

2011 IL App (2d) 101038-U  
No. 2—10—1038  
Order filed August 30, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> ESTATE of ANDREW DUGAN,	)	Appeal from the Circuit Court
	)	of DuPage County.
Deceased,	)	
	)	
GERALD DUGAN, JAMES DUGAN,	)	
and CAROL DUGAN MORRISEY,	)	
	)	
Petitioners-Appellants	)	
	)	
v.	)	No. 07—P—440
	)	
PAUL KENS, individually and as Executor	)	
of the Estate of Andrew Dugan, deceased,	)	
and LEO KENS,	)	Honorable
	)	Thomas C. Dudgeon
Respondents-Appellees.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hudson and Birkett concurred in the judgment.

**ORDER**

*Held:* Trial court properly entered a directed finding in favor of respondents to a will contest. Petitioners failed to set forth a *prima facie* case to support their claim of undue influence, even if the deposition testimony excluded under the Dead Man's Act *had* been admitted.

¶ 1 Petitioners moved to contest on the basis of undue influence decedent's May 3, 2006, will. At the close of petitioners' case, the court granted a directed finding in favor of respondents. Petitioners appeal, arguing that the trial court abused its discretion in barring the deposition testimony of certain witnesses pursuant to the Dead Man's Act (735 ILCS 5/8—201 (West 2010)). For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Decedent, Andrew Dugan (b. 1918, d. 2007), left an estate valued just short of \$500,000. Petitioners, Gerald Dugan, James Dugan, and Carol Dugan Morrissey, are decedent's nephews and niece, and they are his only heirs at law. Respondents, Paul and Leo Kens, are decedent's stepsons.

¶ 4 In 2004, decedent created a will with the following distribution scheme: Paul Kens (25%); Leo Kens (25%); Gerald Dugan (12.5%); James Dugan (12.5%); Carolyn Dugan Morrissey (12.5%); and Virginia Dugan (12.5%) (decedent's sister-in-law and mother of petitioners, not a party to the will contest).

¶ 5 On May 3, 2006, decedent created a new will, at issue in this appeal. The 2006 will was prepared by Tanya Gabbard of the Elder Law Office of Steven C. Perlis and Associates. Paul, who had a law degree and was a political science professor at the Texas State University, was named the executor. Under the 2006 will, decedent's personal property and residuary estate would be equally divided between stepsons Paul and Leo, with any share of the estate not distributed to go to Catholic Charities. In other words, the 2006 will excluded the heirs, Gerald, James, and Carolyn (as well as their mother, Virginia).

¶ 6 On May 23, 2007, Paul petitioned to probate the 2006 will. On August 21, 2007, the will was admitted to probate. In September 2007, petitioners first appeared before the court through their

attorney. Then, on February 15, 2008, petitioners moved to contest the validity of the 2006 will. They alleged lack of testamentary capacity. On February 11, 2009, petitioners moved for leave to amend, wishing to “drop” the allegation of incapacity and allege instead: (1) undue influence; and (2) tortious interference. The trial court allowed the amended pleading but ultimately dismissed the second count as to both Paul and Leo, and the first count as to Leo, *leaving only the allegation of undue influence as to Paul*.<sup>1</sup>

¶ 7 On August 13, 2010, the court granted respondents’ motion to bar pursuant to the Act the testimony of Gerald, James, Carol, and Virginia, on the basis that they stood to gain or lose depending on the outcome of the proceedings. 735 ILCS 5/8—201 (West 2010). On August 20, 2010, the court granted respondents’ motion to bar their own (*i.e.*, Paul’s and Leo’s) testimony, if called as adverse witnesses, because they were interested parties under the Act and their testimony could constitute a waiver of the Act.

¶ 8 On August 23, 2010, the case proceeded to trial. Petitioners presented no live testimony. Instead, their evidence consisted of six documentary exhibits (the 2004 will, a HUD settlement statement, an application for an assisted living facility, reports and notes from the elder law office regarding the 2006 will, a power of attorney for property, and a power of attorney for health care). The application to the assisted living facility contained a report from decedent’s doctor of 10 years, dated July 6, 2005, stating that decedent had no cognitive issues and needed no nursing assistance

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<sup>1</sup> Amidst these filings, respondents requested sanctions against petitioners pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)) in regard to petitioners’ allegation of lack of testamentary capacity, but that request was denied.

in performing his day-to-day activities. Also, petitioners' evidence consisted of two deposition transcripts (by decedent's cousin William Dugan and by attorney Gabbard).

