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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1790-12T4

IN THE MATTER OF THE ESTATE
OF ADRIAN J. FOLCHER (a/k/a ADRIAN
J. FOLCHER, JR.), DECEASED.

Argued May 5, 2014 – Decided June 10, 2014

Before Judges Parrillo, Harris, and Sumners.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Camden County, Docket No. CP-211-07.

J. Philip Kirchner argued the cause for appellant Bernice Tambascia-Folcher (Flaster Greenberg, PC, attorneys; Mr. Kirchner, on the brief).

George J. Singley argued the cause for respondent Estate of Adrian Folcher (Singley & Gindele, attorneys; Mr. Singley, on the brief; Bernice Tambascia-Folcher, on the pro se brief).

PER CURIAM

Following a thirteen-day bench trial in this probate matter, appellant Bernice Tambascia-Folcher appeals from the December 17, 2012 judgment awarding damages in favor of respondent Estate of Adrian J. Folcher. We affirm.

I.

We glean the facts from the trial record. Adrian Folcher and his first wife Marie had owned homes in Haddon Heights and Brigantine. They were the parents of Mary Lee Zawrotny, Thomas Folcher, and Patricia Vaughn. Marie died in July 2002; Folcher and Tambascia-Folcher married in December 2002.[1]

In 2003, Folcher sold the Haddon Heights real property, netting approximately $206,000. He gave Tambascia-Folcher $125,000, and gifted each of his children approximately $20,000.

In March 2003, four months after Folcher and Tambascia-Folcher were married, attorney Jerome A. Bacchetti, Esq. prepared a post-marital agreement that both spouses signed. The agreement provided that their incomes would remain separate, that they would share expenses associated with Tambascia-Folcher's Cherry Hill home, and that upon the death of one spouse, any real estate that they owned jointly would be held in trust for the benefit of the surviving spouse until his or her death.

In November 2003, Folcher executed a will. His daughter Zawrotny was named executrix. In conjunction with the 2003 will, Folcher and Tambascia-Folcher each signed a letter

[1] According to Tambascia-Folcher, she and Folcher lived together in her home, while Folcher was still married to Marie, since 1992.

addressed to Bacchetti that expressed their wishes for the distribution of their personal property. Folcher directed that his vehicles —— including a boat, a pickup truck, and an automobile —— should be bequeathed to two of his children.

In January 2006, Folcher rewrote his will, which was prepared by Bacchetti. Zawrotny again was named executrix. Article 3 provided that any personal property not directed to be distributed by memorandum would be bequeathed to Tambascia-Folcher.

In March 2007, Folcher met with attorney Richard Cohen, Esq.[2] and expressed that he had made material contributions to the Cherry Hill home and he wanted to protect his interest for the benefit of his children. Cohen drafted a deed by which Tambascia-Folcher would transfer the Cherry Hill property to herself and Folcher "as tenants in common, and not as joint tenants with rights of survivorship." The deed provided Folcher and Tambascia-Folcher with the right to reside in the Cherry Hill home for the duration of their lives and, upon death, that each of their one-half interests would pass to their respective estates and not to the survivor of the tenancy in common.

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[2] Tambascia-Folcher's claim that Cohen was barred from testifying by the attorney-client privilege is meritless. R. 2:11-3(e)(1)(E). The privilege was waived by the personal representative of the deceased person. In re Estate of Reininger, 388 N.J. Super. 289, 300 n.2 (Ch. Div. 2006).

On August 28, 2007, Cohen sent the prepared deed to Folcher and Tambascia-Folcher, with instructions as to how to execute and record it. On September 7, 2007, the deed was executed and recorded in the Camden County Clerk's Office.

Shortly thereafter, on September 18 or 19, 2007, Folcher was temporarily hospitalized because of complications stemming from kidney cancer. Folcher became incapacitated —— mostly wheelchair-bound or bedridden —— and could not care for himself. He was dependent upon analgesics and other medications, and Tambascia-Folcher cared for him, fed him, and administered his medications, which included narcotics. Folcher also needed assistance walking and using the bathroom.

On September 26, 2007, Folcher's doctor told the family that there were no further medical treatments available for Folcher, and hospice services were appropriate. Folcher's sister wanted to return for another visit with her brother, but Tambascia-Folcher would not allow it because, as Folcher told his sister by telephone, his wife did not agree to the idea. On September 28, 2007, Folcher said to his sister, "I can't fight [Tambascia-Folcher] anymore. It's too late for that."

On September 28, 2007, Folcher executed two codicils to his 2006 will. The first codicil stated, "I affirm my last will and testament dated January 19, 2006, to be my wishes. I want my

wife Bernice [Tambascia-]Folcher to have all personal property and all items in our home." The second codicil included the following handwritten statement: "I want my spouse Bernice Tambascia[-Folcher], to have all personal accts./property [and] all items in our home."

