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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-505

Filed 16 January 2024

Moore County, No. 21E160

IN THE MATTER OF THE ESTATE OF THOMAS HAROLD BLUE, SR. DECEASED.

Appeal by Caveator from judgment entered 11 January 2023 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 28 November 2023.

Van Camp & Van O'Linda, PLLC, by James R. Van Camp, and Kristen Nicole Mulder, for the caveator-appellant.

Fox Rothschild LLP, by Matthew Nis Leerberg, for the caveator-appellant.

Manning Fulton & Skinner P.A., by Robert S. Shields, Jr., and Lawrence D. Graham, Jr., for the propounders- appellees.

TYSON, Judge.

Sharon Blue Reid ("Caveator" or "Sharon") appeals the trial court's order, which granted her two siblings' motion for summary judgment. The order held no genuine issue of material fact existed regarding whether Sharon's Father, Thomas Harold Blue, Sr. ("Harold") possessed testamentary capacity or was unduly influenced when executing a codicil nine years prior to his death. We affirm.

I. Background

Harold and his wife, Carolyn Blue ("Carolyn"), resided in Moore County. They were parents of three children: Thomas Harold Blue, Jr. ("Tommy"), Christy Jackson ("Christy") (collectively "Propounders"), and Sharon.

Harold and Carolyn owned separate businesses. Harold owned Harrison Sand Pit, until he sold it during the 2000s. Harold also owned 51% of T. H. Blue, Inc. ("T. H. Blue"), which is a tree bark plant. His son, Tommy, owned the remaining 49% of T. H. Blue and daily ran the business. Carolyn owned a 50% stake in Candor Oil, which she ran. Harold owned a 25% stake, and Tommy owned the remaining 25% of Candor Oil.

Carolyn died on 24 April 2016. Carolyn's will bequeathed all of her personal tangible property to her husband, Harold. All of her real property was also bequeathed to Harold, as trustee of her residual estate trust. Harold died nearly five years later on 8 January 2021. Harold's death certificate lists his cause of death as "Alzheimer's Dementia" and asserts the onset as "10 years."

Harold and Carolyn executed several wills and testaments and codicils throughout their lifetimes. Harold executed his first will on 17 February 1995. Two years later, he executed a second will on 18 September 1997. This cause challenges his last will he executed in 2010, and the purported codicil he executed two years later on 29 February 2012.

Harold and Carolyn hired Attorney Neill McBryde, Esq. ("McBryde") of the

Moore & Van Allen law firm located in Charlotte to represent them from December 2009 to December 2011. Harold and Carolyn executed a set of Wills and Trusts ("Trust Documents") on 2 July 2010 that McBryde had prepared. McBryde's fees for preparing the Trust Documents were testified to cost approximately $30,000.

The effect of the original 2010 Trust Documents was to distribute one-half of Harold's interest in any real estate he owned to each of his daughters, Sharon and Christy, and further convey Harold's 51% stock ownership in T.H. Blue to his son, Tommy. The Trust Documents further provided that if the stock in T.H. Blue that Tommy received exceeded one-third of the value of the Trust assets, Tommy's sisters, Sharon and Christy, would also receive shares in T.H. Blue, up to the amount that would make all three children to share equally in Harold's estate.

Harold and Carolyn adjusted some aspects of those Trust Documents in 2011. According to Tommy, Carolyn was dissatisfied with certain aspects of the 2010 Trust Documents, and she wanted to designate specifically-identified properties to each of her daughters, Sharon and Christy. During his deposition, McBryde confirmed receiving an email from Tommy's email address on 22 March 2011. The email started with "Dad and I" and explained: "To give you a heads-up, dad's intent was to give the girls all the property and me the T. H. Blue, Inc. . . . That is not the way it appears in his Will, and he will address the conversation with that mindset." Tommy also cautioned McBryde to "[b]ear in mind that dad gets real emotional when talking about wills and death."

After communicating with Harold and Tommy, McBryde sent a letter with draft copies of the proposed will codicils on 1 April 2011. Although McBryde addressed the letter to Harold and Carolyn, the letter was sent in "care of" Tommy. The letter provided: "Pursuant to our recent telephone conference with Harold and Tommy, we have prepared and enclosed with this letter drafts of the following documents[.]"

The letter also explained how the codicil would change Harold's and Carolyn's estate planning documents:

> After the death of the last spouse to die, your tangible property will pass to Sharon and Christy, then any interest in T. H. Blue, Inc. will pass to Tommy and all your other property will pass to Sharon and Christy in equal shares in the trusts already provided for your children. . . . Since Tommy's trusts will receive the T. H. Blue, Inc. stock and Sharon's and Christy's trusts will receive all your other assets, your estate planning documents no longer provide that each of your three children's trusts would receive an equal share of the total value of your assets.