¶ 9 In his deposition, William Dugan, then age 80, testified that he was decedent's first cousin. William stated that decedent passed away 2 years prior and had been 11 years William's senior. William last saw decedent approximately one year before his death, and he last spoke with decedent on the telephone approximately six months before his death (*i.e.*, *after* the formation of the 2006 will). According to William, decedent seemed to "have all his wits about him." Decedent did not talk much about his stepsons. However, William had the general sense that they "got along." William never had the "indication or feeling" that decedent's stepsons "pressured" decedent into making a will. Similarly, as far as William knew, decedent "liked" petitioners. Decedent never expressed to William his intentions concerning the will. It was simply "a mystery" why decedent chose to exclude petitioners.

¶ 10 In her deposition, attorney Tanya Gabbard testified that she helped decedent to prepare the 2006 will. Paul accompanied decedent to the initial consultation, but she could not remember whether Paul sat in on the entire meeting. The consultation took place in February 2006 (at least three months prior to the finalization of the will). Before the consultation, Gabbard had reviewed decedent's 2004 will (which named petitioners), and she asked decedent about petitioners. Decedent "adamantly" stated that he did not want to include petitioners in the will or even talk about them. He wanted to leave everything to his two stepsons because, as she recorded in her notes, "they had become like sons to him." In that first meeting, decedent did not explain why he chose to disinherit petitioners; however, it was not Gabbard's practice to formally note the disinheritance of nieces and nephews (as opposed to closer relatives such as children). Decedent also spoke with Gabbard on the

telephone several times before the will was finalized. Decedent discussed the possibility of intentionally going through probate because he “knew that a nephew [might] contest his will, and [that way] there would be a legal record of everything that went on.” In another telephone conversation, decedent told her, as she recorded in her notes, that he “no longer trust[ed]” one of his nephews and that the nephew “might cause problems.”

¶ 11 Although the court barred the deposition testimony of Paul, the parties stipulated to a portion of the deposition. In that portion, Paul stated that he is 63 years old, that he was present at the first meeting at the Perlis law firm, and that he is a professor at Texas State University.

¶ 12 Petitioners made an offer of proof as to the barred testimony by submitting the full deposition testimony of Virginia (exhibit 9), Paul (exhibit 10), and Leo (exhibit 11).<sup>2</sup> In Paul’s (excluded) deposition, he stated that decedent asked him on two separate occasions to be the executor of the will. Aside from the conversation in front of the attorney at the Perlis law firm, decedent never discussed whether he intended to leave a bequest to petitioners. Decedent did not often speak to Paul of petitioners. Paul was also decedent’s power of attorney for health care and property. Paul was present at the real estate closing when decedent sold his home (before moving into the assisted living facility). Additionally, Paul contacted the Perlis law firm on behalf of decedent, because decedent

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<sup>2</sup> Exhibits 9, 10, and 11 are not in the record on appeal. Virginia’s deposition is contained in a supplemental record. Paul’s deposition is attached to an earlier-filed motion. Neither party asserts that the depositions contained in the appellate record are different than those offered in exhibits 9 to 11. However, the record on appeal does *not* include Leo’s deposition. In any case, in their reply brief, petitioners have abandoned any claim concerning the barring of Leo’s testimony.

had asked for his help in finding a new attorney. Paul accompanied decedent on decedent's first visit to the Perlis firm.

¶ 13 In Virginia's (excluded) deposition, she stated that she married decedent's brother in 1950. Beginning then, she and her husband lived with decedent for 11 years. At some point, decedent married Elizabeth Kens, Paul and Leo's mother. Decedent had no children of his own. Decedent and Elizabeth were married for 22 years before Elizabeth died.

