incapacity within a reasonable time before and after, is relevant and admissible." *In re Hall*, 252 N.C. 70, 77–78, 113 S.E.2d 1, 7 (1960) (internal marks

and citations omitted).

Witness testimony, including Testator's medical chart, unequivocally indicated that, for some time leading up to, during, and after Testator's execution of the 2016 Will and 2016 Trust, Testator was heavily medicated. Further, Caveator testified at length about Testator's state of mind leading up to and after the execution. Caveator noted Testator suffered from delusions and hallucinations starting on 8 September 2016 which continued through 12 September 2016, the day of execution. Following the execution, at the time Testator was discharged to be transferred to Duke University Medical Center, he was not allowed to sign his own discharge papers due to lack of competence. Upon arrival at Duke, Testator was diagnosed with delirium, and records reflect he had an "impaired/altered mental status."

Moreover, Caveator testified she was able to speak with Testator on 14 September 2016, and he asked her: "What happened the last two weeks?" Similarly, Testator's medical records also reflected that after regaining competence on 15 September 2016, Testator had no memory of the prior two weeks, including the time when he signed the 2016 Will. Additionally, at trial several experts indicated, in their opinion, Testator lacked the ability to understand what was transpiring at the time of execution.

Not only is this evidence within a reasonable time before and after Testator's execution of the 2016 Will, but such evidence specifically relates to Testator's capacity, or lack thereof, to understand the natural objects of his bounty; the kind,

nature and extent of his property; the manner in which he desired his act to take effect; and the effect his actions would have on his estate. Further, this evidence, taken in the light most favorable to Caveator as the non-moving party, was sufficient to submit the issue of testamentary capacity to the jury.

Therefore, the trial court did not err in denying Executrix's motions for directed verdict and judgment notwithstanding the verdict.

b. Undue Influence

Executrix contends the trial court erred in concluding there was sufficient evidence presented on the issue of undue influence such that it may be submitted to the jury.

Undue influence, which justifies the setting aside of a will, is a fraudulent influence whereby "the mind of the person exercising the influence [is substituted] for the mind of the testator, causing him to make a will which he otherwise would not have made." *In re Will of Jones*, 362 N.C. 569, 574, 669 S.E.2d 572, 577 (2008) (internal marks and citations omitted). "The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003) (citations omitted). While we recognize "[i]t is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence[,]" our Supreme Court set aside factors which

may be relevant in making such a determination. *In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 200 (1980) (citation omitted). Those factors include:

> 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;
>
> 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.

Id. at 55, 261 S.E.2d at 200 (internal marks and citations omitted). "Although the caveator is not required to demonstrate the existence of every factor to prove undue influence, the caveator must establish a *prima facie case*." *Estate of Paxton v. Owen*, 287 N.C. App. 167, 172, 882 S.E.2d 578, 581 (2022) (citations omitted).

Here, as explained above, Testator was suffering from mental weakness at the time he executed the 2016 Will. Not only was Testator heavily medicated at the time, but he was also suffering from delusions and hallucination and was diagnosed with delirium. *See Jones*, 362 N.C. at 577, 669 S.E.2d at 579 (holding evidence suggesting the testator was "ill with cancer, and by many accounts confused, in pain, significantly debilitated, and nearly entirely dependent on his wife" might allow a jury to reasonably infer undue influence). Not only this, but Caveator was not privy

to the contents of the 2016 Will before execution by Testator as Warwick, upon arriving at the hospital to have Testator sign the 2016 Will, asked her to leave the room. Further, the 2016 Will is unequivocally different from the 2012 Will as the 2012 Will left all of Testator's assets to Caveator outright, whereas the 2016 Will placed all of Testator's assets in trust for Caveator's use during her lifetime and, upon her death, any property remaining would be evenly distributed between Propounders or their descendants.

This evidence supports several of the above factors weighing in favor of undue influence. Thus, there was sufficient evidence presented as to the issue of undue influence such that it could be submitted to the jury. Therefore, the trial court did not err.

c. Devisavit Vel Non

Executrix contends the trial court erred in submitting the issue of devisavit vel non to the jury as there was sufficient evidence to send the issues of testamentary capacity and undue influence to the jury.

