Opinion issued March 17, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00315-CV

BARBARA JEAN QUIROGA, Appellant

V.

SANDRA CAROL MANNELLI, Appellee

On Appeal from the 122nd Judicial District Court
Galveston County, Texas
Trial Court Case No. 08CV0254

MEMORANDUM OPINION

Shortly before his death, Ulderico Mannelli (Ulderico) changed his account with Guaranty Bank, which had been payable on his death to his ex-wife, Barbara Quiroga, to a joint account with his daughter, Sandra Carol Mannelli, giving her

right of survivorship. After Ulderico's death, Quiroga sued Mannelli. She sought to set aside the new account agreement as invalid, claiming that Mannelli had unduly influenced her father into making the change. Mannelli moved for summary judgment on the undue influence claim, and the trial court granted her motion. On appeal, Quiroga contends that the trial court erred in denying her motion for rehearing of the summary judgment and attacks the propriety of the summary judgment on its merits. Finding no error, we affirm.

Background

Facts

Ulderico and Quiroga had a romantic relationship beginning in the mid-1990's. In the fall of 1995, Quiroga moved into Ulderico's home, and they eventually married.

Ulderico's marriage to Quiroga was not his first. By the time he married Quiroga, he was in his sixties and had adult children, including Mannelli. Mannelli suspected that Quiroga was after Ulderico's money and told her as much on their first meeting.

Four years after they married, Quiroga and Ulderico divorced. According to Quiroga, Ulderico divorced her because he was concerned that the expenses associated with her chronic health problems would erode his wealth. In any event, Quiroga continued to live with Ulderico in his house, but they no longer held each

other out as husband and wife. To avoid financial liability for Quiroga's medical care, Ulderico signed a letter to her health care providers explaining that she was his housekeeper and caregiver.

As Ulderico advanced in age, his health began to decline. In 2002, he had a brain aneurysm. Quiroga had him brought to the hospital by ambulance and conferred with his treating physician about his care. Once Mannelli and her brother Vincent arrived at the hospital, however, they intervened. They informed the doctor that Quiroga was not family and took measures to prevent Quiroga from visiting Mannelli in the hospital. Mannelli told Quiroga that she was going to make sure Quiroga did not see a penny of Ulderico's money. The heated discussion among Quiroga, Mannelli, and Vincent then elevated to an altercation. According to Quiroga, Mannelli slapped her, and Vincent hit the side of Quiroga's head hard enough to rupture her eardrum. Quiroga swore out a criminal complaint against Mannelli for assault, but no charges were brought against Vincent.

Before he had the aneurysm, Ulderico held his money market account with Guaranty Bank as a joint account with right of survivorship with his adult children, Mannelli and Vincent. In early 2003, after he had recovered from the aneurysm, Ulderico executed documentation to change the account to one that was payable on death to Quiroga.

Ulderico was diagnosed with lung cancer in the spring of 2004. When Ulderico began chemotherapy treatments, Quiroga cared for him at home and accompanied him to his doctor visits. Mannelli visited her father often, bringing him nutritious food and beverages. Also during this time, Ulderico was diagnosed with depression and prescribed antidepressant medication.

By the fall of 2004, it became apparent that Ulderico's cancer would not go into remission. While Ulderico was hospitalized in early September, Quiroga made arrangements for his return, securing a hospital bed and other medical equipment. After his release, though, Mannelli brought Ulderico to her own home for hospice care.

Several days after Ulderico began hospice care, Mannelli called the customer service manager at Guaranty Bank. When Mannelli sought information about her father's accounts, the manager informed her that he could not answer her questions because her name did not appear on the accounts. Mannelli called Ulderico to the telephone to speak with the manager. Ulderico informed the manager that he wished to change the account to benefit Mannelli rather than Quiroga.

Based on his discussion with Ulderico, the manager prepared the necessary documentation, then contacted Mannelli. Mannelli picked up the documentation and brought it to Ulderico to sign, then returned the signature card to the bank. A

week later, on September 22, Mannelli returned to the bank, withdrew all of the funds, and closed the account.

Ulderico died at Mannelli's home on September 24. After his death, Mannelli evicted Quiroga from the house Ulderico had owned.

Proceedings in the trial court

More than a year after Quiroga brought suit against Mannelli for undue influence, Mannelli moved for summary judgment on both traditional and no-evidence grounds. After considering the motion and response, the trial court granted the motion. In its order, the trial court noted that the summary judgment order resolved Quiroga's claims against Mannelli, leaving for adjudication Mannelli's motion for sanctions against Quiroga and her attorney. Quiroga moved for rehearing of the summary judgment motion, which the trial court denied. The trial court severed the remaining issues, making the summary judgment final and appealable.

