COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2584 **Cir. Ct. No. 99-CV-112**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LINDA KALLAS AS GUARDIAN FOR RUTH M. RADTKE,

PLAINTIFF,

V.

WAYNE HUBERTY AS TRUSTEE OF RUTH M. RADTKE REVOCABLE TRUST, SALLY KOLIAN, LYNNE HAESSLY-SHAW, CATHY HAESSLY, NANCY CONKLIN-RADTKE,

DEFENDANTS,

NANCY YENTZ,

DEFENDANT-RESPONDENT,

MICHELLE MAJEWSKI, HERMAN J. RADTKE, MATTHEW RADTKE, DAVID RADTKE, SANDRA WAMBLE, BARBARA WIHELMS, HELEN SCHUETZ AND PATRICK RADTKE,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 ANDERSON, P.J. The challengers to the 1994 Last Will and Testament of Ruth M. Radtke and the amendments to her revocable trust did not submit any evidentiary facts that would defeat the proponent's prima facie case for summary judgment on the question of whether Ruth had the necessary capacity to execute the testamentary documents. We affirm the grant of summary judgment in favor of the proponent of the will because the undisputed evidence permits only one reasonable inference—Ruth did have a general, meaningful conception of the nature, extent and scope of her property and the natural objects of her bounty on the day she executed the challenged documents.

¶2 Appellants Michelle Majewski, Herman J. Radtke, Matthew Radtke, David Radtke, Sandra Wamble, Barbara Wihelms, Helen Schuetz and Patrick Radtke (the grandchildren) are all the issue of James Radtke, the deceased son of Ruth, and they challenge Ruth's 1985 will and revocable trust, contending that the documents were the result of undue influence. They also challenge the 1994 last will and testament and amendments to the revocable trust, contending that Ruth lacked the testamentary capacity to execute those documents.

¶3 Nancy Yentz is the daughter of Ruth and is the proponent of the 1985 revocable trust and the 1994 last will and trust amendments. Yentz filed a summary judgment motion seeking dismissal of the grandchildren's opposition to the testamentary documents. Yentz asserted there was no evidence to support the claim of undue influence and the undisputed facts establish that Ruth possessed the basic capacity to execute the testamentary documents.

¶4 The grandchildren opposed summary judgment. The only counteraffidavit they submitted was limited to the property tax assessment of a lakefront cottage. They did not submit any counteraffidavit contradicting the proofs submitted by Yentz. In the brief submitted in opposition to the summary judgment motion, the grandchildren asserted that there were material issues of fact involving what was claimed to be suspicious circumstances surrounding the 1985 will and trust. They also asserted that material issues of fact require a trial on the issue of Ruth's testamentary capacity because a psychiatric examination of Ruth at the Mayo Clinic, approximately two months after she executed the 1994 testamentary documents, found that she was "suffering from a degenerative dementing process possibly Alzheimer's disease."

¶5 The trial court limited its ruling on the summary judgment motion to the 1994 testamentary documents, reasoning that if those documents were valid, the validity of any earlier documents would be irrelevant. The trial court lamented the failure of the grandchildren to submit any opposing affidavits focusing on Ruth's capacity at the time she executed the 1994 testamentary documents.[1] The

[1] To defeat a summary judgment motion, WIS. STAT. § 802.08 (2001-02) requires the grandchildren, by affidavit or other proof, to show facts which the court deems sufficient to entitle them to a trial. Such proof may be less than is sufficient to prove their case, but it must be substantial and raise questions of fact. ***Leszczynski v. Surges***, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966). The trial court put into plain words the difficulties caused when a party opposing summary judgment fails to submit counteraffidavits:

(continued)

trial court reviewed the evidentiary affidavit Yentz submitted in support of her motion and concluded that the uncontroverted facts of the supporting affidavit gave rise to a single conclusion—Ruth had the requisite testamentary capacity—and Yentz had established a prima facie case for summary judgment. The trial court did not address the claims of undue influence in the execution of the 1985 testamentary documents. The grandchildren appeal.

