In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00066-CV

IN THE ESTATE OF MINNIE OLA KREMER

On Appeal from the County Court at Law
Polk County, Texas
Trial Cause No. 07530

MEMORANDUM OPINION

This is a will contest case. Minnie Ola Kremer, the testator, executed a will in 1989 ("1989 Will"), leaving the bulk of her estate to her sister, Pearl Graef. In 2004, Minnie executed another will ("2004 Will") that left her estate to Charles Lester Smith, to whom she was not related. When Minnie died in 2004, Pearl filed Minnie's 1989 Will and requested that it be probated. Although Smith knew that a will inconsistent with the provisions of the 2004 Will had been filed, he did not, at that time, appear and challenge Pearl's request to probate Minnie's 1989 Will. Approximately twenty months after Minnie's 1989 Will was admitted to probate, and after Pearl died, Smith requested that the probate court set aside its order admitting Minnie's 1989 Will to probate.

The jury, in resolving the disputed issues between the parties, determined that Minnie lacked testamentary capacity when she executed the 2004 Will naming Smith as independent executor and beneficiary of Minnie's entire estate, and that Smith had exerted undue influence over Minnie when she executed the 2004 Will. Smith's appeal challenges the legal sufficiency of the evidence supporting the jury's findings. Additionally, Smith challenges the probate court's ruling to admit Minnie's medical records into evidence. We affirm the probate court's judgment.

Procedural History

Minnie died on May 26, 2004. In August 2004, Pearl filed an application to probate Minnie's 1989 Will. The 1989 Will devised a cash sum to Minnie's sister, Alma Lee Pogue, and left the remainder to Pearl. The probate court admitted the 1989 Will to probate and authorized Pearl to act as the independent executrix of Minnie's estate. Pearl filed an inventory, appraisement, and list of claims, which the probate court approved in October 2004.

In April 2006, at least twenty months after the 1989 Will was admitted to probate, Smith filed an "Application to Set Aside Order Probating Will." Smith's application alleges that Minnie executed a will dated April 4, 2004. The 2004 Will named Smith as independent executor and devised Minnie's estate to Smith and his wife, Janet Smith. Smith filed his application to set aside the 1989 Will approximately three months after

Pearl died. In the will contest, Minnie's 1989 Will was defended by the respective executors of Minnie's and Pearl's estates (the "proponents of Minnie's 1989 Will").

The probate court conducted a jury trial in October 2009; the jury found that Minnie lacked testamentary capacity when she executed the 2004 Will and that Smith procured the 2004 Will by exercising undue influence over Minnie. The jury also found that the proponents of Minnie's 1989 Will prosecuted the proceedings against Smith in good faith and with just cause, and that Smith, in challenging the 1989 Will, had not proceeded in good faith and with just cause. The probate court's judgment, which incorporates the jury's findings, denies Smith any recovery against the proponents of Minnie's 1989 Will, denies Smith's request to set aside the order probating the 1989 Will, denies Smith's request to probate the 2004 Will, and awards attorney's fees against Minnie's estate to the attorneys who defended the 1989 Will. Smith timely filed an appeal.

Factual Background

Smith's relationship with Minnie and Pearl began in the 1980s. According to Smith, by the time he and Janet married in 1984, they had developed a friendship with Minnie and Pearl. Smith helped Minnie and Pearl around each of their houses, and he also visited them. After Smith and Janet married, their relationship with Minnie and Pearl grew stronger. The Smiths visited them more often, frequently had dinner with them on weekends, and began to travel with them. In the late 1980s, Minnie and Pearl encouraged

Smith to borrow money from them. After they inquired about the possibility of loaning Smith money, Smith introduced them to his accountant, Jim Kollaja. Smith and Kollaja discussed the advantages of Smith borrowing money from Minnie and Pearl: they would receive a higher return than they would otherwise earn from a bank, and Smith would benefit from being charged a lower interest rate than he could get by borrowing from a bank. After agreeing to make Smith loans, Smith, individually and on behalf of his companies, executed various promissory notes payable to Minnie and Pearl. By the time of the trial, Smith had paid back the majority of these loans.

