CAMBRIDGE FORUM ON
PRIVATE WEALTH LITIGATION
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The Fuzzy Line Between Influence and Undue Influence

Discussion led by

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- Introduction – What is Undue Influence?
  - Undue influence is the exercise of influence on the testator of a will or the settlor of a trust that overcomes his or her exercise of free choice and results in a will or trust that expresses the wishes of the undue influencer rather than of the testator or settlor.

- Health Issues and Isolation – The Primary Breeding Grounds for Undue Influence
  - Both mental and physical ailments are relevant to mental status, and to whether the testator was too weak to resist undue influence.
  - But if the testator was alert and mentally sound, even severe disability will not support undue influence.
  - There are many ways to isolate the testator, including prevention of communication with competing heirs, creating physical barriers such as new locks and gates, defamation of competing heirs, and filling the void left by the death of a spouse or close relative on whom the testator depended.

- What Are Some of the Badges of Undue Influence That Have Been Persuasive in the Recent Case Law?
  - The influencer's control over the process of making the will.
  - The influencer's holding a power of attorney or similar agency appointment.
  - The testator's making a significant change in estate plan.
  - The testator's favoring an unnatural beneficiary.
  - The testator's dependency on the influencer.

- How Can We Defuse or Otherwise Explain Away the Badges of Undue Influence?
  - Testator was properly and privately advised by an independent drafting attorney.
  - Anything that logically explains the testator's decision, including the desire to reward a caregiver or helper, and familial relationships both good and bad.

- How to Effectively Marshal the Circumstantial Evidence of Undue Influence
  - Valuable sources of evidence include: fact witnesses; medical experts; documents concerning the testator's estate-planning and agency appointments; medical records; financial and property records; testator's communications with family members, the drafting attorney, and the influencer; and court records and criminal history of the undue influencer.
  - Take advantage of opportunity for pre-objection discovery if allowed by the law of your state (such as in New York).

- How to Shift and Meet Evidentiary Burdens of Proof
  - The objectant generally must prove motive, opportunity, and the actual exercise of undue influence.
  - If the objectant establishes (1) a confidential or fiduciary relationship between the testator and the influencer, and (2) suspicious circumstances, the burden of proof (or at least of explanation, depending on the state) shifts to the influencer.

16 A.D.3d 995
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of the ESTATE OF
Agnes S. FELLOWS, Deceased.
Carol A. Thompson, as Executor of the Estate of
Agnes S. Fellows, Deceased, Appellant–Respondent;
Jeffrey A. Fellows, as Executor of the Estate of Lee
Fellows Jr., Deceased, Respondent–Appellant.

March 31, 2005.

Synopsis

Background: Executor of husband's estate filed election to take against will of wife. Executor of wife's estate moved for partial summary judgment dismissing objections to probate. The Surrogate's Court, Broome County, Peckham, S., declared election invalid and partially denied summary judgment. Husband's executor appealed.

Holdings: The Supreme Court, Appellate Division, Mugglin, J., held that:

will would not be set aside on grounds of undue influence, and

estate of husband could not elect to take against wife's will.

Affirmed, as modified.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****665** Hinman, Howard & Kattell L.L.P., Binghamton (Harvey D. Mervis of counsel), for appellant-respondent.

Levene, Gouldin & Thompson L.L.P., Binghamton (David M. Gouldin of counsel), for respondent-appellant.

Before: CARDONA, P.J., CREW III, MUGGLIN, ROSE and KANE, JJ.

Opinion

***995** MUGGLIN, J.

Appeals (1) from an order of the Surrogate's Court of Broome County (Peckham, S.), entered July 25, 2003, which declared a right of election filed by respondent to be invalid, (2) from an order of said court, entered October 9, 2003, which held that certain items of personal property did not vest in decedent's estate, and (3) from an order of said court, entered March 4, 2004, which partially denied petitioner's motion for summary judgment dismissing the objections to probate.

Agnes S. Fellows (hereinafter decedent) and Lee Fellows Jr. (hereinafter Fellows) married in 1982. Both were previously married and both are survived by children of their first marriages. Petitioner, who offers decedent's 1993 will for probate, is decedent's daughter. Unlike the will that decedent executed in 1988, the 1993 will leaves the residue of decedent's estate to petitioner. Fellows, prior to his death in April 2003, filed multiple objections to the probate of the 1993 will. Prior to a determination on the probate petition, respondent, who became the executor of Fellows' estate upon Fellows' death, attempted to exercise Fellows' right of election against decedent's estate. By order entered in July 2003, Surrogate's Court denied respondent's application determining that respondent did not have the authority to exercise Fellows' right of election. Petitioner thereafter moved for summary judgment dismissing respondent's objections to probate. In March 2004, Surrogate's ***996** Court, finding that the affidavits of Fellows' two sons raised issues of fact as to undue influence, denied petitioner's motion to that extent, but granted said motion with respect to the objections based on due execution, capacity and fraud. Respondent appeals these two orders. [1]

****666** To deny probate on the basis of undue influence, an objectant must establish that:

> "the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist" (*Children's Aid Socy. of City of N.Y. v. Loveridge,* 70 N.Y. 387, 394–395 [1877]).

Undue influence of this nature must be shown by establishing motive, opportunity, and the actual exercise of that undue influence (*see Matter of Walther,* 6 N.Y.2d 49, 55, 188 N.Y.S.2d 168, 159 N.E.2d 665 [1959]; *Matter of Fiumara,* 47 N.Y.2d 845, 846, 418 N.Y.S.2d 579, 392 N.E.2d 565 [1979]).

As Surrogate's Court recognized, motive is almost always present and is here established by the benefit that petitioner received as the sole residuary beneficiary. The other elements are much more problematic. The record establishes that petitioner lived out of state, was not present when the will was executed, had no input with respect to its contents and, indeed, had no knowledge of the contents until receiving an e-mail from decedent in 2000. The record does reflect, however, that a family rift developed during a 1991 visit by petitioner and her family with decedent and Fellows because of the latter's statement that petitioner simply used her mother as a free babysitting service. Because of this and a second event where petitioner allegedly told decedent that she was "disappointed" after decedent scolded her children, Fellows' two sons claim that decedent was fearful that she would be denied access to her grandchildren. Lacking any direct evidence that petitioner, in fact, either threatened to or did deny access to her children or that decedent changed her will as a result, respondent argues that circumstantial evidence exists sufficient to require a trial. According to respondent, this circumstantial evidence consists of the close personal relationship between mother and daughter, that the resulting will is unfair or unjust in its provision for Fellows and that the resulting will is considerably different in intention than the intention expressed in a previous will.

***997** While undue influence may be proven through circumstantial evidence, that evidence must be significant (*see Matter of Soltys,* 199 A.D.2d 846, 848, 606 N.Y.S.2d 364 [1993]; *Matter of Elmore,* 42 A.D.2d 240, 241, 346 N.Y.S.2d 182 [1973]). The fact that decedent and petitioner were mother and daughter is not such a significant factor. The fact that the will left Fellows less than his intestate share, while on its face might seem to be unfair, is explained by the affidavit of decedent's attorney who advises that decedent changed her testamentary plan after discovering that Fellows had a "gambling problem" and had already received, surreptitiously, more of her assets than his fair share. Further, on the issue of the expression of a changed testamentary intention, we note that the previous will is not free from doubt. In her 1988 will, the residue of her estate was distributed half to petitioner and half for college scholarships for Union Endicott High School graduates "if my husband, Lee Fellows, does not survive me." While it is possible that this provision might be construed to leave the residue to Fellows if he did survive her, it does not specifically do so and does not represent any considerably different intention as to him than that expressed in the will being offered for probate. In our view, that leaves *only* the self-serving affidavits of Fellows' two sons ****667** and, as their testimony would be barred by CPLR 4519, no issue of fact concerning undue influence remains for trial (*see Albany Sav. Bank v. Seventy–Nine Columbia St.,* 197 A.D.2d 816, 817, 603 N.Y.S.2d 72 [1993]). Therefore, the March 2004 order partially denying petitioner's motion for summary judgment must be modified to dismiss the undue influence objection.

With respect to the appeal from the July 2003 order, respondent recognizes that the right of election against a will is a personal right which dies with the surviving spouse (*see Matter of Wurcel,* 196 Misc.2d 796, 797–799, 763 N.Y.S.2d 902 [2003]; *Matter of Crane,* 170 Misc.2d 97, 99–102, 649 N.Y.S.2d 1006 [1996]). Respondent argues, however, that the rule is antiquated and ignores the current reality of joint contribution that is recognized in other aspects of the law, particularly equitable distribution. In our view, EPTL 5–1.1–A makes clear that the right of election is personal to a surviving spouse and may not be exercised by anyone else except certain representatives of incompetent surviving spouses (*see* EPTL 5–1.1–A [c] [3]). Under the circumstances, the Legislature is deemed to have specifically and intentionally excluded the right of the estate of a surviving spouse to exercise the right of election (*see Weingarten v. Board of Trustees of N.Y. City Teachers' Retirement Sys.,* 98 N.Y.2d 575, 584, 750 N.Y.S.2d 573, 780 N.E.2d 174 [2002]). Thus, we conclude that Surrogate's Court properly determined that the notice to exercise the right of election was invalid.

ORDERED ***998** that the orders entered July 25, 2003 and October 9, 2003 are affirmed, without costs.

ORDERED that the order entered March 4, 2004 is modified, on the law, without costs, by reversing so much thereof as partially denied petitioner's motion; motion granted in its entirety and decedent's will is admitted to probate; and, as so modified, affirmed.

CARDONA, P.J., CREW III, ROSE and KANE, JJ., concur.

All Citations

16 A.D.3d 995, 792 N.Y.S.2d 664, 2005 N.Y. Slip Op. 02516

Footnotes

1 Respondent also appealed from an order entered October 9, 2003. Respondent's brief fails to address the issue of exempt property disposed of by this order and, thus, this issue is abandoned (*see* *Grieco v. Grieco,* 307 A.D.2d 488, 488 n., 761 N.Y.S.2d 750 [2003]).

180 Conn.App. 331
Appellate Court of Connecticut.

Andrew BASSFORD et al.
v.
Frances Z. BASSFORD et al.

(AC 39087)
|
Argued December 4, 2017
|
Officially released March 20, 2018

Synopsis

Background: Testator's son appealed from decision of the Probate Court, District of Middletown, admitting testator's will to probate and finding that testator's trust was revocable. The Superior Court, Judicial District of Middlesex, Barbara M. Quinn, Judge Trial Referee, issued memorandum of decision dismissing appeal. Son appealed.

Holdings: The Appellate Court held that:

testator's son was classically aggrieved by Probate Court decisions, and thus son had standing to appeal from decision;

surviving widow met her burden of proving that testator's new will was properly executed in accordance with statutory requirements;

testator had requisite mental capacity to execute will;

section of trust stating that testator reserved right to revoke the trust more consistently carried out testator's intent than trust's recital;

record established that testator had requisite mental capacity to revoke trust;

testator retained right to accept deed from trustees conveying to him his revoked trust's interest in home; and

testator's son failed to meet his burden of proving that surviving widow exerted undue influence.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****684** Carmine Perri, for the appellants (plaintiffs).

Joseph A. Hourihan, with whom, on the brief, were Teresa Capalbo and Annette Smith, for the appellee (named defendant).

Lavine, Alvord and Bear, Js.

Opinion

PER CURIAM.

***332** ****685** The plaintiffs, Andrew Bassford, Zelda W.B. Alibozek, and Jonathan Bassford, appeal from the judgments of the trial court, dismissing their consolidated appeals from the Court of Probate for the district of Middletown. On appeal, the plaintiffs claim that the trial court erred as a matter of law by concluding that the decedent, William W. Bassford, an involuntarily conserved person, (1) was competent (a) to revoke a certain trust he had settled and (b) to receive and retain interest in real property, (2) had the testamentary capacity to execute a will, and (3) was not under the undue influence of the defendant Frances Z. Bassford. [1] We affirm the judgments of the trial court.

The following procedural history underlies the appeal to this court. The decedent, a physician and World War II veteran, died on February 19, 2014. The plaintiffs are children of the decedent and his first wife, who ***333** predeceased him. The defendant is the decedent's third wife and, at the time of his death, had been married to him for more than thirty years.

Prior to his death, the decedent suffered increasingly from physical and psychiatric ailments, which required hospitalizations in the Institute of Living in Hartford, where he responded well to medical treatment. In October, 2011, the defendant filed an application for the appointment of a conservator of the decedent's person and estate. Although the plaintiffs agreed that a conservator should be appointed for the decedent, they disagreed that the defendant should be his conservator. On November 14, 2011, following a hearing, the Probate Court appointed the defendant to be the decedent's conservator. Conflict between the parties continued.

Although the decedent had executed a last will and testament many years prior to his death, he executed a new will on May

7, 2012 (2012 will). In his 2012 will, the decedent distributed various items of personal property to Andrew Bassford, Zelda W.B. Alibozek, and certain of his grandchildren, and $1 to Jonathan Bassford. The remainder of his estate he left to the defendant. The plaintiffs contested the admission of the will to probate and challenged its validity on the basis of the decedent's alleged lack of testamentary capacity and the alleged exercise of undue influence on the part of the defendant. Following a two day hearing, the Probate Court found that the 2012 will had been executed properly, that the plaintiffs had failed to prove by clear and convincing evidence that the defendant had exercised undue influence over the decedent in executing the 2012 will, and that the decedent had the testamentary capacity to execute the 2012 will. The Probate Court admitted the 2012 will to probate and named the defendant executrix of the decedent's estate.

***334** On July 7, 2006, the decedent settled the William W. Bassford Irrevocable Trust (trust) that held title to the home in which he and the defendant resided and to an individual retirement account, but on June 25, 2012, the trustees reconveyed the property ****686** in the trust to the decedent. Following the decedent's death, the plaintiffs asked the Probate Court to determine title to the trust's holdings. Specifically, the Probate Court was asked to determine whether the trust was irrevocable, thus invalidating the trustees' conveyance of the real property back to the decedent, and whether the decedent had the capacity to revoke the trust and receive property from it. The Probate Court found, pursuant to the articles of the trust, as opposed to the title of the trust instrument, that the trust was revocable and that the decedent, despite being a conserved person, was capable of receiving the property in the trust.

On December 22, 2014, the plaintiffs commenced an appeal from the Probate Court's decision regarding the trust, in part claiming that the court erred in failing to find that the trust was unambiguously irrevocable. On March 31, 2015, the plaintiffs commenced an appeal from the Probate Court's decision regarding the 2012 will, in part claiming that the court erred in admitting the will to probate. Thereafter, the plaintiffs filed a motion to consolidate the probate appeals, which was granted by the court, *Domnarski, J.*

The court, *Hon. Barbara M. Quinn*, judge trial referee, tried the probate appeals in December, 2015. The issues before the court were (1) whether the decedent lacked testamentary capacity to execute the 2012 will, (2) whether the trust was irrevocable and therefore its revocation was improper, (3) whether the decedent lacked the capacity to accept the deed for the property held by the trust, and (4) whether the defendant had exercised undue influence in securing the execution of the 2012 will. The court issued a memorandum of decision on March 24, 2016, in which it found in favor ***335** of the defendant on all of the issues and dismissed the appeals. The plaintiffs appealed to this court.

The claims raised by the plaintiffs in this court are the same claims they raised in the trial court. We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgments of the trial court should be affirmed. Because the trial court's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt that court's well reasoned decision as a proper statement of the facts and the applicable law on the issues. *Bassford* v. *Bassford*, Superior Court, judicial district of Middlesex, Docket Nos. CV–15–6012903–S and CV–15–6013338–S (March 24, 2016) (reprinted at 180 Conn. App. 335, —— A.3d ——). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgments are affirmed.

APPENDIX

Andrew Bassford et al.

v.

Frances Z. Bassford [*]

Superior Court, Judicial District of Middlesex,

File Nos. CV–15–6012903–S and CV–15–6013338–S

Memorandum filed March 24, 2016

Proceedings

Memorandum of decision on plaintiffs' appeals from orders of Probate Court for district of Middletown determining revocability of decedent's trust, title to certain ***336** ****687** real property and admitting decedent's will. *Appeals dismissed.*

Carmine Perri and *Taylor J. Equi*, for the plaintiffs.

Joseph A. Hourihan, for the defendant.

Opinion

HONORABLE BARBARA M. QUINN, JUDGE TRIAL REFEREE. In these two consolidated cases, the plaintiffs, Andrew and Jonathan Bassford and Zelda Alibzek, have appealed from the admission of their father's will to probate and from the revocation of a trust as well as the validity of a quitclaim deed thereafter executed by the trustees, all in furtherance of their father's estate plan. They claim that they are aggrieved parties and that: (1) the decedent, their father, Dr. William W. Bassford, lacked testamentary capacity at the time of the execution of his last will and testament; (2) a trust Dr. Bassford had earlier established was irrevocable, and therefore, its revocation was improper and of no effect. The trust assets could therefore not properly be conveyed and become part of the decedent's estate; (3) that the decedent lacked the capacity to accept the deed for property held in the purportedly irrevocable trust; (4) and there was undue influence exerted by the defendant, his surviving widow and their stepmother, in securing the execution of the new will. For the reasons set forth in detail below, the court finds all issues in favor of the defendant and dismisses these appeals.

I

BACKGROUND

From the reliable, probative and credible evidence, the court finds the following facts. The defendant, Dr. Bassford's widow, is his third wife and at the time of his death on February 19, 2014, Dr. and Mrs. Bassford had been married for thirty-three years. The defendant, Frances Bassford, became Dr. Bassford's conservatrix when he was involuntarily conserved in November ***337** 2011. Dr. Bassford's three children are his children from his first marriage, and by their conduct at trial, were not close to their stepmother. Dr. Bassford executed a will in 2006 in which the bulk of his estate was left to his three children. On May 7, 2012, he executed a new will in which he changed his estate plan to leave the bulk of his estate to his wife, with certain articles of personal property to two of his three children and some of his grandchildren, and one dollar to his son, Jonathan. The will of May 7, 2012, was duly admitted to probate, after findings made by Judge Marino that Dr. Bassford possessed sufficient testamentary capacity to execute the new will. He also found that the will was executed with the necessary statutory formalities. In addition, he determined that there was no evidence of undue influence by Frances Bassford, as claimed by Dr. Bassford's children. This appeal ensued.

