2013 IL App (1st) 122083-U

SECOND DIVISION
October 8, 2013

No. 1-12-2083

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF LYDIA M. TYLER, Deceased.	)	
	)	
(Mary Suzanne Richards, Mary Lynn Drabik, and Mary Elizabeth Smith,	)	
	)	
Petitioners-Appellants,	)	
	)	
v.	)	Appeal from
	)	the Circuit Court
Mary Janet Drabik, Mary Patricia Knopp, Mary Rose Drabik, a/k/a Mary Rose Ojalvo, John Henry Drabik, Nancy Marie Wood, a/k/a Nancy Marie Pitts, Terri Henson, George Wood, B. David Wood, Guy Wood, Jamie Rickert, Raymond Keable, Ronald Keable, Mary Lee Johnson, and Charles Tiedje,	)	of Cook County
	)	
	)	No. 10 P 3312
	)	
Petitioners,	)	Honorable
	)	Susan M. Coleman,
v.	)	Judge Presiding.
	)	
James Drabik, Individually and as Independent Executor of the Estate of Lydia M. Tyler, and Bette DeHeer,	)	
	)	
Respondents-Appellees.	)	

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Judgment entered on directed verdict in favor of appellees affirmed where evidence presented by appellants could not sustain a verdict of lack of testamentary capacity or undue influence.

¶ 2 Decedent, Lydia M. Tyler, died on May 28, 2010. Her last will and testament, dated January 5, 2004, was admitted to probate on June 2, 2010. On November 30, 2010, appellants, Mary Suzanne Richards, Mary Lynn Drabik, and Mary Elizabeth Smith, were among 22 nieces and nephews who filed a petition to contest the validity of decedent's will on various grounds. The petition was subsequently amended to include four fewer nieces and nephews and to allege only two grounds: undue influence and lack of testamentary capacity.[1] Respondents-appellees, James Drabik (respondent), individually and as independent executor of the Estate of Lydia M. Tyler, and Bette DeHeer, filed a motion for summary judgment, which was denied. A jury trial then ensued, and at the conclusion of petitioners' case, the circuit court granted appellees' motion for a directed verdict and entered judgment in favor of them. Appellants, *pro se*, now appeal, contending, essentially, that the circuit court erred in granting appellees' motion for a directed verdict. For the reasons discussed below, we affirm.

¶ 3 The following is a summary of the pertinent testimony elicited at trial in this case. Dr. Dina Desai testified that she first saw decedent shortly after decedent became a widow. Decedent complained of pain and dizziness and was admitted to Hinsdale Hospital on December

[1] On June 20, 2012, petitioner Holly Wood's claims were also voluntarily dismissed without prejudice.

2, 2003. Decedent was alert and oriented, but "markedly lethargic." Her admitting diagnosis was shoulder pain, possible cellulitis. On December 10, 2003, decedent was discharged with diagnoses of pseudogout of the shoulder and knee; a urinary tract infection; dizziness; an old stroke (decedent had a stroke two years prior); mild dementia; and marked fatigue and weakness. Dr. Desai had also tried to wean decedent off morphine and put her on Vicodin, a lesser-strength painkiller. Dr. Desai testified to a note that she took at a nursing home on December 30, 2003. The note read, "[S]he did not recognize me," and the resident's name on the note was Lydia Walker.

¶ 4 On cross-examination, Dr. Desai stated that none of the medications taken by decedent at the hospital impaired her mental capacity to a measurable extent. She also stated that a urinary tract infection and mild dementia are often related and that when the urinary tract infection clears up, "[t]hey go back to normal." Dr. Desai opined that nothing impaired decedent's ability to understand how to make a will.

¶ 5 Mary Katherine Paul, the sister of respondent, testified that decedent was her aunt and godmother. Decedent sent her a number of cards over the years, and Paul would visit Chicago about four times a year to be with her family and decedent. On October 2, 2003, Harry Tyler, decedent's husband, had a pacemaker installed and had an adverse reaction to the surgery. The next evening, Paul and her mother drove decedent to the hospital after learning that Harry was in critical condition. Paul did not see respondent that night or when she drove to decedent's apartment the next day. Respondent also was not present when she attended a care planning meeting for Harry at the hospital on November 3, 2003. Paul testified that she does not believe

respondent was helping decedent and Harry in November 2003.