> The Court inquired about other reinforcement for the belief that Ms. Radtke may have lacked the capacity, and in arguments here today, [the grandchildren's counsel] indicated that there would be, at trial, testimony of other family members who would indicate … that at various times during various visits, certain symptoms were evidenced by gramma that gave concerns to them about her capacity.… [I]f the capacity issue as to the 1994 documents is the focal point of a later trial and right now we have a summary judgment motion that is attempting to avoid the necessity of a trial, it is incumbent upon both parties to put forth to the Court what they offer in support of and what they offer in opposition to that particular aspect of these proceedings. While it is not trial proof, it nonetheless needs to be the battle of affidavits or the battle of some type of somewhat reliable evidence that the evidence does exist. In this case, even if the grandchildren did produce affidavits, there may be some issue about what level of proof they would rise to, but the Court would at least have to take into account the existence, the probability that a dispute may exist, and that a trial may be the only way to fairly resolve conflicting views about capacity. But absent anything from the grandchildren to know what they might be saying, lacking anything from the grandchildren that what they observed was proximate to September 22, 1994 and absent anything else being offered to tie capacity or incapacity to the requisite time frame that the Court needs to make—needs to view for the purposes of this determination, the Court lacks the ability to conclude that there is a genuine issue as to material or relevant facts.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶6 An appeal from a grant of summary judgment raises an issue of law that we review de novo.[2] ***Van Erden v. Sobczak***, 2003 WI App 57, ¶8, 260 Wis. 2d 881, 659 N.W.2d 896. The summary judgment methodology we employ was recently explained in ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶21-24, 241 Wis. 2d 804, 623 N.W.2d 751. In the usual case, we first examine whether the complaint states a claim and whether the answer raises a material issue of fact. ***Id.***, ¶¶21-22. In this case, Yentz concedes that the grandchildren's issues' cross-claim states a claim.

¶7 We next examine Yentz's proof to determine whether it states a prima facie case for summary judgment. If it does, we next look to the opposing parties' affidavits to determine whether material facts are in dispute, which entitles the opposing party to a trial. ***Id.***, ¶22. Any doubt as to the existence of a genuine issue of material fact is resolved against the party moving for summary judgment. ***Id.***, ¶23. Evidentiary facts are accepted as true unless they are contradicted by opposing proof. ***Id.*** If at any point we determine that there is a genuine issue of fact entitling the opposing party to a trial, we reverse the summary judgment and remand the matter for further proceedings.

¶8 The summary judgment methodology is made more difficult in this case because of the failure of the grandchildren to file any opposing evidentiary affidavits on the question of Ruth's testamentary capacity on the day she executed the 1994 testamentary documents.

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[2] Although we review the issues on this appeal de novo, we benefit from the analysis of the trial court. ***Wis. Retired Teachers Ass'n, Inc. v. Employee Trust Funds Bd.***, 195 Wis. 2d 1001, 1024, 537 N.W.2d 400 (Ct. App. 1995), *aff'd as modified and remanded*, 207 Wis. 2d 1, 558 N.W.2d 83 (1997).

> [T]he failure of the opponent to submit counter-affidavits does not, of itself, entitle the movant to summary judgment. The movant must by evidentiary facts establish a prima facie [case] sufficient to defeat the [opponent]. If the movant's affidavits do not contain sufficient material evidentiary facts, or if uncontroverted evidentiary facts give rise to conflicting inferences, a prima facie case for summary judgment has not been established.

Jones v. Sears Roebuck & Co., 80 Wis. 2d 321, 326, 259 N.W.2d 70 (1977) (citations omitted).

¶9 Before we undertake this summary judgment methodology, we will review the law governing a challenge to a testator's testamentary capacity. The test for testamentary capacity has been the same in Wisconsin for more than a century. ***O'Brien v. Lumphrey***, 50 Wis. 2d 143, 146, 183 N.W.2d 133 (1971). A testator "must have the mental capacity to comprehend the nature, the extent, and the state of affairs of his [or her] property." ***Id.*** "The testator must know and understand his [or her] relationship to persons … reasonably … expected to become the objects of his [or her] bounty from which he [or she] must be able to make a rational selection of his [or her] beneficiaries." ***Id.*** "He [or she] must understand the scope and general effect of the provisions of his [or her] will in relation to his [or her] legatees and devisees." ***Id***. "Finally, the testator must be able to contemplate these elements together for a sufficient length of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will." ***Id.*** at 146-47.

