2013 IL App (2d) 121014-U
No. 2-12-1014
Order filed May 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF ANTOINETTE BEAN	)	Appeal from the Circuit Court of Kane County.
	)	No. 10-P-624
(Kenneth Bean and Michael Kaye, Plaintiffs-Appellants, v. Michelle Guajardo, Defendant-Appellee).	)	Honorable Joseph M. Grady, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Factual issues, regarding the existence of an agreement as to a particular testamentary disposition as expressed through mutual and reciprocal wills of husband and wife, precluded the entry of partial summary judgment.

¶ 2 In December 2010, the executor of the estate of Antoinette Bean had a 2008 will and a purported codicil admitted to probate in this matter. The claimants, Kenneth Bean and Michael Kaye, who are some of the decedent's children and step-children, challenged these instruments and asserted that Antoinette and her late husband, Donald Bean, had executed earlier mutual and reciprocal wills pursuant to a testamentary agreement that should be given effect. The estate and the

claimants filed cross-motions for partial summary judgment on this issue. The trial court found in favor of the estate and the claimants appealed. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 On October 27, 2000, Donald (Don) and Antoinette (Toni) Bean executed wills. At the time, Don had been diagnosed with cancer and had undergone chemotherapy and had multiple surgeries. Don and Toni had been married about 30 years. The marriage was the second marriage for both, and they each had two children from previous marriages. Don's children were Kenneth Bean and Catherine Bean Weser. Toni's children were Michelle Kaye Guajardo and Michael Kaye.

¶ 5 The wills that Don and Toni executed on October 27, 2000, were substantially similar, and all of the parties to this appeal agree that they were mutual and reciprocal wills. Both wills identified Don and Toni's children and then-living grandchildren. Both wills included two specific bequests of $25,000 each to Don's ex-daughter-in-law Joyce Bean and Toni's niece Lisa ("Toni") Bosch. Both wills provided that the residuary estate would go to the testator's spouse if that spouse survived. If there was no surviving spouse, both wills provided that the residuary estate would go to a trust, which would be divided into two equal shares, one share for the benefit of Don's descendants, and one for the benefit of Toni's descendants. Don died about one year later, on October 29, 2001.

¶ 6 On June 27, 2003, Toni executed documents creating a trust. Under the terms of the trust, Toni was to have the income and access to the principal of the trust during her life. After her life, the trust was to be distributed as follows: one-half to be shared by three grandchildren (the children of Toni's daughter Michelle), and one-half to be shared by nine persons (Don's two children and three grandchildren; Toni's two grandchildren who were her son Michael's children; and the two persons who received specific bequests under the 2000 wills).

¶ 7 On November 5, 2008, Toni executed documents amending the trust and creating a pour-over will. As amended, the trust provided that upon Toni's death, Michelle and her children would receive 55% of the *res*; Michael and his two children would receive 20%; Don's heirs would receive 20%; and Toni's niece would receive 5%.

¶ 8 A purported codicil, a one-page document titled "Ammendment [*sic*] to Will and Trust for Antionette [*sic*] Bean," dated January 28, 2009, removed as beneficiaries of the will and trust Toni's son Michael and Don's children and grandchildren, all of whom were now "to receive nothing." The shares that were to go to Michelle's children were increased.

¶ 9 Toni died on September 7, 2010, approximately nine years after Don, after suffering from Parkinson's disease and other conditions for several years. Michelle filed the November 2008 will and the 2009 "Ammendment" with the probate court, and was appointed executor of the will. Thereafter, Kenneth Bean and Michael Kaye ("claimants") filed several challenges. One such challenge was a claim against the estate (Claim). The Claim alleged that in 2000 Don and Toni had agreed to irrevocable mutual and reciprocal dispositions dividing their property equally between their respective heirs upon the death of the second to die, and asserted that Toni had breached this agreement. In separate petitions, the claimants also attacked the validity of the various documents executed by Toni since 2000. The May 2011 petition sought to set aside the "Ammendment" on the ground of incapacity and undue influence by Michelle. The June 2011 petition sought to set aside the 2003 document creating Toni's trust and the 2008 will and trust amendments. This petition likewise alleged incapacity and undue influence (counts I and II), and added an assertion of breach of contract (count III).

¶ 10 The parties filed cross-motions for summary judgment on only one of the causes of action—the breach of contract claims (the Claim and count III of the June 2011 petition). In support, both parties cited to portions of the discovery deposition of Norbert Ritt, the attorney who had drafted the 2000 wills for the Beans. Ritt testified that he had no independent memory of drafting the Beans' wills, nor of meeting or speaking with them. However, his file for the Beans (the contents of which were produced prior to his deposition) contained several documents including his notes from certain meetings and conversations. Ritt stressed that his testimony was limited to reading and clarifying his notes, as he had no personal knowledge or recollection of anything else that might have occurred.