On Saturday, September 29, 2007, Tambascia-Folcher requested that Folcher's children not visit their father. Instead, on that day, Tambascia-Folcher and her daughter, Desiree, drove Folcher to a Sterling Bank branch in Maple Shade. Tambascia-Folcher requested that a bank employee accompany her to the parking lot to notarize a document that Folcher, sitting in the motor vehicle, would sign. According to Desiree, a woman came out from the bank and notarized the document, while witnesses remained inside the bank observing Folcher's signature through the windows.

The document was another deed to the Cherry Hill home, which had been prepared by Tambascia-Folcher using Cohen's deed as a template. However, contrary to the provisions of Cohen's deed, the new deed made the couple joint tenants with rights of survivorship. The seller's residency certification that had been prepared by Cohen was adjusted to reflect the new date, September 29, 2007, and the additional seller's name. When Cohen later saw this deed, he stated that it was not consistent

with Folcher's instructions to him.

The two codicils each contained a purported notarization by bank employee Mileva Boncic and witness attestation by Anthony Mannello. Boncic and Mannello were certain, however, that they had not witnessed the codicils. In fact, Boncic kept a detailed log of her notarizations, and while the September 29, 2007 deed appeared in her record, there was no mention of the codicils. Mannello stated that it was unusual for him to witness a document being signed in the bank parking lot, and that he would have remembered if such a thing had happened on consecutive days.

Edmund Tambascia, Tambascia-Folcher's first husband, testified that on numerous visits during Folcher's final days Folcher's "thought process was . . . very rational" and Folcher never appeared confused. According to Tambascia, Folcher explained that "Desiree was kind enough to take [Folcher] to the bank this week and settle some more of [his] affairs," and that Folcher told him, "[Tambascia-Folcher] and [he] have been together for a long time and [he] want[ed] to give her the house."

During the final week of Folcher's life his sister visited him, describing him as tired, and having difficulty breathing and speaking.

Folcher died on October 2, 2007. On the same date, Tambascia-Folcher recorded the new deed and also withdrew approximately $25,000 of Folcher's funds from Sterling Bank and Morgan Stanley. On October 15, 2007, Zawrotny submitted the 2003 will to the surrogate for probate. On the same day, Tambascia-Folcher delivered a number of documents to Edward D. Sheehan, Esq., who was retained to represent the estate.[3] The documents included Folcher's 2003 will and the first codicil, but did not include the letter memorandum of distribution or the second codicil.

Sheehan became suspicious because the first codicil was clearly not prepared by an attorney, contained spelling errors, and repeated certain bequests that were already in the will. Also, the first codicil contained Boncic's signature but no "appropriate acknowledgement paragraphs." Therefore, Sheehan advised Zawrotny not to submit the first codicil for probate even though she had already submitted the 2003 will.

Eventually, the January 2006 will was discovered. On February 8, 2008, the Superior Court entered a judgment

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[3] Tambascia-Folcher objected to Sheehan's trial testimony because his law firm was representing the estate. Sheehan's testimony is explicitly permitted by Rule of Professional Responsibility 3.7(b) ("A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.").

admitting the January 2006 will for probate.

Approximately one year after Folcher died, in October 2008, Tambascia-Folcher mailed the second codicil to Sheehan. She had already submitted it to the surrogate. This codicil contained Boncic's signature, but lacked a "proper acknowledgment." Sheehan suspected that the second codicil was fraudulent because Tambascia-Folcher did not submit it until one year after she delivered the other documents to him. Also, the second codicil appeared to be a cut-and-paste of the first codicil. In addition, the second codicil specifically mentioned bank accounts and Sheehan believed that Tambascia-Folcher had produced this codicil as a response to Sheehan's expressed position that the first codicil would not govern disposition of those accounts.

The present litigation commenced after Zawrotny issued a final accounting of Folcher's estate.[4] It appears that the litigation consumed over five years, culminating in the 2012 bench trial conducted by Judge John A. Fratto.

On November 5, 2012, Judge Fratto found that there had been a confidential relationship between Tambascia-Folcher and

[4] The record does not contain the final accounting, the pleadings, or portions of the procedural history that indicate precisely how the matter was navigated through the litigational process.

Folcher, and that Folcher was in a weakened and fragile state when he made the transactions at the end of September 2007, including the new deed and the two codicils. According to the judge, there were suspicious circumstances surrounding the execution of the two codicils and the new deed. Finding that Tambascia-Folcher's testimony lacked credibility, the judge concluded that Tambascia-Folcher had fraudulently executed the new deed and the codicils.