Additionally, Dr. Bassford's children challenged the revocation of the trust established by Dr. Bassford as well as his acceptance of a deed to real estate from the trustees. Judge Marino held the trust to be revocable and that Dr. Bassford could receive the deed to the real estate in Cromwell on which his home was located and in which he resided. An appeal was taken to the Superior Court and the two appeals are now consolidated.

II

JURISDICTION AND AGRRIEVEMENT

When considering an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. "In ****688** ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." (Internal quotation marks omitted.) *State* v. *Gordon*, 45 Conn. App. 490, 494, 696 A.2d 1034, cert. granted on other grounds, 243 Conn. 911, 701 A.2d 336 (1997) (appeal dismissed October 27, 1998).

***338** The trial court does not have "subject matter jurisdiction to hear an appeal from probate unless the person seeking to be heard has standing.... In order for an appellant to have standing to appeal from an order or decree of the Probate Court, the appellant must be aggrieved by the court's decision. General Statutes § 45a–186 .... Aggrievement falls within two categories, classical and statutory.... Classical aggrievement exists where there is a possibility, as distinguished from a certainty, that a Probate Court decision has adversely affected a legally protected interest of the appellant in the estate.... Statutory aggrievement exists by legislative fiat which grants an appellant standing by virtue of particular legislation, rather than by judicial analysis of the particular facts of the case.... It merely requires a claim of injury to an interest that is protected by statute." (Citations omitted; internal quotation

marks omitted.) *Kucej* v. *Kucej*, 34 Conn. App. 579, 581–82, 642 A.2d 81 (1994), overruled in part on other grounds by *Heussner* v. *Hayes*, 289 Conn. 795, 807, 961 A.2d 365 (2008); see also *Marchentine* v. *Brittany Farms Health Center, Inc.*, 84 Conn. App. 486, 490, 854 A.2d 40 (2004).

In this instance, Dr. Bassford's three children would have received a different and greater portion of their father's estate had the Probate Court ruled in their favor. By its contrary ruling, each of Dr. Bassford's children is classically aggrieved. They each have standing to prosecute these appeals and the court has jurisdiction to hear these appeals.

III

FACTS AND DISCUSSION

A

Burdens of Proof, Due Execution
of Will And Testamentary Capacity

Our law provides that "[a]n appeal from probate is not so much an appeal as a trial de novo with the ***339** Superior Court sitting as a Probate Court and restricted by a Probate Court's jurisdictional limitations.... At the trial de novo, a will's proponent retains the burden of proving, by a preponderance of the evidence, that the will was executed in the manner required by statute.... The proponent must prove anew that the will's execution was in compliance with the statute in effect at the time it was executed.... To be valid, [a] will must comply strictly with the requirements of [the] statute.... Because the offer for probate of a putative will is in essence a proceeding *in rem* the object of which is a decree establishing a will's validity against all the world ... the proponent must at least make out a *prima facie* case that all statutory criteria have been satisfied even when compliance with those criteria has not been contested." (Citations omitted; emphasis added; internal quotation marks omitted.) *Gardner* v. *Balboni*, 218 Conn. 220, 225–26, 588 A.2d 634 (1991).

In this case, the proponent of the will is the defendant, Mrs. Bassford. Connecticut General Statutes § 45a–251 governs the proper execution of a will and provides in pertinent part: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence ...." The facts demonstrate unequivocally ****689** that Dr. Bassford's attorney, Attorney Annette V. Willis, brought two witnesses into the home and Dr. Bassford signed the will in their presence. While on some points the witnesses' subsequent testimony by way of deposition transcripts reflects their lack of detailed recall, such testimony is inadequate to overcome both Attorney Willis' direct testimony to the events of that day as well as the contents of their sworn affidavit on the bottom of the will that they state under oath that they: "attested the within and foregoing Will ... and subscribed the same in his presence and at his request and in the presence of each other; that the ***340** said Testator signed, published and declare the said Instrument as and for his Last Will and Testament in our presence on this 7th day of May, 2012; and at the time of the execution of said Will said Testator was more than eighteen years of age, was able to understand the nature and consequences of the document and was under no improper influence or restraint to the best of our knowledge and belief .... [1]

Contrary to Plaintiffs' arguments, the will was properly executed in accordance with the statutory requirements. The court finds, from the relevant and probative evidence, that the defendant has met her burden of proof of the due execution of the will.

The proper execution of Dr. Bassford's will is only the first of the plaintiffs' several challenges to the will's effectiveness and admission to probate. The major issue in this appeal is Dr. Bassford's capacity to make a will. General Statutes § 45a–250 provides that: "Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will." "The burden of proof in disputes over testamentary capacity is on the party claiming under the will." *Stanton* v. *Grigley*, 177 Conn. 558, 564, 418 A.2d 923 (1979). The defendant in this case has this burden as well.

"What constitutes testamentary capacity is a question of law.... To make a valid will, the testatrix must have had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of the will, at the very time she executed it.... Whether she measured up to this test is a question of fact for the trier." (Citations omitted.) *City National Bank & Trust Co.'s Appeal*, 145 Conn. 518, 521, 144 A.2d 338 (1958).

***341** Our law provides that it is a testator's capacity at the time of the will execution that is relevant. "The fundamental test of the testatrix's capacity to make a will is her condition of mind and memory at the very time when she executed the instrument.... While in determining the question as to the mental capacity of a testator evidence is received of his conduct and condition prior and subsequent to the point of time when it is executed, it is so admitted solely for such light as it may afford as to his capacity at that point of time and diminishes in weight as time lengthens in each direction from that point." (Citations omitted.) *Jackson* v. *Waller*, 126 Conn. 294, 301, 10 A.2d 763 (1940). [2]

The decedent, Dr. Bassford, as the medical evidence and other testimony ****690** demonstrates, was a person who suffered from severe anxiety and depression as well as post-traumatic stress disorder from his service in World War II. None of the parties dispute that he suffered from some mild to moderate dementia, had impaired hearing and was susceptible to frequent urinary tract infections from his Foley catheter, which had been in place for over nineteen years at the time of his death. Due to the drug treatment Dr. Bassford received for anxiety, he became dependent on benzodiazepine, specifically Lorazepam. [3] The use of this drug is known to cause some impairment of general cognitive function, as well. When he suffered from urinary tract infections, he would become delirious and require hospitalization. ***342** Treatment with antibiotics stabilized him quickly and he returned to his former functioning state.

Dr. Bassford became concerned about the distribution of his monthly Veterans Administration pension payments and his estate in 2011. The defendant in these appeals, Mrs. Bassford, then commenced an involuntary conservatorship proceeding to have Dr. Bassford conserved. Attorney Willis was appointed to represent Dr. Bassford in October, 2011, by the Probate Court. She had not met him prior to her appointment by the court.

From Attorney Willis' testimony, the court finds that in October of 2011, when she met him, Dr. Bassford was eloquent, well-spoken and coherent. He was oriented as to place and time. He was upset that his pension payments were going to his children. He was able to ask relevant and reasonable questions about the conservatorship. The court finds that Dr. Bassford was informed about the types of conservatorship possible, voluntary and involuntary. His counsel affirmed she was aware that he had memory deficits and anxiety and did not like to leave his home. Nonetheless, he was clear he wanted his wife to have full authority over his affairs and to help him secure his pension payments. When his counsel met with Dr. Bassford, after the preliminary social niceties, she met alone with Dr. Bassford. The defendant did not participate in the discussions and was not in the room when Attorney Willis and Dr. Bassford discussed his legal affairs and his pension payments.

Andrew Bassford testified to the fact that his father, at the time the veteran's pension benefits had earlier commenced, wanted his children to receive those benefits as they came from a time when he had not yet married the present Mrs. Bassford. There was some indication that at the commencement of the payments, they were deposited into Dr. Bassford's bank accounts ***343** and then distributed to his children. By 2011, these benefits were being deposited into accounts no longer under Dr. Bassford's control.

At the time of the conservatorship, the court finds, such distributions were no longer what he desired. Even if, as the plaintiffs claim, there was tension between the family members and between Dr. Bassford and his wife, [4] there was ample ****691** opportunity for him to request different actions from his attorney, during their private meetings. He never did so, despite having multiple appointments with her. He emphasized how upset he was with his son, Jonathan, and his conduct. From this, the court finds, that his wishes at the time in question were as stated to his attorney. He wanted his veteran's pension to be paid into his own accounts for his use. In due course, the pension payments were rerouted from Dr. Bassford's children to Dr. Bassford's accounts.

During the time of the proceedings leading up to the conservatorship, Dr. Bassford informed Attorney Willis about his desire to change his will and the distribution of his estate. Once the conservatorship was completed, and over the course of the next several months after the conservatorship was granted, Attorney Willis began her work to carry out his wishes. There were at least three meetings for his lawyer to go over his estate plan and conduct a detailed review of his assets with him. It was during this time that Attorney Willis came to understand that there was a trust containing his interest ***344** in the home in which the Bassfords resided in addition to a retirement account. Dr. Bassford's statements of his wishes regarding his estate remained consistent over these months and at each meeting with Attorney Willis. He never wavered or was confused about his desires. He was focused on adequately providing for his wife.

Dr. Bassford and Attorney Willis had a meeting in March, 2012, in his home. She spoke with him in detail about his assets and what he wanted to happen in his will and his general estate plan. At that time and earlier, he was and had been insistent that his son Jonathan only receive one dollar. Dr. Bassford wanted his treasured antiques to go to his other two children and some of his grandchildren. Subsequently, after the March appointment, Dr. Bassford and Mrs. Bassford prepared a list of those items of personal property, as Dr. Bassford's handwriting was a bit shaky. Attorney Willis reviewed that list with him in detail and had him sign it at their next meeting on April 26, 2012. The list[5] clearly specifies what is to be distributed and to whom and the last page is in his handwriting. In addition, on that day Dr. Bassford wrote out and signed a note indicating he only wished his son Jonathan to receive one dollar upon his death.[6] The court finds that the list and note represented Dr. Bassford's personal wishes.

Next, Dr. Bassford's general mental condition was evaluated, at Attorney Willis' request, by a psychiatrist, Dr. Jay A. Lasser, who subsequently issued a report and testified at the probate hearing as well as at trial. Dr. Lasser met with Dr. Bassford on April 26, 2012, and conducted a formal clinical interview. He previously had access to and had reviewed Dr. Bassford's extensive medical history. He confirmed that Dr. Bassford ***345** had dementia, which was a slowly progressive and ongoing ****692** condition. He found Dr. Bassford to have memory deficits and, determined from recent medical records, that he had had episodes of delirium when he had urinary tract infections.[7] Dr. Lasser found that when Dr. Bassford's infections were treated, he returned to lucidity quickly. He found the episodes of infection-induced delirium had no residual impact on his baseline cognitive level, which he admitted was impaired. He agreed that Dr. Bassford's functioning fluctuated significantly from time to time, but that when he was well and not in the throes of an infection, he functioned at a stable level. In his professional psychiatric opinion, Dr. Bassford possessed the cognitive ability to know the nature and extent of his assets and what he wanted to have done with them.

On May 7, 2012, Dr. Bassford met with his counsel, Attorney Willis, and reviewed his will, the list of personal property contained within the will, his decision to leave his son Jonathan only one dollar and the other details of his will. He also reviewed his health care directive and independently noted some errors when it was presented to him. He corrected those errors himself, and initialed them. He then signed his will and the directive in front of two witnesses and Attorney Willis took his acknowledgment and signed the self-proving affidavit of the witnesses. From Attorney Willis' testimony, the court finds that he was functioning at his normal level on that day, that he was well-spoken, lucid and aware of the time and place. He understood her questions and directions. He knew the nature and extent ***346** of his estate and how he wanted it distributed. Those statements and wishes were consistent with those he had expressed in the months leading up to the execution of his last will and testament.

Plaintiffs called a psychiatric expert, Dr. Harry E. Morgan, who reviewed Dr. Bassford's extensive multiy-ear medical records, but did not meet with him personally. In general, his opinion was that Dr. Bassford did not have sufficient capacity to execute a will. He particularly focused on the impairments to his executive functions and the tests which demonstrated his deficits. Dr. Morgan's expert testimony, despite his evident expertise, is not persuasive on this conclusion, the court finds, based both on his lack of opportunity to personally observe Dr. Bassford and his testimony about the actions Dr. Bassford took on the day of the will execution. Dr. Morgan admitted that, if Dr. Bassford was able to make independent, unsolicited corrections to a legal document on the day of his will execution, then at that time, he possessed sufficient mental capacity to execute his will. The court has specifically found that he made such independent corrections to his health care directive on that day. Attorney Willis' testimony and the document reflect those independently made corrections.[8] Dr. Morgan's admissions are further evidence and support for the conclusion that Dr. Bassford knew and understood what he was about at the time he signed the will on May 7, 2012. The court finds, from all of the evidence, that Dr. Bassford, on May 7, 2012, had the requisite mental capacity to understand what he was signing. He knew the nature ****693** and extent of his estate and how he wanted his last will and testament to distribute that estate upon his death.

***347** B

Nature of Trust and Its Revocation,
Mental Capacity to Revoke

1

Nature of Trust and Revocation

The next legal task to be completed on Dr. Bassford's behalf was the revocation of the trust Dr. Bassford had established, so that terms of his estate plan, as he had outlined those wishes to Attorney Willis, could be accomplished. Plaintiffs first claim that it was not a revocable trust. Dr. Bassford established a trust on July 7, 2006 labeled the "William W. Bassford Irrevocable Trust." That trust, however, contained an Article Two, which specifically states that: "[n]otwithstanding anything herein contained, the Settlor explicitly reserves the following powers ... 5. [t]o revoke this trust ...." While the plaintiffs argue that the title of the trust should control, rules of the construction of contracts indicate otherwise.

In general, it is hornbook law that where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. "[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000). "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract.... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not ***348** torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity .... Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) Id., at 498, 746 A.2d 1277.

In this trust, there is a conflict between the label used in the title "Irrevocable" and the direct provisions in Article Two. The rule has long been established that: "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." (Internal quotation marks omitted.) *Wilson* v. *Towers*, 55 F.2d 199, 200 (4th Cir. 1932).

The plaintiffs argue that the recital, that is to say the word "Irrevocable" in the title of this trust, should control. Such a construction would defeat the more detailed and operative terms of Article Two and therefore, the court finds, that the more detailed provisions more consistently carry out the settlor's intent and wishes, namely that he should be able to revoke the trust at his discretion. The court interprets and construes the trust to effectuate that intent and finds that it is a revocable trust. [9]

****694** 2

Mental Capacity to Revoke Trust

Next, plaintiffs challenge Dr. Bassford's mental capacity to revoke the trust. While separate from the ***349** issue of testamentary capacity, these claims raise similar issues, although on such claims the plaintiffs have the burden of proof. The law on taking any action with respect to a trust requires the individual taking such action to have the mental capacity to undertake business. Such action requires a greater capacity than the ability to make a will. As noted in *Kunz* v. *Sylvain*, 159 Conn. App. 730, 123 A.3d 1267 (2015), a case with many similarities to the present case, there were two different standards for signing a will and taking action with respect to a trust. *Kunz* quoted *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 127, 129, 43 A.3d 759 (2012), that a person may have the mental capacity necessary to make a will although incapable of transacting business generally. See also *Turner's Appeal*, 72 Conn. 305, 44 A. 310 (1899). In *Kunz*, the court reviewed the task required of the settlor of the trust in amending it and found it was a simple matter. It held that the requisite mental capacity under the higher standard had been established.

A review of the relevant facts reveals that on June 14, 2012, Dr. Bassford was psychiatrically hospitalized at the Institute of Living. He was feeling more "anxious and more depressed over the past few weeks prior to admission" and "stated he was experiencing suicidal ideations." [10] The discharge note goes on to say that during the course of his stay, "[t]he patient was alert and oriented x3, but sometimes would become easily confused with multiple stressors and multiple parts of information." [11]

When Attorney Willis came to visit Dr. Bassford at the Institute, she brought her husband with her as a witness. She testified that, on that day, she had a question and answer session with Dr. Bassford that lasted ***350** approximately

twenty minutes. He was alert and not confused. She had advised Dr. Bassford that execution of the trust revocation awaited his discharge. Nonetheless, Dr. Bassford wanted to proceed and put the whole matter behind him as he knew that the will would not have the effect he intended without the revocation. He instructed her to proceed, despite her cautions. She recalled that she had reviewed the trust terms with him from memory and certainly the right to revoke the trust. On June 20, 2012, Dr. Bassford signed the revocation as well as his wife, Frances Bassford. Attorney Willis took their acknowledgments. Mrs. Bassford also testified to his functioning on that day and confirmed Attorney Willis' account of Dr. Bassford's lucidity.

The court finds that Dr. Bassford was functioning at his normal level on that day, and understood what he was about. The plaintiffs argue and stress that Dr. Bassford was not capable of making such a decision with the level of cognition and understanding required. Dr. Morgan, the plaintiffs' expert had testified that Dr. Bassford had ever increasing dementia and impairment of his executive functions, as well as acalculia, the inability to deal with numbers involving even a moderate level of complexity. And the Institute of Living discharge note of July 3, 2012, also talks about Dr. Bassford's rising levels of confusion ****695** with "multiple stressors and multiple parts of information." [12]

Nonetheless, the court finds that the task required of Dr. Bassford on that day in June, 2012, had been discussed and contemplated by him over the course of more than three months and his desire to complete his estate plan had not wavered or changed in any way. There were not "multiple stressors or multiple parts of information" for him to process with respect to the revocation of his trust. This was a simple task which ***351** did not require complex or interrelated decisions or numerical calculations. He simply needed to indicate his desire to revoke his trust. There were no facts in support of a finding that Dr. Bassford was confused about what was happening.