¶ 14 Virginia and James went to visit decedent in the assisted living facility one month before he died. Additionally, Virginia happened to speak to decedent on the telephone the evening before he died (and he complained of difficulty breathing). Although decedent was in an assisted living facility, it was fair to say that he was able to take care of himself; he drove, he went shopping, and he paid his own bills. When decedent sold his home and moved into the assisted living facility, he "mentally seem[ed] like he knew what he was doing."

¶ 15 As to decedent's relationship with petitioners (Virginia's three children), Virginia stated that they were very close. Decedent was Gerald's godfather. After Elizabeth died, decedent spent holidays with petitioners. Each of the petitioners visited decedent in the assisted living facility at least five times in the year prior to his death. Moreover, Virginia did not believe decedent enjoyed a close relationship with Paul and Leo. Decedent did not talk with her about Paul and Leo. Paul and Leo lived far away, in Texas and Urbana, Illinois, respectively. Finally, although Virginia did not specify precisely *when* this conversation occurred, she stated that decedent once told her that he wanted to include petitioners in his will, and he asked her for their birth dates and social security numbers. Virginia was "shocked" that petitioners were excluded from the 2006 will.

¶ 16 Respondents moved for a directed finding. The trial court took the matter under advisement so that it could review the evidence. Then, on September 7, 2010, the trial court granted the motion for a directed finding in favor of respondents.

¶ 17 In making its finding, the trial court stated that, “*no evidence \*\*\* exists* in this case that Paul Kens stood in a position of dominance in his relationship with [decedent.]” (Emphasis added.) The court stated that, to the contrary, the evidence tended to show that decedent was “a man clearly in charge of his faculties and making his own decisions.” Decedent was neither physically nor mentally frail. A physician’s report attached to the assisted living facility application described decedent’s physical and mental health as good. Moreover, the attorney who drafted the will described decedent as “adamant” about excluding petitioners and leaving everything to Paul and Leo. In several months of discussion leading up to the finalization of the will, decedent never strayed from that position. In fact, decedent discussed whether the will should go through probate because he feared that one of the nephews would challenge the will. Finally, the court noted that, over this same several-month interval, decedent discussed with his attorney other issues in addition to the beneficiary question, such as whether an autopsy should be performed, and nothing suggested by decedent in these discussions caused his attorney to second-guess his autonomy or competence. This appeal followed.

¶ 18

## II. ANALYSIS

¶ 19 On appeal, petitioners do *not* argue that, given the evidence admitted, the trial court erred in granting the directed finding. Rather, they argue that the trial court erred in barring pursuant to the Act the testimony of Virginia and Paul, and they request that the case be remanded for a new trial.<sup>3</sup>

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<sup>3</sup> In their initial brief, petitioners argue that the court likewise erred in barring Leo’s testimony. As respondents note in their response brief, petitioners do not set forth what the content

¶ 20 The Act provides:

“Dead-Man’s Act. In the trial of any action in which any party sues or defends as the representative of a deceased person \*\*\*, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased person \*\*\* or to any event which took place in the presence of the deceased \*\*\*, except in the following instances:

(a) If any person testifies on behalf of the representative to any conversation with the deceased \*\*\*, any adverse or interested person \*\*\* may testify concerning the same conversation or event.

(b) If the deposition of the deceased \*\*\* is admitted into evidence on behalf of the representative \*\*\*, any adverse or interested party may testify concerning the same matters admitted into evidence.

(c) Any testimony competent under Section 8—401 of this Act \*\*\*.

(d) [If the testimony] relate[s] to the heirship of a decedent.” 735 ILCS 5/8—201 (West 2010).

¶ 21 To render a witness incompetent to testify under the Act, the potential witness must have an interest in the judgment that will result in a direct, immediate monetary gain or loss. *Estate of Hurst v. Hurst*, 329 Ill. App. 3d 335, 337 (2002). The purpose of Act is to protect the estate by removing the temptation of a survivor to testify to matters that cannot be rebutted because of the death of the only other party to the conversation or witness to the event. *Balma v. Henry*, 404 Ill. App. 3d 233,

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of Leo’s testimony would have been. Petitioners then abandon their claim as to Leo in their reply brief.