¶ 11 Ritt was first contacted by Toni on June 8, 2000. He received a telephone message that she had called about a will. He had had no prior contact with the Beans.

¶ 12 The Beans met with Ritt at his office on June 12, 2000. They brought with them a typed, two-page document listing the names and addresses of all of their children and grandchildren. Ritt's file also contained a one-page document that listed the Beans' assets and liabilities. The Beans had cash accounts, investments, individual retirement accounts (IRAs), a home, a rental townhouse, a six-flat, and personal property worth an estimated $60,000. All of these assets except the IRAs were held in joint tenancy. Net of the mortgage and other debts, the Bean's estate was then worth a little over $1 million.

¶ 13 As reflected in Ritt's notes from the meeting, the Beans had three objectives for their estate plan:

"1. Security of spouse

2. At death of second spouse:

- Don's 2 children, per stirpes

- Toni's grandchildren (skipping children)
  - Tyler, Emilee and Jessica
    and Jonathan, equally
  - niece, Lisa Bosch ("Toni") lives in Ohio
  - friend, Joyce Bean (ex-sister-in-law [*sic*]; a nurse, lives in Houston, TX)

3. Control by spouse w/o strings"

Ritt stated that the Beans were "in agreement" on these three objectives.

¶ 14 At that same meeting, Ritt offered the Beans an alternate means of disposing of their property. He did so because the value of their estate was over $1 million, and at the time the exemption under the federal estate tax was less than that, with the result that the estate of the second spouse to die would be taxed. Accordingly, Ritt "felt that that issue should be addressed." Under the alternate plan proposed by Ritt, each spouse would create a revocable trust in his or her own name and put assets worth approximately $320,000 into it, leaving the remaining assets (worth $360,000 to $370,000) in joint tenancy. Upon the death of the first spouse, the surviving spouse would receive income from the first spouse's trust, as well as access to the principal of that trust as needed to maintain the survivor's lifestyle. Upon the death of the second spouse, the remaining principal of the first spouse's trust would be distributed to the first spouse's descendants without being subject to estate tax.

¶ 15 In his notes of the meeting, Ritt wrote "No!!" next to this option, and circled it. He testified that the Beans emphatically rejected this proposal, but he did not recall why. The Beans might have rejected it because it would interfere with their third objective ("control by spouse w/o strings") in that it would require the surviving spouse to ask a trustee for any money beyond the income from the

trust. Or the proposal could have been seen as interfering with the third objective in that it may have had an element of irrevocability. (This comment was not explained further; presumably, although the proposed trusts would be revocable during the trust-making spouse's lifetime, after that spouse's death the terms of the trust could not be changed.) Ritt acknowledged that the alternate proposal he offered also could have had the effect of depleting the assets available to the first spouse's descendants with the result that the surviving spouse's descendants would receive more.

¶ 16 Ritt agreed to draft reciprocal wills that would reflect the Beans' stated objectives. He agreed that the Beans intended that, upon the surviving spouse's death, one-half of the residue of the estate would be distributed to each spouse's descendants. He drafted the wills to reflect this intent. On August 10, 2000, he sent drafts of Don's documents (a will, and two powers of attorney, one for health care and one for property) to the Beans to review. The Beans met with him on August 28, 2000, to go over the drafts. At some point in this process, Toni decided to change the distribution to her descendants: although she originally had indicated that she wanted her grandchildren to be the only beneficiaries, she decided to name her children as beneficiaries as well. Ritt incorporated the requested changes into both wills. On October 27, Don and Toni came into the office and signed their wills and powers of attorney. Ritt and his administrative assistant witnessed the execution of the documents, and Ritt testified that both of the Beans appeared to be of sound mind and not acting under duress. Ritt gave the Beans a copy of all of their documents. He did not see either of them again.

¶ 17 Ritt's notes do not reflect that either of the Beans ever stated that they wanted their wills to be irrevocable. He did not recall whether he ever told them that the wills might be revocable, or that the surviving spouse could change the will to leave everything to his or her own children if the wills

were not explicitly irrevocable. Ritt did not have the impression that the Beans wanted their wills to be permanent, because they rejected his alternate proposal that "would have had some irrevocability to it." However, he admitted that he did not know why they rejected that proposal. Although he had been in estate planning for many years, he did not typically tell couples like the Beans (*i.e.*, in their second marriage with children from their prior marriages) that they should put their agreement not to change the estate plan in writing if they wanted to make sure the plan was followed by the survivor. Instead, he would counsel such clients about how to ensure irrevocability only if the clients asked about it. In the Beans' case, he did not believe there was any conflict of interest in representing both spouses because there was no disagreement between the two about how their estate should be distributed.