In 2004, Pearl contacted Smith "out of the blue[:]" she wanted him to bring his accountant to meet with her and Minnie. In March 2004, Smith and Kollaja met with Minnie and Pearl, who discussed their desire to draft new wills. According to Smith, Minnie said that she wanted a new will and that she wanted to leave everything to him and Janet. When Kollaja asked Minnie if she wanted to leave anything to anyone else, Minnie, according to Smith, said "she did not want to include any of her family members." Smith explained that Minnie seemed to have a clear mind, she seemed to understand the questions she was asked, and he saw nothing to indicate that she was mentally infirm.

After the meeting, Kollaja contacted his friend, an attorney, to draft Minnie's and Pearl's wills. The attorney testified that he and Kollaja had been friends since elementary school. After drafting the two wills, the attorney sent them to Kollaja, who gave them to

Smith to take to Minnie and Pearl. Afterwards, Pearl arranged for the wills to be signed at Minnie's house on April 4, 2004. Smith arranged for the witnesses, a notary, and his wife to attend the will signing ceremony with him.

Minnie was admitted to a nursing home approximately three weeks before she attended the meeting to sign the 2004 Will. According to Smith, Minnie was in the nursing home because she was "[p]hysically frail." Although Minnie had used oxygen at times, Smith acknowledged that Minnie did not have an oxygen tank with her during the will signing ceremony.

According to Smith, Minnie appeared to be of sound mind on the day she signed the 2004 Will. Pearl also executed a will during the same meeting. Smith gathered the executed wills, gave them to Kollaja, and Kollaja then forwarded them to the attorney. After the attorney reviewed them, he sent them to Kollaja, who returned the originals to Smith, and Smith then took them to Minnie and Pearl. After looking over the executed wills, Pearl gave the originals back to Smith, stating that "she did not want to be responsible for them[.]" Smith paid the attorney's bill for drafting the wills.

As of the date of Minnie's death, Smith's note payments were current, but the debts to Minnie had not been paid in full. After Minnie died in 2004, Smith contacted an attorney to probate Minnie's 2004 Will, but he decided to wait because the attorney told him he had four years in which to probate Minnie's will. Although, according to Smith, Pearl knew that Minnie had signed a later will, Pearl applied on August 10, 2004, to

probate Minnie's 1989 Will. Minnie's 1989 Will named Pearl as the independent executrix of Minnie's estate. During the period that Pearl served as the independent executrix of Minnie's estate, Smith continued to make payments on his outstanding notes. When asked why he would continue to pay notes that were owed to Minnie's estate when the 2004 Will devised Minnie's assets to him, Smith answered: "I don't have an answer for that." Smith's notes, which were payable to Minnie's estate, constituted the majority of her estate. Additionally, Smith acknowledged that three days prior to Minnie signing the 2004 Will, his deadline for paying principal on a $140,000 note was extended. At the time of the extension, he had yet to make any principal payments. Smith also testified about two other loans Minnie had made to him that had not been paid in full as of the date of her death.

In addition to designating the Smiths as the beneficiaries of her 2004 Will, Minnie designated the Smiths as her agents in her durable power of attorney and in her medical power of attorney. Even though he acknowledged holding certain legal powers, Smith testified Pearl took care of Minnie financially, paid the medical bills for her nursing home care, and made Minnie's healthcare decisions.

The jury also heard Janet Smith's testimony describing Minnie's relationship with the Smiths. According to Janet, she and Smith met Minnie and Pearl in 1983. Janet explained that Minnie had a hearing problem, but it did not interfere with Minnie's ability

to communicate. Janet also recalled that Minnie moved slowly and only used a walker when outside. Minnie also had oxygen available for her use in her house.