Plaintiffs stress that Attorney Willis failed to review with Dr. Bassford all relevant terms of the trust or bring the trust with her on that day. Specifically, they cite the need to review with him Articles Two, Three, Four and Thirteen. [13] The court begs to differ. All Dr. Bassford needed to know was his lawyer's opinion and her basis for concluding that the trust was revocable and what was necessary for him to do; that is as settlor, state his reasons for revoking the trust, revoke the trust and also request that his trustees take such action. As *Kunz* v. *Sylvain*, supra, 159 Conn. App. at 730, 123 A.3d 1267, suggests, the complexity of the task at hand is of relevance in the determination about a person's required level of functioning. On June 20, 2012, it is apparent, and the court finds, that Dr. Bassford clearly understood what was required and what task he was undertaking. It was a simple matter. He was not confused or uncertain but had been independently determined, even while so hospitalized, to proceed with this action and complete his estate plan. The court finds he had the greater mental capacity legally required to undertake this transaction.

The last steps to complete the transaction were required of Dr. Bassford's trustees. His trustees, William Long and Henry L. Long, Jr., were two longtime friends of Dr. Bassford's from his childhood. [14] Dr. Bassford had earlier requested that his counsel contact them about his wishes. This Attorney Willis accomplished by letter and the Long brothers visited Dr. Bassford while he ***352** remained at the Institute of Living. Each of them stated that Dr. Bassford appeared his normal self and was able to carry on a conversation with them. According to Henry Long, Jr., when Dr. Bassford said what he wanted, he was going to do it, as this was his best friend. William Long testified, when questioned about the detailed recitals in the revocation instrument, he did not now recall, but that he would not have signed the document if the statements were not true. The recitals in the instrument are that Dr. Bassford requested the revocation of the trust, that he wished the real property contained in the trust to be reconveyed to him, that the Longs had personally conferred with Dr. Bassford and that they had read Dr. Lasser's report concerning Dr. Bassford's capacity to make a new will. [15] At trial in December, 2015, Henry Long recalled the letter sent to him by Attorney Willis and that it contained other information ****696** which he believed he must have read. [16] They subsequently signed the trust revocation some days after their visit with Dr. Bassford.

From the testimony of the Long brothers, Attorney Willis' testimony, the simple nature of the actions required, Dr. Bassford's awareness of the important connection of this document to his estate, as well as his sense of urgency on June 20, 2012, the court finds that Dr. Bassford had the requisite mental capacity to properly revoke the trust he had established in 2006. The plaintiffs' claims must fail, as they have not met their burden of proof.

C

Ability to Accept Deed

There remains the issue of Dr. Bassford's status as a conserved person, which implicates his ability to accept ***353** the deed from his trustees conveying the revoked trust's interest in the real estate to him. As a preliminary matter, it is interesting to note that the probate decision by Judge Marino of November 21, 2014, holds that the involuntary conservatorship did not remove Dr. Bassford's right to take action with respect to his trust or to accept title to real estate.[17] Specifically, he stated that the issue of "Dr. Bassford's capacity to authorize revocation of the Trust and to accept a conveyance of property from the Trust is covered by [§] 45a–650 [(c)] of the Connecticut General Statutes. 'A conserved person shall retain all rights and authority not expressly assigned to the conservator.' " Those rights, he notes, were not specifically assigned to the conservator. The court agrees and finds that Dr. Bassford retained such rights and could, despite being a conserved person, request that the trustees revoke the trust and revoke it himself. Further, he could request they convey real estate to him.

Plaintiffs cite Connecticut General Statutes § 45a–653 in support of their proposition that Dr. Bassford could not accept the real property conveyed to him. The court finds this statutory section to be inapposite since it concerns conveyances of property by the proposed conserved or conserved person, not the situation before the court. The public policy of this statute is to protect a conserved person from depleting his or her assets, not adding to them, as results from the acceptance of a deed to property. Certainly, the specific right for trustees to convey property is set forth in the Connecticut Fiduciary Powers Act, General Statutes § 45a–234 (2). The court concludes there is no prohibition against a conserved person receiving title to real property from another source. Plaintiffs have not prevailed on this claim.

***354** 4

Undue Influence

Plaintiffs also claim that the defendant exerted undue influence in getting Dr. Bassford to sign a will leaving the bulk of his estate to her. The burden of proof on this issue remains with the plaintiffs. The law provides that:

"Undue influence is the exercise of sufficient control over a person, whose acts are brought into question, in an attempt to destroy his [or her] free agency and constrain him [or her] to do something other than he [or she] would do under ****697** normal control.... It is stated generally that there are four elements of undue influence:

"(1) a person who is subject to influence;

"(2) an opportunity to exert undue influence;

"(3) a disposition to exert undue influence; and

"(4) a result indicating undue influence....

"Relevant factors include age and physical and mental condition of the one alleged to have been influenced, whether he [or she] had independent or disinterested advice in the transaction ... consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his [other] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] whole worth ... failure to provide for all of his [or her] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties." (Citations omitted; internal quotation marks omitted.) *Pickman* v. *Pickman*, 6 Conn. App. 271, 275–76, 505 A.2d 4 (1986). See also *Lee* v. *Horrigan*, 140 Conn. 232, 237, 98 A.2d 909 (1953).

***355** While it is true that Mrs. Bassford was Dr. Bassford's conservatrix, it has not been demonstrated that Dr. Bassford was a person subject to such influence nor susceptible to it. While Mrs. Bassford was in a position to exert such influence, the testimony of Attorney Willis and her independent observations of Dr. Bassford demonstrate that such influence was not exerted. Dr. Lasser also testified to the fact that Dr. Bassford was aware of his situation and clear about his wishes. There is no direct evidence of undue influence, and to the extent it may exist, it is inferential in nature; merely by the position of these parties as husband and wife in the twilight of their lives.

Direct evidence of undue influence is often not available and is not indispensable. See *Salvatore* v. *Hayden*, 144 Conn. 437, 440, 133 A.2d 622 (1957). But the mere opportunity to exert undue influence is not alone sufficient. There must be proof

not only of undue influence but that its operative effect was to cause the testator to make a will which did not express his actual testamentary desires. *Hills* v. *Hart*, 88 Conn. 394, 402, 91 A. 257 (1914). On all these points, the plaintiffs have failed to meet their burden of proof. There simply is no evidence. Their suspicions alone are not enough. On this claim, the court also finds for the defendant.

ORDERS

For all of the foregoing reasons, the plaintiffs' claims fail and the appeals are dismissed.

All Citations

180 Conn.App. 331, 183 A.3d 680

Footnotes

1 The defendants at trial were Frances Z. Bassford, the decedent's widow; Theodore V. Raczka, an attorney, temporary administrator of the estate of the decedent; and Henry L. Long, Jr., and William Long, trustees of the William W. Bassford Irrevocable Trust. Frances Z. Bassford is the only defendant who is a party to this appeal, and in this opinion, we refer to her as the defendant.

* Affirmed. *Bassford* v. *Bassford*, 180 Conn. App. 331 (2018).

1 Exhibit A and Exhibit 71, copies of Dr. Bassford's Last Will and Testament, dated May 7, 2012.

2 It is for these legal reasons, that most of Dr. Bassford's medical records dating from 2006 through 2011 are not highly relevant to the issue of his testamentary capacity on May 7, 2012. They are all simply too remote in time.

3 Many exhibits concerning Dr. Bassford's medical condition were introduced, which detailed his various conditions including his medication history, starting from 2006 forward. Those records reflect that on a number of occasions, his doctors attempted to reduce his Lorazepam dosage and dependence, with resulting significant increases in his anxiety levels. Each such attempt ended when his treaters reluctantly acquiesced in his use of this drug at the dosages required to keep him calm and stable.

4 The plaintiffs point to multiple medical records documenting such tension during times of medical stress, delirium and disorientation, as though such reports were the only correct and "true" evidence of Dr. Bassford's desires. They ignore and choose to discount all independent evidence of Dr. Bassford's expression of his desires on multiple occasions when he was alert and functioning well. Logically, they cannot have the evidence to support two such inconsistent notions, correct for purposes of demonstrating undue influence and that his "true desires" were not to benefit his wife, and on the other hand, that such delirium and reduced functioning is evidence of his lack of testamentary capacity and capacity to revoke his trust.

5 See Exhibit 34, signed on April 26, 2012.

6 Exhibit 62, dated April 26, 2012.

7 While plaintiffs make much of the differences of opinion between the two experts, Dr. Jay A. Lasser and Dr. Harry E. Morgan, about the meaning of the word "pseudo-dementia," the court finds the insistence on one expert's definition over the other to have no particular weight in these proceedings. An expert is entitled to his definition as he uses it and it is that expert's use of the term that controls.

8 See notations on Exhibit D, with Dr. Bassford's initials on all the corrections.

9 The court has reviewed and notes the cases and statutes on which the plaintiffs rely in support of their argument that this is an irrevocable trust. Having determined the trust is revocable, the court does not review such cases and law further.

10 Exhibit 93, Discharge Summary, Institute of Living, July 3, 2012, page 1.

11 Ibid., page 2.

12 Exhibit 93, Discharge note of July 3, 2012, Institute of Living, page 1.

13 See Exhibit 10 and the relevant articles set forth therein.
14 Each of them testified that they had known Dr. Bassford for more than eighty years.
15 See Exhibit 89, signed by the Longs on June 25, 2012, before a notary.
16 Exhibit 75, Letter dated May 18, 2012, which contains the information referenced sent by Attorney Willis to Henry and William Long.
17 Both Probate Court decisions are attached to the respective complaints filed by the plaintiffs in these appeals, and as such, are judicial admissions.

2016 WL 1552888
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Middlesex.

Andrew BASSFORD et al.
v.
Frances Z. BASSFORD.

No. MMXCV156012903S.
|
March 24, 2016.

Attorneys and Law Firms

Czepiga Daly Pope LLC, Berlin, for Andrew Bassford et al.

Kenny & Brimmer & Mahoney LLC, Wethersfield, for Frances Z. Bassford.

Opinion

BARBARA M. QUINN, Judge Trial Referee.

***1** In these two consolidated cases, the plaintiffs, Andrew and Jonathan Bassford and Zelda Alibzek, have appealed from the admission of their father's will to probate and from the revocation of a trust as well as the validity of a quitclaim deed thereafter executed by the trustees, all in furtherance of their father's estate plan. They claim that they are aggrieved parties and that: (1) the decedent, their father, Dr. Bassford, lacked testamentary capacity at the time of the execution of his last will and testament; (2) a trust Dr. Bassford had earlier established was irrevocable, and therefore, its revocation was improper and of no effect. The trust assets could therefore not properly be conveyed and become part of the decedent's estate; (3) that the decedent lacked the capacity to accept the deed for property held in the purportedly irrevocable trust; (4) and there was undue influence exerted by the defendant, his surviving widow and their stepmother, in securing the execution of the new will. For the reasons set forth in detail below, the court finds all issues in favor of the defendant and dismisses these appeals.

1. BACKGROUND

From the reliable, probative and credible evidence, the court finds the following facts. The defendant, Dr. Bassford's widow, is his third wife and at the time of his death on February 19, 2014, Dr. and Mrs. Bassford had been married for thirty-three years. The defendant, Frances Bassford, became Dr. Bassford's conservatrix when he was involuntarily conserved in November 2011. Dr. Bassford's three children are his children from his first marriage, and by their conduct at trial, were not close to their stepmother. Dr. Bassford executed a will in 2006 in which the bulk of his estate was left to his three children. On May 7, 2012, he executed a new will in which he changed his estate plan to leave the bulk of his estate to his wife, with certain articles of personal property to two of his three children and some of his grandchildren, and one dollar to his son, Jonathan. The will of May 7, 2012 was duly admitted to probate, after findings made by Judge Marino that Dr. Bassford possessed sufficient testamentary capacity to execute the new will. He also found that the will was executed with the necessary statutory formalities. In addition, he determined that there was no evidence of undue influence by Francis Bassford, as claimed by Dr. Bassford's children. This appeal ensued.

Additionally, Dr. Bassford's children challenged the revocation of the trust established by Dr. Bassford as well as his acceptance of a deed to real estate from the trustees. Judge Marino held the trust to be revocable and that Dr. Bassford could receive the deed to the real estate in Cromwell on which his home was located and in which he resided. An appeal was taken to the Superior Court and the two appeals are now consolidated.

II. JURISDICTION AND AGRRIEVMENT

When considering an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. “In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court.” (Citations omitted; internal quotation marks omitted.) *State v. Gordon,* 45 Conn.App. 490, 494, 696 A.2d 1034, cert. granted on other grounds, 243 Conn. 911, 701 A.2d 336 (1997) (appeal dismissed October 27, 1998).

***2** The trial court does not have "subject matter jurisdiction to hear an appeal from probate unless the person seeking to be heard has standing ... In order for an appellate to have standing to appeal from an order or decree of the Probate Court, the appellant must be aggrieved by the court's decision." See Connecticut General Statutes § 45a–186. "Aggrievement falls within two categories, classical and statutory. Classical aggrievement exists where there is a possibility, as distinguished from a certainty, that a Probate Court decision has adversely affected a legally protected interest of the appellant in the estate ... Statutory aggrievement exists by legislative fiat which grants an appellant standing by virtue of particular legislation, rather than by judicial analysis of the particular facts of the case ... It merely requires a claim of injury to an interest that is protected by statute." (Citations omitted; emphasis added; internal quotation omitted.) *Kucej v. Kucej,* 34 Conn.App. 579, 582, 642 A.2d 81 (1994); *Marchentini v. Brittany Farms Health Center, Inc.,* 84 Conn.App. 486, 490, 854 A.2d 40 (2004), overruled on other grounds ... In this instance, Dr. Bassford's three children would have received a different and greater portion of their father's estate, had the Probate Court ruled in their favor. By its contrary ruling, each of Dr. Bassford's children is classically aggrieved. They each have standing to prosecute these appeals and the court has jurisdiction to hear these appeals.

II. FACTS AND DISCUSSION

A. Burdens of Proof Due Execution of the Will, and Testamentary Capacity

Our law provides that "[a]n appeal from probate is not so much an 'appeal' as a trial de novo with the Superior Court sitting as a Probate Court and restricted by a Probate Court's jurisdictional limitations ... At the trial de novo, a will's proponent retains the burden of proving, by a preponderance of the evidence, that the will was executed in the manner required by statute ... The proponent must prove anew that the will's execution was in compliance with the statute in effect at the time it was executed ... To be valid, [a] will must comply strictly with the requirements of [the] statute ... Because the offer for probate of a putative will is in essence a proceeding *in rem* the object of which is a decree establishing a will's validity against all the world; the proponent must at least make out a *prima facie* case that all statutory criteria have been satisfied even when compliance with those criteria has not been contested." (Footnote, citations and internal quotation marks omitted.) *Gardner v. Balboni,* 218 Conn. 220, 225–6, 588 A.2d 634 (1991).

In this case, the proponent of the will is the defendant, Mrs. Bassford. Connecticut General Statutes § 45a–251 governs the proper execution of a will and provides in pertinent part: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence ..." The facts demonstrate unequivocally that Dr. Bassford's attorney, Attorney Willis, brought two witnesses into the home and Dr. Bassford signed the will in their presence. While on some points the witnesses' subsequent testimony by way of deposition transcripts reflects their lack of detailed recall, such testimony is inadequate to overcome both Attorney Willis' direct testimony to the events of that day as well as the contents of their sworn affidavit on the bottom of the will that they state under oath that they:

> ***3** "attested the within and forgoing Will ... and subscribed the same in his presence and at his request and in the presence of each other; that the said Testator signed, published and declare the said Instrument as and for his Last Will and Testament in our presence on this 7th day of May 2012 and at the time of the execution of said Will said Testator was more than eighteen years of age, was able to understand the nature and consequences of the document and was under no improper influence or restraint, to the best of our knowledge and belief ... [1]
>
> Contrary to Plaintiffs' arguments, the will was properly executed in accordance with the statutory requirements. The court finds, from the relevant and probative evidence, that the defendant has met her burden of proof of the due execution of the will.

The proper execution of Dr. Bassford's will is only the first of the plaintiffs' several challenges to the will's effectiveness and admission to probate. The major issue in this appeal is Dr. Bassford's capacity to make a will. General Statutes § 45a–250 provides that: "Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will." "The burden of proof in disputes over testamentary capacity is on the party claiming under the will." (Citations omitted.) *Stanton v. Grigley,* 177 Conn. 558, 564, 418 A.2d 923 (1979). The defendant in this case has this burden as well.

"What constitutes testamentary capacity is a question of law ... To make a valid will, the testatrix must have had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of the will, at the very time she executed it ... Whether she measured up to this test is a question of fact for the trier." (Citations omitted.) *City National Bank Trust Co.'s Appeal,* 145 Conn. 518, 521, 144 A.2d 338 (1958).

Our law provides that it is a testator's capacity at the time of the will execution that is relevant. "The fundamental test of the testatrix's capacity to make a will is her condition of mind and memory at the very time when she executed the instrument ... While in determining the question as to the mental capacity of a testator evidence is received of his conduct and condition prior and subsequent to the point of time when it is executed, it is so admitted solely for such light as it may afford as to his capacity at that point of time and diminishes in weight as time lengthens in each direction from that point." (Citations omitted). *Jackson v.. Waller,* 126 Conn. 294, 301, 10 A.2d 763 (1940). [2]

The decedent, Dr. Bassford, as the medical evidence and other testimony demonstrates, was a person who suffered from severe anxiety and depression as well as post-traumatic stress disorder from his service in World War II. None of the parties dispute that he suffered from some mild to moderate dementia, had impaired hearing and was susceptible to frequent urinary tract infections from his Foley catheter, which had been in place for over nineteen years at the time of his death. Due to the drug treatment Dr. Bassford received for anxiety, he became dependent on benzodiazepine, specifically Lorazepam. [3] The use of this drug is known to cause some impairment of general cognitive function, as well. When he suffered from urinary tract infections, he would become delirious and require hospitalization. Treatment with antibiotics stabilized him quickly and he returned to his former functioning state.

