NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0436-14T1

IN THE MATTER OF
THE ESTATE OF
HELEN M. WESTE

Argued May 16, 2016 – Decided June 24, 2016

Before Judges Messano and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County, Docket No. 228318.

Mark Goldstein argued the cause for appellant Joanne Halkovich (Goldstein, Bachman & Newman, L.L.P., attorneys; Mark Goldstein and Steven M. Cytryn, on the briefs).

David B. Littman argued the cause for respondent John Brek.

PER CURIAM

Joanne Halkovich, niece of Helen M. Weste (Helen[1]), appeals from the Chancery Division's August 8, 2014 order that: discharged Halkovich as administratrix CTA[2] of Helen's estate; ordered Halkovich to provide a full inventory and accounting of

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[1] We refer to Helen Weste, and her ex-husband John, by their first names to avoid confusion. We mean no disrespect by this informality.

[2] The initials stand for "Cum Testamento Annexo," or "with will attached." See N.J.S.A. 3B:10-15.

the estate's assets; admitted Helen's 2002 last will and testament (the 2002 will) to probate; and appointed Helen's neighbor, John Brek, as executor under the terms of the 2002 will. We discern the following facts from the evidence adduced at the trial before Judge Frank M. Ciuffani.

Helen had no children and was divorced from her husband, John. On March 28, 1994, she executed a will (the 1994 will) that made three charitable bequests to two religious entities; left her personal property to her niece Louise Ogletree; and bequeathed the remainder of her estate in different percentages to a sister and eight nieces and nephews, including Halkovich. Helen named John, then a resident of Florida, as executor. Helen died on March 6, 2010, at the age of eighty-two. Halkovich became administratrix CTA because John and one of the alternate executrixes pre-deceased Helen, and the other alternate executrix and family members renounced the rights to administration. The 1994 will was admitted to probate on March 30, 2010.

In 1995, Helen left the apartment she had shared with John and moved back into her family's home located on Hampden Street in Linden. Brek rented a portion of the house across the street. Over the ensuing years, he befriended Helen and would do odd jobs around her home and drive her to do her errands.

Helen's health began failing in 2001. Her nephew testified that he and his wife often visited, but, on one occasion in July of that year, Helen referred to him by his father's name, even though he had been dead for nearly twenty years. Throughout fall 2001, Halkovich and another niece, Carolyn Amoroso, visited, and Helen did not recognize either of them. Amoroso testified that she and her mother, Helen's sister, visited on March 17, 2002; Helen recognized her sister, but not Amoroso. Amoroso observed that Helen's home was not as neat as usual. However, Amoroso acknowledged at trial that Helen was still coherent and stayed on topic during the conversation.

Concerned about Helen's failing health, family members contacted John, who was attorney-in-fact pursuant to a written power of attorney Helen had executed at the time of the 1994 will. John flew to New Jersey from Florida, and, on April 5, 2002, after summoning police and emergency medical services, had Helen admitted to Trinitas Hospital (Trinitas). In his psychiatric evaluation, Dr. Benjamin Chu noted that Helen "appears confused, and disoriented . . . . Her insight and judgment are poor. She is unable to take care of herself." Dr. Chu diagnosed Helen with dementia, and assigned her a GAF score of 20, well below normal functioning. Helen was discharged from Trinitas, but never returned home. In June 2002, Halkovich

coordinated her aunt's admission to an assisted living community in New Jersey.

Michelle Chihadeh, a certified dementia practitioner and assisted living administrator, testified regarding the care she provided Helen at the facility. Helen was admitted to the special care community as a result of her memory impairment, risk of wandering and need for twenty-four-hours-a-day supervision. Following John's death, on July 28, 2006, Halkovich was appointed Helen's guardian. Helen was transferred to another facility where she remained until her death.

Victor Padlo, who at the time of trial had been a practicing attorney in New Jersey for thirty-nine years, testified that Helen called his office and scheduled an appointment for February 15, 2002. Brek testified that he drove Helen to Padlo's office, but he had no prior knowledge of the reason for the meeting and no prior association with Padlo. During the meeting, Helen gave Padlo a handwritten document that Padlo testified was essentially a "holographic will."

As was his practice, Padlo contemporaneously prepared a will information worksheet. Padlo testified that no one else was present in his office when he interviewed Helen, and he had no doubt regarding her testamentary capacity. Padlo testified that he had never prepared a will for, or allowed it to be

executed by, anyone who lacked sufficient mental/testamentary capacity. He had, on other occasions, declined to prepare the documents.

Padlo prepared the will after the February 15, 2002 meeting and contacted Helen to make arrangements for its execution. Helen returned on March 14, 2002, and executed the will. The same day, Padlo oversaw execution of Helen's living will, that provided Brek with Helen's medical proxy. Only Padlo's secretary and another attorney in his office were present during the execution of the documents.