In March 2004, Minnie decided that she needed to go to a nursing home; subsequently, Janet visited her there on several occasions. Although Janet acknowledged that Minnie's physical state was in decline, she denied that Minnie was declining mentally. Janet saw Minnie in the hospital two days prior to her death on May 26, 2004. On that date, Minnie was in bed, on oxygen, and she requested some water, which Janet gave her. According to Janet, Minnie recognized her, said "Janet," and squeezed her hand.

Janet also discussed Minnie's condition on April 4, 2004, the day Minnie signed the 2004 Will. Janet testified Minnie acted like herself that day and nothing Minnie did caused her any concern. Janet could not recall whether Minnie had oxygen with her during the will signing ceremony.

Janet testified about Minnie's decision to change her will. According to Janet, she learned in February 2004 that Minnie wanted a new will. Specifically, Janet recalled that when she was leaving, "out of the clear blue, . . . [Minnie said:] 'If something happens to me, I want Lester [Smith] to tear up those notes.'" After Janet told Smith of her conversation with Minnie, Minnie told her that "she would just make a new Will and leave everything to us."

Janet acknowledged that Smith knew Pearl had filed the 1989 Will for probate, and she testified that it was their choice not to contest Pearl's application. Janet also acknowledged speaking to the purchasers who bought Minnie's home from Minnie's estate; but, despite having had the opportunity to do so, Janet admitted that she never told the purchasers of their interest in Minnie's home. Janet further testified that she never complained during Pearl's lifetime about anything that Pearl did while acting as the independent executrix of Minnie's estate. Janet offered the following explanation for their inaction: "Pearl was upset over Minnie's death and we didn't want to upset Pearl. And we knew we had four years to probate the Will."

The jury also considered the testimony of the attorney who prepared Minnie's 2004 Will. According to the attorney, Kollaja told him that Minnie and Pearl both wanted to leave their entire estates to the Smiths. The attorney told Kollaja that he would have to speak to Minnie and Pearl about their wills to find out what they wanted. Subsequently, Minnie and Pearl called the attorney and requested that he prepare new wills for them that left everything to the Smiths. The attorney explained that he never met Minnie personally. While talking to Minnie and Pearl over the phone, the attorney asked questions to determine whether they were mentally competent. When the attorney asked why neither of them wanted to leave anything to their relatives, Minnie responded that she did not want them to have anything. Nothing they told him caused him to have any concern that Minnie lacked mental capacity or that she did not intend to leave her estate

to the Smiths. According to the attorney, Pearl instructed him to forward the drafts of the estate planning documents, including the wills, to Kollaja. After receiving the draft wills, Minnie called the attorney again and asked him about the meaning of the term "disinherit," a term that was contained in the 2004 Will. The attorney explained that it meant that she did "not want them to receive any part of [her] estate upon [her] death." Minnie indicated to the attorney that was her intent. While the attorney did not recall who paid him to prepare Minnie's will, he recalled sending his bill to Smith. The attorney was unaware that Minnie was living in a nursing home at the time he spoke to her on the phone. The attorney also acknowledged that he was unaware of Minnie's physical problems. The attorney did not inquire about Minnie's medical problems, and he stated that a person's physical condition is not relevant to preparing estate planning documents. The attorney was not present at the will execution ceremony; therefore, he had no personal knowledge concerning the formalities that were followed when Minnie executed her 2004 Will.