***4** Dr. Bassford became concerned about the distribution of his monthly Veterans Administration pension payments and his estate in 2011. The defendant in these appeals, Mrs. Bassford, then commenced an involuntary conservatorship proceeding to have Dr. Bassford conserved. Attorney Annette Willis was appointed to represent Dr. Bassford in October 2011 by the probate court. She had not met him prior to her appointment by the court.

From Attorney Willis' testimony, the court finds that in October of 2011, when she met him, Dr. Bassford was eloquent, well-spoken and coherent. He was oriented as to place and time. He was upset that his pension payments were going to his children. He was able to ask relevant and reasonable questions about the conservatorship. The court finds that Dr. Bassford was informed about the types of conservatorship possible, voluntary and involuntary. His counsel affirmed she was aware that he had memory deficits and anxiety and did not like to leave his home. Nonetheless, he was clear he wanted his wife to have full authority over his affairs and to help him secure his pension payments. When his counsel met with Dr. Bassford, after the preliminary social niceties, she met alone with Dr. Bassford. The defendant did not participate in the discussions and was not in the room when Attorney Willis and Dr. Bassford discussed his legal affairs and his pension payments.

Andrew Bassford testified to the fact that his father, at the time the veteran's pension benefits had earlier commenced, wanted his children to receive those benefits as they came from a time when he had not yet married the present Mrs. Bassford. There was some indication that at the commencement of the payments, they were deposited into Dr. Bassford's bank accounts and then distributed to his children. By 2011, these benefits were being deposited into accounts no longer under Dr. Bassford's control.

At the time of the conservatorship, the court finds, such distributions were no longer what he desired. Even if, as the plaintiff's claim, there was tension between the family members and between Dr. Bassford and his wife, [4] there was ample opportunity for him to request different actions from his attorney, during their private meetings. He never did so, despite having multiple appointments with her. He emphasized how upset he was with his son, Jonathan, and his conduct. From this, the court finds, that his wishes at the time in question were as stated to his attorney. He wanted his veteran's pension to be paid into his own accounts for his use. In due course, the pension payments were rerouted from Dr. Bassford's children to Dr. Bassford's accounts.

During the time of the proceedings leading up to the conservatorship, Dr. Bassford informed Attorney Willis about his desire to change his will and the distribution of his estate. Once the conservatorship was completed, and over the course of the next several months after the conservatorship was granted, Attorney Willis began her work to carry out his wishes. There were at least three meetings for his lawyer

to go over his estate plan and conduct a detailed review of his assets with him. It was during this time that Attorney Willis came to understand that there was a trust containing his interest in the home in which the Bassfords resided in addition to a retirement account. Dr. Bassford's statements of his wishes regarding his estate remained consistent over these months and at each meeting with Attorney Willis. He never waivered or was confused about his desires. He was focused on adequately providing for his wife.

***5** Dr. Bassford and Attorney Willis had a meeting in March 2012 in his home. She spoke with him in detail about his assets and what he wanted to happen in his will and his general estate plan. At that time and earlier, he was and had been insistent that his son Jonathan only receive one dollar. Dr. Bassford wanted his treasured antiques to go to his other two children and some of his grandchildren. Subsequently, after the March appointment, Dr. Bassford and Mrs. Bassford prepared a list of those items of personal property, as Dr. Bassford's handwriting was a bit shaky. Attorney Willis reviewed that list with him in detail and had him sign it at their next meeting on April 26, 2012. The list[5] clearly specifies what is to be distributed and to whom and the last page is in his handwriting. In addition, on that day Dr. Bassford wrote out and signed a note indicating he only wished his son Jonathan to receive one dollar upon his death.[6] The court finds that the list and note represented Dr. Bassford's personal wishes.

Next, Dr. Bassford's general mental condition was evaluated, at Attorney Willis' request, by a psychiatrist, Dr. Lasser, who subsequently issued a report and testified at the probate hearing as well as at trial. Dr. Lasser met with Dr. Bassford on April 26, 2012 and conducted a formal clinical interview. He previously had access to and had reviewed Dr. Bassford's extensive medical history. He confirmed that Dr. Bassford had dementia, which was a slowly progressive and ongoing condition. He found Dr. Bassford to have memory deficits and, determined from recent medical records, that he had had episodes of delirium when he had urinary tract infections.[7] Dr. Lasser found that when Dr. Bassford's infections were treated, he returned to lucidity quickly. He found the episodes of infection-induced delirium had no residual impact on his baseline cognitive level, which he admitted was impaired. He agreed that Dr. Bassford's functioning fluctuated significantly from time to time, but that when he was well and not in the throes of an infection, he functioned at a stable level. In his professional psychiatric opinion, Dr. Bassford possessed the cognitive ability to know the nature and extent of his assets and what he wanted to have done with them.

On May 7, 2012, Dr. Bassford met with his counsel, Annette Willis, and reviewed his will, the list of personal property contained within the will, his decision to leave his son Jonathan only one dollar and the other details of his will. He also reviewed his healthcare directive and independently noted some errors when it was presented to him. He corrected those errors himself, and initialed them. He then signed his will and the directive in front of two witnesses and Attorney Willis took his acknowledgment and signed the self-proving affidavit of the witnesses. From Attorney Willis' testimony, the court finds that he was functioning at his normal level on that day, that he was well-spoken, lucid and aware of the time and place. He understood her questions and directions. He knew the nature and extent of his estate and how he wanted it distributed. Those statements and wishes were consistent with those he had expressed in the months leading up to the execution of his last will and testament.

***6** Plaintiffs called a psychiatric expert, Dr. Morgan, who reviewed Dr. Bassford's extensive multi-year medical records, but did not meet with him personally. In general, his opinion was that Dr. Bassford did not have sufficient capacity to execute a will. He particularly focused on the impairments to his executive functions and the tests which demonstrated his deficits. Dr. Morgan's expert testimony, despite his evident expertise, is not persuasive on this conclusion, the court finds, based both on his lack of opportunity to personally observe Dr. Bassford and his testimony about the actions Dr. Bassford took on the day of the will execution. Dr. Morgan admitted that, if Dr. Bassford was able to make independent, unsolicited corrections to a legal document on the day of his will execution, then at that time, he possessed sufficient mental capacity to execute his will. The court has specifically found that he made such independent corrections to his health care directive on that day. Attorney Willis' testimony and the document reflect those independently made corrections.[8] Dr. Morgan's admissions are further evidence and support for the conclusion that Dr. Bassford knew and understood what he was about at the time he signed the will on May 7, 2012. The court finds, from all of the evidence, that Dr. Bassford, on May 7, 2012, the requisite mental capacity to understand what he was signing. He knew the nature and extent of his estate and how he wanted his last will and testament to distribute that estate upon his death.

B. The Nature of the Trust and Its Revocation, Mental Capacity to Revoke

(1) Nature of the Trust and Revocation

The next legal task to be completed on Dr. Bassford's behalf was the revocation of the trust Dr. Bassford had established, so that terms of his estate plan, as he had outlined those wishes to Attorney Willis, could be accomplished. Plaintiffs first claim that it was not a recoverable trust. Dr. Bassford established a trust on July 7, 2006 labeled the "William W. Bassford Irrevocable Trust." That trust, however, contained an Article Two, which specifically states that: "[n]otwithstanding anything herein contained, the Settlor explicitly reserves the following powers: (5) to revoke this trust ..." While the plaintiffs argue that the title of the trust should control, rules of the construction of contracts indicate otherwise.

In general, it is hornbook law that where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. "Where there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.,* 252 Conn. 479, 495, 746 A.2d 1277 (2000). "The intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract ... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity ... Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Id.,* at 498.

***7** In this trust, there is a conflict between the label used in the title "Irrevocable" and the direct provisions in Article Two. The rule has long been established that: "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." *Wilson v. Towers,* 55 F.2d 199 (4th Cir.1932).

The plaintiffs argue that the recital, that is to say the word "Irrevocable" in the title of this trust, should control. Such a construction would defeat the more detailed and operative terms of Article Two and therefore, the court finds, that the more detailed provisions more consistently carry out the settlor's intent and wishes, namely that he should be able to revoke the trust at his discretion. The court interprets and construes the trust to effectuate that intent and finds that it is a revocable trust. [9]

(2) Mental Capacity to Revoke the Trust

Next, plaintiffs challenge Dr. Bassford's mental capacity to revoke the trust. While separate from the issue of testamentary capacity, these claims raise similar issues, although on such claims the plaintiffs have the burden of proof. The law on taking any action with respect to a trust requires the individual taking such action to have the mental capacity to undertake business. Such action requires a greater capacity that the ability to make a will. As noted in *Kunz v. Sylvain,* 159 Conn.App. 730, 123 A.3d 1267 (2015), a case with many similarities to the present case, there were two different standards for signing a will and taking action with respect to a trust. *Kunz* quoted *Deroy v. Estate of Baron,* 136 Conn.App. 123, 127, 129, 43 A.3rd 759 (2012), that a person may have the mental capacity necessary to make a will although incapable of transacting business generally. See also *Turner's Appeal,* 72 Conn. 305, 44 A. 310 (1899). In *Kunz,* the court reviewed the task required of the settlor of the trust in amending it and found it was a simple matter. It held that the requisite mental capacity under the higher standard had been established.

A review of the relevant facts reveals that on June 14, 2012, Dr. Bassford was psychiatrically hospitalized at the Institute of Living. He was feeling more "anxious and depressed over the past few weeks prior to admission and ... stated he was experiencing suicidal ideations." [10] The discharge note goes on to say that during the course of his stay, "the patient was alert and oriented x3, but sometimes would become easily confused with multiple stressors and multiple parts of information." [11]

When Attorney Willis came to visit Dr. Bassford at the Institute, she brought her husband with her as a witness. She testified that, on that day, she had a question and answer session with Dr. Bassford that lasted approximately twenty minutes. He was alert and not confused. She had advised Dr. Bassford that execution of the trust revocation await his discharge. Nonetheless, Dr. Bassford wanted to proceed and put the whole matter behind him as he knew that the will would not have the effect he intended without the revocation. He instructed her to proceed, despite her cautions. She recalled that she had reviewed the trust terms with him from memory and certainly the right to revoke the trust. On June 20, 2012, Dr. Bassford signed the revocation as well as his wife, Francis Bassford. Attorney Willis took their acknowledgments. Mrs. Bassford also testified to his functioning on that day and confirmed Attorney Willis' account of Dr. Bassford's lucidity.

***8** The court finds that Dr. Bassford was functioning at his normal level on that day, and understood what he was about. The plaintiffs argue and stress that Dr. Bassford was not capable of making such a decision with the level of cognition and understanding required. Dr. Morgan, the plaintiffs' expert had testified that Dr. Bassford had ever increasing dementia and impairment of his executive functions, as well as acalculia, the inability to deal with numbers involving even a moderate level of complexity. And the Institute of Living discharge note of July 3, 2012 also talks about Dr. Bassford's rising levels of confusion with "multiple stressors and multiple pieces of information." [12]

Nonetheless, the court finds that the task required of Dr. Bassford on that day in June 2012 had been discussed and contemplated by him over the course of more than three months and his desire to complete his estate plan had not waivered or changed in any way. There were not "multiple stressors or multiple pieces of information" for him to process with respect to the revocation of his trust. This was a simple task which did not require complex or interrelated decisions or numerical calculations. He simply needed to indicate his desire to revoke his trust. There were no facts in support of a finding that Dr. Bassford was confused about what was happening.

Plaintiffs stress that Attorney Willis failed to review with Dr. Bassford all relevant terms of the trust or brought the trust with him on that day. Specifically, they cite the need to review with him Articles Two, Three, Four and Thirteen. [13] The court begs to differ. All Dr. Bassford needed to know was his lawyer's opinion and her basis for concluding that the trust was revocable and what was necessary for him to do; that is as settlor, state his reasons for revoking the trust, revoke the trust and also request that his trustees take such action. As *Kunz v. Sylvain, supra,* suggests, the complexity of the task at hand is of relevance in the determination about a person's required level of functioning. On June 20, 2012, it is apparent, and the court finds, that Dr. Bassford clearly understood what was required and what task he was undertaking. It was a simple matter. He was not confused or uncertain but had been independently determined, even while so hospitalized, to proceed with this action and complete his estate plan. The court finds he had the greater mental capacity legally required to undertake this transaction.

The last steps to complete the transaction were required of Dr. Bassford's trustees. His trustees, William H. Long, Jr. and Henry Long, were two longtime friends of Dr. Bassford's from his childhood . [14] Dr. Bassford had earlier requested that his counsel contact them about his wishes. This Attorney Willis accomplished by letter and the Long brothers visited Dr. Bassford while he remained at the Institute of Living. Each of them stated that Dr. Bassford appeared his normal self and was able to carry on a conversation with them. According to Henry Long, Jr., when Dr. Bassford said what he wanted, he was going to do it, as this was his best friend. William Long testified, when questioned about the detailed recitals in the revocation instrument, he did not now recall, but that he would not have signed the document if the statements were not true. The recitals in the instrument are that Dr. Bassford requested the revocation of the trust, that he wished the real property contained in the trust to be re-conveyed him, that the Longs had personally conferred with Dr. Bassford and that they had read Dr. Lasser's report concerning Dr. Bassford's capacity to make a new will. [15] At trial in December 2015, Henry Long recalled the letter sent him by Attorney Willis and that it contained other information which he believed he must have read. [16] They subsequently signed the trust revocation some days after their visit with Dr. Bassford.

***9** From the testimony of the Long brothers, Attorney Willis' testimony, the simple nature of the actions required, Dr. Bassford's awareness of the important connection of this document to his estate, as well as his sense of urgency on June 20, 2012, the court finds that Dr. Bassford had the requisite mental capacity to properly revoke the trust he had established in 2006. The plaintiffs' claims must fail, as they have not met their burden of proof.

C. Ability to Accept the Deed

There remains the issue of Dr. Bassford's status as a conserved person, which implicates his ability to accept the deed from his trustees conveying the revoked trust's interest in the real estate to him. As a preliminary matter, it is interesting to note that the Probate decision by Judge Marino of November 21, 2014 holds that the involuntary conservatorship did not remove Dr. Bassford's right to take action with respect to his trust or to accept title to real estate.[17] Specifically, he stated that the issue of "Dr. Bassford's capacity to authorize revocation of the Trust and to accept a conveyance of real property from the Trust is covered by Section 45a–650(c) of the Connecticut General Statutes." A conserved person shall retain all the rights and authority not expressly assigned to the conservator." Those rights, he notes, were not specifically assigned to the conservator. The court agrees and finds that Dr. Bassford retained such rights and could, despite being a conserved person, request that the trustees revoke the trust and revoke it himself. Further, he could request they convey real estate to him.

Plaintiffs cite Connecticut General Statutes § 45a–653 in support of their proposition that Dr. Bassford could not accept the real property conveyed to him. The court finds this statutory section to be inapposite since it concerns conveyances of property by the proposed conserved or conserved person, not the situation before the court. The public policy of this statute is to protect a conserved person from depleting his or her assets, not adding to them, as results from the acceptance of a deed to property. Certainly, the specific right for trustees to convey property is set forth in the Connecticut Fiduciary Powers Act, § 45a–234(2). The court concludes there is no prohibition against a conserved person receiving title to real property from another source. Plaintiffs have not prevailed on this claim.

4. Undue Influence

Plaintiffs also claim that the defendant exerted undue influence in getting Dr. Bassford to sign a will leaving the bulk of his estate to her. The burden of proof on this issue remains with the plaintiffs. The law provides that:

> Undue influence is the exercise of sufficient control over a person, whose acts are brought into question, in an attempt to destroy his [or her] free agency and constrain him [or her] to do something other than he [or she] would do under normal control ... It is stated generally that there are four elements of undue influence:
>
> ***10** (1) a person who is subject to influence;
>
> (2) an opportunity to exert undue influence;
>
> (3) a disposition to exert undue influence; and
>
> (4) a result indicating undue influence ...
>
> Relevant factors include age and physical and mental condition of the one alleged to have been influenced, whether he [or she] had independent or disinterested advice in the transaction ... consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his [other] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] whole worth ... failure to provide for all of his [or her] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties." (Citations omitted; internal quotation marks omitted.) *Pickman v. Pickman,* 6 Conn.App. 271, 275–76, 505 A.2d 4 (1986). See also *Lee v. Horrigan,* 140 Conn. 232, 237, 98 A.2d 909 (1953).

While it is true that Mrs. Bassford was Dr. Bassford's conservatrix, it has not been demonstrated that Dr. Bassford was a person subject to such influence nor susceptible to it. While Mrs. Bassford was in a position to exert such influence, the testimony of Attorney Willis and her independent observations of Dr. Bassford demonstrate that such influence was not exerted. Dr. Lasser also testified to the fact that Dr. Bassford was aware of his situation and clear about his wishes. There is no direct evidence of undue influence, and to the extent it may exist, it is inferential in nature; merely by the position of these parties as husband and wife in the twilight of their lives.

Direct evidence of undue influence is often not available and is not indispensable. See *Salvatore v. Hayden,* 144 Conn 437, 440, 133 A.2d 622 (1957). But the mere opportunity to exert undue influence is not alone sufficient. There must be proof not only of undue influence but that its operative effect was to cause the testator to make a will which did not express his actual testamentary desires. *Hill v. Hart,* 88 Conn. 394, 402, 91 A. 257 (1914). On all these points, the plaintiffs have failed to meet their burden of proof. There simply is no evidence.

Their suspicions alone are not enough. On this claim, the court also finds for the defendant.

ORDERS

For all of the foregoing reasons, the plaintiffs' claims fail and the appeals are dismissed.

All Citations

Not Reported in A.3d, 2016 WL 1552888

Footnotes

1 Exhibit A and Exhibit 71, copies of Dr. Bassford's Last Will and Testament, dated May 7, 2012.

2 It is for these legal reasons, that most of Dr. Bassford's medical records dating from 2006 through 2011 are not highly relevant to the issue of his testamentary capacity on May 7, 2012. They are all simply too remote in time.