On 2 December 2011, McBryde sent another letter through the care of Tommy. This letter was also addressed to Harold and Carolyn and provided the following summary of their dealings with McBryde:

> In our last communication earlier this year, we discussed amendments you wish to make to your estate planning documents, including codicils to your wills and amendments to your revocable trusts which collectively operate after your deaths to direct your interest in T. H. Blue, Inc. to Tommy, direct all your other property to your daughters, and apportion the estate tax burden of your estates and your exemption from the federal generation-

> skipping transfer tax equitably among your children. We also prepared drafts of the aforementioned documents. From our discussion, we understand when you are able to further decide how you wish to allocate your real estate and other holdings (aside from Harold's interest in T. H. Blue, Inc.) among your daughters, we will then adjust the amendments that we previously drafted to conform to your newly-determined wishes.

In his deposition, Tommy testified Harold walked into his office in late 2011 or early 2012 and dictated a list to designate which of the specific real properties would go to each of his daughters. Tommy quickly wrote down what Harold had allegedly communicated to him, and then he rewrote the list in better handwriting using his "scribbly notes" as a guide. Tommy brought the handwritten list to the office of Attorney Frank Thigpen, Esq. ("Thigpen"), who had previously performed some legal work for Harold, and asked Thigpen's paralegal to "type up the handwritten list of assets [and] to prepare Will Codicils for both Thomas Harold Blue, Sr. and Carolyn Harrison Blue." Thigpen's office staff made two typographical errors when designating the properties from the handwritten list, and the list also contained improper descriptions of the properties themselves. Thigpen never communicated directly with Harold or Carolyn regarding the handwritten list or the will codicils he drafted.

Harold and Carolyn both executed the Codicils to the Will on 29 February 2012, which included the typed list of designated properties from Attorney Thigpen's office. Tommy explained during his deposition that neither he nor Harold read the Codicils

Thigpen had prepared, or they would have noticed the errors contained in the documents. Several family members, including Tommy's daughter and his two sons-in-law, along with T. H. Blue's corporate secretary, witnessed and notarized Harold signing the codicil.

Throughout the time these Wills, Codicils, and Trust Documents were being drafted and edited, Harold's, Tommy's, and Carolyn's health statuses deteriorated. Tommy suffered a heart attack in 2008 and was diagnosed with bladder cancer in 2009. Carolyn became very ill and died in 2016.

Tommy became worried about dying from cancer and his children not receiving his interest in T. H. Blue. Harold and Tommy met with Attorney McBryde, who explained Harold could immediately sell/transfer 2% of his T. H. Blue stock to Tommy, making him the majority owner. Then, over the next two years, Harold could sell the remaining 49% to Tommy in two 24.5% increments. Harold never signed any of the stock certificates. In exchange, Tommy deeded his 25% interest in Candor Oil back to his parents, and he also deeded his 25% interest in the family's beach house back to them. Harold and Carolyn also deeded Tommy two separate tracts of undeveloped land totaling 114 acres in 2011, while both of his parents were alive.

Harold's health and memory began declining. In 2006, Harold's treating physician, Dr. Robert Maynor, at Pinehurst Medical Clinic wrote in Harold's medical chart after an appointment on 5 July 2006: "I am somewhat worried that he might have [a] memory disorder, in fact I tried to call his house today but I couldn't get an

answer. I am going to try to call tomorrow." In that same medical note, Dr. Maynor expressed Harold was "not a very good historian" and "his short term memory seems to be somewhat inadequate."

Dr. Sarah Uffindell, a board-certified neurologist and a treating physician employed by a hospital to perform neurological evaluations of patients admitted to the hospital, reviewed Harold's medical records to prepare for trial. At her deposition, Dr. Uffindell testified: "It's my opinion that February of 2012, [Harold] had moderate dementia. Not mild cognitive impairment, not mild dementia, but moderate dementia before he went into severe dementia. There are stages and at moderate dementia, he could do some things on some days correctly." Harold was officially diagnosed with a memory disorder in 2014.