Jim Kollaja, Smith's friend and his personal and business accountant, also testified during the trial. Kollaja explained that he first met Minnie and Pearl in the mid-1980s, when he explained to them how the interest and payments were to be made on a loan they intended to make to Smith. Kollaja next saw Minnie and Pearl in 2004, when he and Smith spoke to them about preparing new wills. Kollaja indicated that when he met with Minnie in 2004, she was "coherent, sharp. There weren't any issues with her mental

capacity whatsoever." During this meeting, Minnie confirmed that she, like Pearl, wanted to leave her entire estate to the Smiths because "they did not like any of their relatives[.]" Following that meeting, Kollaja told Smith he would contact the attorney to prepare the wills. After contacting the attorney, Kollaja testified that the attorney sent him various legal documents, including Minnie's and Pearl's respective wills, which he then provided to Smith. When he gave Smith the draft wills, he also told Smith about certain formalities that were to be observed when the wills were signed. When Smith returned the executed wills to him, Kollaja sent them to the attorney and requested the attorney make sure they had been properly executed and that they were in order. After the attorney reviewed the wills, he delivered them to Kollaja and then Kollaja gave the original executed wills to Smith.

At Smith's request, Louis Gerick, one of his friends, witnessed the 2004 Will. Louis testified that although he had met Minnie and Pearl many years before, he had not seen Minnie for approximately thirty years before he went to her house to serve as a witness to her will. According to Louis, Minnie walked into the house without assistance, and she was of sound mind and memory on the day she signed the 2004 Will.

Jane Gerick, who died before the date of the trial, also served as a witness to the 2004 Will. Jane had been deposed prior to the trial, and the parties introduced her testimony by reading portions of her deposition into evidence. According to Jane, Minnie was of sound mind and memory at the time she signed the 2004 Will.

At Smith's request, Mandi Ramey attended the will ceremony and notarized Minnie's and Pearl's signatures on legal documents, including the wills. According to Ramey, she met Minnie and Pearl several years prior to the will ceremony at a benefit for the local fire department. Ramey testified that Minnie did not have any problems understanding what she said during the will ceremony, nor did she see anything which might have indicated that Minnie was having any mental problems at that time. According to Ramey, Minnie indicated that she understood what she was about to sign.

Minnie's niece, Melva Whitehead, provided testimony consistent with the jury's verdict on the disputed issues. According to Melva, Minnie had a sixth grade education. During portions of her childhood, Melva and her mother, Alma, lived with Minnie. Melva described Minnie's relationship with her as similar to that of a second mother. Melva also described Minnie's longstanding hearing problems, and according to Melva, Minnie was unable to carry on communications over the telephone. Nevertheless, Melva acknowledged that she talked to Pearl on the phone approximately once a month, and that on some of these occasions, with Pearl's assistance, she could communicate with Minnie by phone. Melva indicated that she visited with her aunts frequently, and stated that she went to either Pearl's or Minnie's house approximately every other month.

In 2002, Minnie had pneumonia and was hospitalized and temporarily placed on a ventilator. After Minnie's discharge, according to Melva, Minnie required oxygen continuously and used an oxygen concentrator or small bottles of oxygen that she carried

with her. Melva also described spending time with Minnie during the Thanksgiving and Christmas holidays in 2003. Over the 2003 Christmas holidays, Minnie told Melva that she had decided to go into the nursing home because Pearl could no longer care for her in her home. Melva saw Minnie several times in the months before she entered the nursing home, and also saw her several times thereafter. As of March 2004, Melva thought that Minnie had exercised her free will in making the decision to be cared for in a nursing home. According to Melva, Minnie's health deteriorated between Christmas and March 2004, when she was admitted into the nursing home. While Minnie was in the nursing home, Melva indicated Minnie knew where she was and that she talked about family. According to Melva, the nursing home provided Minnie with oxygen continuously, and when she did not have it, Minnie would become "extremely confused[,]" would get "very disoriented[,] and she would have "a very difficult time breathing." According to Melva, without supplemental oxygen, Minnie would have been incapable of understanding that she was signing a will. Melva also described how Minnie depended on Pearl to make most of her business decisions.