3 Many exhibits concerning Dr. Bassford's medical condition were introduced, which detailed his various conditions including his medication history, starting from 2006 forward. Those records reflect that on a number of occasions, his doctors attempted to reduce his Lorazepam dosage and dependence, with resulting significant increases in his anxiety levels. Each such attempt ended when his treaters reluctantly acquiesced in his use of this drug at the dosages required to keep him calm and stable.

4 The plaintiffs point to multiple medical records documenting such tension during times of medical stress, delirium and disorientation, as though such reports were the only correct and "true" evidence of Dr. Bassford's desires. They ignore and choose to discount all independent evidence of Dr. Bassord's expression of his desires on multiple occasions when he was alert and functioning well. Logically, they cannot have the evidence to support two such inconsistent notions, correct for purposes of demonstrating undue influence and that his "true desires" were not to benefit his wife, and on the other hand, that such delirium and reduced functioning is evidence of his lack of testamentary capacity and capacity to revoke his trust.

5 See Exhibit 34, signed on April 26, 2012.

6 Exhibit 62, dated April 26, 2012.

7 While plaintiffs make much of the differences of opinion between the two experts, Dr. Lasser and Dr. Morgan, about the meaning of the word "pseudo-dementia," the court finds the insistence on one expert's definition over the other to have no particular weight in these proceedings. An expert is entitled to his definition as he uses it and it is that's expert's use of the term that controls.

8 See notations on Exhibit D, with Dr. Bassford's initials on all the corrections.

9 The court has reviewed and notes the cases and statutes on which the plaintiffs rely in support of their argument that this is an irrevocable trust. Having determined the trust is revocable, the court does not review such cases and law further.

10 Exhibit 93, Discharge Summary, Institute of Living, July 3, 2013, page 1.

11 *Id.,* page 2.

12 Exhibit 93, Discharge note of July 3, 2012, Institute of Living Page 1.

13 See Exhibit 1 and the relevant articles set forth therein.

14 Each of them testified that they had known Dr. Bassford for more than eighty years.

15 See Exhibit 89, signed by the Longs on June 25, 2012 before a notary.

16 Exhibit 75, Letter dated May 18, 2012, which contains the information referenced sent by Attorney Willis to Henry and William Long.

17 Both probate court decisions are attached to the respective complaints filed by the plaintiffs in these appeals, and as such, are judicial admissions.

End of Document

159 So.3d 390
District Court of Appeal of Florida,
Fourth District.

Demetra F. BLINN, Appellant,
v.
Patricia A. CARLMAN and Brian Blinn, Appellees.

No. 4D13–1156.
|
March 18, 2015.

Synopsis

Background: Testator's daughter sought to invalidate testator's will based on claim of undue influence. The Fifteenth Judicial Circuit Court, Palm Beach County, Diana Lewis, J., entered a final judgment invaliding the will. Testator's wife appealed.

The District Court of Appeal, Gross, J., held that evidence supported invalidation of testator's will based on undue influence by testator's fourth wife who became sole beneficiary contrary to prior will devising estate to daughter.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***390** Philip M. Burlington and Nichole J. Segal of Burlington & Rockenbach, P.A., West Palm Beach, and Robert C. Sorgini of Sorgini & Sorgini, P.A., Lake Worth, for appellant.

Jane Kreusler–Walsh and Rebecca Mercier Vargas of Kreusler–Walsh, Compiani & Vargas, P.A., West Palm Beach, and Theodore S. Kypreos of Jones, Foster, ***391** Johnston & Stubbs, P.A., West Palm Beach, for appellees.

Opinion

GROSS, J.

The final judgment invalidating the April 2, 2008 will based on undue influence is supported by substantial competent evidence and, thus, we affirm. *Hendershaw v. Estate of Hendershaw,* 763 So.2d 482, 483 (Fla. 4th DCA 2000) ("The probate court's findings in a will contest shall not be overturned where there is substantial competent evidence to support those findings, unless the probate judge has misapprehended the evidence as a whole.").

"When a will is challenged on the grounds of undue influence, the influence must amount to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator." *Levin v. Levin,* 60 So.3d 1116, 1118 (Fla. 4th DCA 2011) (quoting *Raimi v. Furlong,* 702 So.2d 1273, 1287 (Fla. 3d DCA 1997)). The doctrine of undue influence is based on the theory that the "testator is induced by various means, to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of testator." *In re Winslow's Estate,* 147 So.2d 613, 617 (Fla. 2d DCA 1962) (citation omitted). "Undue influence is not usually exercised openly in the presence of others, so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred." *Gardiner v. Goertner,* 110 Fla. 377, 149 So. 186, 190 (1932) (citation omitted).

The Florida Supreme Court has established a set of non-exhaustive factors for courts to consider on the issue of undue influence or active procurement:

(a) presence of the beneficiary at the execution of the will;

(b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will;

(c) recommendation by the beneficiary of an attorney to draw the will;

(d) knowledge of the contents of the will by the beneficiary prior to execution;

(e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;

(f) securing of witnesses to the will by the beneficiary; and

(g) safekeeping of the will by the beneficiary subsequent to execution

In re Estate of Carpenter, 253 So.2d 697, 702 (Fla.1971).

In August 2007, appellant became the decedent Richard Blinn's fourth wife. Richard was almost 82. His mental

health began to deteriorate as early as 2005 and he suffered from "numerous and serious physical infirmities beginning in 2005 and continuing until his death" in 2012. In addition to physical problems, Richard had cognitive difficulties. From 2006 onward, he suffered from progressive dementia, which worsened over time. He frequently engaged in inappropriate behaviors and expressed paranoid beliefs. As the trial judge found, Richard started to make "imprudent financial decisions, which caused his local yacht brokerage business [Sovereign Yachts] to decline significantly." In 2007, he began to regularly play mail-away scam lotteries in foreign countries and was convinced that he was winning significant sums, without ever receiving a dime. In June 2011, a circuit court determined that Richard was totally incapacitated and appointed his daughter, Patty, as his plenary guardian. As the trial court found, the decedent was "susceptible to undue influence due to his declining physical state, anxiety disorders, depression, and progressive dementia." *See* *Hack v. Estate of* ***392** *Helling,* 811 So.2d 822, 826 (Fla. 5th DCA 2002) (stating that a testator's "failed mental capacity ... is a factor which should be considered, as supporting the undue influence claim."); *In re Perez' Estate,* 206 So.2d 58, 59 (Fla. 3d DCA 1968) ("It is true ... that the amount of undue influence need not be great where a testator is weak and his intellect clouded.").

The April 2, 2008 will was executed under most suspicious circumstances. Two lawyers were involved, a referring lawyer and the drafting lawyer. The referring lawyer, who had minimal experience in estate planning, was a social friend of Richard and appellant. In 2007, appellant "loaned" the referring lawyer money, which was never repaid. The referring lawyer sent Richard and appellant to the drafting lawyer, his former law partner, to obtain a new will for each of them. The referring lawyer testified that he did not discuss the contents of the new will with Richard or appellant, nor did he give his former partner instructions for its preparation; he said he gave the couple no legal advice whatsoever.

The testimony of the drafting lawyer sharply conflicted with that of the referring lawyer. The drafting lawyer had no personal interaction with the couple prior to their appearance at his office on April 2, 2008 to sign their new wills. His law firm provided no legal advice to the couple prior to the wills' preparation. He had no knowledge of the decedent's prior wills or his estate plan. He testified that it was the referring lawyer who gave him instructions for the preparation of the decedent's will and the revocation of a power of attorney. He sent a copy of the decedent's will to the referring lawyer along with an e-mail saying that the will had been prepared without talking or giving estate planning advice to Richard and appellant. The drafting lawyer spent minimal time with the couple on April 2, 2008, and he "acknowledged that he was uncomfortable with the circumstances surrounding his preparation of the 2008" will. In his testimony, the drafting lawyer repeatedly stated that he had trouble recalling the meeting, which was "vague" in his memory. The majority of his conversation was with appellant, who did most of the talking. If both lawyers are to be believed, Richard's April 2008 will drafted itself and miraculously appeared at the drafting lawyer's office on April 2.

Although appellant claimed that she first learned of the appointment with the drafting lawyer on the morning of April 2, she could not explain how the drafting lawyer obtained a copy of her earlier will and trust. In May, 2008, appellant sent the drafting lawyer two "doctor letters" stating that both she and her husband were of sound mind. The letters had been written in July, 2007, nine months before the execution of the 2008 wills. Appellant wanted the letters to be attached to both her will and Richard's. The drafting lawyer did not request these letters and recognized that they would have had little probative value since they had been written so long before the execution of the 2008 wills. This conduct suggests that, on her own, appellant was trying to overcome legitimate concerns about the circumstances surrounding the April, 2008 will.

The 2008 will completely transformed Richard's prior estate plan. In a 2006 will executed eight months after he met appellant, Richard devised the entire estate outright to his daughter, Patty, with his granddaughter as the alternate beneficiary. This will was consistent with an earlier will which provided for Richard's family. Prior to meeting appellant, Richard financially assisted his children. However, the 2008 will devised the entire estate to appellant, with an existing charity created by ***393** Richard as the alternate beneficiary. Four months after the execution of the 2008 will, the charity was dissolved and all of its assets were distributed to a New Hampshire beneficiary.

Before and during the marriage, appellant preyed on Richard's paranoia and mental infirmity to alienate the decedent from his two children and their families. Both of his children had enjoyed close, loving relationships with their father prior to his marriage to appellant. Richard and his daughter, Patty, had worked closely together at Sovereign Yachts. Communication with Patty dropped off once appellant took control of the couple's life. None of Richard's family or friends were invited

to the August 3, 2007 wedding. Whenever Richard's son, Brian, telephoned, appellant would immediately hang up if she answered the phone. Due to appellant's dislike of Brian's lifestyle, she and Richard did not attend Brian's wedding.

A significant insight into the dynamics of the marital relationship occurred when appellant inadvertently left a message on a cell phone of a former employee of Sovereign Yachts. She had dialed the number and forgot to hang up before she started in on Richard. On the voicemail, appellant was screaming at Richard that,

> Patty was still running the company, that she was—and that she was still running the company, she's lying to him, "She's no GD good, I told you so, I told you she's no GD good, she's just taking your money doing stuff behind your back, she's not telling you about this."

At the beginning of the message appellant said, "[s]ee, Richard, I told you the number is still working. I told you she is stealing from you. She's running the company and not telling you about it." Although appellant claimed that it was Richard's belief that Patty was stealing from him, it is clear that it was appellant who aggressively pushed this idea, without any evidence of Patty's wrongdoing. It is rare in a case like this to have such a glimpse into an abusive marital relationship.

Prior to the marriage, Patty took care of her father's personal finances and helped him pay his bills. After the 2007 marriage, appellant paid all the bills and wrote all the checks. In the summer of 2008, appellant wrote a letter in her own handwriting to Richard's life insurance company requesting that the beneficiary on his policy be changed from Patty to appellant. Appellant sent a similar handwritten request to the insurance company in 2010 and again in 2011, after Richard was hospitalized and diagnosed with severe dementia. At the time of this hospitalization, appellant contacted the drafting lawyer's law firm to send her estate planning documents for Richard and a durable power of attorney in favor of appellant; she said she would have the documents signed, witnessed, and notarized. The law firm complied with appellant's request. The trial judge found that if appellant were "so bold as to openly display such influence over [the decedent]," then the court could "reasonably infer that similar or greater influence was occurring in the dark during their marriage."

We give deference to the trial judge's detailed final judgment; she heard the evidence, questioned the witnesses, and observed their demeanor. On an evidentiary issue, we find no abuse of discretion in the trial court's consideration of Dr. Alexander's testimony.

Affirmed.

TAYLOR and LEVINE, JJ., concur.

All Citations

159 So.3d 390, 40 Fla. L. Weekly D678

End of Document

601 S.W.3d 77
Court of Appeals of Texas, El Paso.

IN RE the ESTATE OF Buford SCOTT, Jr., Deceased, Appellant.

No. 08-19-00011-CV
|
April 7, 2020

Synopsis

Background: Private investigator hired by testator, whose mental capacity to make his own financial and other life decisions had been disputed during his life, submitted testator's will, which included self-proving affidavit, to probate and was named executor of testator's estate. Testator's cousins filed petition to contest will. Investigator and his assistant filed conditional counterapplication to admit prior wills allegedly executed by testator in the event that self-proving will was found invalid. Following trial, the Probate Court No. 2, Tarrant County, No. 2015PR02393-2-A, Brooke Allen, J., declared all three wills invalid, based on jury findings that testator lacked testamentary capacity to sign non-holographic wills and signed all three wills as a result of undue influence, and denied probate and denied request by investigator and assistant for attorney fees and expenses. Investigator and assistant appealed.

Holdings: The Court of Appeals, Alley, C.J., held that:

[1] sufficient evidence supported finding that investigator and assistant exerted influence over testator's decision to draft first will;

[2] sufficient evidence supported finding that investigator and assistant overpowered testator's decision-making process as to first will;

[3] sufficient evidence supported finding that investigator and assistant had opportunity and motive to exert influence as to second will;

[4] sufficient evidence supported finding that investigator and assistant effectively asserted influence over susceptible testator as to second and third wills;

[5] testimony of psychiatrist sufficiently linked testator's physical ailments and mental status at time he executed wills in hospital; and

[6] private investigator and his assistant acted in bad faith and without just cause in offering wills to probate and defending them.

Affirmed.

West Headnotes (34)

[1] Wills Handwriting of testator
Wills Execution

If an instrument is wholly in the testator's handwriting and signed by the testator, with the intent to dispose of his property, the holographic will is generally considered to be valid. Tex. Estates Code §§ 251.051, 251.052.

[2] Appeal and Error Legal sufficiency or "no evidence" in general

A legal insufficiency challenge claims that there is “no evidence” to support a finding.

[3] Appeal and Error Legal sufficiency or "no evidence" in general

A reviewing court sustains a legal sufficiency challenge only if the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere

scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact.

[4] **Appeal and Error** Review for factual or legal sufficiency; "no evidence" review

In reviewing the record for legal sufficiency, the Court of Appeals credits the evidence favorable to the judgment if a reasonable fact finder could, disregards contrary evidence unless a reasonable fact finder could not, and reverses the fact finder's determination only if the evidence presented in the trial court would not enable a reasonable and fair-minded fact finder to reach the judgment under review.

[5] **Appeal and Error** Legal sufficiency or "no evidence" in general

When considering a factual sufficiency challenge brought by a party without the burden of proof at trial, the Court of Appeals considers all of the evidence and sets aside the judgment only if it is so contrary to the overwhelming weight of the evidence that it is clearly wrong and unjust.

[6] **Appeal and Error** Jury as Factfinder Below

Under the standards of review for legal and factual challenges to the sufficiency of the evidence, the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony.

[7] **Appeal and Error** Jury as factfinder below

Evidence Credibility of witnesses in general

The jury may choose to believe one witness and disbelieve another, and a court reviewing the sufficiency of the evidence must not impose its opinion to the contrary.

[8] **Appeal and Error** Jury as Factfinder Below

Appeal and Error Review for factual or legal sufficiency; "no evidence" review

Under both legal and factual sufficiency standards, the inferences drawn from the evidence are within the province of the jury, and a court reviewing the sufficiency of the evidence must assume that the jurors made all inferences in favor of the verdict if reasonable minds could do so and disregard all other inferences not so drawn.

[9] **Appeal and Error** Jury as factfinder below in general

Appeal and Error Reasonableness

If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so; a reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement.

[10] **Wills** Nature and degree in general

Generally, the term “undue influence” describes such influence or dominion as exercised at the time, under the facts and circumstances of the case, which destroys the free agency of the testator, and substitutes in the place thereof the will of another.

[11] **Wills** Nature and degree in general

The exercise of undue influence may be accomplished in many different ways: directly and forcibly, as at the point of

a gun, but also by fraud, deceit, artifice and indirection; by subtle and devious, but nonetheless forcible and effective means.

[12] **Wills** Nature and degree in general

Wills Importunity, persuasion and threats

Undue influence may take the form of force, intimidation, duress, excessive importunity or deception used in an effort to overcome or subvert the will of the maker of a testament and induce the execution thereof contrary to his will.

[13] **Wills** Fraud and undue influence in general

To prove undue influence, a will contestant must convince the fact finder of: (1) the existence and exertion of an influence; (2) that the influence subverted or overpowered the mind of the testator at the time of the execution of the testament; and (3) the maker would not have executed the testament but for that influence.

[14] **Wills** Fraud and undue influence in general

The burden is upon a will contestant to prove each of the elements of undue influence by a preponderance of the evidence.

[15] **Wills** Fraud and undue influence in general

Wills Circumstantial evidence

Undue influence can be established by direct or circumstantial evidence.

[16] **Wills** Circumstantial evidence

When relying on circumstantial evidence to prove undue influence to execute a testament, the evidence must be of a reasonably satisfactory and convincing character, and it must not be equally consistent with the absence of such influence; this is so because a solemn testament executed under the formalities required by law by one mentally capable of executing it should not be set aside upon a bare suspicion of wrongdoing.

[17] **Wills** Fraud and undue influence in general

Because undue influence may be part of a continuing scheme, the jury may consider events occurring both before and after the will execution in determining whether such undue influence is proven.

[18] **Contracts** Undue influence

Mere requests or efforts to execute a favorable instrument are not sufficient to establish undue influence unless the requests or efforts are so excessive so as to subvert the will of the maker.

[19] **Wills** Motive and opportunity of person receiving benefit

The fact that an individual had the opportunity to influence a testator, such as by being the testator's caregiver, is insufficient to establish undue influence.

