2015 IL App (3d) 140374-U

Order filed March 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

BONNIE MELLENY and STEVEN MELLENY,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Mercer County, Illinois,
Petitioners-Appellants,	)	
v.	)	Appeal No. 3-14-0374 Circuit No. 13-P-4
THE ESTATE OF EDNA MAE ROBBINS,	)	Honorable Gregory G. Chickris,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice McDade and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court did not err in granting summary judgment in favor of respondent where petitioners failed to raise an issue of material fact. (2) Trial court's finding that decedent possessed testamentary capacity was not contrary to the manifest weight of the evidence.

¶ 2 In a will dated June 23, 2010, and subsequently admitted to probate, decedent, Edna Mae Robbins, bequeathed much of her estate to, *inter alia*, Sandra Daves. Petitioners, Bonnie Melleny and Steven Melleny, challenged the admission of decedent's will to probate, arguing that Sandra exerted undue influence over decedent and that decedent lacked testamentary

capacity. The trial court granted the estate's motion for summary judgment with respect to the undue influence, but denied the motion with respect to testamentary capacity. Following a bench trial, the court found that petitioners failed to demonstrate that decedent lacked the requisite capacity to create a will. Petitioners appeal this ruling as well as the court's ruling at the summary judgment stage. We affirm.

¶ 3 FACTS

¶ 4 Decedent died on December 2, 2012. On January 7, 2013, decedent's will was admitted to probate. In the will, created on June 23, 2010, decedent bequeathed much of her estate to Sandra and Sandra's children. Sandra was not a blood relative of decedent. Upon admission of the will into probate, Rodney Thirtyacre and Sandra were appointed as co-executors.

¶ 5 Petitioners were decedent's grandchildren and her only heirs. On March 28, 2013, they filed a petition to contest the admission of the will to probate. Petitioners alleged that Sandra exerted undue influence upon decedent to cause her to formulate and execute the will. Petitioners also alleged that decedent lacked testamentary capacity.

¶ 6 In an affidavit attached to the petition, Bonnie averred that decedent regularly gave money to Sandra and to Sandra's children. Bonnie opined that decedent "was controlled by [Sandra]" and that "[Sandra] took advantage of [decedent's] deteriorating mental state for financial gain." Bonnie concluded that "[Sandra] conned [decedent] into changing her will so as to benefit from her death." In his affidavit, Steven claimed that Sandra was always present when he visited decedent, to the point where he "got the feeling that [decedent] couldn't do anything without [Sandra's] approval."

¶ 7 The estate moved for summary judgment on each of petitioners' claims. In support of its motion, the estate attached excerpts from a number of depositions. Likewise, petitioners, in their

reply to the motion, attached a number of exhibits, including excerpts from depositions.

¶ 8 David Zwicker testified in his deposition that he drafted decedent's 2010 will. Zwicker testified that decedent had come to his office "every once in a while" since her husband died, and each time she came in alone, including when she came to discuss the will. A number of people were present for the execution of that will, but Sandra was not. Zwicker did not notice if anyone other than decedent herself had driven decedent to his office.

¶ 9 Bonnie testified at her deposition that it seemed decedent "couldn't do anything without the permission of [Sandra]." Bonnie admitted that she did not know of any financial relationship between Sandra and decedent at any time. Although she believed it possible that Sandra drove decedent to the June 23, 2010, will execution, she admitted that she had no evidence of that fact. She did not know if Sandra was present for the execution of the will. When asked how Sandra might have unduly influenced decedent, Bonnie replied: "I just felt that the world revolved around [Sandra]. I mean, everything that—you would go and help [decedent] do something, and that's all you heard." Bonnie admitted that she did not have any evidence of Sandra "doing anything inappropriate or dominating or actively doing anything[.]" Bonnie agreed that Sandra had been listed as executor and trustee in previous wills created by both decedent and her late husband.

¶ 10 Steven testified in his deposition that decedent did not like to leave the house without Sandra. Steven explained his belief that Sandra exerted undue influence on decedent as follows: "[E]very time I went over there, [Sandra] had to be there. [Sandra] had to know what was going on, and [decedent] had to let her know what was going on. There was quite a few times she had to call [Sandra], let her know that I was there." Steven noted that decedent would call Sandra on the telephone and tell her when he visited. Steven first noticed this behavior in 2010; it never

occurred while his grandfather—decedent's husband—was alive. Steven was not aware of any instruction from Sandra to decedent that decedent notify Sandra of his visits. Although Steven recalled decedent telling him that Sandra would run errands for her, such as buying groceries, going to the bank, and paying bills, he had no evidence that Sandra actually performed these tasks for decedent.