Melva viewed Minnie's 2004 Will as creating an unnatural distribution of Minnie's Estate. According to Melva, Minnie's 2004 Will would deprive Pearl of a place to live. In Melva's opinion, it was inconceivable that Minnie would leave the house in which Pearl lived to someone else because "Aunt Pearl and Aunt Minnie were very, very close. They had - - both of them had been widowed. From 1980 on, they lived right next

door to each other." Melva stated that she was shocked when she heard that Minnie signed a will leaving her estate to a stranger.

Minnie's physical status, a fact relevant to the jury's assessment of her capacity and ability to resist being unduly influenced, was also shown by the introduction of her nursing home records. Minnie's nursing home records contain information about Minnie's physical condition beginning on March 17, 2004, the date she was admitted into the nursing home. These records show that upon her admission, Minnie was ninety years old, and her admitting diagnoses were chronic bronchitis, anxiety states, osteoporosis, osteoarthrosis, chronic airway obstruction, and depressive disorder.

The Smiths requested that Dr. George Glass, a board-certified psychiatrist, review Minnie's medical records. Dr. Glass testified that Minnie, at the time of her admission to the nursing home, was "independent or fully functional[,]" she could understand others, and she had no cognitive impairments. Dr. Glass also explained that the removal of oxygen from persons in Minnie's situation could occur without an immediate loss of cognitive skills. However, on cross-examination, Dr. Glass acknowledged that he could not say whether depriving Minnie of supplemental oxygen would have affected her because he had never examined her.

Nursing Home Records and Medical Testimony

We choose to address Smith's second and third issues first. Smith's second issue challenges the probate court's admission of Minnie's nursing home records. Issue three contends that the jury could not disregard Dr. Glass's testimony on medical causation.

According to Smith, Minnie's nursing home records were not admissible because they were "not supported by expert testimony." When the attorneys for Minnie's estate offered the nursing home records, Smith objected under Rule 403 of the Texas Rules of Evidence that the probative value of the records was substantially outweighed by their prejudicial effect, confusion of the issues, or tendency to mislead the jury. Smith explained, while objecting, that Minnie's nursing home records were being offered without the benefit of having "expert witnesses to talk about what they mean."

Generally, "[w]hether to admit or exclude evidence is a matter committed to the trial court's sound discretion." *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001) (citing *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995)). "To reverse a judgment based on a claimed error in admitting or excluding evidence, a party must show that the error probably resulted in an improper judgment." *Id.*; *see also* Tex. R. App. P. 44.1(a); *Alvarado*, 897 S.W.2d at 753. If evidence was improperly admitted, the appellate court reviews the entire record to determine whether the inadmissible evidence caused the factfinder to reach an improper verdict. *See*

McCraw v. Maris, 828 S.W.2d 756, 758 (Tex. 1992). Thus, the threshold issue is whether it was error for the probate court to admit the nursing home records into evidence.

In general, relevant evidence is admissible unless the evidence is excluded by the Rules of Evidence, the Constitution, or a statute. Tex. R. Evid. 402. On appeal, Smith advances the same argument he made at trial: without expert testimony to explain the contents of Minnie's nursing home records, Rule of Evidence 403 required the probate court to exclude the records. *See* Tex. R. Evid. 403. Minnie's medical records contain information relevant to Minnie's physical status during a period of time relevant to whether she lacked testamentary capacity or was capable of being unduly influenced, the two issues that were to be decided by the jury. Nevertheless, the records do not contain a medical opinion directly addressing either of these ultimate issues.

Generally, relevant medical records are admissible as records of regularly conducted activity if they have been properly authenticated. *See* Tex. R. Evid. 803(6), 901, 902; *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995); *Glenn v. C&G Elec., Inc*., 977 S.W.2d 686, 689 (Fort Worth—1998, pet. denied). In his appeal, Smith does not complain that the medical records were not properly authenticated.