Discussion

I. Standard of review

Quiroga frames her issues on appeal as a challenge to the trial court's denial of her motion for rehearing. The body of the brief clarifies that she challenges the summary judgment on its merits. Mannelli contends that we should restrict our review to the abuse-of-discretion review applicable to rulings on motions for

rehearing and not the de novo standard we apply to review summary judgments. *Compare Macy v. Waste Mgmt.*, 294 S.W.3d 638, 651 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (reviewing trial court's ruling on motion to reconsider prior summary judgment under abuse-of-discretion standard) *with Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) (applying de novo standard to review summary judgment).

We construe Quiroga's issues on appeal as encompassing a challenge to the propriety of the summary judgment on its merits. "Even though a specific point on appeal may not be recited within the statement of the issue presented, that point is not waived if it is raised in the body of the brief." *Hagberg v. City of Pasadena*, 224 S.W.3d 477, 480 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 n.1 (Tex. 2004) (court may properly consider additional ground for reversal of trial court's judgment briefed together with argument addressing appellant's issue regarding separate ground for reversal, even though additional ground was not expressly contained in wording of any issue)).

Mannelli moved for summary judgment on both traditional and no-evidence grounds, and the trial court's order grants summary judgment without specifying any grounds. We review a trial court's summary judgment de novo. *Valence Operating Co.*, 164 S.W.3d at 661; *Provident Life Accid. Ins. Co. v. Knott*, 128

S.W.3d 211, 215 (Tex. 2003). Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant a judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215; *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Traditional summary judgment is proper only if the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The motion must state the specific grounds relied upon for summary judgment. *Id.* A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc.*, 941 S.W.2d at 911.

After adequate time for discovery, a party may move for a no-evidence summary judgment on the ground that no evidence exists to support one or more essential elements of a claim or defense on which the opposing party has the burden of proof. TEX. R. CIV. P. 166a(i). The trial court must grant the motion

unless the nonmovant produces summary judgment evidence raising a genuine issue of material fact. *Id.* More than a scintilla of evidence exists if the evidence "would allow reasonable and fair-minded people to differ in their conclusions." *Forbes Inc. v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).

II. Late-filed evidence

We decline Quiroga's invitation to adopt her reading of the order as containing an "implicit" recitation that it considered the late-filed evidence. The plain language of the order references only the motion for rehearing itself, and does not recite that the trial court granted leave to consider the late-filed evidence. "Summary judgment evidence may be filed late, but only with leave of court." *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). Where nothing appears in the record to indicate that the trial court granted leave to file the summary judgment evidence or arguments late, we presume that the trial court did not consider it. *Id.*; *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 815 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

After the trial court granted summary judgment, Quiroga filed her motion for rehearing, with which she included, for the first time, various affidavits, including: (1) her own affidavit detailing her life with Ulderico and the circumstances surrounding his hospitalization and move to Mannelli's home; (2) an affidavit executed by Quiroga's expert witness, a psychiatrist, tendering his

opinion of whether Ulderico was susceptible to undue influence and attaching the documents he reviewed to formulate that opinion, including Ulderico's hospital and hospice care records, a copy of the Guaranty Bank account signature card signed by Ulderico, and correspondence that Mannelli sent to Quiroga following Ulderico's death.

In denying rehearing, the trial court declined to reconsider the summary judgment. The trial court did not expressly consider Quiroga's late-filed evidence or grant leave for Quiroga to file the evidence on the record, either orally from the bench or by separate written order. Quiroga does not argue that the trial court abused its discretion in declining to consider the late-filed evidence. In reviewing the summary judgment, therefore, we consider only Quiroga's initial response and the evidence included with that response, along with Mannelli's motion and evidence. *See SP Terrace, L.P. v. Meritage Homes of Tex., LLC*, No. 01-09-0155-CV, 2010 WL 4121088, at *3 (Tex. App.—Houston [1st Dist.] Oct. 21, 2010, no pet.) (mem. op.) (citing *Stephens v. Dolcefino*, 126 S.W.3d 120, 133–34 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)).

III. Undue influence

"In Texas, the rules guiding determination of the existence of undue influence apply substantially alike to wills, deeds, and other instruments." *Wils v. Robinson*, 934 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1996), *writ granted*,

judgm't vacated w.r.m., 938 S.W.2d 717 (Tex. 1997); *see Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) (relying on, among other precedent, *Curry v. Curry*, 270 S.W.2d 208 (Tex. 1954), involving execution of deed, in discussing undue influence in testamentary disposition). In deciding whether undue influence has been exerted, the contestant must prove:

> (1) the existence and exertion of an influence;
>
> (2) that the influence operated to subvert or overpower the person's mind when executing the document; and
>
> (3) that the person would not have executed the document but for the influence.

Rothermel, 369 S.W.2d at 922. Influence

> is not undue unless the free agency of the testatrix was destroyed and the will produced expresses the wishes of the one exerting the influence. One may request, importune, or entreat another to create a favorable dispositive instrument, but unless the importunities or entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument.