¶10 A testator is presumed to have the capacity to make a will. ***Miller v. Gaudynski***, 46 Wis. 2d 393, 398, 175 N.W.2d 272 (1970). The opponent must present evidence that the testator did not have a general, meaningful conception of the nature, extent and scope of his or her property and the natural objects of his or her bounty. ***Zelner v. Krueger***, 83 Wis. 2d 259, 279, 265 N.W.2d 529 (1978).

The focus is on the testator's testamentary capacity at the time of executing the will; his or her degree of competency before or after the execution is not material. ***O'Brien***, 50 Wis. 2d at 147.

> The general mental condition of one who executes a will is only peripherally relevant, for a person may have a general or usual condition of inability to comprehend and yet have lucid intervals, during which time there is demonstrated testamentary capacity and a will may be appropriately executed.

Becker v. Zoschke, 76 Wis. 2d 336, 345, 251 N.W.2d 431 (1977).

¶11 Likewise, evidence that the testator has been adjudicated mentally incompetent or is the subject of a guardianship is not controlling because the law recognizes that the testator may have lucid intervals during which he or she possesses sufficient testamentary capacity. ***Sorensen v. Ziemke***, 87 Wis. 2d 339, 345, 274 N.W.2d 694 (1979).

> Infirmities of old age, such as forgetfulness, incoherence, and eccentricity, do not necessarily incapacitate a person from making a valid will. And the finding of incapacity to manage property sufficient to warrant guardianship does not negate capacity to make a will. A person may be incompetent at some times but may have rational intervals during which his acts will be given legal effect.

Schultz v. Lena, 15 Wis. 2d 226, 231, 112 N.W.2d 591 (1961).

¶12 As we have previously observed, the grandchildren failed to submit any evidentiary affidavits spotlighting Ruth's testamentary capacity on the day she executed the 1994 testamentary documents. Consequently, our review will be limited to whether Yentz's evidentiary affidavit established a prima facie case that Ruth had sufficient testamentary capacity on the day she executed the 1994 testamentary documents. *See* ***Jones***, 80 Wis. 2d at 326.

¶13 Ruth executed the questioned testamentary documents on September 22, 1994, at her home in Naples, Florida. In 1994, she split her time between the condominium in Florida and her cottage on Green Lake, Wisconsin. She was managing her own financial affairs in 1994, although because of the volume of transactions she had to deal with each month, she finally decided that it would be better to have her financial affairs managed by a professional and she retained John Gusory from a local Merrill Lynch office in Naples.

¶14 Gusory referred Ruth to Attorney Joseph D. Zaks of Quarles and Brady's Florida office to make changes in her will and revocable trust. The deposition of Zaks was submitted in support of Yentz's summary judgment motion; Zaks testified that he had a J.D. and an LLM in Taxation from Boston University and was an estate planning specialist.[3] He testified that he met with Ruth two or three times to prepare the testamentary documents she wanted; he was satisfied that she knew the nature and extent of her property that would be conveyed by the testamentary documents, and that she understood who her heirs-at-law were and how she provided for them in the will and trust. He opined, based upon his meetings with Ruth, that she was competent to execute her will and trust amendment.

¶15 Two days after executing the testamentary documents, Ruth returned to Wisconsin with Yentz, her daughter, to enter an assisted living facility in Brookfield. The primary reason for her entering an assisted living facility was her physical deterioration, but she was also starting to forget things. Yentz testified

[3] In 1995, after drafting the testamentary documents in question, Zaks was certified in Florida as an estate planning specialist.

that her mother "was not as quick and sharp as she had been in previous years." After her admission to the assisted living facility, Ruth began to exhibit a number of physical symptoms that required medication and when she was visited by another daughter, Sally Kolian, she appeared psychotic. Because of concerns over Ruth's deteriorating condition in the assisted living facility, Kolian and Yentz made arrangements to have her evaluated, physically and mentally, at the Mayo Clinic on November 16, 1994.