Both Tommy and Christy testified to several lapses in their father's memory during the latter years of Harold's life. In the summer of 2014, Harold allegedly believed Tommy had stolen 2.6 million dollars from T.H. Blue. Harold called his stockbroker and his insurance agent several times to inquire about how Tommy could steal 2.6 million dollars from him. Both the stockbroker and insurance agent called Tommy to ask about his father's health, and eventually revealed Harold's theft accusations to Tommy. According to Tommy, the stockbroker attempted to convince Harold that Tommy did not steal the money, but Harold did not believe him. Tommy and Harold refused to speak to one another for about fifteen months. Christy testified during her deposition that Harold had also wrongfully accused her mother of having

an affair with two separate men.

Propounders filed a motion for summary judgment on 26 October 2022. The trial court concluded no genuine issues of material facts existed and granted summary judgment for the Propounders, Christy and Tommy. Sharon, as Caveator, appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Plaintiff asserts the trial court erred by entering summary judgment for Defendants, after concluding Harold: (1) had testamentary capacity; and, (2) was not unduly influenced when executing a codicil nine years prior to his death.

IV. Summary Judgment

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

When the court reviews the proffers of evidence, verified complaint, and affidavits at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the

motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). A genuine issue of material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted).

"An issue is material if the facts alleged would . . . affect the result of the action[.]" *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). A party may meet this burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element

of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense[.]" *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995).

"Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) (citations omitted).

"To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992).

We review Caveator's arguments *de novo* on appeal. *In re Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

B. Testamentary Capacity

"Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises." *In re Will of Lomax*, 224 N.C. 459, 462, 31 S.E.2d 369, 370 (1944) (citation omitted).

"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 Whitaker*, 144 N.C. App. 295, 298, 547 S.E.2d

853, 856 (2001) (citation and internal quotation marks omitted). A caveator may demonstrate incapacity by demonstrating one of these four elements is lacking. *In re Estate of Phillips*, 251 N.C. App. 99, 110, 795 S.E.2d 273, 282 (2016); *In re Kemp*, 234 N.C. 495, 499, 67 S.E.2d 672, 675 (1951).

"[E]vidence of incapacity within a reasonable time before and after is relevant and admissible insofar as it tends to show mental condition at the time of execution of the will." *In re Coley*, 53 N.C. App. 318, 324, 280 S.E.2d 770, 773 (1981).

"[T]he question for the trial court when considering a motion for summary judgment in a will [or codicil] caveat proceeding is whether that court can determine the testator's intent as a matter of law or whether there is enough uncertainty about testamentary intent to present the issue as a jury question." *In re Will of Allen*, 371 N.C. 665, 668-69, 821 S.E.2d 396, 400 (2018); *see also In re Will of McCauley*, 356 N.C. 91, 100-01, 565 S.E.2d 88, 94-95 (2002).

Here, the trial court concluded, and we agree, the Caveator presented insufficient evidence to rebut or overcome the presumption of competency and capacity to create a genuine issue of material fact to submit the question regarding Harold's testamentary capacity or intent to the jury. *Id.* Caveator's argument is overruled.

C. Undue Influence

In the context of a will caveat, 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) (citation omitted). This Court long ago stated: "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 Sechrest*, 140 N.C. App. at 469, 537 S.E.2d at 515 (citation omitted).

Our Supreme Court also noted a number of factors, which are relevant to the issue of undue influence, in the case of *In re Andrews*:

> 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.

In re Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (citation and quotation marks omitted).

A caveator is "not required to demonstrate the existence of every factor to prove undue influence, because undue influence is generally proved by a number of facts, each one of which standing along may be of little weight, but taken collectively may satisfy a rational mind of its existence." *In re Phillips*, 251 N.C. App. at 111, 795 S.E.2d at 282 (citation and internal quotation marks omitted).

Nearly ninety years ago, our Supreme Court explained that for something to constitute "undue influence," the evidence must tend to show:

> [S]omething operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.
>
> In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

In re Jones, 362 N.C. at 574, 669 S.E.2d at 577 (quoting *In re Will of Turnage*, 208 N.C. 130, 131-32, 179 S.E. 332, 333 (1935)).

Here, the trial court concluded, and we agree, that Caveator failed to present sufficient evidence to demonstrate Tommy had exerted undue influence on Harold to the extent that "the end reached is tantamount to the effect produced by the use of fear or force." *Id.* The Caveator's evidence failed to create a genuine issue of material fact to demonstrate Tommy had exerted an "overpowering influence" or had a "sufficient controlling effect to destroy [Harold's] free agency" to render the will void. *Id.* Caveator's argument is overruled.

V. Conclusion

The trial court properly concluded no genuine issues of material fact existed in the pleadings, depositions, and affidavits served and entered in this matter to overcome Defendant's motions. The summary judgment order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges ZACHARY and FLOOD concur.

Report per Rule 30(e).