2017 IL App (3d) 160322-U

Order filed April 21, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

PATRICIA A. SMITH and PAMELA S. SCHUPP CHAIN, Plaintiffs-Appellees/ Cross-Appellants, v. LOU W. TAYLOR, as Trustee and beneficiary Of the Aline M. Taylor Living Trust dated September 6, 2011, and individually, and PAULA M. BERGSTRESSER, as beneficiary of the Aline M. Taylor Living Trust dated September 6, 2011, Defendants-Appellants/ Cross-Appellees.	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois. Appeal No. 3-16-0322 Circuit No. 14-CH-30 The Honorable Stephen A. Kouri, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's finding that son unduly influenced his mother to change will and trust was not against manifest weight of evidence where mother was in poor health, son acted as mother's agent under power of attorney, helped take care of mother and handled her affairs, including scheduling and taking her to appointment with attorney to change will and trust. Trial court erred in voiding

only a portion of will and trust that gave half of estate to son who unduly influenced mother. Trial court did not abuse its discretion by denying attorney fees to plaintiffs who proved their brother unduly influenced their mother.

¶ 2 Aline M. Taylor had four children: plaintiffs Patricia A. Smith and Pamela S. Schupp Chain and defendants Lou W. Taylor and Paula M. Bergstresser. Two years before her death, Aline created a revised will and trust, leaving her entire estate to Lou and Paula. After Aline's death, plaintiffs filed a complaint against defendants, alleging undue influence, lack of testamentary capacity and tortious interference with an expectancy. The trial court ruled in favor of plaintiffs on their undue influence claim and against them on their other claims. The court deleted the potion of Aline's trust that left half of the estate to Lou and divided that portion of the estate equally between the four children, leaving Patricia, Pamela and Lou each with a 12.5% interest in Aline's estate and Paula with a 62.5% interest in the estate. Plaintiffs filed a motion for attorney fees against Lou, which the trial court denied.

¶ 3 Lou appeals the trial court's finding of undue influence against him. Plaintiffs filed a cross-appeal, appealing the trial court's remedy and its denial of their motion for attorney fees. We affirm the trial court's rulings on each count of plaintiffs' complaint but reverse the trial court's remedy and remand for further proceedings.

¶ 4 FACTS

¶ 5 In 2009, Aline and her husband, Joe, met with attorney Ketra Mytich to draft estate planning documents. The will Aline created at that time gave specific bequests to three godchildren and distributed the remainder of her estate to her children, each receiving 21.5% of the estate, and grandchildren, who would share the remaining 14% of the estate.

¶ 6 In March 2011, Aline suffered a stroke. In September 2011, Aline met with attorney Mytich to create a new will and trust. Under the 2011 will, Aline's estate was distributed to a trust. The sole beneficiaries of the trust were Lou and Paula.

¶ 7 Aline died in June 2013. After Aline's death, Patricia and Pamela filed a three-count complaint against Lou and Paula. Count I alleged that Aline lacked capacity to create a new will and trust in 2011. Count II alleged undue influence by Lou. Count III alleged tortious interference with an expectancy.

¶ 8 At the bench trial, Patricia testified that she saw her parents regularly until April 2011. In March 2011, Aline had a "brain bleed" and was in the hospital for several weeks. Shortly after Aline came home from the hospital, Patricia and Pamela were at their parent's home with their mother and father when Lou "came flying in the driveway *** all mad and enraged." He told Pamela that she had to leave and couldn't come back, so she left. A few days later, Lou called Patricia complaining that her son had taken property that didn't belong to him. Patricia said she was done helping her mother because Lou wanted to control everything. Patricia didn't return to see her mother because she was intimidated by Paula and Lou.

¶ 9 Patricia did not think Aline should have left the hospital when she did after her stroke, but she felt "powerless" to do anything about it because Lou wanted her to go home. Lou's attorney asked Patricia about a restraining order taken out by Aline against Patricia's son, Paul. Patricia said she was not aware of any such restraining order.

¶ 10 Pamela is a registered nurse. She testified that Aline was in the hospital following her March 2011 stroke for about two weeks. She and Patricia wanted Aline to go to the physical therapy floor at the hospital, but Lou refused. Since Lou was listed first in Aline's power of

attorney, Pamela felt like there was nothing she could do. When Aline was discharged from the hospital, her speech was "garbled" and "[i]ncomprehensible."