Because of Tambascia-Folcher's fraud and forgery, the court determined that she was obliged to pay the estate consequential damages. This included reimbursement of $20,000 for Folcher's boat, $8755 for his truck, and $5100 for his automobile. In addition, the court ordered that Tambascia-Folcher reimburse the approximate $25,000 she had fraudulently withdrawn from Folcher's accounts shortly after his death. The court also awarded $397,309 in attorneys' fees and costs as part of the estate's damages. This appeal followed.

II.

A.

Our scope of review in this appeal is circumscribed. We do "'not disturb the factual findings and legal conclusions of the trial judge unless [we are] convinced that they are so manifestly unsupported by or inconsistent with the competent,

relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)); see also Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Review on appeal "does not consist of weighing evidence anew and making independent factual findings; rather, our function is to determine whether there is adequate evidence to support the judgment rendered at trial." Cannuscio v. Claridge Hotel & Casino, 319 N.J. Super. 342, 347 (App. Div. 1999) (citing State v. Johnson, 42 N.J. 146, 161 (1964)). If the trial court's findings meet this benchmark, our "task is complete and [we] should not disturb the result," even if we "might have reached a different conclusion were [we] the trial tribunal." Ibid. (internal quotation marks and citations omitted).

Findings of the trial court on undue influence are entitled to great deference because the trial court had the ability to see and hear witnesses, and could form an opinion regarding their credibility. In re Will & Testament of Liebl, 260 N.J. Super. 519, 523 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993). Such factual findings should not be disturbed unless they are "so manifestly unsupported or inconsistent with the

competent, reasonably credible evidence so as to offend the interests of justice." Id. at 524 (citations omitted).

Not all influence is undue. "[U]ndue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets[,]" In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008), and forces the testator to "accept[] instead the domination and influence of another." Haynes v. First Nat'l St. Bank of N.J., 87 N.J. 163, 176 (1981) (quoting In re Neuman, 133 N.J. Eq. 532, 534 (E. & A. 1943)).

In the present case, a claim of undue influence was asserted against Tambascia-Folcher. A grievance based upon undue influence may be sustained by showing that the beneficiary had a confidential relationship with the party who established the will. See In re Estate of DeFrank, 433 N.J. Super. 258, 269 (App. Div. 2013). Accordingly,

> if the challenger can prove by a preponderance of the evidence that the survivor had a confidential relationship with the donor . . ., there is a presumption of undue influence which the survivor donee must rebut by clear and convincing evidence.
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> [Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 401 (App. Div. 2007).]

Although perhaps difficult to define, the concept "encompasses

all relationships 'whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists.'" Pascale v. Pascale, 113 N.J. 20, 34 (1988) (internal citation omitted).

Applying the foregoing review standards, it is readily apparent that the trial court's decisions in favor of the estate are sufficiently consistent with the evidence adduced at this bench trial. Here, Folcher was clearly reliant on Tambascia-Folcher for companionship, care, and support. He had been recently discharged from the hospital and had mere days to live at the time he purportedly generated the two codicils and second deed. He was wheelchair-bound, could not bathe himself, had trouble getting in and out of bed, and Tambascia-Folcher controlled his intake of pain-killers and other medications. His daughter described him as having trouble breathing and speaking. His sister quoted him as stating "I can't fight her anymore." All of this evidence supports the trial court's finding that there was a confidential relationship.

Furthermore, notwithstanding Tambascia-Folcher's plausible explanations to the contrary, there was substantial evidence supporting the trial court's conclusions that the two codicils on September 28, 2007, and the new deed on September 29, 2007, were the product of suspicious circumstances. The court found

suspicious circumstances infected the deed inasmuch as it was not prepared by Folcher's attorney as was his practice; the residency certification was copied from the deed prepared by Cohen; the signatures did not appear in the proper place; there were two signature pages and a loose notary page; and Folcher had been seated in a motor vehicle and the notary came outside to notarize the document while the witnesses watched through the bank window. Moreover, suspicious circumstances surrounding the two codicils included: Tambascia-Folcher's delivery to Sheehan of the 2003 will with only the first codicil and failing to produce the second codicil until a year later; the codicils did not have proper notarizations; the codicils contained a purported notarization by Boncic, yet Boncic denied notarizing them; and Mannello's signature appeared on the codicils but he denied witnessing them.

"Where parties enjoy a relationship in which confidence is naturally inspired or reasonably exists, the person who has gained an advantage due to that confidence has the burden of proving that no undue influence was used to gain that advantage," In re Estate of Penna, 322 N.J. Super. 417, 423 (App. Div. 1999), and "the donee has the burden of showing by clear and convincing evidence not only that 'no deception was practiced therein, no undue influence used, and that all was

fair, open and voluntary, but that it was well understood.'" In re Estate of Mosery, 349 N.J. Super. 515, 522-23 (App. Div. 2002) (citing In re Dodge, 50 N.J. 192, 227 (1967)). In the present appeal, Tambascia-Folcher could not overcome the presumption, and we will not second-guess the trial court's conclusions in this regard.