¶ 18 At his deposition, Ritt agreed that the Beans' first and third objectives (security of spouse, and control by spouse without strings) would have been achieved even without drafting any wills, as almost all of the Bean's assets were held in joint tenancy. By operation of law, the surviving spouse would become the sole owner of all of these assets upon the first spouse's death, and could do whatever he or she wished with the assets. When asked whether this fact did not suggest that the Beans' primary reason for making wills was their second objective (equal division of the estate "at death of second spouse"), Ritt said he did not know. He then continued, "Each made separate wills that were, in fact, reciprocal, and the survivor would not have had to change a will. The will would have been in place for a survivor."

¶ 19 The trial court granted the estate's motion for summary judgment and denied the claimants' cross-motion for summary judgment, noting that the 2000 wills themselves did not state that the Beans intended the wills to be irrevocable, and stating, "It seems to the Court that irrevocability of

the wills *** is contradictory to the objective of control of the estate by the surviving spouse without strings." The trial court then stated that it found "no clear and convincing evidence" that the Beans "either intended that their wills were to be irrevocable or that they entered into *** a contract to make irrevocable wills." The trial court subsequently denied the claimants' motion to reconsider, and they filed this timely appeal.

¶ 20 ANALYSIS

¶ 21 "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Therefore, summary judgment is proper only when the pleadings, depositions and admissions on record, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). Summary judgment should be granted when " 'the right of the moving party is clear and free from doubt.' " *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). In reviewing a trial court's grant of this relief, we do not assess the credibility of the testimony presented but, rather, only determine whether the evidence presented was sufficient to create an issue of fact. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001).

¶ 22 When the parties have filed cross-motions for summary judgment, they believe the matter presents to the court no genuine issues of material fact, only questions of law. *Gaylor*, 363 Ill. App. 3d at 546. However, the fact that the parties filed cross-motions for summary judgment does not establish the absence of factual issues sufficient to preclude summary judgment; both the trial court and the reviewing court may independently determine that a genuine issue of material fact exists

despite the parties' belief that no factual issue exists. *Id*. at 547. We review *de novo* the trial court's grant of one cross-motion for summary judgment and denial of another (*id*.), and will reverse if we find that a genuine issue of material fact exists.

¶ 23 As we have noted, it is undisputed that the Beans' 2000 wills are mutual and reciprocal wills that share a common plan of distribution: at the death of the first spouse, all of the property to the surviving spouse; and upon the death of the surviving spouse, the remainder to be distributed in equal shares to Don's descendants and Toni's descendants (subject to identical specific bequests).

> "Mutual and reciprocal wills are the separate instruments of two or more persons, the terms of such wills being reciprocal, by which each testator makes a testamentary disposition in favor of the other. [Citation.] Mutual and reciprocal wills may or may not be revocable at the pleasure of either party depending on the circumstances and understanding upon which they were executed." *Felson v. Scarpelli*, 165 Ill. App. 3d 869, 871-72 (1987).

Mutual wills are not, in and of themselves, sufficient evidence of a contract, nor is the fact that the mutual wills were executed on the same day. *Proctor v. Handke*, 116 Ill. App. 3d 742, 746-47 (1983). This is not to say, however, that the instruments are irrelevant. In weighing the evidence regarding an agreement between the testators, courts consider "the terms of the wills themselves, relevant facts and circumstances, treatment of the [testators'] assets as a common pool and testimony as to the intentions of the testators." *In re Estate of Basich*, 79 Ill. App. 3d 997, 1003 (1979); see also *Bonczkowski v. Kucharski*, 13 Ill. 2d 443, 453 (1958). The existence of an agreement for a particular testamentary disposition must be proved by clear and convincing evidence, and "the party asserting [that] an instrument is contractual as well as testamentary has the burden" of proof. *Bonczkowski*, 13 Ill. 2d at 453. "When it is established that the instrument is contractual, equity holds that the survivor

is estopped to dispose of his [or her] property otherwise than as contemplated in the agreement, and such contract may be enforced by third-party beneficiaries." *Id*. at 452.

¶ 24 Thus, the issue at hand is the Beans' intent at the time they entered into the mutual wills. Intent is a question of fact that is typically inappropriate for resolution via summary judgment. See *Borchers v. Franciscan Tertiary Province of the Sacred Heart, Inc.*, 2011 IL App (2d) 101257, ¶ 32 ("As summary judgment must be reserved for cases in which there is no question of material fact [citation], it generally should not be used when *** intent is a central issue in the case"). However, factual matters may be decided via summary judgment if the movant puts forward evidence as to a material fact that would entitle him or her to judgment and the nonmovant does not counter by pointing to contrary evidence (*Schroeder v. Winyard*, 375 Ill. App. 3d 358, 368 (2007)), or if the evidence is capable of only one construction (*cf. Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004) (a triable issue exists where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts)).