We conclude that the nursing home records contain a number of facts the jury was entitled to consider in reaching its conclusions on the ultimate issues. The records are probative because they provided a general background from which jurors could understand the general status of Minnie's health in periods of time relevant to the issues

the jury was asked to decide. The probate court may not have viewed the nursing home records as unduly prejudicial because they do not contain an express medical opinion about Minnie's testamentary capacity or whether she could have been unduly influenced. We conclude that the probate court, in the exercise of its discretion, could reasonably conclude that the probative value of the records outweighed any potential prejudicial effect. *See* Tex. R. Evid. 403. Issue two is overruled.

With respect to Smith's third issue, expert medical testimony is not required to prove that a person lacks testamentary capacity or to prove an undue influence claim. *See Estate of Riggins*, 937 S.W.2d 11, 19 (Tex. App.—Amarillo 1996, writ denied); *see also Decker v. Decker*, 192 S.W.3d 648, 652 (Tex. App.—Fort Worth 2006, no pet.) (holding that "the requisite proof regarding mental capacity is within the common knowledge and experience of laypersons and therefore, expert medical testimony is not required"). Dr. Glass's medical testimony was not controlling with respect to the jury's resolution of the ultimate issues. We overrule issue three.

Undue Influence

Next, we address Smith's issues asserting there is no evidence to support the jury's finding on the issue of undue influence. In his first issue, Smith argues there is no evidence to support the jury's verdict that Smith exerted undue influence over Minnie when she executed the 2004 Will. In Smith's fourth issue, he argues there is no evidence on several elements relevant to claims of undue influence.

Standard of Review

When reviewing a legal sufficiency or "no evidence" challenge, we determine "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We review the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Id.* Appellate courts will sustain a legal sufficiency or "no evidence" challenge when: (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules or law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *City of Keller*, 168 S.W.3d at 819. "They may choose to believe one witness and disbelieve another." *Id.* "Reviewing courts cannot impose their own opinions to the contrary." *Id.* "Courts reviewing all the evidence in a light favorable to the verdict thus assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it." *Id.*

When reviewing the evidence, a court may not substitute its judgment for that of the jury. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). When enough evidence is before the finder-of-fact that reasonable minds could differ on the meaning of

the evidence or the conclusions or inferences to be drawn from that evidence, the reviewing court may not substitute its judgment for that of the jury. *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988).

Analysis

"[U]ndue influence implies the existence of a testamentary capacity subjected to and controlled by a dominant influence or power." *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). To prevail on an undue influence claim, the contestant has the burden to prove (1) the existence and exertion of an influence, (2) that subverted or overpowered the testator's mind at the time she executed the instrument, (3) so that the testator executed an instrument she would not otherwise have executed but for such influence. *Id.* The elements of undue influence may be proven by circumstantial, as well as direct, evidence. *Id.* However, "[t]he exertion of undue influence cannot be inferred by opportunity alone." *Cotten v. Cotten*, 169 S.W.3d 824, 827 (Tex. App.—Dallas 2005, pet. denied). There must be some evidence to show that the influence was not only present, but in fact exerted, with respect to making the instrument. *Id.*

Not every influence exerted by a person on the will of another is undue. *Rothermel*, 369 S.W.2d at 922. Influence is not undue unless the free agency of the testator was destroyed and a testament produced that expresses the will of the one exerting the influence. *Id.* Mere requests to execute a favorable instrument are not sufficient to establish subversion or overpowering of the maker's will, unless the requests

"are shown to be so excessive as to subvert the will of the maker[.]" *Id.*; *see also Curry v. Curry*, 153 Tex. 421, 270 S.W.2d 208, 212 (1954). "Influence that was or became undue may take the nature of, but is not limited to force, intimidation, duress, excessive importunity[,] or deception used in an effort to overcome or subvert the will of the maker of the testament and induce the execution thereof contrary to his will." *Rothermel*, 369 S.W.2d at 922. Factors which have been considered in determining the existence of undue influence include:

> (1) the nature and type of relationship existing between the testator, the contestants and the party accused of exerting such influence; (2) the opportunities existing for the exertion of the type of influence or deception possessed or employed; (3) the circumstances surrounding the drafting and execution of the testament; (4) the existence of a fraudulent motive; (5) whether there has been an habitual subjection of the testator to the control of another; (6) the state of the testator's mind at the time of the execution of the testament; (7) the testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted; (8) words and acts of the testator; (9) weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise; and (10) whether the testament executed is unnatural in its terms of disposition of property.