¶ 11 About a week after Aline came home from the hospital, Lou pulled into the driveway of Aline's and Joe's home, "came storming out of his vehicle" and yelled at her, "You are out of here." She was upset, scared and left. About two weeks after that incident, she started seeing her mom "frequently" for the next six months. During those six months, Aline's condition continued to decline. She was not sleeping or eating and had to be hospitalized for blood clots. Pamela testified that Aline could not read or communicate verbally and could not say Pamela's name. Pamela testified that she was "[p]hysically" and "[v]erbally" prevented from seeing Aline and had to obtain a restraining order against Lou. She agreed with Lou's counsel that "[t]here w[ere] a lot of restraining orders."

¶ 12 Paula testified that her family got along well until 2008, after her great aunt died and left money to Aline, Joe and Lou, but none to Patricia and Pamela. After that, the family relationship was "strained." After 2008, all four siblings stopped spending holidays together. Paula said that Aline begged to go home after her stroke. According to Paula, her mother did not qualify for rehabilitation services in the hospital.

¶ 13 In the summer of 2011, Aline stopped taking her medication. After that, her behavior improved dramatically, according to Paula. In September 2011, Aline was not able to speak her children's names but knew who they were. Aline "frequently" called Paula by name. Aline had problems processing information "at times" in September 2011 but was able to identify objects and found ways to communicate with Paula. Aline was not able to write much in September 2011, but could write her name and address.

¶ 14 Lou testified that he knew his parents had prepared a will with Ketra Mytich in 2009. Lou recommended Mytich and drove his parents to Mytich's office.

¶ 15 After Aline's stroke in 2011, the plan was for her to be transferred to the rehabilitation floor of the hospital, but Aline did not want to do that. In May 2011, Aline returned to the hospital for deep vein thrombosis. At the hospital, the decision was made for her to stop taking antidepressants. Lou said that decision was based on the advice of her neurologist, Dr. Dinh, and his staff. At that time, Aline could sometimes identify objects correctly and sometimes say her children's names. She always remembered Lou's name but couldn't always say it. She sometimes called Lou her "son" or "boy." Lou did not believe that Aline could read a document in September 2011.

¶ 16 Lou testified that he made an appointment for Aline to meet with Mytich to change her will in 2011. Lou drove Aline to Mytich's office and sat in the waiting room while Aline met with Mytich. Mytich sent the documents she prepared to Lou's address. The 2011 will did not give any bequests to grandchildren or godchildren, but Aline left Lou instructions to give money to certain grandchildren, and he followed those instructions, giving them $1,000 to $10,000 each. Lou said he did not know what the provisions of the 2011 will were until he received it in the mail and reviewed it with Aline. Aline explained to Lou why she was leaving nothing to Patricia and Pamela.

¶ 17 Ketra Mytich testified that Lou has been her client for seven or eight years. In 2009, she prepared a will for Joe and Aline. She prepared a new will and trust for Aline in 2011. In 2011, Aline had trouble speaking. Mytich did not recall if Aline had trouble saying her children's names but "presumed" she identified her children by name. Mytich did not have "too much of an independent recollection" of her meetings with Aline in 2011 but remembered that Aline was

"frustrated," "angry" and "had definite ideas of what she wanted changed from before when she had done her will."

¶ 18 Mytich testified that Aline "knew what she wanted." Mytich explained that if she felt that Aline did not understand what she was doing, she would not have proceeded in drafting new testamentary documents for her. Mytich was satisfied that Aline was of sound mind and memory when she signed the 2011 documents.

¶ 19 After the first day of trial testimony, the trial court instructed the parties as follows:

> "I would encourage you to talk to your attorneys and take one shot at maybe resolving this case without me resolving it.
>
> Because if I resolve it it's probably going to be winner take all. And I don't have any idea which way I'm going to go. But I think I understand the issues here. And I would just take a shot.
>
> *** I would encourage you to maybe – to use your attorneys and maybe take a shot at it. And if you can't resolve it, you can't resolve it."

¶ 20 After all of the evidence was presented, the trial court issued an order. The court ruled in favor of plaintiffs on their undue influence claim, finding that Lou "exercised undue influence causing Lou to receive additional benefit in the 2011 will." The court ruled against plaintiffs on their other claims. In its order, the trial court stated that it took judicial notice of five orders of protection entered between and against various family members that "evidence the considerable interfamily strife."