¶ 11 Sandra testified at her deposition that she never discussed with decedent the possibility that Bonnie and Steven had taken advantage of decedent. Sandra did not know why decedent "left everything" in her will to Sandra and her children. Regarding what she knew of decedent's relationship with her grandchildren, Sandra explained: "[T]here [were] different times [decedent] would say, He's not getting anything, or she's not getting anything, and I ignored it, so she didn't go on, you know, because I didn't really care, but I had no idea what was in that will[.]" Sandra also stated that she had no knowledge of decedent's previous wills. Decedent never discussed the 2010 will with Sandra. Sandra testified that in 2008 she was given power of attorney over decedent's healthcare.

¶ 12 Sandra also testified that Steven borrowed a car jack and stand from decedent. Over a period of six months, decedent attempted to contact Steven to return the items. Steven returned only the stand after Rodney Thirtyacre was able to reach him at decedent's request.

¶ 13 Dr. Ahmed Khalafallah testified in his deposition that decedent was his patient for 15 to 20 years. He testified that Sandra accompanied decedent on her doctor visits following the death of decedent's husband. Although Khalafallah testified that Sandra was "engaged in [decedent's] medical treatment[,]" he never witnessed Sandra being pushy or directing decedent in ways that seemed inappropriate. Sandra merely helped decedent understand her medical condition. Khalafallah stated "[Sandra] was more educated about medication and medical problem, [*sic*]

and I think she was helping in that."

¶ 14 In support of its motion for summary judgment, the estate also attached a number of affidavits. John Waugh averred that he was decedent's financial services representative and insurance agent. He met with decedent in 2004, and spoke with her on the phone on occasions after that. He did not meet Sandra until decedent's funeral. Bettye Leonhart averred that she had known decedent for 30 years. Following the death of decedent's husband, Leonhart would go shopping with decedent two to three times per month. Leonhart knew Sandra through decedent. According to Leonhart, Sandra did not accompany decedent on the shopping trips, nor did decedent rely on Sandra for transportation or food.

¶ 15 Petitioners each attached their original affidavits to their reply to the estate's motion for summary judgment. In an additional affidavit, Bonnie claimed that Sandra's claim to have no knowledge of decedent's wills was false. Bonnie found the claim unbelievable because "[Sandra] was in [decedent's] home at least every other day for the last 15 years and was intimately familiar with every piece of paper in that house." Bonnie also stated that Sandra asked her when Steven would return the jack to decedent. Bonnie averred, "In retrospect, I suspect that this was a method Sandra used to fuel a sore point or perceived problem in [decedent's] mind and keep it alive." Bonnie also asserted that she had "heard from people in [her] community that they were told by Sandra Daves that [she] ruined Harold [Robbins'] and [decedent's] credit rating." Bonnie concluded that "Sandra Daves disparaged both myself and my brother Steven Melleny before [decedent] in order to foster resentment against us."

¶ 16 Following arguments, the court granted summary judgment on the issue of undue influence, but denied summary judgment on the issue of testamentary capacity. In ruling, the court stated: "The Court finds there's no fiduciary present. Therefore, there's no presumption of

undue influence. I don't see any facts whatsoever connecting the allegation of undue influence with this particular will that is to be probated."

¶ 17 The matter proceeded to a bench trial on the lone remaining issue on March 13, 2014. At trial, Zwicker testified that he drafted a number of wills for decedent, including the 2010 will sought to be admitted to probate. He also drafted a will for decedent's husband in 1995. Decedent's 2006 will, drafted by Zwicker at decedent's direction, specifically disclaimed Bonnie and Steven. A draft of the 2010 will did the same. The final executed 2010 will removed the section specifically disclaiming decedent's grandchildren, though it provided for no gifts to them. Zwicker testified that decedent felt the language specifically disclaiming certain relatives was too harsh. Zwicker took this behavior to indicate that decedent knew what she was doing and why she was doing it.

¶ 18 Zwicker testified that before her death—but after the execution of her will—decedent indicated to him that she wished to sell a piece of her property to Thirtyacre. Decedent put a letter in Zwicker's mailbox detailing her instructions, including a copy of a tax bill that showed she owned the lot. Zwicker mentioned the sale briefly when he spoke on the phone with decedent when decedent was in the hospital. In that conversation, decedent informed Zwicker that she had pneumonia. Zwicker believed decedent to be of sound mind and memory at the time of the execution of her 2010 will.