¶ 6 On December 1, 2003, Paul's mother called and told her that Harry had died. Paul assisted in planning Harry's funeral, and also officiated, read, sang a hymn, and "did the prayers." On December 25, 2003, Paul spoke with respondent at her mother's house about what was going to happen with decedent's apartment. Respondent told her that he had power of attorney and "was making all decisions." Paul was "surprised" and "didn't understand why he was power of attorney." She and her husband offered to help pack up the apartment, but respondent told her that he would do it. Paul later went to the apartment and cleaned for two days with an aunt, her mother, and her sister. Paul testified that decedent was 88 years old when she signed her will on January 5, 2004, and had been widowed for 35 days, 10 of which were spent in the hospital.

¶ 7 Mary Suzanne Richards testified that she is a niece of decedent. She and her husband prepared a family tree of decedent's extended family, which was entered into evidence.

¶ 8 Annette Mary Watts testified that she is the daughter of Dorothy Wood, decedent's sister. Annette testified that, in 2003, her mother spoke with decedent on the phone weekly and that "[i]t was like the highlight of her week."

¶ 9 Jay Francis Drabik testified that on December 20 or 21, 2003, he went and saw decedent at Brighton Gardens, a nursing home. He went to see her again on December 24, 2003, and brought her a bed from his mother's house.

¶ 10 John Henry Drabik testified that sometime around June 26, 2006, he and a nephew were going through his mother's house when they found a draft copy of decedent's will in an area of the house that was used by respondent, his brother. The draft was found with a letter from Nancy

Smith to decedent stating that she had delivered a copy of decedent's final will to respondent.

¶ 11 Mary Lynn Drabik testified that she had nine siblings, including respondent. She also testified that Dorothy Woods, her aunt, resided in California in 2003, and she listed Dorothy's seven children.

¶ 12 The evidence deposition of Nancy Smith-Lehrer[2] was read to the jury. Lehrer testified that she is an attorney and was self-employed in December 2003 and January 2004. She was the principal of Nancy J. Smith, P.C., and her employees included Margaret Connell and Kelli Biggam.

¶ 13 Smith-Lehrer identified billing statements for will, power of attorney, and estate planning work she did for decedent on December 15, 2003 through December 18, 2003, and on January 5, 2004. She also identified a billing statement for work done on the estate of Harry Tyler, which was billed to decedent. She further identified two attorney-client agreements signed by her and decedent on December 16, 2003. In the first, decedent retained Smith-Lehrer to draft a durable power of attorney, a healthcare power of attorney, a will, a trust, and/or a codicil for her. In the second, decedent retained Smith-Lehrer to handle her husband's estate, of which she was the executor.

¶ 14 Smith-Lehrer identified a number of additional documents, including a healthcare power of attorney for decedent executed on December 16, 2003; a durable power of attorney executed that same day, naming respondent as agent; and a copy of decedent's will, dated July 8, 1971. Smith-Lehrer testified that respondent showed her the 1971 will and that she made a copy of it.

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[2] Smith-Lehrer went by the name Nancy Smith until her marriage sometime after 2004.

She testified that the beneficiary of the 1971 will was Harry Tyler, and that if Harry predeceased decedent, the residue poured over into the Lydia Marie Dudley Trust. Decedent's brother's and sisters were beneficiaries, *per stirpes*, under the Lydia Marie Dudley Trust.

¶ 15 Smith-Lehrer testified that on December 15, 2003, respondent, a former client of Smith-Lehrer's husband Norman Lehrer, called her and asked if he could come to her office because his aunt was looking for an attorney to handle her husband's estate and also "looking for powers of attorney and wills." She told respondent, "I can't have you hire me. I have to go meet Lydia." Respondent later came by and asked Smith-Lehrer to call decedent and try to meet with her at the facility where she stayed because she was unable to come to the office. Respondent and Smith-Lehrer did not discuss decedent's estate.

¶ 16 Smith-Lehrer called decedent and met with her at Brighton Gardens on December 16, at which time respondent was present. She brought the attorney-client agreement and powers of attorney, and decedent executed them during their meeting. On the healthcare power of attorney, which became effective on December 16, 2003, decedent is the principal and respondent is the agent.

¶ 17 On cross-examination, Smith-Lehrer stated that respondent never brought up what decedent wanted to do with her estate. She also stated that decedent told her she wanted respondent to be her power of attorney.

¶ 18 Respondent was called as an adverse witness. He testified that, in 2003, Harry Tyler always insisted on cooking for decedent and handled their finances. He also testified that decedent was in a nursing home in Brighton Gardens in early December 2003, and that she asked

him to help with Harry's estate. Respondent acknowledged that Norman Lehrer is a friend. In December 2003, Norman referred him to Nancy Smith-Lehrer. Respondent called Smith-Lehrer and explained to her that his uncle had died and that his aunt was the executor and wished to speak with an attorney. Respondent then told decedent that an attorney would be contacting her.