[20] **Wills** Personal, confidential, or fiduciary relations in general

Wills Motive and opportunity of person receiving benefit

Sufficient evidence supported finding that private investigator and his assistant exerted influence over testator's decision to draft holographic will, as necessary for will to be rejected from probate as the product of undue influence, where when testator first met investigator and

assistant, he had no will and expressed no intent to draft a will, investigator spent months trying to convince testator to write will, investigator billed testator for time spent assisting him in preparing will, and investigator had taken over virtually all of testator's legal affairs by the time testator signed will.

[21] **Wills** Motive and opportunity of person receiving benefit

Sufficient evidence supported finding that private investigator and his assistant, who were hired by testator, had improper or fraudulent motive for influencing testator's decision to sign holographic will, as supported ultimate finding of undue influence, where will created charitable trust that would contain all of testator's assets upon his death, trust documents named investigator as trustee with unfettered decision-making authority, and after testator's death, investigator created charitable foundation in testator's name for which investigator and assistant were members of board of directors.

[22] **Wills** Nature and degree in general

Jury's finding that testator had capacity to execute holographic will did not foreclose finding that testator was unduly influenced to do so; testamentary capacity was separate issue from undue influence.

[23] **Wills** Nature and degree in general

Testamentary capacity and undue influence are separate and distinct questions.

[24] **Wills** Personal, confidential, or fiduciary relations in general

Sufficient evidence supported finding that private investigator and his assistant overpowered testator's decision-making process, as supported ultimate finding that testator's holographic will was product of undue influence, where psychiatrist who had examined testator in prior guardianship proceeding testified that testator's permanent traits of paranoia, mistrust of others, and cognitive impairments made him "extremely susceptible" to others' manipulation and control, testator had previously been manipulated into giving away large amount of money to person he believed was his friend, testator did not understand what was necessary to protect his assets, and investigator admitted he essentially dictated terms of will to testator.

[25] **Wills** Unequal, unjust, or unnatural disposition

Sufficient evidence supported finding that testator would not have disinherited his cousins and left his entire estate to charity but for influence of private investigator and his assistant, as supported ultimate finding that testator's holographic will was product of undue influence, where testator never told his attorneys he wished to disinherit his cousins and leave his money to charity, and testator expressed desire to die intestate, leaving estate to cousins, before meeting investigator and assistant.

[26] **Wills** Unequal, unjust, or unnatural disposition

When a jury is presented with two reasonable explanations for why a testator might draft a will that appears unnatural, the jury is free to choose between those explanations.

[27] **Wills** Motive and opportunity of person receiving benefit

Sufficient evidence supported finding that private investigator and his assistant had opportunity and motive to exert influence over testator regarding his second will, as necessary for will to be the product of undue influence, where after management trust originally placed over testator's finances in guardianship proceedings was lifted, testator quickly signed limited power of attorney giving investigator near-complete control over financial, legal, and medical decisions, investigator declined attorneys' offers to help testator draft formal will to replace holographic will and instead assisted testator himself, and will bequeathed two million dollars to investigator and assistant.

[28] **Wills** Insane Persons

Wills Use and effect of drugs

Wills Illness or debility

Sufficient evidence supported finding that private investigator and his assistant effectively asserted influence over susceptible testator at time he executed wills, where testator's permanent paranoia and cognitive impairments made him vulnerable to manipulation, testator was hospitalized with liver and kidney failure and was on narcotic medications when he executed wills, video recordings of will signings showed testator's weakness and confusion, investigator led testator through his responses on recordings to increase appearance of lucidity, testator gave investigator and assistant near-total power as agents over legal, medical, and financial matters, investigator drafted wills, and investigator misrepresented terms of wills to testator during will signings.

[29] **Wills** Physical and mental condition of testator

A testator's physical ailments may inform the jury of the testator's mental status, if the evidence sufficiently links the two at the time of a will signing.

[30] **Wills** Physical and mental condition of testator

Testimony of psychiatrist, who had examined testator five years before contested wills were executed, sufficiently linked testator's physical ailments at time he executed wills to testator's mental status, and, thus, testimony was admissible at will contest trial as relevant to issue of testator's physical incapacity to resist undue influence to make wills and susceptibility of his mind to such influence, where psychiatrist testified that testator's paranoia and cognitive impairments were permanent characteristics that were likely to get worse over time and that rendered him susceptible to manipulation, and that testator's liver and kidney failure, low oxygen levels, blood toxin levels, and narcotic pain treatment likely worsened his paranoia and cognitive difficulties.

[31] **Wills** Fraud and undue influence in general

Sufficient evidence supported finding that testator would not have signed wills but for influence of private investigator and his assistant, as necessary for wills to be the product of undue influence, where investigator, who drafted wills and had testator sign them in weakened and confused state, misled testator into believing that wills would leave majority of estate to charity rather than to investigator and assistant, and before meeting investigator and assistant, testator expressed intent to die intestate.

[32] **Executors and Administrators** Counsel Fees and Costs

Whether an executor acts in good faith and with just cause in prosecuting or defending a will, for purposes of attorney fees, is a question of fact to be determined by the jury upon a consideration of all of the circumstances of a case. Tex. Estates Code § 352.052.

[33] **Executors and Administrators** Counsel Fees and Costs

A finding that an individual procured a will by undue influence does not preclude a finding that the individual acted in good faith and with just cause in attempting to admit the will to probate or in defending the will against a will contest. Tex. Estates Code § 352.052.

[34] **Executors and Administrators** Probate and contest of will

Private investigator and his assistant acted in bad faith and without just cause in offering testator's wills to probate and defending them from undue influence challenges, and, thus, award of attorney fees was unwarranted, where sufficient evidence supported jury's findings that each will was product of long-term scheme of investigator and assistant to unduly influence vulnerable testator into leaving his estate to them rather than to charity or to cousins. Tex. Estates Code § 352.052.

***82** Appeal from the Probate Court No. 2 of Tarrant County, Texas (TC# 2015PR02393-2-A), Brooke Allen, Judge

Attorneys and Law Firms

ATTORNEY FOR APPELLANTS, Kenneth A. Krohn, Ford + Bergner LLP, 700 Louisiana St Ste 4800, Houston, TX 77002-5824.

ATTORNEY FOR APPELLEES, James J. Hartnett Jr., The Hartnett Law Firm, 2920 N Pearl St, Dallas, TX 75201-1108.

Before Alley, C.J., Rodriguez, and Palafox, JJ.

OPINION

JEFF ALLEY, Chief Justice

This is a will contest. Actually, it is a wills contest (plural) because three wills are at issue and a jury found two were signed without testamentary capacity, and all three were signed as the result of undue influence. The decedent and maker of the wills is Buford Scott, Jr. (Buford). The proponents of the wills are the Appellants here, Geoffrey Tait and Irene Rueda. The antagonists of the wills, and Appellees here, are John Paul Scott, III and Vinnie V. Dungan. The jury also found that the will proponents did not act in good faith in opposing the will contest, and that they were therefore not entitled to attorney's fees. On appeal, the will proponents argue that the evidence was both factually and legally insufficient to support the jury's findings. Because we find sufficient evidence to support the jury's finding that all three wills were signed as the result of undue influence, and that Appellants did not act in good faith in defending the wills, we affirm. Our view of the undue influence findings means that we need not address challenges to the jury's testamentary capacity findings, or a question on revocation of one of the wills. It does mean, however, that we need to supply the reader with a detailed recitation of the evidence.

I. Background

A. Factual Background

Buford Scott, Jr., who never married and had no children, grew up on a ranch in Cresson, Texas, where he lived until his death in August of 2015. For most of his life Buford lived a sheltered existence with

his immediate family members. Buford who had a below average IQ and some cognitive impairments, did not graduate from high school until he was 22 years old, and was never regularly employed outside of working on his family's ranch. His parents and his only sibling predeceased him, each dying intestate. When his mother passed away in 2003 or 2004, Buford inherited a substantial estate, but was left to live alone on the ranch.

1. The Creation of the management trust in 2008

After Buford's mother passed away, his mother's attorney expressed concern about Buford's ability to live on his own, and thereafter initiated a guardianship proceeding in the Hood County Court. In ***83** 2007, that court appointed both a guardian ad litem and an attorney ad litem to represent Buford's interests. The guardian ad litem filed an application to place Buford under a guardianship management trust pursuant to the then applicable Section 867 of the Texas Probate Code.[1] The court ordered Buford to undergo a mental health evaluation by Dr. Larry Padget, a local general practitioner, who determined that Buford was "mentally retarded," and suffered from substance or alcohol abuse or both.[2] Dr. Padget further reported that Buford was unable to make his own financial, medical, or other decisions, and was totally incapacitated. The court agreed, and issued an order creating a management trust, expressly finding that Buford was "completely without capacity as provided by the Texas Probate Code to manage his property[.]" The court placed all of Buford's assets into a trust managed by a local bank.

1 The Texas Probate Code was repealed and replaced with the Texas Estates Code by Act of June 17, 2011, 82nd Leg., R.S., ch. 823, 2011 Tex.Gen.Laws 1901. The current Code provision relating to management trusts is found in Chapter 1301 of the Texas Estates Code. *See* Tex.Est.Code Ann. § 1301.051, et seq.

2 The Diagnostic and Statistical Manual for Mental Disorders (DSM-5) now uses the term intellectual disability. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 5th ed. (2013). *See also Ex parte Cathey*, 451 S.W.3d 1, 11 n.23 (Tex. Crim. App. 2014) (noting change from "mental retardation" to "intellectual disability" by the American Association on Intellectual and Developmental Disabilities).

Upset about the bank's control of his money, Buford retained an attorney who filed a motion to set aside the trust on Buford's behalf in March of 2009. The motion attacked the court's order creating the trust on several procedural grounds, including that the court did not follow the proper procedures in appointing the guardian ad litem or in making its determination that Buford was incapacitated. The court thereafter replaced Buford's guardian ad litem with a new ad litem who requested a psychiatric report to determine Buford's mental capacity. The court granted the request and appointed psychiatrist Dr. Lisa Clayton to perform the psychiatric evaluation.

2. Dr. Clayton's psychiatric report

Dr. Clayton evaluated Buford on February 22, 2010. In her report, Dr. Clayton noted that Buford admitted that he had not taken very good care of his financial affairs after his mother died, and that he "did need help" with his finances. Although she disagreed with Dr. Padget's assessment that Buford was "mentally retarded," she believed that Buford's IQ was below average, that he suffered from learning disabilities, and evidenced various cognitive impairments. He also exhibited some degree of paranoia, poor insight, and impaired personal judgment. Dr. Clayton concluded that Buford was unable to take care of himself independently, noting, among other things, that Buford had rotting teeth, did not have a primary care doctor, and did not appear to be well-groomed. In addition, she concluded that Buford was "extremely susceptible to the manipulation and control by others" due in part to his below average intelligence and paranoid tendencies. She noted that Buford had previously been manipulated by an individual who convinced him to pay for assistance in obtaining some unclaimed property located in Oklahoma. In her report, Dr. Clayton advised the court that she believed Buford was "partially incapacitated" and needed a partial guardianship with regard to managing his financial and business affairs.

***84** *3. The August 2011 settlement agreement*

In August of 2011, Buford settled the dispute raised in his pending motion to terminate the management trust. He agreed to allow the management trust to continue with modifications, which allowed him to retain his personal property and to open his own bank account. The bank trustee agreed to pay Buford $800.00 a week for his personal use. The agreement further stated that the "temporary guardianship" under which Buford had been placed was to be dismissed, as were all court appointees.

4. Buford hires Geoffrey Tait and Irene Rueda

Despite signing the settlement agreement, Buford continued to be dissatisfied with the bank's control of his assets. After unsuccessfully asking his friends for assistance, in June 2012 Buford contacted a private investigator, Geoffrey Tait, whose name he found in a phone book. Tait, and his assistant, Irene Rueda, agreed to assist Buford with his efforts to have the management trust lifted. In addition, Tait and Rueda soon began providing Buford with other services, including cleaning, cooking, bill paying, shopping, and running errands. In fact, Rueda testified that she saw Buford almost every day for three years until his death in August of 2015. During these three years, Tait and Rueda submitted numerous invoices to Buford, billing him tens of thousands of dollars for their investigation and other services. In addition, Buford gave both Tait, Rueda, and their family members bonuses and gifts, including a $5,000.00 gift to Tait's wife, despite the fact that Buford had admittedly never met his wife. In addition, the record contains evidence that Buford made large cash withdrawals from his account during the time that Tait and Rueda were providing services to him, some of which were signed by Tait, acting on Buford's behalf.

5. The March 23, 2013 Holographic Will

[1] Buford did not have a will when he first met Tait and Rueda, and as early as August 2012, Tait began discussing the need for Buford to sign various legal documents, including a will, a trust instrument, and a power of attorney. In February of 2013, Tait contacted attorney Scott Moseley to discuss the possibility of hiring him to assist Buford with lifting the management trust, and with drafting a will or trust documents for Buford to sign. During one of their discussions, Moseley informed Tait that Buford could draft a handwritten holographic will, rather than a formal will, and further explained to Tait the legal requirements for making such a will.[3]

3 Although a will must typically be signed by a testator in the presence of two witnesses, who must then subscribe their names to the will, a holographic will need not be so witnessed. Tex.Est.Code Ann. §§ 251.051, 251.052. Thus, if an instrument is wholly in the testator's handwriting and signed by the testator, with the intent to dispose of his property, the will is generally considered to be valid. *See Lemus v. Aguilar*, 491 S.W.3d 51, 56 (Tex.App.--San Antonio 2016, no pet.).

On March 23, 2013, Buford signed a three-page will that was all in his own handwriting. That document stated that he wished to create the "Buford Scott, Jr., Charitable Trust," in which all of his assets would be placed at the time of his death. In the will, Buford stated that he was aware that he had cousins, uncles and aunts, but that he did not wish to leave any of his money or property to them. At the time, Buford actually did not have any living aunts and uncles, but he did have cousins. He was upset with the cousins as he believed they had either initiated or participated in the earlier guardianship ***85** proceedings, and that they were trying to take his money.[4]

4 Although there is no evidence that Buford's cousins actively sought the guardianship, there is evidence that some of them spoke with the guardian ad litem about the court proceedings and that some of them, including the two will contestants, may have attended court hearings in the guardianship case.

On the same day that Buford signed the will, Tait emailed a copy of it to Moseley, asking if it met the legal requirements for a holographic will. Moseley responded that although the will appeared to comply with the basic legal requirements for a holographic will, he believed that the will could be improved by naming an executor or trustee, and by naming the

charity or charities that Buford wished to benefit by the proposed trust. Moseley offered to assist Buford by drafting a "formal will" for him, and in particular, recommended the creation of a trust with a pour over will. The original of the Holographic Will was never found, and Appellants later used the copy sent to attorney Moseley as proof that it was made.

A short time later, Tait advised Moseley that Buford had "added a lot more to his will" and that he would "have him finish his holographic will" and send it to Moseley for review. In addition, Tait advised Moseley that he had already drafted yet another will--presumably a formal one--for Buford to sign after the management trust was lifted, together with trust documents which would create a new trust into which all of Buford's assets were to be transferred. Moseley ultimately declined to represent Buford. Tait thereafter contacted attorney Pam Walker, and in March of 2014, she agreed to assist Buford with filing an application to restore him to full legal capacity.

6. The management trust is lifted in November of 2014

Tait contacted two psychologists, Drs. Earl Johnson and Stephen Karten, as well as a psychiatrist, Dr. Jeffrey Schlueter, to conduct mental status evaluations of Buford in aid of establishing that he was not in need of a management trust or a guardianship. In their written reports, all three experts agreed that despite Buford's below-average IQ, Buford was not incapacitated and had sufficient mental capacity to make his own financial, medical and other decisions. Based on these reports, on November 4, 2014 the trial court restored Buford to full legal capacity. Thereafter, attorney Walker suggested that Buford create a formal will, but Tait sent an email to Walker, stating that Buford did not need her assistance, as he (Tait) had already prepared a will for Buford to sign. Tait explained he had downloaded a will template from the internet and that he was "working on" convincing Buford to sign the will as well as various trust documents that he had also prepared. Although Tait indicated that he would bring the will and trust documents for Walker to review, Walker stated that Tait never did and that he essentially "disappeared" after the management trust was lifted.

A month later, Buford signed a "Limited Power of Attorney" giving Tait the right to make personal, financial, and other decisions on Buford's behalf.

7. The July 10, 2015 "Annie Green Will"

In early July of 2015, both Tait and Rueda noticed that Buford lost a significant amount of weight and they became concerned about his health. At that time, Tait drafted a will for Buford to sign, using a will template that he had obtained some years earlier. On July 10, 2015, Tait videotaped Buford at his home signing the will; however, Tait failed to arrange for a notary ***86** public or for any individuals to be present to witness Buford's signature. Despite being a notary public himself, and admittedly knowing that it was against the rules, Tait took the will to notary Annie Green and asked her to notarize it for him. She refused.

Although the parties discussed the so-called "Annie Green Will" at trial, neither the will nor the videotape recording was introduced at trial. Tait claimed that the recording had inadvertently been destroyed due to problems with Rueda's computer where it had been stored. However, Tait testified that the "Annie Green Will" made substantially the same bequests as did the next two wills that Buford signed in July and August of 2015, both of which are described below, and both of which left significant bequests to Tait and Rueda.

8. The July 21, 2015 Will

Buford was admitted to the hospital on July 19, 2015 and diagnosed with terminal esophageal cancer; he died a month later. On his second day at the hospital (July 21, 2015) Buford signed another will that Tait had drafted (the "July Will"). Tait was unable to produce a copy of the July Will, and stated that he believed it was destroyed when Buford signed his last and final will the next month. However, Tait videotaped the signing of the July Will, and that videotape was played for the jury. In the videotape, Buford is seen lying in a hospital bed as Tait summarized the terms of the will. In his summary, Tait told Buford: "You've made bequests to several different people, you've made bequests to me, you've made bequests to [Rueda] [and] you've made the majority of your bequests to the

Buford Scott Charitable Trust, right?" Buford agreed, and Tait next confirmed that Buford was not leaving anything to his cousins. Buford then explained that he believed his cousins had attended two hearings when the court was considering whether to place his assets in the management trust, and he faulted them for not opposing the trust and for allowing the judge to take his property away from him.