¶ 19 Petitioners next called Lonnie Daves, who testified that he was decedent's nephew. Lonnie was not related to Sandra. Lonnie spoke with decedent two to three times per year. Lonnie recalled a specific encounter in 2010 where he received the impression that decedent was "kind of slipping a little bit[,]" noting that stressful situations made "her decide she doesn't really know for sure what's right and wrong in the world." Lonnie had lived with decedent for six

months when he was in high school, and he noticed a marked difference in decedent's demeanor from that time until 2010. Lonnie testified, "She was not quite understanding the whole situation."

¶ 20 When asked if decedent knew who her relatives were in 2010, Lonnie replied, "I would say not completely." Lonnie explained that decedent would sometimes use incorrect names when referring to his children. Decedent talked about Bonnie, but seemed to be of the impression that Bonnie was her daughter. Lonnie opined that decedent did not have the ability to form a plan for the disposition of her property. Lonnie did admit, however, that decedent had lucid moments, and would ask him about his children.

¶ 21 On cross-examination, Lonnie admitted that he was upset about the manner in which decedent disposed of her property. Specifically, he was upset that a blood relative did not receive anything in decedent's will.

¶ 22 Walter Miller testified that he was acquainted with decedent through Bonnie, with whom he had lived with for 10 years. Miller testified that some time in 2008 he purchased a piece of land from decedent. After the sale, however, it turned out that decedent had only sold one-half of the lot, and wanted more money for the second half. When Miller, Bonnie, and decedent discussed the sale of the second half of the lot, decedent apparently believed she was selling a full lot. After Miller went to the courthouse with decedent to explain the situation, decedent "was not able to understand at the courthouse that it was only half a lot. She thought it was still a full lot."

¶ 23 Miller also testified that he, Bonnie, and their children continued to visit decedent until her death. Miller noticed that decedent "was a little slow to react to understanding who was coming in to her house." When asked if decedent had, in 2010, the mental capacity to create a

will, Miller opined, "No, because she talked in circles. *** [H]er mind would trip."

¶ 24 Amanda Hamilton was the final witness called by petitioners. She testified that she grew up in Viola—the town where decedent lived—and had known decedent for most of Hamilton's life. She became reacquainted with decedent in 2007 when Hamilton returned to Viola to work in the local café. Hamilton rented property from decedent. Hamilton opined that decedent was capable of dealing with her rental properties. Hamilton also testified that decedent was friendly and affectionate. Hamilton had no doubts as to decedent's mental capacity. Following petitioners' case-in-chief, the estate moved for a directed verdict, but the court denied the motion.

¶ 25 The estate called Daniel Hildreth, who testified that he was decedent's uncle. Hildreth resided in Washington, but had visited decedent on numerous occasions in 2011 and 2012. When he was not visiting, Hildreth spoke to decedent on the phone every night for at least one-half of an hour. Hildreth testified that decedent talked about her relatives, and how they were related to him. He witnessed decedent paying her bills. Decedent was able to gather the paperwork necessary for the filing of taxes. Decedent socialized with people and was capable of having competent conversations.

¶ 26 The estate next called Sheila Sull, who testified that she met decedent through Vern Daves, decedent's nephew. Sull dated and eventually married Vern. Following Sull's 2007 divorce from Vern, decedent would visit with Sull approximately once a year until her death. Sull also conversed with decedent on occasion at the grocery store. Sull had no concerns that decedent was having any sort of mental problems.

¶ 27 Doris Hoing testified that she was decedent's sister-in-law. Hoing described her relationship with decedent as close, noting that she spoke with decedent on a weekly basis. Hoing and decedent attended the same church and worked many church functions together.

Hoing testified that she had no concerns for decedent's mental health, opining that decedent was "pretty sharp clear until the end."

¶ 28 Dorothy Hutt testified that she had known decedent for approximately 40 years. Hutt saw her in town on a regular basis, usually at the grocery store. Decedent would ask Hutt about Hutt's family and their health. Hutt worked as a CNA, and treated decedent when she was in the hospital just prior to her death. Even then, decedent asked Hutt about Hutt's family. While in the hospital, decedent asked Hutt if she could prevent Miller from visiting her. Bonnie did visit decedent in the hospital, along with her children. Hutt testified that decedent was able to recognize who Bonnie was and who her great-grandchildren were.

¶ 29 To conclude its case, the estate also submitted as evidence the full deposition of Khalafallah. Khalafallah testified at his deposition that decedent was his patient for 15 to 20 years. It was Khalafallah's opinion that decedent did not have dementia and that she was oriented to time and place. The doctor further opined that decedent "was in the right state of mind until the last few days before she passed away." Khalafallah was not aware of any time prior to decedent's death that she was not capable of making her own choices.