¶ 19 A few days prior to Harry's death, Harry asked respondent to get his living will from his and decedent's apartment. There was a folder in their apartment "that said wills and something else," and the people at Northwestern hospital removed Harry's living will from the folder. The folder then went with decedent and respondent's mother back to the latter's house. Respondent later provided the entire folder to Smith-Lehrer. Respondent testified that at some point in time he saw decedent's will, which was in the folder. He also identified decedent's will dated January 5, 2004.

¶ 20 Respondent testified that he is the executor of decedent's estate. He also testified that the will states:

> "I give the residue of my estate wherever situated, excluding any property over which I have the power of appointment at my death, to my sisters, Rosemary Drabik and Bette Jane DeHeer, and to my nephew, James T. Drabik, if living, in equal shares per capita.
>
> In the event that one of them predeceases me, then the residue of my estate shall be divided among the remaining named legatees in equal shares per capita."

Respondent testified that decedent's sister, Dorothy Wood, was alive on January 5, 2004, but was

not mentioned in the will. On January 5, 2004, respondent's mother, Rosemary Drabik, was 80 years old, and respondent was 45 years old.

¶ 21 The evidence deposition of Margaret Connell was read to the jury. Connell was the officer manager for Nancy Smith-Lehrer, her sister, in December 2003 and January 2004. As part of her duties, she prepared billing statements. On January 5, 2004, Connell, Smith-Lehrer, and Kelly Biggam went to decedent's place of residence. When they arrived, Smith-Lehrer spoke with decedent privately, then Connell went in the room and witnessed decedent sign her will. No time was billed for Connell and Biggam witnessing the will.

¶ 22 Petitioners rested their case, and appellees moved for a directed verdict. The court first granted appellees' motion for a directed verdict as to lack of testamentary capacity. The court found that Dr. Desai's note that "she doesn't recognize me" was "innocuous" and that there was "absolutely no other evidence with regards to lack of testamentary capacity." The court then took a short recess to review some cases. When proceedings resumed, the court likewise granted a directed verdict on the count of undue influence. Citing *Malone v. Malone*, 26 Ill. App. 2d 291 (1960), the court found that the only evidence against respondent was that "he made a phone call and dropped off documents," and that "as a matter of law, the evidence is insufficient to establish that Respondent caused the preparation of the document purporting to be the last Will of [decedent.]" Appellants appeal from the judgment pursuant to Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010).

¶ 23 ANALYSIS

¶ 24 Before addressing the merits of appellants' claims, we note that appellants have failed to

comply with the Supreme Court Rules governing appellate court briefs. Appellants' statement of facts does not contain "the facts necessary to an understanding of the case" or state the facts "without argument or comment" in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013). Appellants also fail to consistently cite the pages of the record on which they rely in both their statement of facts and argument sections. Ill. S. Ct. R. 341(h)(6)-(7).

¶ 25 Appellants' *pro se* status does not relieve them of the burden of complying with the supreme court rules governing appeals. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001). However, our jurisdiction to entertain the appeal of *pro se* appellants is unaffected by the insufficiency of their brief so long as we understand the issue they intend to raise and where, as here, we have the benefit of a cogent brief of the opposing party. *Twardowski*, 321 Ill. App. 3d at 511.

¶ 26 In this appeal, appellants essentially contend that the circuit court erred in granting appellees' motion for a directed verdict. "A directed verdict will be upheld where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 123 (2004) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "We review a trial court's grant of a motion for directed verdict *de novo*." *Stehlik v. Village of Orland Park*, 2012 IL App (1st) 091278, ¶ 15 (citing *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010)).

¶ 27 The first count on which the court granted appellees a directed verdict was lack of testamentary capacity. "[I]t has long been established that to prevail in a will contest where the

testator is of legal age, a plaintiff need only show that the will in question was the product of an unsound mind or memory." *DeHart v. 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.' " *DeHart*, 2013 IL 114137, ¶ 20 (quoting *Dowie v. Sutton*, 227 Ill. 183, 196 (1907)). "The absence of any one of these requirements would indicate a lack of testamentary capacity." *DeHart*, 2013 IL 114137, ¶ 20. " 'Since the law presumes every person sane until the contrary is proved, the burden rests on the party asserting the lack of testamentary capacity to prove it.' " *In re Estate of Elias*, 408 Ill. App. 3d 301, 316 (2011) (quoting *In re Estate of Barth*, 339 Ill. App. 3d 651, 665 (2003)).