9. The August 13, 2015 Will

Tait next consulted with another attorney, Paul Wieneskie, regarding the validity of the July Will, and was told that although the will was valid, it would have been preferable to include a self-proving affidavit, and to have included more specificity with regard to the creation of the charitable trust. Tait subsequently revised the will to include the affidavit and to "[add] more meat to the charitable trust" provisions. Tait arranged for another formal will signing on August 13, 2015, while Buford was in an assisted nursing facility. According to Tait, the July and August Wills were virtually identical to each other with the two exceptions discussed above.

Although Tait did not videotape the entire signing of the August Will, he did conduct a videotaped interview with Buford afterwards. In this videotape, Buford acknowledged his awareness of the will's provisions. Tait then summarized the provisions of the will, stating that Buford had left a "large bequest" to the Charitable Trust, to be distributed in accordance with Buford's wishes, and that he had also "left things" to Tait, Rueda, and five others mentioned in the will. Buford expressly denied being coerced into signing the will, and stated that he had intentionally not left anything to his cousins because "they didn't want me to have a country to live in," further explaining that he believed his cousins had supported the court in taking away his rights when the management trust was imposed.

The August Will, which revoked all prior wills and named Tait as Executor, requested ***87** that Tait create "The Buford Scott, Jr. Charitable Trust, or the Buford Scott, Jr. Charitable Foundation." Tait was named as the "initial and permanent Trustee, Administrator, Executive or overseer of whatever such business he shall create, until such time as he is replaced by death or operation of law." It further stated that Tait "shall have the sole and final authority to determine what type of business entity ... shall be formed and what provisions it shall include, so long as it fulfills my desire to provide help to people who face an unfair judicial system, or incompetent and unscrupulous lawyers." The will provided that the Charitable Trust was to be funded by certain mineral and leasing rights that Buford owned in both Texas and Oklahoma. The record contains evidence that Tait was aware at the time Buford signed the August Will that the leasing rights were not producing, and that they were valued at only $32,500.00.

With the exception of Buford's household furniture and clothing, which he gave to Goodwill, the August Will gave Tait and Rueda all of his real property and his personal property, in addition to $350,000 in cash to Tait, and $200,000 in cash to Rueda. The Will further named Rueda's children and Tait's wife as alternate beneficiaries in the event they predeceased him. In the will, Buford stated that the bequests were made to Tait and Rueda, due to his gratitude to them for assisting him with his legal problems and for helping him through his final illness. The bequests given to Rueda and Tait in the August Will were valued at approximately 2.4 million dollars.

And finally, Buford included a paragraph expressly disinheriting his cousins, stating that he was doing so because they had failed to speak up on his behalf during the guardianship proceedings, and had allowed the Hood County Court to set up the management trust. Buford died five days after he signed the August Will. Buford's cousins, however, were unaware of Buford's death until several months later when Tait returned one of their calls to tell them of his passing.

B. Procedural History

After Buford's death, Tait submitted the August Will to probate, and the court named him as executor of Buford's estate.[5] Upon learning of the court proceedings, Buford's cousins, John Paul Scott, III and Vinnie Dungan, filed a petition to contest the will. The petition alleged that Buford lacked the requisite testamentary capacity to sign the August Will and that he had been "unduly influenced" into signing it by Tait and Rueda. They sought a

declaration that the will was invalid and that Buford had died intestate. As the cousins were Buford's only remaining family members, if Buford died intestate, his entire estate would pass to them under the Texas intestate succession laws. Tex.Est.Code Ann. § 201.001. Tait and Rueda thereafter filed a conditional counterapplication seeking to admit the July Will or the March 2013 Holographic Will to probate in the event that the August Will was found to be invalid.

5 Although Tait and Rueda were given all of Buford's real property in the August Will, they nevertheless billed the estate for thousands of dollars as "property management fees" for their efforts in cleaning up the property

The matter was tried to a jury that found:

1. Buford lacked testamentary capacity to sign the August 13, 2015 will, and ***88** signed it as the result of undue influence.

2. Buford lacked testamentary capacity to sign the July 21, 2015 will, and signed it as the result of undue influence.

3. Buford had testamentary capacity to sign the March 23, 2013 Holographic Will, but signed it as the result of undue influence. The jury otherwise found that the Holographic Will was wholly in Buford's handwriting, and was intended to dispose of his property.

4. Buford subsequently revoked the March 23, 2013 Holographic Will.

5. Tait and Rueda did not act in good faith or with just cause in submitting the wills to probate or defending the wills during the will contest proceedings.

The trial court's final judgment declared all three wills invalid and denied probate as to each of them. The court further denied Tait and Rueda's request for attorney's fees and expenses in defending against the will contest.

On appeal Tait and Rueda (hereinafter Appellants) raise 17 issues, contending that the evidence is both legally and factually insufficient to support any of the jury's findings as summarized above. We distill Appellants' arguments into three broad categories, starting with the jury's findings with respect to (1) the validity of the March 2013 Holographic Will, (2) the validity of the July and August Wills, and (3) the jury's finding that Appellants did not act in good faith in submitting the wills to probate and/or in defending against the will contest.

As Appellants arguments all turn on challenges to either the legal or factual sufficiency of the evidence to support the jury's findings, we start with our standard of review.

II. Standard of Review

[2] **[3]** **[4]** A legal insufficiency challenge claims that there is "no evidence" to support a finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). We sustain a legal sufficiency challenge only if the "record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact." *Id.* at 810. In reviewing the record for legal sufficiency, we credit the evidence favorable to the judgment if a reasonable fact finder could, disregard contrary evidence unless a reasonable fact finder could not, and reverse the fact finder's determination only if the evidence presented in the trial court would not enable a reasonable and fair-minded fact finder to reach the judgment under review. *Id.* at 827.

[5] Appellants also raise factual sufficiency challenges. When considering a factual sufficiency challenge brought by a party without the burden of proof at trial, we consider all of the evidence and set aside the judgment only if it is so contrary to the overwhelming weight of the evidence that it is clearly wrong and unjust. *City of El Paso v. Parsons*, 353 S.W.3d 215, 225 (Tex.App.--El Paso 2011, no pet.), *citing* *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *see also* *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (requiring appellate court that overturns a verdict on factual insufficiency grounds to explain why evidentiary discrepancy is

"manifestly unjust; why it shocks the conscience; or clearly demonstrates bias").

[6] **[7]** **[8]** **[9]** Under either standard, the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Parsons*, 353 S.W.3d at 225. ***89** The jury may choose to believe one witness and disbelieve another, and we must not impose our opinion to the contrary. *Id., citing City of Keller*, 168 S.W.3d at 819. The inferences drawn from the evidence are also within the province of the jury, and we must assume that the jurors made all inferences in favor of the verdict if reasonable minds could do so and disregard all other inferences not so drawn. *Id.* at 820-21. "If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *Id.* at 822.

III. Discussion

A. The Validity of the March 2013 Holographic Will

In Issues Two through Four, Appellants contend that there was both legally and factually insufficient evidence to support the jury's finding that Buford was unduly influenced into signing the March 2013 Holographic Will. In addition, Appellants argue in Issue One that the record contains no evidence to support the jury's finding that Buford subsequently revoked the Holographic Will. If we conclude that there was sufficient evidence to support the jury's finding on undue influence, we need not reach the issue of whether Buford revoked the Holographic Will. We therefore start with whether the Holographic Will was signed as the result of undue influence.

1. The law on undue influence

[10] **[11]** **[12]** Generally, the term undue influence describes "such influence or dominion as exercised at the time, under the facts and circumstances of the case, which destroys the free agency of the testator, and substitutes in the place thereof the will of another." *Long v. Long*, 133 Tex. 96, 125 S.W.2d 1034, 1035 (1939). As this Court has recognized, "[t]he exercise of undue influence may be accomplished in many different ways--directly and forcibly, as at the point of a gun; but also by fraud, deceit, artifice and indirection; by subtle and devious, but none-the-less forcible and effective means." *In re Olsson's Estate*, 344 S.W.2d 171, 173-74 (Tex.Civ.App.--El Paso 1961, writ ref'd n.r.e.). Or as the Texas Supreme Court stated, undue influence may take the form of "force, intimidation, duress, excessive importunity or deception used in an effort to overcome or subvert the will of the maker of the testament and induce the execution thereof contrary to his will." *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

[13] **[14]** To prove undue influence, the contestant must convince the fact finder of: (1) the existence and exertion of an influence; (2) that the influence subverted or overpowered the mind of the testator at the time of the execution of the testament; and (3) the maker would not have executed the testament but for that influence. *Id.* The burden is upon the contestant to prove each of these allegations by a preponderance of the evidence. *Woods' Estate*, 542 S.W.2d 845, 846 (Tex. 1976); *see also Matter of Kam*, 484 S.W.3d 642, 651-53 (Tex.App.--El Paso 2016, pet. denied) (recognizing that once evidence established that will was signed in compliance with all statutory requirements, the burden shifted to will contestant to establish that the will should be voided as the product of undue influence).

[15] **[16]** **[17]** Undue influence can be established by direct or circumstantial evidence. *Olsson's Estate*, 344 S.W.2d at 175; *see also Rothermel*, 369 S.W.2d at 922 (recognizing that undue influence may be proven by direct or circumstantial evidence). However, ***90** when relying on circumstantial evidence, the evidence must be of a "reasonably satisfactory and convincing character, and they must not be equally consistent with the absence of such influence." *Rothermel*, 369 S.W.2d at 922. "This is so because a solemn testament executed under the formalities required by law by one mentally capable of executing it should not be set aside upon a bare suspicion of wrongdoing." *Id.* at 922-23. Because undue influence may be part of a continuing scheme, the jury may consider events occurring both before and after the will execution. *Id.* at 922 (recognizing that proof of undue influence

often involves an "extended course of dealings and circumstances").

[18] **[19]** Some evidence, however, falls short of the mark. "Mere requests or efforts to execute a favorable instrument are not sufficient to establish undue influence unless the requests or efforts are so excessive so as to subvert the will of the maker." *Matter of Kam*, 484 S.W.3d at 652, *quoting In re Estate of Clifton*, No. 13-11-00462-CV, 2012 WL 3139864, at *2 (Tex.App.--Corpus Christi Aug. 2, 2012, no pet.) (mem. op., not designated for publication). Similarly, the fact that an individual had the opportunity to influence the testator, such as by being the testator's caregiver, is insufficient to establish undue influence. *Rothermel*, 369 S.W.2d at 923; *see also Woods' Estate*, 542 S.W.2d at 848.

In *Rothermel*, the Texas Supreme Court laid out a non-exhaustive list of ten factors that courts should consider in assessing undue influence:

> (1) the nature and type of relationship existing between the testator, the contestants, and the party accused of exerting such influence;
>
> (2) the opportunities existing for the exertion of the type or deception possessed or employed;
>
> (3) the circumstances surrounding the drafting and execution of the testament;
>
> (4) the existence of a fraudulent motive;
>
> (5) whether there had been a habitual subjection of the testator to the control of another;
>
> (6) the state of the testator's mind at the time of the execution of the testament;
>
> (7) the testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted;
>
> (8) words and acts of the testator;
>
> (9) weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise;
>
> (10) whether the testament executed is unnatural in its terms of disposition of property.

Matter of Kam, 484 S.W.3d at 651-53, *citing Rothermel*, 369 S.W.2d at 923. The first five factors on this list "address the first element of undue influence (i.e., whether such influence existed and was exerted with respect to the testament at issue); the next four factors concern the second element (i.e., whether the testator's will was subverted or overpowered by such influence); and the tenth factor is relevant to the third element (i.e., whether the testament would have been executed but for such influence)." *Kam*, 484 S.W.3d. at 652-653, *citing In re Estate of Clifton*, 2012 WL 3139864, at *3.

2. The existence and exertion of an influence

[20] Appellants argue that the evidence fails to support a finding that they exerted any influence over Buford's decision to draft the Holographic Will, contending that, at most, the evidence suggested that Tait was merely present when Buford drafted the will. This argument, however, overlooks several key items of evidence.

***91** First, the undisputed evidence demonstrated that when Buford first met Tait and Rueda, he did not have a will, and had not expressed any intent to draft a will; to the contrary, in his 2010 meeting with Dr. Clayton, Buford told her that his family did not write wills and that they had all died intestate. Tait himself admitted that when he initially suggested to Buford that he should draft a will, Buford was resistant to the idea, and that he spent several months trying to convince Buford of the need to do so. Tait's efforts were documented in two emails that he sent to attorney Pam Walker in October of 2014, in which he stated that he had been "working on" Buford for two years to get Buford to "trust" him enough to follow his advice, and that it took "several months" before he "finally got [Buford] to write out a holographic will."[6] In addition, Tait submitted an invoice to Buford billing him for his assistance in preparing the Holographic Will, expressly stating that Tait spent four and a half hours at Buford's home on March 23, 2013, "to help him prepare will."[7]

6 As well, Tait's own time-log indicates that he began discussing the need for a will with Buford

as early as August 13, 2012, two months after he and Rueda first met with Buford.

7 Tait also submitted a bill to Buford for assisting him with making changes or additions to the Holographic Will after he received feedback from Moseley about the will's deficiencies.

Moreover, the record demonstrates that by the time Buford signed the Holographic Will, Tait had taken over virtually all of Buford's legal affairs, was corresponding directly with the attorneys and experts who had been retained to assist Buford in lifting the management trust, and Tait accompanied Buford to virtually every meeting he had with his attorneys to discuss his legal issues. We therefore conclude that there was both legally and factually sufficient evidence to support a finding that Appellants, and Tait in particular, had a clear opportunity to exert their influence on Buford's decision to sign the Holographic Will.

[21] Appellants, however, contend that even if they had an opportunity to influence Buford's decision to sign the Holographic Will, there was no evidence to support a finding that they had an "improper or fraudulent motive" for doing so, as the will did not name either of them as beneficiaries. Appellants are correct that the Holographic Will did not make a direct bequest to either of them. However, there is evidence that Appellants could have indirectly benefitted by the Holographic Will, based on the will's creation of the "Buford Scott, Jr. Charitable Trust," into which all of Buford's assets were to be placed upon his death. In particular, the first draft of the trust document named Tait as trustee. The trust documents which were eventually signed as part of the August Will also named Tait as the trustee and gave him unfettered decision-making authority with respect to how to conduct the business of the trust. After Buford's death, Tait filed a certificate of formation of a non-profit corporation creating the "Buford Scott, Jr. Charitable Foundation," in which he listed himself, Rueda, and one other person as the sole members on the Board of Directors. From this, the jury could have inferred that Appellants influenced Buford to sign the Holographic Will that would in turn place them in control of the trust and its assets.

3. Appellants' influence was effectively asserted

Appellants next argue that the evidence was insufficient to support a finding that ***92** their influence was effectively asserted, or in other words, there was no evidence that Buford's will was overborne by them at the time he signed the Holographic Will. In particular, Appellants contend that there was no evidence to suggest that "Buford's mind was weak or that he was easily subjected to the influence of others at the time the Holographic Will was adopted."

[22] **[23]** In making this argument, Appellants first contend that the jury impliedly rejected the notion that Buford had any mental weakness because they found he had testamentary capacity to sign the Holographic Will. Yet testamentary capacity and undue influence are separate and distinct questions. *Rothermel*, 369 S.W.2d at 922 (noting that undue influence in the procurement of a will is a ground for contesting a will "separate and distinct from the ground of testamentary incapacity"). Accordingly, the jury's finding that Buford had testamentary capacity does not foreclose a finding that he was controlled by Appellants' actions.

[24] Next, Appellants argue that the uncontroverted evidence demonstrated that they did not overpower Buford's decision-making process. In particular, Appellants contend that the evidence demonstrated that Buford was an unusually stubborn individual, who was not easily influenced or controlled, and that he generally did not trust others, especially when it came to his finances. Several witnesses, including three of Buford's long-time family friends and his former attorney, Pam Walker, described Buford as being "quite stubborn" and "damn hard-headed."[8] True as that may be, there was also evidence that Buford was susceptible to the very type of influence that Tait and Rueda exerted over him. For example, Dr. Clayton, who examined Buford in 2010, believed that Buford exhibited signs of paranoia and was distrustful which, combined with his cognitive impairments, made him "extremely susceptible to the manipulation and control by others." In addition, at trial, Dr. Clayton opined that Buford did "not have the cognitive ability to access and determine the motives of others," and that in particular, he was "very susceptible to being taken advantage [of] by people that he thought were his

friends and yet were only using him for his money." This had happened in the past when a person Buford believed was his friend manipulated him into giving away a significant amount of money. She further testified that Tait and Rueda had manipulated Buford by "feeding into [Buford's] paranoid delusions" about his cousins' role in the guardianship proceedings, in order to influence Buford's decision to disinherit them.

8 Each of the three friends or their spouses were named as beneficiaries in Buford's August Will, and therefore had a vested interest in convincing the court that Buford was not unduly influenced by Appellants.

Appellants, however, contend that Dr. Clayton's opinion should not be considered because her examination was done some three years before execution of the Holographic Will. Dr. Clayton explained at trial, however, that the traits that she described in her report, (Buford's learning disabilities, his paranoia, and his susceptibility to undue influence) were of a "permanent" nature and were not likely to change or improve. In fact, she opined that, if anything, these traits were likely to get worse over time.

Moreover, attorney Pam Walker, who represented Buford shortly after he signed the Holographic Will, testified that she believed Buford had "paranoid" tendencies, and found him to be "susceptible" to being influenced by someone he trusted. ***93** She further believed--after learning that Buford had left the bulk of his estate to Appellants in his August Will--that Appellants had taken advantage of Buford's paranoid tendencies, and had fueled his suspicions about the cousins' role in the earlier guardianship proceedings to serve their own purposes.[9] In particular, Walker recalled that on at least two occasions Tait "bad-mouthed" Buford's cousins in front of Buford.