¶16 The grandchildren argue that the report of the examining neurologist from the Mayo Clinic, contained in Yentz's evidentiary affidavit, creates a genuine issue of material fact of whether Ruth had the requisite testamentary capacity on September 22, 1994.[4] They attempt to bolster their argument with reference to Yentz's testimony during her deposition when she was responding to a question of whether the neurologist's report was a valid reflection of her mother's condition and she replied that her mother had been suffering from the reported condition for about one year. The grandchildren argue that this evidence admits a reasonable inference that Ruth was not competent when she executed her testamentary documents and entitles them to a trial.

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[4] The neurologist's report, dated December 30, 1994, provided:

> I evaluated Mrs. Ruth Radtke who was referred to the Department of Neurology at the Mayo Clinic because of memory difficulties on November 16, 1994. On my examination, there was no evidence of focal motor sensory deficits, but there was clear evidence of cognitive impairment with the overall score on the short test of mental status being 20/38. It is my impression that Mrs. Radtke has significant cognitive impairment and is likely suffering from a degenerative dementing process possibly Alzheimer's disease. Given the results of my examination, Mrs. Radtke is unable to handle her personal affairs nor is she capable of independent living.

¶17 The neurologist's report and Yentz's statement that she believed her mother was suffering from a degenerative dementing process for a year do not create a genuine question of material fact for several reasons.[5] First, the critical issue is Ruth's testamentary capacity on September 22, 1994, not two months later when she was evaluated by a physician. *See* ***O'Brien***, 50 Wis. 2d at 147. The test is whether the testator possesses sufficient capacity at the time the will is executed, not at some later time. ***Fischbach v. Knutson***, 55 Wis. 2d 365, 372, 198 N.W.2d 583 (1972). The question of whether a testator had testamentary capacity at a particular time must be determined by the immediate circumstances of the transaction examined in the light of human experience. ***Steussy v. First Wis. Trust Co.***, 74 Wis. 2d 413, 422, 247 N.W.2d 75 (1976).

¶18 Second, the grandchildren have presented no evidence that sheds light on whether Ruth lacked a meaningful conception of the nature, extent, and scope of her property and the natural objects of her bounty on the day she executed her testamentary documents. *See* ***Zelner***, 83 Wis. 2d at 279. Third, even if Ruth had Alzheimer's disease, that, in and of itself, does not call her testamentary capacity into question. "Infirmities of old age, such as forgetfulness, incoherence, and eccentricity, do not necessarily incapacitate a person from making a valid will." ***Schultz***, 15 Wis. 2d at 231.

[5] The neurologist's report is contradicted by a report from Ruth's lead physician at the Mayo Clinic, prepared less than two weeks after her examination, stating that while there was some cognitive dysfunction, it could not be fully evaluated because of the various medications Ruth had been taking. But, the report is hearsay evidence—the opinion is in the form of an unsigned letter and not in the form of either an affidavit or a deposition. Summary judgment evidence must be on personal knowledge and set forth in such a manner as would be admissible in court. ***Steffen v. Luecht***, 2000 WI App 56, ¶32 n.4, 233 Wis. 2d 475, 608 N.W.2d 713.

¶19 Finally, the sworn testimony of Zaks only admits of one reasonable inference—that Ruth had the necessary testamentary capacity when she signed her 1994 will and amendment to her trust. In his deposition, Zaks testified that he was satisfied that she had an understanding of the nature and extent of her property, her heirs and her testamentary plan, and he stated his opinion that she had the necessary testamentary capacity to execute the testamentary documents.[6] The trial court properly relied upon the testimony given by Zaks and his qualifications and experience; the testimony of the attorney who drew the will may not be lightly brushed aside or permitted to be outweighed by circumstances which give rise merely to suspicions. ***Kirch v. Krainovich***, 244 Wis. 374, 383, 12 N.W.2d 688 (1944). The evidence the grandchildren point to does nothing more than give rise to suspicions. They have presented no evidence contemporaneous with the execution of the will that permits questioning Ruth's testamentary capacity.

¶20 Like the trial court, we are satisfied that the undisputed material evidentiary facts, presented in support of Yentz's summary judgment motion, establish a prima facie case that Ruth had the requisite testamentary capacity when she executed her 1994 will and amendment to her revocable trust.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[6] There was also anecdotal evidence from the depositions of Ruth's daughters that with the assistance of a home secretary and later a representative of Merrill Lynch, she was personally managing her business affairs up until the day she entered the assisted living facility.