¶ 30 Following closing arguments, the court denied the petition, finding that petitioners had failed to meet its burden in proving that decedent lacked testamentary capacity. In delivering its judgment, the court found that Miller was not a credible witness, owing to a grudge he held against decedent and his interest in the will being overturned. The court further reasoned that even if decedent did not know whether she owned a full lot or one-half of a lot, Miller made "quite a leap" in seizing upon that event and concluding that decedent therefore lacked testamentary capacity. A common theme among petitioners' witnesses, the court pointed out, was that "they were upset because an unrelated person was named as one of the heirs over blood

relatives and they thought that was despicable."

¶ 31 The court found that, in contrast, the estate's witnesses were credible. The court specifically cited Zwicker and Khalafallah as having credible opinions that decedent had full testamentary capacity. Notably, the court found that the friends and relatives of decedent who testified for the estate gave very specific reasons for their opinions, basing those opinions on numerous contacts with decedent. These witnesses, the court opined, "were rock solid and unequivocal in their testimony not only as to testamentary capacity and satisfying all of the elements, but that [decedent] was sharp." The court subsequently entered a written order memorializing its decision, and included all of these observations as factual findings. This appeal follows.

¶ 32 ANALYSIS

¶ 33 On appeal, petitioners contend that they introduced enough evidence to create an issue of material fact as to whether decedent was unduly influenced by Sandra. Therefore, petitioners maintain, the trial court erred in granting summary judgment in favor of the estate on that issue. Petitioners further contend that the trial court erred in finding that decedent possessed testamentary capacity. We find each of these arguments to be without merit, and accordingly affirm each of the trial court's judgments.

¶ 34 I. Undue Influence

¶ 35 Under section 2-1005 of the Code of Civil Procedure, summary judgment shall be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). " 'A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in

dispute, reasonable minds might differ in drawing inferences from those facts.' " *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 35 (quoting *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999)). If a plaintiff fails to allege facts sufficient to make a *prima facie* case regarding each essential element of his or her claim, summary judgment in favor of the defendant is proper. *Rogers v. Matanda, Inc*., 393 Ill. App. 3d 521, 526-27 (2009).

¶ 36 In cases involving summary judgment, we conduct a *de novo* review of the evidence on the record. *Happel v. Wal-Mart Stores, Inc*., 199 Ill. 2d 179, 185 (2002). In our review, we "construe the facts strictly against the moving party and in the light most favorable to the nonmoving party." *Id*. at 186.

¶ 37 A party contesting a will on the grounds of undue influence may establish undue influence in either of two separate fashions. First, a presumption of undue influence arises where: (1) a fiduciary relationship exists between the testator and a substantial beneficiary of the contested will; (2) the testator is the dependent and the beneficiary of the dominant party; (3) the testator places trust and confidence in the beneficiary; and (4) the will is prepared by or its preparation procured by such beneficiary. *DeHart v. DeHart*, 2013 IL 114137, ¶ 30. Alternatively, undue influence may be established through evidence of "secret" undue influence. "Secret" undue influence is established where the evidence shows "the influence was connected with and operative at the time of execution of the will and that the influence was directed toward procuring the will in favor of the beneficiary." *Id*. ¶ 27.

¶ 38 Petitioners do not allege a presumption of undue influence exists. Petitioners instead argue that Sandra exerted "secret" undue influence over decedent. In support of their argument, petitioners correctly point out that "the testator's will may be overborne by a series of misrepresentations about a beneficiary's character." (citing *In re Estate of Hoover*, 155 Ill. 2d

402, 413 (1993). Petitioners cite two specific instances in which, they claim, Sandra disparaged them: (1) when Sandra told decedent that Steven had never returned her car jack; and (2) when Sandra claimed that Bonnie had ruined decedent's credit rating. Petitioners also argue that Sandra's constant presence around decedent is indicative of her influence.

¶ 39 Although the requirements for proving "secret" undue influence are less rigid than those required for establishing a presumption of undue influence, each path requires proving some nexus between the influence and the procurement of the will. See *DeHart*, 2013 IL 114137, ¶ 30. The trial court found that petitioners had not offered any evidence that might link Sandra's alleged influence to the contested will. We agree.