¶ 21 As a result of Lou's undue influence, the court invalidated the section of Aline's trust that gave half of her estate to Lou and precluded Lou from acting as executor or trustee of Aline's estate. Thereafter, the court entered an order dividing Lou's former one-half share of Aline's

property equally between Patricia, Pamela, Lou and Paula. Plaintiffs filed a motion for attorney fees against Lou. The trial court denied the motion.

¶ 22 ANALYSIS

¶ 23 I. Undue Influence

¶ 24 Lou argues that the trial court's finding of undue influence is against the manifest weight of the evidence. He further argues that the trial court improperly considered orders of protection and its personal feelings in ruling on plaintiffs' undue influence claim.

¶ 25 To invalidate a will on the basis of undue influence, the plaintiff must establish that the intent of the testator was overpowered so that she was induced to do or refrained from an act without free will, causing her to devise her property according to the plan of another. *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1018 (1997). The influence must have been felt at the time the will was executed. *Id*. "[T]he more enfeebled the mind of the testator, the less evidence is required to establish the existence of undue influence." *Id.*

¶ 26 A presumption of undue influence is established by the following: (1) a fiduciary relationship between the testator and person who receives a substantial benefit under the will; (2) a testator in a dependent situation in which the substantial beneficiaries are in dominant roles; (3) a testator who reposed trust and confidence in such beneficiaries; and (4) a will prepared or procured in circumstances wherein the beneficiaries were instrumental or participated. *In re Estate of Kline*, 245 Ill. App. 3d 413, 422 (1993). The plaintiff has the burden to prove the presumption of undue influence, after which the defendant must offer evidence to rebut the presumption. *In re Estate of Henke*, 203 Ill. App. 3d 975, 979-80 (1990). When any one of the four elements is rebutted by clear and convincing evidence, the entire presumption of undue influence disappears. *Id*. at 981.

¶ 27 A fiduciary relationship may exist where there is trust reposed on one side and a resulting superiority and influence on the other. *Kline*, 245 Ill. App. 3d at 425-26. A power of attorney gives rise to a general fiduciary relationship between the grantor and the grantee as a matter of law. *In re Estate of Elias*, 408 Ill. App. 3d 301, 319 (2011).

¶ 28 Here, the evidence established that Lou was in a fiduciary relationship with Aline. He was named as her agent in her power of attorney documents, he drove her where she needed to go, provided her supervision and administered her medication. Lou occupied a position of dominance and control over Aline. He directed Patricia and Pamela to leave Aline's property and not return. Because she was intimidated by Lou, Patricia did not come back. As a result of Lou's action, Pamela also stopped seeing her mother for a period of time until she obtained a restraining order against Lou. As of April 2011, Lou and Paula, the only named beneficiaries of the 2011 will, assumed dominant roles and controlled Aline's living environment. Aline placed her trust in Lou, as he and Paula were her only caregivers and were with her every day. Finally, Lou was instrumental in the creation and execution of the 2011 will because he made the appointment for Aline to see Mytich to create a new will, drove Aline to Mytich's office, waited in Mytech's office while Aline met with Mytich, had the will sent to his home, and read the will to Aline. Lou admitted that Aline would not have been able to read the document without the help he provided.

¶ 29 Since there were sufficient facts presented to the trial court to support all four elements necessary to raise a presumption of undue influence, we must determine if Lou rebutted this presumption. Mytich testified that Aline "knew what she wanted." However, without evidence that Aline was handling her business and personal affairs on her own without help and assistance from Lou, Lou did not rebut the presumption of undue influence. Compare *Henke*, 203 Ill. App.

3d at 982-83 (where testator managed her own business affairs, paid her bills and was not mentally or physically infirm, the presumption of a fiduciary relationship was rebutted). Because Aline was still suffering from the effects of her stroke and was completely reliant on Lou and Paula when the 2011 will and trust were drafted, the trial court's finding of undue influence is not against the manifest weight of the evidence.

¶ 30 Lou argues that the trial court improperly (1) expressed its opinion that the parties should settle their dispute, and (2) considered evidence not properly before the court in making its decision. We disagree.