In re Estate of Graham, 69 S.W.3d 598, 609-10 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Rothermel*, 369 S.W.2d at 923). Additionally, whether the beneficiary took part in the preparation or execution of the will has been considered as a factor. *See Guthrie v. Suiter*, 934 S.W.2d 820, 831 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Mackie v. McKenzie*, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied).

Because the question of whether a person unduly influenced another is usually subtle, proving undue influence generally involves an extended course of dealings and circumstances. *See Rothermel*, 369 S.W.2d at 922.

> [A]ll of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testator and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion.

Id. Nevertheless, circumstances relied on as establishing the elements of undue influence must be of a reasonably satisfactory and convincing character, and they must not be equally consistent with the absence of the exercise of such influence. *Id.*

In reviewing the sufficiency of the evidence, we view the evidence in a light that favors the jury's verdict and allow the jury to judge the credibility of the evidence and to weigh the testimony of the witnesses. *City of Keller*, 168 S.W.3d at 819. In that light, the jury could have concluded that Minnie and Smith were friends who had a creditor-debtor relationship. In the course of that relationship, Smith learned from his wife Janet that Minnie had expressed the desire that if "something happened to her," that he destroy the notes that showed he owed her money. However, despite Minnie's expressed desire, which was limited to Smith's notes, the evidence shows that Minnie then signed a will transferring her entire estate to the Smiths. Further, there is nothing to show that Minnie had an incentive to divest Pearl, her closest living relative, of the house in which she

lived. In light of the relationship between the parties, the jury could have reasonably concluded that Minnie's gift was an unnatural disposition of her estate.

The jury could also have reasonably inferred that the circumstances involved in the creation and execution of Minnie's 2004 Will did not reflect the normal manner under which testators create wills. Smith, with the help of his personal accountant, arranged for an attorney, who had previously represented Smith, to prepare Minnie's 2004 Will. The jury could have also considered that Smith, not Minnie, paid for the attorney's services, and that Smith arranged for his friends to serve as witnesses at the will signing ceremony. Finally, because the drafts of the wills were circulated to Kollaja, Smith's accountant, the jury could reasonably infer that Smith's agent had the opportunity to review Minnie's draft will before she was asked to review or sign it. This evidence, along with all of the other factors that are relevant to the finding of undue influence, tends to support the jury's finding on undue influence.

Additionally, the circumstances surrounding the drafting and execution of the will tend to show that Minnie was in a state of declining health between the date she expressed her desire that Smith tear-up the notes and the date she executed the 2004 Will. In April 2004, when Minnie executed the 2004 Will, she was ninety years of age. She was in poor health and unable to care for herself. She had only a sixth grade education. The jury could have reasonably concluded that Minnie was susceptible to being unduly influenced during the ceremony in light of her minimal educational background, her poor

hearing, and her generally poor state of health around the time she signed the 2004 Will, together with evidence showing that Minnie was not provided with supplemental oxygen during the will ceremony, and that neither before or during the ceremony, did Minnie question why the 2004 Will left the home in which Pearl was living to the Smiths. The jury could reasonably conclude from all of the circumstances that Minnie did not have the strength of mind or body to exercise her own will when she executed the 2004 Will.

The evidence concerning whether Minnie had a poor relationship with her extended family was disputed. While there was testimony that she considered her extended family to be hovering over her and that she did not want her extended family to inherit, there was other evidence that Minnie's relationship with Melva, one of her nieces, was not strained. There was also no testimony to explain why Minnie desired to disinherit Pearl. Instead, the jury heard considerable evidence that Minnie and Pearl were inseparable, lived next to each other for most of their lives, and that Minnie "loved her family dearly" and provided support for many of them. We conclude the jury was free to disbelieve the testimony of witnesses describing Minnie's relationship with her extended family as being strained.