Devisavit vel non requires the trial court to make a finding as to "whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987) (citations omitted). *See also In re Will of McNeil*, 230 N.C. App. 241, 243, 749 S.E.2d 499, 501 (2013) ("The Latin phrase devisavit vel non simply 'refers to a determination of whether a will is valid.'" (citations omitted)). Thus, "[i]n a multiple-script case, it

stands to reason that numerous sub-issues must be answered in order to determine this ultimate issue." *Hester,* 320 N.C. at 745, 360 S.E.2d at 806.

As noted above, the trial court heard sufficient evidence to submit the issues of Testator's testamentary capacity and undue influence to the jury. Because there was sufficient evidence to submit both issues to the jury, there was also sufficient evidence to submit the issue of devisavit vel non to the jury. As such, the trial court did not err in denying Executrix's motions for directed verdict or judgment notwithstanding the verdict.

B. The Doctrine of Judicial Estoppel

Executrix argues the trial court committed reversible error in that it abused its discretion in declining to apply the doctrine of judicial estoppel.

1. Standard of Review

Where the trial court declines to apply the doctrine of judicial estoppel, we must review its decision for abuse of discretion. *Harvey v. McLaughlin*, 172 N.C. App. 582, 584, 616 S.E.2d 660, 663 (2005) (citations omitted). "A matter left to the trial court's discretion 'will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. A trial judge's decision only amounts to an abuse of discretion if there is no rational basis for it.'" *New Bar P'ship v. Martin*, 221 N.C. App. 302, 308, 729 S.E.2d 675, 681 (2012) (quoting *State v. Mutakbbic*, 317 N.C. 264, 273–74, 345 S.E.2d 154, 158–59 (1986) (citations and internal marks omitted)).

2. Declining to Apply the Doctrine of Judicial Estoppel

Executrix argues the trial court erred in declining to apply the doctrine of judicial estoppel because (1) Caveator pursued two distinct and inconsistent factual positions through probate and in filing the caveat; (2) Caveator's position poses a threat to judicial integrity; and (3) Caveator caused substantial expense to all parties as a result of her inconsistent positions to the detriment of the beneficiaries of Testator's estate.

Under the doctrine of judicial estoppel, "a party [who] assumes a certain position in a legal proceeding, and succeeds in maintaining that position, [ ] may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 22, 591 S.E.2d 870, 884 (2004) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). The doctrine "seeks to protect courts, not litigants, from individuals who would play fast and loose with the judicial system, and is an inherently flexible and discretionary doctrine." *Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 417, 808 S.E.2d 488, 500 (2017) (internal marks and citations omitted). Moreover, our Supreme Court previously enumerated factors which help inform the trial court in deciding whether to apply the doctrine:

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in

> persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Dep't of Transp. v. Mt. Vills., LLC, 286 N.C. App. 246, 261–62, 880 S.E.2d 438, 448–49 (2022) (quoting *Whitacre P'ship*, 358 N.C. at 28–29, 591 S.E.2d at 888–89 (internal marks and citations omitted)).

Nonetheless, we again recognize our review of the trial court's decision as to whether to apply the doctrine is limited to whether the trial court abused its discretion. *See Harvey*, 172 N.C. App. at 584, 616 S.E.2d at 663. Thus, where the trial court's decision is supported by reason, we will not reverse. *See Martin*, 221 N.C. App. at 308, 729 S.E.2d at 681.

At trial, the court heard arguments for and against the application of judicial estoppel and stated as follows:

> As I understand the argument that's been made by the Executrix, that argument is based almost entirely on the argument that since the Caveator participated in the—in the oath, served as a co-executrix, that it would be now inconsistent—legally inconsistent to pursue this caveat. . . . And so having already concluded that it's still appropriate for the Court to consider the matter of judicial [estoppel], I've read—I've considered the arguments that have been made on behalf of the Executrix and the Caveator, read the—the motion—I would submit the exceedingly thorough motion that's been handed up and

> also considered the case that was—the *Shepherd* case that was handed up by [Caveator]. It appears to the [c]ourt that on the facts and the applicable law in this case that [ ] Caveator is not barred by judicial [estoppel], so that motion for directed verdict is denied.