237-38 (2010). The trial court's evidentiary rulings made pursuant to the Act will be reversed only if it abused its discretion. *Agins v. Schonberg*, 397 Ill. App. 3d 127, 130 (2009). A court can be said to have abused its discretion if its ruling was arbitrary, fanciful, or unreasonable and that no reasonable person would take the view adopted by the trial court. See, e.g., *In re Jessica M.*, 399 Ill. App. 3d 730, 738 (2010). The court should construe the Act liberally to ensure that its purpose is carried out. *Rerack v. Lally*, 241 Ill. App. 3d 692, 694 (1992).

¶ 22

A. Paul

¶ 23 As to Paul, petitioners argue that the court abused its discretion in granting Paul's motion to bar his own testimony if called as an adverse witness because the Act does not prohibit testimony by the executor. *Bailey v. Robinson*, 244 Ill. 16, 19-20 (1910). The privilege of asserting or waiving the Act's protection belongs only to the estate's representative (*i.e.*, the executor). *Balma*, 404 Ill. App. 3d at 239. While we agree that Paul's testimony in his capacity as executor was not prohibited (see, e.g., *People v. \$5,608 US Currency*, 359 Ill. App. 3d 891, 895 (2005) (citing the general proposition that an executor is not an interested party merely because he is to receive a fee)), Paul clearly was an interested party in his capacity as legatee (in that he stood to inherit 50% of the estate if the will was held valid).

¶ 24 In any case, we decline to reverse the trial court's exclusion of Paul's testimony because the exclusion of Paul's testimony in no way prejudiced plaintiff's case. See, e.g., *\$5,608 US Currency*, 359 Ill. App. 3d at 895 (a trial court's ruling on an issue involving the Act will not be reversed unless the error was substantially prejudicial and affected the trial court's outcome). Even if Paul's deposition testimony was allowed, the trial court still would be compelled to grant a directed finding.

¶ 25 When considering a motion for a directed finding, the trial court engages in a two-step analysis. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). First, the trial court determines as a matter of law whether the petitioner presented a *prima facie* case. *Id.* Second, if the court finds that petitioner presented a *prima facie* case, it proceeds to weigh the evidence to determine whether the *prima facie* case survives. *Id.* Where, as here, the trial court did not proceed beyond the first stage, we review *de novo* its determination. *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 992 (2009).

¶ 26 To establish a *prima facie* case, petitioners have to proffer at least some evidence on every essential element of the cause of action. *Foxfield*, 396 Ill. App. 3d at 992. The following are elements sufficient to raise a presumption of undue influence (in the context of creating a will): (1) the existence of a fiduciary relationship between the testator and a substantial and comparatively disproportionate beneficiary under the will; (2) the dependency of the testator and the dominance of the beneficiary; (3) the testator placed trust and confidence in the beneficiary; and (4) the beneficiary was instrumental or participated in the preparation, procurement, or execution of the will. *In re Estate of Julian*, 227 Ill. App. 3d 369, 376 (1991); *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1018 (1997). Particularly as to the element of “dependency and dominance,” undue influence sufficient to invalidate a will is that influence which prevents a testator from exercising his own free will in the disposition of his estate or deprives the testator of free agency and renders the will more that of another than of his own. *Id.* The more enfeebled the testator’s mind, the less evidence is required to establish the existence of undue influence. *Id.*

¶ 27 Here, Paul’s deposition establishes only that decedent asked him to be the executor of his will, be his power of attorney, and help him find a new attorney. Also, Paul was present at decedent’s real estate closing and the first meeting with the attorney who created the will. Petitioner

argues this establishes that Paul stood in a fiduciary relationship to decedent, noting Paul's close relationship, disparity in age, legal education, and participation in decedent's estate planning and financial affairs. However, even if we were to accept petitioners' argument that a fiduciary relationship existed, proffering evidence as to a single element of a cause of action does not make a *prima facie* case. Nothing in Paul's deposition speaks to the element of dependence and dominance or even *tends* to show that Paul "prevented [decedent] from exercising his own free will in the disposition of his estate." See *Julian*, 227 Ill. App. 3d at 376. Therefore, the admission of Paul's deposition would not have aided petitioners in establishing a *prima facie* case.