¶ 25 Here, the evidence is subject to contrary inferences on most of the factors to be considered when seeking to determine intent. For instance, the language of the instruments is subject to contrary inferences. On one hand, neither of the mutual wills explicitly acknowledges the existence of the other, nor do they state expressly that they are intended to be irrevocable. On the other hand, both wills reflect a common disposition plan that provides equally for each testator's descendants, and both were drafted to effectuate a list of goals upon which the Beans had agreed. The wills also treat all of the Beans' assets as a common pool of funds.

¶ 26 Similarly, Ritt's testimony regarding the Bean's stated goals for their estate plan is ambiguous. Does their third goal, "control by spouse without strings,"[1] refer to a wish to give the surviving spouse the ability to dispose freely of the entire estate upon death, or does it refer only to free control over the estate assets during the survivor's lifetime? If it is the former, the third goal is in tension with the Bean's second stated goal, equal shares of the residuary estate to Don's descendants and Toni's descendants, "at death of [the] second spouse." It is also clear that different inferences could be drawn from the Beans' rejection of the alternate disposition proposed by Ritt.

¶ 27 The circumstances under which the 2000 wills were made are similarly open to differing inferences. Don was gravely ill. Although the Beans had been married about 30 years when they made these wills, it was their second marriage, and their only children were from each spouse's first marriage. Moreover, by holding the great majority of their assets in joint tenancy, the Beans had already effectuated an estate plan that would ensure that the surviving spouse would have full access to all of these assets and could freely use or dispose of them. We note that, in *Bonczkowski*, the supreme court found that the claimants had presented clear and convincing evidence that a married couple's testamentary instrument comprised an agreement to dispose of the couple's estate as provided in that instrument (and that the agreement became irrevocable upon the first spouse's death) where there were similar facts as in this case: (1) the marriage was the second marriage for each, and each spouse had children from a prior marriage; (2) the "plainly expressed intent of both was that each

[1]We note that the trial court erred in re-stating the third goal as "control *of the estate* by the surviving spouse without strings." Ritt's notes do not establish that the Beans' third goal referred to control by the surviving spouse of his or her testamentary estate.

would make the children of the other a beneficiary"; (3) the property referred to in the instrument was owned by the spouses as joint tenants, yet the parties agreed to divest themselves of the right of survivorship in order to assure themselves that their children would receive the property in equal shares; and (4) in the instrument, the spouses treated their property "as a joint fund which would be shared by the children of each." *Bonczkowski*, 13 Ill. 2d at 453-55. The supreme court commented that "[s]uch a pooling of interests and then jointly providing for the disposal of the whole fund gives every indication of a mutual compact." *Id*. at 455. We do not necessarily view *Bonczkowski* as controlling, as that case concerned a single testamentary document (an attempted joint will that failed on technical grounds), and there was some additional evidence of a mutual intent not present here. Nevertheless, we find that *Bonczkowski* supports the conclusion that factual issues exist, including different inferences that may be drawn from the facts, that preclude the entry of summary judgment.

¶ 28 The estate argues that there is significant evidence that Toni did not view herself as bound by the 2000 wills, because she later executed other instruments affecting the testamentary disposition of her estate, *i.e.*, the 2003 trust, the 2008 amendments to that trust and pour-over will, and the "Ammendment." The fact that the surviving spouse later executed other testamentary instruments may, under certain circumstances, be a factor to be considered. See *In re Estate of Konow*, 154 Ill. App. 3d 744, 753 (1987) (citing *Anson v. Haywood*, 397 Ill. 370, 378 (1947)). However, it is not a dispositive factor. As our supreme court stated in *Anson*, 397 Ill. at 378, although execution of a different disposition of property is a circumstance to be considered, "such fact does not deprive plaintiff of his right to enforce the contract upon establishing its existence by clear and convincing proof." Indeed, the case law is replete with cases in which courts set aside later instruments, so long as the earlier testamentary agreement was proved by clear and convincing evidence. See, *e.g.*, *Helms*

v. Darmstatter, 34 Ill. 2d 295 (1966); *In re Edward's Estate*, 3 Ill. 2d 116 (1954); *Anson*, 397 Ill. 370; *Freese v. Freese*, 39 Ill. App. 3d 1041 (1977). Further, in this case there are allegations that Toni lacked capacity at the time she executed those instruments and their validity has been challenged. The disputed status of these later instruments supports our determination that their existence is not conclusive evidence regarding Toni's intent and understanding at the time she executed her 2000 will, and that questions of fact remain.

¶ 29 CONCLUSION

¶ 30 For the reasons stated, we reverse the trial court's grant of partial summary judgment in favor of the estate, and remand for further proceedings.

¶ 31 Reversed and remanded.