As conveyed by the above colloquy, the trial court, upon considering the position of each party and their arguments on the motion, declined to apply the doctrine of judicial estoppel as he deemed Caveator's issues concerning the validity of the 2016 Will to be ones for determination by the jury.

As such, the trial court's decision was not arbitrary and therefore it did not abuse its discretion.

C. Executrix's Alternative Motion for a New Trial

Executrix argues the trial court erred in denying her motion for a new trial pursuant to Rule 59(a)(8) of the North Carolina Rules of Civil Procedure. Specifically, Executrix contends the trial court erred in failing to apply judicial estoppel[2] at the directed verdict stage of trial and in excluding relevant evidence under Rule 403 of the North Carolina Rules of Evidence.

1. Standard of Review

Typically, our review of a trial court's ruling denying a motion for new trial is "strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*,

---

[2] *See* Section II.B.2., *supra*, as to Executrix's contention regarding judicial estoppel.

305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citation omitted). However, where "the trial court grants or denies a new trial due to some error of law, then its decision is fully reviewable." *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995) (internal marks and citations omitted). Thus, we review the trial court's denial of Executrix's motion for a new trial de novo recognizing, in reviewing the record, we must determine whether the trial court erred in excluding evidence under Rules 401 and 403.

As to Rule 403, "[w]e review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citation omitted). However, "[b]ecause the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal marks and citations omitted). Thus, the admissibility of evidence under Rule 401 "is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." S*tate v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (internal marks and citations omitted).

2. Financial Evidence

Executrix contends the trial court erred in denying her motion for a new trial pursuant to Rule 59(a)(8) as the jury should have been allowed to consider the entirety of Testator's estate planning including the financial evidence which was excluded under Rules 401 and 403 of the North Carolina Rules of Evidence.

The North Carolina Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021). Such evidence may, nonetheless, be excluded where, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2021). Where the trial court has erred in applying such rules, "[a] new trial may be granted to all or any of the parties and on all or part of the issues for . . . [the] [e]rror in law occurring at the trial and objected to by the party making the motion[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) (2021).

In the instant case, the trial court precluded the introduction of evidence concerning collateral funds Caveator received from Testator including the proceeds from a life insurance policy outside of probate. Such evidence and reference thereto was excluded in limine. Our review on appeal is limited to the record filed on appeal pursuant to Rule 9 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 9. However, the record here is void of any transcript from any hearing on the motion in limine where the trial court granted the exclusion of the financial evidence

under Rule 403. Further, the record is lacking in any order or further discussion as to the exclusion of such evidence under Rule 403. While the record should have included as much under Rule 9, as the purpose of the rule "is to save the time of the Court in reviewing the evidence[,]" *Keller v. Sec. Mills of Greensboro, Inc.*, 260 N.C. 571, 573, 133 S.E.2d 222, 224 (1963), the omission is not such that it would justify a dismissal of the appeal. Further, at trial, upon colloquy concerning the financial evidence, the trial court reiterated its ruling as to the exclusion of evidence under Rule 403 stating:

> I'm sticking by my earlier decision. I think it's—it's appropriate. It seems to me that either way, there's some hazard about the information being misused. I think the other side of the coin is that, potentially, the idea of, well, the jurors may decide that insurance and the retirement accounts, that should be enough for a reasonable person; right? So I just don't want to go down that path either way. So I'm sticking with my original ruling.

From this, we can see the court considered the position of each party and their arguments on the motions. Thus, the court made a reasonable decision in excluding the financial evidence and therefore did not err.

Moreover, because the trial court did not err in excluding the financial evidence under Rule 403, the trial court did not err as a matter of law in denying Executrix's motion for a new trial. As such, the trial court did not err under Rule 59.

III. Conclusion

For the aforementioned reasons, the trial court did not err in submitting the

issues of testamentary capacity, undue influence, and devisavit vel non to the jury; declining to apply the doctrine of judicial estoppel; and excluding financial evidence.

NO ERROR.

Judge ZACHARY and GORE concur.

Report per Rule 30(e).