¶ 28 Lastly, we reject an argument briefly raised by petitioners in their reply brief. Petitioners, citing *Roeseler*, 287 Ill. App. 3d at 1018, imply that they do not need to establish a *prima facie* case of undue influence in order to preclude a directed finding against them where a "party having a claim to the testator's bounty is excluded following the active participation of a beneficiary in procuring a will." Indeed, *Roeseler* states that, under such circumstances, there is a presumption of undue influence. *Id.* However, we decline to apply *Roeseler* to the facts of this case.

¶ 29 In *Roeseler*, and the case upon which *Roeseler* relied, the decedent was enfeebled. *Id.*, citing *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 172-73 (1953) (the active agency of the chief beneficiary in procuring a will, especially in absence of those having equal claim on the bounty of a testator, *who is enfeebled by age and diseased*, is a circumstance indicating the probable exercise of undue influence). Moreover, the chief beneficiary who helped procure the new will was the decedent's neighbor and attorney, a person with a constant presence who had no natural claim to the estate. The excluded beneficiary was the decedent's only daughter (albeit a stepdaughter), who lived across the country in California and who had herself become disabled. *Id.* at 1005-06.

¶ 30 Here, the circumstances are nearly opposite those in *Roeseler*. None of the evidence suggests that decedent was cognitively enfeebled. Paul, accused of undue influence, lived across the country in Texas (as opposed to being a neighbor as in *Roeseler*) and *petitioners* lived nearby. Moreover, Paul *was* a natural object of the testator's bounty. See *Roeseler*, 287 Ill. App. 3d at 1013 (natural objects of a testator's bounty include people related by blood *or affection*). In sum, *Roeseler* does not relieve petitioners of their burden to establish a *prima facie* case of undue influence, which they failed to do.

¶ 31 B. Virginia

¶ 32 As to Virginia, petitioners argue that Virginia is not an "interested party" under the Act. They note that, even if the 2006 will is invalidated, the 2004 will would still need to be admitted before Virginia would receive a bequest. According to petitioners, Virginia's interest in the outcome of the trial is not sufficiently direct and immediate. We disagree.

¶ 33 Again, to render a witness incompetent to testify under the Act, the potential witness must have an interest in the judgment that will result in a direct, immediate monetary gain or loss. *Hurst*, 329 Ill. App. 3d at 337. Here, if the 2006 will is invalidated, the 2004 will would be submitted to probate. Petitioners appear disingenuous to this court when, for the limited purpose of making Virginia's interest in the judgment seem tenuous, they question whether the 2004 will could be admitted. At all other points, petitioners cite to the 2004 will as evidence that decedent intended to make them beneficiaries. If the 2004 will controls, Virginia would gain a 12.5% interest in the estate, and she and her children collectively would have a 50% interest in the estate. If, on the outside chance the 2004 will was also invalidated and decedent died intestate, Virginia's three children (petitioners), as the only living heirs, could receive an even greater share of the estate.

¶ 34 Mindful that the Act was intended to be construed liberally to protect the estate, we cannot say the trial court abused its discretion in finding that Virginia had a direct and immediate monetary interest in the instant judgment. The cases relied upon by defendant are distinguishable in that the interest at issue in those cases is collateral to the judgment. See, e.g., *Hurst*, 329 Ill. App. 3d at 337 (attorney involved in drafting a document in the will contest had a separate malpractice suit pending, and was not barred from testifying); and *Michalski v. Chicago Title & Trust Co.*, 50 Ill. App. 3d 335, 365 (1977) (attorney who may have failed to cause a deed to be recorded was not barred from testifying).

¶ 35 In any case, as with the exclusion of Paul's deposition testimony, the exclusion of Virginia's deposition testimony was not prejudicial to petitioners' case. As stated above, if called, Virginia would testify that decedent and petitioners enjoyed a close relationship and that decedent had previously expressed to Virginia that he wanted petitioners to be in his will. However, we already know from decedent's 2004 will that he, at some point, wanted petitioners in his will. While Virginia's deposition tends to show that it may have been surprising, particularly from the perspective of the Dugan family, that decedent chose to exclude petitioners from the will, the information contained in the deposition does not speak to any of the elements of undue influence.

¶ 36

### III. CONCLUSION

¶ 37 For the aforementioned reasons, we affirm the trial court.

¶ 38 Affirmed.