When viewed in the light most favorable to the jury's verdict, we also conclude the jury could have reasonably decided that Smith's motives were fraudulent. Under the circumstances of this case, evidence of Smith's silence when he had a duty to speak constitutes evidence relevant to the issue of fraudulent intent. *See Spoljaric v. Percival*

Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986) ("When the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation."). Section 75 of the Texas Probate Code requires a person having custody of a decedent's will to deliver the will to the clerk of the court that has jurisdiction over the decedent's estate after receiving notice of the death of the testator. Tex. Prob. Code Ann. § 75 (West 2003). Smith was silent when the probate court admitted the 1989 Will for probate. Had he come forward at that point, Pearl, the person likely most knowledgeable about the circumstances surrounding Minnie's decision to change her 1989 Will, would have been available as a witness. In the course of Pearl's administration of the 1989 Will, Pearl sold Minnie's house, in which Smith had an interest under the 2004 Will, to people that Smith failed to notify of his interest. Additionally, Smith made payments to Pearl as independent executrix on notes that he owned under the terms of the 2004 Will. Not until Pearl died did Smith apply to set aside Minnie's 1989 Will. From these circumstances, the jury could reasonably conclude that Smith's motives towards Minnie were fraudulent. This evidence, along with the additional circumstances we have described, allowed the jury to reasonably reach its verdict.

Having considered the factors that are generally relevant to the question of the exercise of undue influence, we conclude that the record contains more than a scintilla of evidence from which the jury could rationally conclude that Smith procured the 2004

Will through his exercise of undue influence over Minnie. *See Rothermel*, 369 S.W.2d 922-23; *Estate of Graham*, 69 S.W.3d at 609-10. Because more than a scintilla of evidence suggesting undue influence was offered, we are not to substitute our judgment for that of the jury. We overrule issues one and four to the extent they challenge the jury's finding on the question submitted to the jury concerning undue influence.

Testamentary Capacity

In his appeal, Smith also challenges the evidence supporting the jury finding that Minnie did not have testamentary capacity when she executed the 2004 Will. Because we have affirmed the judgment based on the jury's undue influence finding, we need not address Smith's testamentary capacity argument. *See* Tex. R. App. P. 47.1; *see also Rothermel*, 369 S.W.2d at 922-23 (directing that depending on the circumstances of each case, a will procured by undue influence is sufficient to deny its admission to probate).

Attorney's Fees

In his fifth issue, Smith challenges the jury's finding that the proponents of Minnie's 1989 Will prosecuted their claims in good faith and with just cause. Smith also challenges the jury's finding that he did not prosecute his claim in good faith and with just cause. Smith's arguments, however, assume that he would prevail on his legal sufficiency issues.

In a will contest case, the Texas Probate Code allows the trial court to award attorney's fees to be paid by the estate where an executor of a will is required to defend

the will, and has done so in good faith and with just cause. *See* Tex. Prob. Code Ann. § 243 (West 2003). During the trial, the parties stipulated to the amount of attorney's fees that each party had incurred, and Smith's appeal does not challenge the dollar amount the trial court awarded as attorney's fees. Because we have affirmed the jury's finding of undue influence, and Smith advances no additional arguments attacking the trial court's award of attorney's fees, we overrule issue five.

We conclude that legally sufficient evidence supports the jury's finding on the issue of undue influence and that Smith is not entitled to a new trial based on the probate court's decision to admit Minnie's nursing home records into evidence. In light of our disposition of Smith's issues, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on September 23, 2010
Opinion Delivered March 10, 2011
Before Gaultney, Kreger, and Horton, JJ.