9 In addition, Walker testified at trial that she felt "duped" by Appellants and believed that they had misled her and the experts they retained in the action to lift the guardianship into believing that Buford was living more independently than he actually was. In particular, she believed that Appellants had not disclosed to her, or to the expert witnesses that they were providing significant assistance to Buford, making it seem as if he was managing his life on his own, and ensuring that he presented in a well-groomed fashion when he met with them.

Tait himself admitted that Buford exhibited irrational and paranoid tendencies, had a general distrust of the judicial system, and often did not understand what was necessary to protect his assets. More importantly, Tait admitted at trial that despite Buford's paranoid tendencies and his stubborn nature, he was able to "influence" Buford to do what he thought was in his best interest to "protect" Buford's finances and in particular to draft the Holographic Will.

The record also contains evidence from which the jury could have inferred that Tait did more than simply convince Buford to draft the Holographic Will. In particular, attorney Pam Walker and Buford's cousins testified that based on their experience with Buford, they did not believe he was capable of writing the Holographic Will on his own, and that they believed it may have been dictated to him, or that Buford had copied it from another writing. And Tait all but admitted that he was in control of dictating the terms of the Holographic Will to Buford, as he responded to attorney Scott Moseley's critique of the Holographic Will in an email as follows: "If I'd known [the Holographic Will] should include most the [sic] same language of a more formal Texas will as you now indicate, *I'd have had him write it differently*," and that he intended to have Buford "add additional provisions to his Will as you suggest." (emphasis added).

Accordingly, we conclude that the record contains both factually and legally sufficient evidence to support a finding that Buford was susceptible to Appellants' influence and that Appellants effectively asserted their influence by not only convincing Buford to draft the Holographic Will but by controlling and directing his actions in doing so.

4. Buford would not have executed the Holographic Will but for Appellants' influence

[25] Appellants next contend that the evidence was insufficient to support a finding that Buford would not disinherit his cousins and leave his entire estate to charity, but for Appellants' influence. According to Appellants, there was nothing "unnatural" about Buford's decision to do so, and that to the contrary,

the decision was reasonably explained by the fact that Buford was upset with his cousins for their alleged role in the prior guardianship proceedings and by the fact that he did not have any significant relationship with them. Appellants further contend that Buford told both attorneys Moseley and Walker of his intent to disinherit his cousins and of his intent to leave his estate to charity, thereby demonstrating that the Holographic Will expressed his "true wishes." And according to Appellants, there is nothing in ***94** the record to rebut these assertions. We disagree.

First, there is nothing in the record to indicate that Buford made any statements to either Moseley or Walker expressing his intent to disinherit his cousins or his intent to leave his money to charity. Although Moseley recalled that Buford informed him that he was angry with his cousins for their alleged involvement in the guardianship proceedings, he did not recall if Buford ever expressed any intent to disinherit them. Similarly, Walker testified that when she spoke with Buford about the possibility of drafting a formal will in November of 2014, Buford did not tell her how he wanted to dispose of his estate, and instead indicated that he had not yet decided what to do with his money and that he needed time to think about it. He made this statement despite the fact that he had signed the Holographic Will over a year and half prior to that meeting. Further, Walker recalled that although she suggested to Buford that he had the option of leaving his money to charity, Buford never indicated that he intended to do so.

We nevertheless recognize that Buford's decision to disinherit his cousins and to give his money to charity, without more, is not necessarily indicative of an unnatural disposition and does not prove that the decision was the product of undue influence. *See generally Estate of Davis v. Cook*, 9 S.W.3d 288, 294 (Tex.App.--San Antonio 1999, no pet.) (recognizing that testator's decision to exclude nieces and nephews in favor of charities, without more, did not establish an unnatural disposition or the existence of undue influence). However, there are several factors that the jury could have considered in finding that Buford's disposition was in fact unnatural and was the result of Appellants' undue influence. Before meeting Appellants, Buford had expressed an intent to die intestate, which meant that his cousins would have inherited his entire estate. The jury could have concluded that Appellants spent months fueling Buford's animosity towards his cousins and convinced him to sign the Holographic Will disinheriting them. In addition, there is nothing in the record to suggest that Buford had previously given any consideration to leaving his estate to charity before he met Appellants, or that he had even donated to a charity in the past.

[26] Thus, the jury was presented with two alternative explanations for why Buford signed the Holographic Will--either Buford had formulated a true intent to disinherit his cousins and leave his estate to charity, or his decision to do so was influenced by Appellants' long-term plan to take control of his estate. When, as here, a jury is presented with two reasonable explanations for why a testator might draft a will that appears unnatural, the jury is free to choose between those explanations. *See, e.g., In re Estate of Johnson*, 340 S.W.3d 769, 783-784 (Tex.App.--San Antonio 2011, pet. denied) (when a jury is faced with alternative explanations for why a testator might otherwise draft a will that appears unnatural, the jury is free to determine which of the explanations it finds more credible); *see also In re Estate of Luthen*, No. 13-12-00576-CV, 2014 WL 6632952, at *7-8 (Tex.App.--Corpus Christi Nov. 24, 2014, no pet.) (mem. op., not designated for publication) (recognizing that when "competing explanations are advanced" by the parties with regard to a testator's reason for disinheriting a family member, "the jury must determine which explanation should be given more weight and which explanation is more credible.").

In this case, there was both factually and legally sufficient evidence for the jury to choose Appellees' theory that Buford was in fact influenced by Appellants' plan ***95** to take control of his estate, and that Buford would not have drafted the Holographic Will disinheriting his cousins but for Appellants' undue influence.[10]

10 And because of this finding, we conclude that it is unnecessary to decide whether the evidence is sufficient to support the finding that Buford subsequently revoked the Holographic Will.

Appellants' Issues One through Three are Overruled.

B. Validity of the July and August Wills

The trial court invalidated the July 21, 2015 and the August 13, 2015 wills based on jury findings that for both, Buford lacked testamentary capacity and that he signed them as the result of undue influence. In Issues Four through Eleven, Appellants contend that the evidence was both factually and legally insufficient to support these jury findings. Because Appellants' arguments are virtually identical with respect to both Wills, we address them together. We begin with the issue of undue influence.

1. Appellants had the opportunity to exert influence over Buford

[27] Although Appellants contend that there was no evidence to support a finding that they pressured Buford into signing the July and August Wills, they do not contest that they had the opportunity to do so, or a motive for exerting their influence over him. Notably, the opportunity to influence Buford increased after the management trust was lifted in November of 2014. And within days after the management trust was lifted, Buford signed a Limited Power of Attorney giving Tait control over virtually all of Buford's financial, legal, and medical decisions. In addition, despite the fact that both Walker and Moseley offered to assist Buford with drafting a formal will to replace the Holographic Will, Tait declined their offers, and instead spent the next few months assisting Buford with making changes or additions to his Holographic Will. He later took it upon himself to draft the various formal wills that Buford signed in July and August of 2015 during his final illness. In effect, the jury could have inferred that Appellants were engaging in a course of conduct to ensure that they retained complete control over his decision-making process with respect to the future wills that he drafted.

As well, Appellants' motive for influencing Buford to sign the July and August Wills was obvious, as they received bequests exceeding two million dollars in both the July and August Wills. Accordingly, we conclude that there was both factually and legally sufficient evidence to support a finding that Appellants had a clear opportunity and motive to exert their influence over Buford in the drafting of these two wills.

2. Appellants effectively asserted their influence over Buford

Appellants next contend the evidence was insufficient to prove that they effectively asserted influence over Buford or that he was susceptible to influence at the time that he signed the two wills. In particular, they contend that Dr. Clayton was the only witness to discuss Buford's susceptibility to influence at the time he signed the wills, but that her testimony should be disregarded.

[28] First, Appellants once again point out that Dr. Clayton only evaluated Buford one time in 2010, and they argue that she therefore had no basis for opining on his mental status five years later when the wills were signed. But as we explain above, ***96** Dr. Clayton testified that Buford's vulnerability and susceptibility to undue influence was of a permanent nature and if anything, was likely to get worse over time. Moreover, Dr. Clayton testified that Buford's susceptibility increased due to his physical ailments and the medication that he was taking during his final illness in the hospital. By the time of his hospital stay, Buford had tumors in both his liver and lungs. He was in liver and kidney failure, had low oxygen levels, and had toxins in his blood. A treating physician noted that Buford did not appear to understand his diagnosis, was anxious and in pain, and exhibited "scattered thinking" during his hospital stay. Dr. Clayton further pointed out that while in the hospital, Buford was being treated with narcotic pain medicines that would have affected his cognitive abilities. Dr. Clayton concluded that Buford's physical condition and his medications would have likely increased his preexisting paranoid tendencies, making it even easier to manipulate or take advantage of him.

[29] A testator's physical ailments may inform the jury of the testator's mental status, if the evidence sufficiently links the two at the time of a will signing. *See, e.g.*, *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983) (upholding trial court's finding that testator lacked testamentary capacity where evidence of occlusion of the carotid arteries was consistent with mental incapacity at the time of will signing); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 420

(Tex. 2017) (recognizing that "evidence of physical problems that are consistent with or can contribute to mental incapacity is probative" on the issue of an individual's mental capacity). But Appellants argue that Dr. Clayton's testimony did not sufficiently link Buford's physical condition to his mental status on the exact days that he signed the two wills. In support of this argument, Appellants rely on our sister court's holding in *Horton v. Horton*, 965 S.W.2d 78, 86 (Tex.App.--Fort Worth 1998, no pet.). But *Horton* is inapposite. In *Horton*, a testator, who was dying of cancer, was taking pain medication and suffering from periodic hallucinations during the general time period in which he had signed a will. *Id.* at 86. There was no evidence, however, that the testator was on medication or that he was suffering from any hallucinations on the particular day that he signed his will. *Id.* The court therefore concluded that there was insufficient evidence to support a finding that he lacked *testamentary capacity* at the time of the will signing. *Id.*

[30] However, the court used a different analysis when discussing the issue of whether there was sufficient evidence to support a finding that the testator had been *unduly influenced* into signing the will. The court noted that in making a determination of undue influence, the jury could consider more general evidence that the testator had cancer and was in considerable pain in the days leading up to the will signing, as that evidence was relevant to his "physical incapacity to resist or the susceptibility of his mind to an influence exerted."[11] *Id.* at 88. We agree with this analysis, and we conclude that the jury was entitled to rely on Dr. Clayton's testimony concerning Buford's weakened physical condition during the general time period in which he signed the July and August ***97** Wills, as evidence of his enhanced susceptibility to Appellants' influence over him.

11 In *Horton*, however, the court found that, despite the testator's weakened physical state, there was no evidence to support a finding of undue influence, as there was no evidence that the will proponent had an opportunity or did exert influence over him. 965 S.W.2d at 88. Unlike the situation in *Horton*, we have already concluded that Appellants did have the opportunity to influence Buford's decision to sign the wills, as well as a clear motive for doing so.

Beyond that, the jury could have observed Buford's weakened condition from the videotaped recordings of the will signings. Dr. Clayton had in fact observed that Buford appeared confused and "kind of dazed" in the videotape recordings. Dr. Clayton also testified that Tait was essentially leading Buford through his responses on the recordings to make it appear that he was more lucid than he actually was.

We recognize that Appellants presented conflicting evidence regarding Buford's mental state on the day of the will signings. For example, Appellants presented the testimony of the notary public and two of the witnesses who were present at the will signings, all of whom testified that they believed Buford appeared, (1) to understand what he was doing, (2) determined to sign the wills, and (3) not to have been coerced into signing the wills.[12] None of those witnesses, however, had any knowledge of Buford's pre-existing vulnerabilities, or the history of his relationship with Appellants.

12 Appellants also presented the testimony of an emergency room doctor, Dr. Kathleen Delaney, who saw Buford in the hospital on August 15, 2015, the day that he signed the August Will. She believed that Buford appeared "completely oriented" and "very alert" that day. Dr. Delaney, however, did not conduct a mental status examination of Buford, and there was no evidence that she was aware of any of Buford's pre-existing mental limitations, his paranoid tendencies, or his susceptibility to the influence of others. As well, she admitted that she was not aware of all of the medications that Buford was taking at that time.

We also find sufficient evidence that Appellants took advantage of Buford's weakened mental state while he was in his final illness to maintain control over his decision-making process. First, although Buford had already signed a Limited Power of Attorney in November of 2014 giving Tait control of Buford's legal, business, and medical affairs, the day after his hospital admission, Buford signed a medical power of attorney naming Tait as his agent for making medical decisions, and Rueda as his first alternate agent. Shortly thereafter, Buford signed a Texas Statutory

Durable Power of Attorney, designating Tait as his agent for virtually all of his legal, financial, business, and personal matters.

In addition, Tait took it upon himself to draft at least three different formal wills for Buford to sign once Appellants realized that he was dying and arranged for the will signing to take place during Buford's hospital stay. Tait also mispresented the terms of the wills to Buford during the will signings by falsely claiming that Buford was leaving the "majority" of his estate to a charitable trust, when in fact only one minor asset was placed in the trust and the valuable assets were devised to Appellants.[13] The jury could have inferred that this misrepresentation was the final step in a purposeful scheme to ensure that Appellant left the bulk of his estate to them.

13 Appellants contend that Tait did not mislead Buford on this point. In particular, Tait testified that the mineral interests given to the Charitable Trust would be worth 10 to 20 million dollars over the course of 20 years. Appellants also claimed that the land they received was only worth approximately 1.6 million dollars. Tait, however, did not support those opinions with any facts and the jury therefore could have discounted the claim.

Accordingly, we find that the record contains both factually and legally sufficient evidence to support a finding that Appellants effectively exercised their influence over Buford and effectively manipulated him into signing the July and August Wills.

***98** *3. Buford would not have executed the July and August Wills but for Appellants' influence*

[31] Appellants also contend that the record does not support a finding that Buford would not have signed the July and August Wills but for Appellants' influence, contending that there was nothing unnatural about the dispositions that Buford made in those wills. In particular, Appellants once again contend that Buford had consistently expressed his intent to disinherit his cousins prior to signing the July and August Wills, and that he had further expressed to various individuals how grateful he was to Appellants for assisting him with his legal issues and that he had developed a great affection for them. Appellants further argue that there is no evidence in the record that Buford had ever expressed an intent to dispose of his property in any other manner. For the same reasons, and evidence noted in Section III(A)(4) of this opinion, we likewise conclude the evidence supports the jury's finding. And for the July and August Wills, there was evidence to suggest that Appellants had misled Buford into believing that the bulk of his estate was going to his charitable trust, when in fact the express terms of the July and August Wills gave the bulk of his estate to Appellants. The jury therefore could have inferred that Buford was not aware of the actual terms of the wills and that they did not express his true intent. Accordingly, we conclude that there was both factually and legally sufficient evidence to support the jury's finding that Buford signed the July and August Wills as the result of Appellants' undue influence.[14] Appellant's Issues Four through Eleven are Overruled.

14 Having reached this conclusion, we need not address Appellants' alternate argument that the evidence did not support a finding that Buford lacked testamentary capacity to sign those two wills.

C. The Request for Attorney's Fees

At trial, Appellants requested $416,978.75 in attorney's fees, and $29,509.09 in expenses with regard to submitting the August Will to probate, and for defending against Appellees' will contest. Section 352.052 of the Texas Estates Code allows for the payment of a designated executor's or beneficiary's legal expenses when that person defends or prosecutes a will in good faith and with just cause, whether or not that person was successful in doing so. *See* Tex.Est.Code Ann. § 352.052. The jury, however, found that Appellants did not act in good faith or with just cause in doing so, and the trial court therefore denied Appellants' request for fees and expenses. In Issues 12 through 17, Appellants contend that the evidence was both legally and factually insufficient to support the jury's determination that they did not act in good faith, and that the trial court therefore erred in denying their request for attorney's fees. Although Appellants raise separate issues with respect to whether they acted in good faith and just cause with regard to defending each of the three wills, we address these arguments in a more global fashion.

1. The law on attorney's fees

[32] Whether an executor acts in good faith and with just cause in prosecuting or defending a will is a question of fact, to be determined by the jury upon a consideration of all of the circumstances of a case. *Huff v. Huff*, 132 Tex. 540, 124 S.W.2d 327, 330 (1939); *see also Russell v. Moeling*, 526 S.W.2d 533, 536 (Tex. 1975) (recognizing that the question of whether executor acted in good faith and with just cause is a question for jury that should be determined in the original probate proceeding); ***99** *Matter of Kam*, 484 S.W.3d at 654 (recognizing that good faith is ordinarily a question of fact and that an appellate court should uphold a jury finding unless the evidence conclusively established the party's good faith).

[33] To be sure, a finding that an individual procured a will by undue influence does not preclude a finding that the individual acted in good faith and with just cause in attempting to admit the will to probate or in defending the will against a will contest. *Harkins v. Crews*, 907 S.W.2d 51, 62 (Tex.App.--San Antonio 1995, writ denied), *citing Huff*, 124 S.W.2d at 330.

2. Application

[34] Appellants contend that there was no evidence that they acted in bad faith or with a fraudulent intent in offering the various wills to probate. Rather, the "uncontroverted evidence" demonstrated that they submitted the wills to probate in good faith because they genuinely believed that the wills expressed Buford's "true intent." This argument, however, is essentially a rehash of the arguments set forth above, with Appellants contending that they had reason to believe that Buford wished to disinherit his cousins, that Buford wished to leave part of his estate to charity, and that Buford also wanted to benefit Appellants due to his gratitude for assisting him with his legal and other issues over the years.

Although the jury was free to believe Appellants' theory that they acted in good faith in defending the wills, the jury was also presented with an alternative theory that Appellants did so in bad faith by perpetrating a long-term scheme to gain access to Buford's not insignificant estate. The record contains sufficient evidence to support the jury's finding that implicitly accepts the existence of such a scheme. That scheme negates any good faith or just cause in submitting any of the wills to probate or in defending against Appellees' will contest. We conclude that the jury's findings were supported by both factually and legally sufficient evidence.

Appellants' Issues Twelve through Seventeen are Overruled.

IV. Conclusion

We affirm the trial court's judgment.

All Citations

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