B.

The trial court awarded almost $400,000 to compensate the estate for attorneys' fees and costs associated with the litigation. Tambascia-Folcher takes issue with the award of attorneys' fees as a species of damages in favor of the estate. She claims that the trial court should not have awarded attorneys' fees at all; the fee award was excessive; the award was disproportionate to the amount in dispute; she cannot afford to pay her obligations; and a prior judge had ordered that each party pay its own attorneys' fees. Furthermore, she argues that the trial court never properly examined the billings and that the fees were excessive because the amount in dispute was only $53,000, which represented the aggregate value of Folcher's three vehicles, but the attorneys' fees were significantly higher.

New Jersey hews to the American Rule —— with limited exceptions —— that parties are responsible for their own

attorneys' fees. Innes v. Marzano-Lesnevich, ___ N.J. Super. ___, ___ (App. Div. 2014) (slip op. at 66). Rule 4:42-9 (a)(3) provides for reallocation of attorneys' fees in certain types of probate and guardianship proceedings. An award of counsel fees is discretionary with the court and will not be reversed absent a demonstration of manifest abuse of discretion. In re Probate of Alleged Will of Landsman, 319 N.J. Super. 252, 271 (App. Div.), certif. denied, 161 N.J. 335 (1999). R.P.C. 1.5(a) provides that the following factors pertain to whether an attorney fee is reasonable: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; whether acceptance of the employment precluded other employment by the lawyer; the fee customarily charged in the locality for similar legal services; and the amount involved and the results obtained.

In In re Niles Trust, 176 N.J. 282, 296-99 (2003), the Court balanced the adherence to the American Rule with the need to make the victims of perfidious behavior whole. The Court stated that when an executor or trustee commits the "pernicious tort" of undue influence, it should result in an award of all reasonable counsel fees and costs. Id. at 298-99. Moreover, fees should be awarded when a person commits fraud which

"results in the development or modification of estate documents that create or expand the fiduciary's beneficial interest in the estate." Id. at 299.

Here, although Tambascia-Folcher was not a fiduciary of the estate, she was in a confidential relationship with Folcher and exercised undue influence to modify estate documents in order to expand her own beneficial interests. But for her conduct, the litigational costs and expenses associated therewith would have been avoided. Her fraud contributed to the erosion of Folcher's estate, and there is no just reason why she, like a corrupt fiduciary, should not make the estate whole. Tambascia-Folcher further argues that the trial court failed to properly scrutinize the actual attorney billings, and that the total hours expended were in excess of what was reasonably required. We disagree, for two reasons. First, the trial court stated that it "considered the submissions, the hourly rate and the amount of hours that were necessary." The court explained, "There is no doubt in my mind that the work was done and done well. There is no concern as to [whether] the hourly rate is appropriate." Second, our independent review of the record discloses that the trial court's determination is well-supported by the facts.

Much of the estate's expense was generated in response to

Tambascia-Folcher's overweening litigational positions. Representing herself pro se, she produced an overabundance of documents that required responses from the estate's counsel. A pro se litigant is required to comply with the court rules. Venner v. Allstate, 306 N.J. Super. 106, 110 (App. Div. 1997). Also, Tambascia-Folcher contributed to, and greatly increased, the time required litigating the matter. We detect no abuse of discretion in the manner that the trial judge reviewed and awarded the attorneys' fees.

Additionally, Tambascia-Folcher challenges the amount awarded generally but does not point to any particular work that she believes was improper. Instead, she contends that reallocation of $377,351 plus costs was not in proportion to the amount in dispute which, according to her, was merely $53,000.

The trial court addressed this issue, and expressed concern that the amount of fees exceeded the amount that had been in dispute. Finding the amount withdrawn from the bank totaled approximately $60,000, decedent's one-half interest in the Cherry Hill dwelling amounted to $167,000, and the residuary estate that was addressed by the fraudulent codicils was valued at approximately $100,000, the total amount in dispute was approximately $330,000. The trial court justified the greater award of attorneys' fees, however, because of the actions of

Tambascia-Folcher who "waged a scorched-earth campaign." A party that suffers damages because of the fraudulent acts of another should be entitled to attorney fees "to be made whole." In re Niles Trust, supra, 176 N.J. at 304. The trial court decided not to reduce the fees based on Tambascia-Folcher's "sophisticated attempts to defraud this estate." We detect no abuse of discretion and we have no basis to disturb these findings.

Tambascia-Folcher's remaining claims are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.