¶ 28 Viewed in the aspect most favorable to appellants, we find that the evidence presented at trial was insufficient to show that decedent lacked testamentary capacity. Only the testimony of Dr. Desai was presented to establish this claim. Although Dr. Desai testified that decedent was taking medication and was discharged from the hospital on December 10, 2003, with various diagnoses, including a urinary tract infection, a stroke that had occurred two years prior, and mild dementia, she testified that the medications decedent was taking did not impair her mental capacity to a measurable extent and that mild dementia typically goes away when a urinary tract infection clears up. She further opined that nothing impaired decedent's ability to understand how to make a will. Her note from the nursing home stating, "[S]he did not recognize me," does not undermine this opinion. Besides the fact that decedent's name was not even on the note, decedent's purported failure to recognize a doctor on one occasion is not a measure of her

testamentary capacity. *DeHart*, 2013 IL 114137, ¶ 20. Under the circumstances, appellants failed to meet their burden of proving decedent's lack of testamentary capacity. *In re Estate of Elias*, 408 Ill. App. 3d at 316. The circuit court thus properly granted a directed verdict as to that count. *Sullivan*, 209 Ill. 2d at 123.

¶ 29 We next turn to the circuit court's order granting appellees a directed verdict on the count of undue influence. Our supreme court has defined undue influence as follows:

> " '[U]ndue influence which will invalidate a will is "any improper *** urgency of persuasion whereby the will of a person is over-powered and he is indeed induced to do or forbear an act which he would not do or would do if left to act freely. [Citation.]" To constitute undue influence, the influence "must be of such a nature as to destroy the testator's freedom concerning the disposition of his estate and render his will that of another." [Citations.]
>
> What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case. [Citation.] The exercise of undue influence may be inferred in cases where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason. [Citation.] Proof of undue influence may be wholly circumstantial. [Citation.] The influence may be that of a beneficiary or that of a

> third person which will be imputed to the beneficiary. [Citations.] False or misleading representations concerning the character of another may be so connected with the execution of the will that the allegation that such misrepresentations were made to the testator may present triable fact questions on the issue of undue influence. [Citations.]' " (Internal quotation marks omitted.) *DeHart*, 2013 IL 114137, ¶ 27.

A presumption of undue influence arises where "(1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will, (2) the testator is the dependent and the beneficiary the dominant party, (3) the testator reposes trust and confidence in the beneficiary, and (4) the will is prepared by or its preparation procured by such beneficiary." *DeHart*, 2013 IL 114137, ¶ 30.

¶ 30 Here, there is no doubt that a fiduciary relationship existed between respondent and decedent. "As a matter of law, a power of attorney gives rise to a general fiduciary relationship between the grantor and the grantee." *DeHart*, 2013 IL 114137, ¶ 31. Notwithstanding, we agree with the circuit court that, viewed in the aspect most favorable to appellants, the evidence failed to show that respondent prepared or procured decedent's will.

¶ 31 In the case at bar, respondent's involvement in the drafting of decedent's will was two-fold: (1) he contacted Nancy Smith-Lehrer on behalf of decedent; and (2) he delivered a folder of estate planning documents to Smith-Lehrer. Although there was evidence that respondent had a relationship with Smith-Lehrer's husband, there was no evidence that he ever spoke with Smith-

Lehrer about decedent's estate, no evidence that he was present at the time decedent's will was executed, and no evidence that he arranged for the witnesses. We cannot say that respondent's two acts of assistance to decedent in connection with her will are sufficient to establish a claim of undue influence. *DeHart*, 2013 IL 114137, ¶¶ 27, 30; see *Flanigon v. Smith*, 337 Ill. 572, 578 (1930) (holding that calling the party who drew the will and gathering the witnesses "would not be sufficient to render [the will] invalid on the ground of a fiduciary relation and undue influence"). The circuit court therefore properly granted a directed verdict on that count. *Sullivan*, 209 Ill. 2d at 123.

¶ 32 Although appellants have raised numerous other objections to the proceedings, we are unable to address those claims here due to the insufficiency of their brief. " 'A reviewing court is entitled to have issues clearly defined with pertinent authority cited and coherent arguments presented; arguments inadequately presented on appeal are waived.' " *McCarthy v. Denkovski*, 301 Ill. App. 3d 69, 75 (1998). Here, appellants have failed to consistently cite the pages of the record where alleged errors occurred, and when they do cite the record, it is frequently to a large span of pages which we, presumably, are expected to sift through. They also cite various statutes and case law without any coherent legal analysis. Under the circumstances, these issues are waived.

¶ 33 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.