Guthrie v. Suiter, 934 S.W.2d 820, 831 (Tex. App.—Houston [1st Dist.] 1996, no writ).

The Texas Supreme Court has repeatedly observed that "every case of undue influence must be decided on its own peculiar facts." *Pearce v. Cross*, 414 S.W.2d 457, 462 (Tex. 1967) (citing *Rothermel*, 369 S.W.2d at 922); *see also Curry*, 270 S.W.2d at 211 (acknowledging that circumstances of each case will dictate whether undue influence exists). Among other factors, courts consider:

- the circumstances surrounding execution of the instrument;
- the relationship between the transferor and the beneficiary and any others who might be expected recipients of the testator's bounty;
- the motive, character, and conduct of the persons benefitted by the instrument;
- the participation by the beneficiary in the preparation or execution of the instrument;
- the words and acts of the parties;
- the interest in and opportunity for the exercise of undue influence;
- the physical and mental condition of the transferor at the time of the instrument's execution, including the extent to which he was dependent upon and subject to the control of the beneficiary; and
- the improvidence of the transaction by reason of unjust, unreasonable, or unnatural disposition of the property.

Guthrie, 934 S.W.2d at 831.

A. Burden of proof

The person challenging the validity of an instrument generally bears the burden of proving the elements of undue influence by a preponderance of the evidence. *Evans v. May*, 923 S.W.2d 712, 715 (Tex. App.—Houston [1st Dist.] 1996, writ denied). In some cases involving confidential or fiduciary relationships, however, the burden shifts to the person receiving the benefit to prove the fairness of the transaction. *See, e.g.*, *Bohn v. Bohn*, 455 S.W.2d 401, 410–11 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ dism'd) (burden of proof on husband, who

was attorney and drafted documentation of wife's gift of stock certificates); *see also Buckner v. Buckner*, 815 S.W.2d 877, 879–81 (Tex. App.—Tyler 1991, no writ) (upholding admission of will to probate after court found evidence sufficient to support finding that delay was result of son's fraud on wife, decedent's daughter-in-law and will proponent; son did not meet burden to show fairness in transaction where he misrepresented to wife that they did not need to probate will because transfer by intestate succession would effect same result).

Quiroga contends that Mannelli should bear the burden to prove no undue influence in this case. This contention lacks merit. Under analogous circumstances, the Texas Supreme Court expressly refused to apply the rule urged by Quiroga. *Gates v. Asher*, 280 S.W.2d 247, 250 (Tex. 1955). *Gates* involved a challenge to a transfer by deed from a mother to her daughter. Like Quiroga, the parties challenging the validity of the transfer contended that the daughter who received the deed had a confidential or fiduciary relationship to her mother and, consequently, should bear the burden to rebut the presumption of fraud or undue influence and prove the fairness of the transaction. *Id.* The Court categorically rejected that position. A transfer from parent to child does not give rise to a presumption of undue influence, and the burden remains with the party challenging the transaction's validity. *Id.* Quiroga does not point to any Texas authority that would cause us to question the applicability of *Gates* to this case.

B. Summary judgment evidence

Quiroga challenges the propriety of summary judgment based on the grounds set forth in Mannelli's motion, which attack the first and third elements of Quiroga's undue influence claim. To determine whether the evidence raises a fact issue on the first element, concerning the existence and exertion of an influence over Ulderico, we examine the relationship between the person who executed the document, the contestant, and the party accused of exerting undue influence. *See Rothermel*, 369 S.W.2d at 923. Quiroga points to evidence that, at or near the time Ulderico changed the account beneficiary,

- Ulderico was seventy-six years old, terminally ill with cancer and in hospice care;
- Ulderico was living with Mannelli, who was responsible for his care;
- Mannelli initiated the call to the bank to change the account; and
- Mannelli had repeatedly expressed great animosity toward Quiroga, telling Quiroga that she would prevent her from receiving Ulderico's money.

This evidence, at most, raises a fact issue as to whether Mannelli had an opportunity to exert influence over Ulderico. "Mere opportunity to unduly influence a testatrix is no proof that influence has actually been exerted." *Guthrie*, 934 S.W.2d at 832 (citing *Miller v. Flyr*, 447 S.W.2d 195, 202–03 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.)). Nothing in the summary judgment record

raises a fact issue that Mannelli "coerced, intimidated, or otherwise forced" Ulderico to change the bank designation. *See id.* The circumstances show that in Ulderico's final days, his daughter took over his care, and Ulderico changed the bank account designation to one that would benefit a family member rather than his ex-wife. A bank account officer verified that Ulderico intended to change the account. This evidence does not rise to a level that would enable reasonable and fair-minded people to differ in their conclusions about whether Mannelli unduly influenced Ulderico to change his account beneficiary. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). The trial court did not err in granting Mannelli's summary judgment motion or in denying Quiroga's motion for rehearing.

Conclusion

The trial court correctly granted summary judgment and denied rehearing. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.