¶ 40 When viewed in the light most favorable to petitioners, Sandra's reminder to decedent that Steven had not returned the car jack might be seen as an attempt to disparage Steven. Nevertheless, there is no evidence to indicated that this disparagement "was directed toward procuring the will in favor of" Sandra. *DeHart*, 2013 IL 114137, ¶ 27. Likewise, petitioners clearly established that Sandra spent a great deal of time with decedent. However, no evidence was introduced that would connect the time Sandra spent with decedent to the procurement of decedent's will. The same is true of Sandra's purported disparagement of Bonnie.[1] Accordingly, we find that petitioners failed to establish a genuine issue of material fact regarding Sandra's purported "secret" undue influence over decedent, and the trial court properly entered summary

[1] Perhaps more importantly, Bonnie merely averred that she "heard from people in [her] community that they were told by Sandra Daves that [she] ruined Harold [Robbins'] and [decedent's] credit rating." This constitutes speculation hearsay, and would be inadmissible; in turn, it should not be considered in ruling of a motion for summary judgment. See, *e.g.*, *Camco, Inc., v. Lowery*, 362 Ill. App. 3d 421, 435 (2005).

judgment on the issue.

¶ 41 II. Testamentary Capacity

¶ 42 Petitioners argue that the trial court erred in finding that they failed to prove decedent lacked testamentary capacity. The verdict of a trial court will not be reversed on review unless it is contrary to the manifest weight of the evidence. *E.g.*, *Gretencord v. Cryder*, 336 Ill. App. 930, 933 (2003). A trial court's judgment is not against the manifest weight of the evidence unless the opposite conclusion is clearly evident. *In re Estate of Wilson*, 238 Ill. 2d 519, 570 (2010).

> "Under the manifest weight standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses. [Citation.] A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006).

¶ 43 In order to prove a lack of testamentary capacity, a will contestant must establish that the will was the product of an unsound mind or memory. *DeHart*, 2013 IL 114137, ¶ 20. "The standard test of testamentary capacity, *i.e.*, soundness of mind and memory, is that 'the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and also be able to understand the nature, consequence, and effect of the act of executing a will.' " *Id*. (quoting *Dowie v. Sutton*, 227 Ill. 183, 196 (1907)). The absence of any of these requirements constitutes a lack of testamentary capacity. *DeHart*, 2013 IL 114137, ¶ 20. "The natural objects of one's bounty include those people related to him by ties of blood or affection, and thus are those who are or should be considered to be recipients of his bequests." *Id.*

¶ 44 Here, Lonnie testified that decedent sometimes forgot his children's names and at one point thought Bonnie was her daughter. Miller testified that decedent was sometimes slow to recognize who was at her door. From this testimony, one could infer that decedent was incapable of knowing the natural objects of her bounty. However, the trial court received considerable conflicting testimony from numerous witnesses for the estate, each of whom testified that decedent was "sharp." After determining that neither Lonnie nor Miller was a credible witness, the court chose to make no such inference from their testimony. This court will not substitute its own judgment for that of the trial court regarding the credibility of petitioners' witnesses or the inferences to be drawn from their testimony. See *Best*, 223 Ill. 2d at 351.

¶ 45 Similarly, Miller testified that decedent failed to understand that she owned one-half of a lot rather than a full lot. However, the trial court refused to infer from this testimony that decedent lacked the capability to know what her property was. The court cited Miller's lack of credibility, also opining that the singular incident was insufficient to establish that decedent lacked testamentary capacity. Deferring to the trial court's determinations regarding credibility and inferences to be drawn from the evidence, we find that the trial court's judgment that petitioners had failed to negate any element of testamentary capacity was not contrary to the manifest weight of the evidence.

¶ 46 In coming to this conclusion, we note that the petitioners also assert that the trial court "misapprehend[ed] what must be shown to establish a lack of testamentary capacity." Despite this allegation, petitioners do not expound upon the trial court's mistake, nor do they suggest what the correct standard might be. Indeed, aside from the standard of review, petitioners' briefs—both initial and reply—do not include a single legal citation relating to the issue of testamentary capacity. We thus consider that portion of petitioners' argument waived, pursuant

to Illinois Supreme Court Rules 341(h)(7) and 341(i) (eff. Feb. 16, 2013). See also *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009) ("[A reviewing court] is not merely a repository into which an appellant may 'dump the burden of argument and research,' nor is it the obligation of this court to act as an advocate or seek error in the record. [Citations.] Supreme Court Rule 341 requires that the appellant clearly set out the issues raised and the legal support therefor with relevant authority. [Citation.] The consequence of not complying with Supreme Court Rule 341 is waiver of those issues on appeal." (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993))).

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Mercer County is affirmed.

¶ 49 Affirmed.