¶ 31 "It is the policy of the courts to encourage parties to settle their disputes." *Ripplinger v. Quigley*, 231 Ill. App. 3d 1002, 1009 (1992). A trial court does not err by stating that the parties should attempt to settle. See *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915, 930 (1997). The trial court's comments in this case did nothing more than encourage the parties to settle, which was not improper. See *id*.

¶ 32 Additionally, the trial court did not err in examining numerous restraining orders entered by and against the parties in this case. Where a party introduces or elicits certain evidence, he cannot later complain when the court considers that evidence. *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 374 (1990). In questioning witnesses, Lou's counsel brought up the existence of several orders of protection between and among the family members involved in this case. Because Lou elicited the testimony that "there w[ere] numerous orders of protection" between and among family members involved in this case, Lou cannot complain that the trial court considered those orders of protection.

¶ 33 Moreover, a trial court may take judicial notice of a written decision that is part of the record in another court. *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 37.

This includes orders of protection. See *In re D.C.*, 209 Ill. 2d 287, 293 (2004); *In re Estate of H.B.*, 2012 IL App (3d) 120475, ¶ 23; *In re S.B.*, 316 Ill. App. 3d 669, 672 (2000). The trial court did not err in considering the orders of protection entered by and against family members in this case.

¶ 34 II. Remedy

¶ 35 Plaintiffs argue that the trial court erred in invalidating only a portion of Aline's 2011 will and trust. They contend that the trial court should have invalidated all of Aline's 2011 testamentary documents.

¶ 36 Undue influence is a ground for invalidating a will. *Hall v. Eaton*, 259 Ill. App. 3d 319, 321 (1994). However, "in a will contest in which it is alleged that part of a will is a product of undue influence, those portions of the will alleged to be the product of undue influence may be stricken and the remainder of the will allowed to stand if those portions of the will can be separated without defeating the testator's intent or destroying the testamentary scheme." *Williams v. Crickman*, 81 Ill. 2d 105, 115 (1980). Nevertheless, invalidity of part of a will may invalidate the entire will if it would defeat decedent's overall testamentary intent and scheme. *Hall*, 259 Ill. App. 3d at 321.

¶ 37 The key inquiry in determining whether partial invalidation should be allowed is whether the undue influence affected only a limited portion of the will and whether the testator would have intended that the entire will fail because of the invalidation of one provision. *Williams*, 81 Ill. 2d at 115-16. Where part of a will was procured by undue influence and that part can be separated from the rest, leaving it intelligible and complete, only that part of the will procured by undue influence is invalid, and the rest is valid. *Id.*

¶ 38 Here, Aline's 2011 will and trust left half of her property to Lou and half to Paula. While the supreme court's decision in *Williams* allows a court to strike only a portion of a will and leave the rest intact, partial invalidation is only appropriate if the invalid part can be separated from the rest, leaving the will complete. See *id.* This cannot be done with Aline's 2011 will and trust because Aline's grant of half of her estate to Lou is a major part of Aline's estate plan and affects her entire testamentary scheme. Striking Aline's distribution to Lou does not leave an intelligible and complete testamentary document, but, rather, leaves an incomplete plan. Thus, the court erred in invalidating only a portion of Aline's will and trust. We reverse the trial court's order invalidating only a portion of Aline's will and trust and remand for the trial court to enter an order invalidating Aline's 2011 testamentary documents in their entirety, leaving Aline's 2009 will as the sole operative testamentary device.

¶ 39 III. Attorney Fees

¶ 40 Finally, plaintiffs argue that the trial court erred in denying their motion for attorney fees against Lou. They contend that fees were warranted because Lou's undue influence was "outrageous."

¶ 41 Attorney fees can be assessed against a party in a probate proceeding where there was willful or outrageous conduct due to evil motive or a reckless indifference to the rights of others. *Elias*, 408 Ill. App. 3d at 542. A finding of undue influence in and of itself does not establish bad faith. See *Estate of Settle*, 97 Ill. App. 3d 552, 554 (1981). Whether to allow or deny attorney fees rests in the sound discretion of the trial court. *Id.* at 555.

¶ 42 Here, the trial court found that Lou exercised undue influence over Aline. This ruling did not require the trial court to assess attorney fees against Lou. See *id.* The trial court did not abuse its discretion in denying plaintiffs' motion for attorney fees.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Peoria County is affirmed in part and reversed in part; cause remanded.

¶ 45 Affirmed in part and reversed in part; cause remanded.