The 2002 will made a bequest to one of the religious institutions referred to in the 1994 will, made a specific bequest to Helen's niece Louise Ogletree, bequeathed her personal property to her niece Linda Ogletree, together with 10% of her residual estate and bequeathed the home on Hampden Street and 90% of her residual estate to Brek. It also named Brek executor.

Helen gave Brek copies of the testamentary and living wills when they left Padlo's office in March 2002. Brek testified that Helen told him that he should not let anyone put her in a nursing home and asked Brek to take care of her. Nonetheless, Brek stood by silently and actually witnessed Helen's involuntary removal from her home and subsequent admission to

Trinitas in April 2002. He never advised anyone that he possessed a copy of the 2002 will during the ensuing years, and, in February 2010, Brek moved to Pennsylvania. Brek became aware of Helen's death nine months after the fact, when a neighbor notified him. For reasons unexplained, Brek never filed his complaint seeking to probate the 2002 will until October 2011.[3]

Each side produced expert witnesses who reached differing opinions regarding Helen's testamentary capacity at the time of the 2002 will. Dr. Peter Crain, a board certified forensic psychiatrist, testified that Helen lacked two of the three criteria, specifically, that she did not "understand the natural

[3] Rule 4:85-1 provides:

> If a will has been probated by the Surrogate's Court or letters testamentary or of administration, guardianship or trusteeship have been issued, any person aggrieved by that action may, upon the filing of a complaint setting forth the basis for the relief sought, obtain an order requiring the personal representative, guardian or trustee to show cause why the probate should not be set aside or modified or the grant of letters of appointment vacated, provided, however, the complaint is filed within four months after probate or of the grant of letters of appointment, as the case may be, or if the aggrieved person resided outside this State at the time of the grant of probate or grant of letters, within six months thereafter.

The estate never sought to dismiss Brek's complaint as untimely and the issue was not addressed by Judge Ciuffani.

recipients" of her assets, or reasonably appreciate "the extent of [those] assets." Dr. Eileen A. Kohutis, a psychologist, testified as Brek's expert witness. She opined that Helen possessed testamentary capacity when she executed the 2002 will.

In a comprehensive written opinion, Judge Ciuffani reviewed the testimony and the case law regarding testamentary capacity. He concluded

> the evidence does not clearly and convincingly establish that Helen Weste, when she met with her attorney on February 13, 2002 [sic], after preparing in her own handwriting a document setting forth her testamentary intent, and on March 14, 2002[1], when she signed a [w]ill which Mr. Padlo prepared based on her written instructions, lacked testamentary capacity. The best evidence is from those who interacted with her during that critical timeframe, Mr. Padlo, Mr. Brek and her two nieces who visited her before and after she signed the [w]ill and left her to care for herself. If Helen Weste had the capacity to live alone and care for herself, she had the capacity to make a [w]ill.

Judge Ciuffani noted that "[t]he case law clearly states that the threshold for testamentary capacity is very low, one need only possess a very low degree of mental capacity to execute a will, even less than is needed to enter into a contract."

The judge noted that Helen was able to contact Padlo on two occasions, and prepared "very specific" handwritten instructions for preparation of the 2002 will. He rejected the argument that

Dr. Kohutis's opinion was a "net opinion," observing that she had reviewed the same documents as Dr. Crain. Judge Ciuffani also noted that Dr. Crain conceded that a person with "moderate dementia could have testamentary capacity," and that Dr. Crain offered no opinion "on whether Helen Weste, if she wrote the written instructions [on] her own, had testamentary capacity." The judge implicitly rejected Halkovich's argument that "Brek told Helen what to write."

Lastly, Judge Ciuffani rejected any claim that Brek asserted "undue influence" upon Helen. He found no evidence to support the contention, noting that Brek was not present when Helen met with Padlo, Helen made dispositions to a charity and relatives in the 2002 will and did not bequeath all her assets to Brek, and Brek waited many months after Helen's death to present the will. The judge rejected the claim that misspellings and errors in the handwritten instructions demonstrated that it was not prepared by Helen. He entered the order under review, and this appeal followed.

Before us, Halkovich argues that, for a variety of reasons, the judge erred in concluding that Helen had the requisite testamentary capacity to make the 2002 will. She also contends that the 2002 will was the product of undue influence. We have

considered these arguments, in light of the record and applicable legal standards. We affirm.

Our review of the findings made by the judge in a non-jury trial is limited.

> Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "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[.]"
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> [Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (alteration in original) (quoting In re Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)).]

In particular, "[t]he findings of the trial court on the issues of testamentary capacity and undue influence, though not controlling, are entitled to great weight since the trial court had the opportunity of seeing and hearing the witnesses and forming an opinion as to the credibility of their testimony." In re Will of Liebl, 260 N.J. Super. 519, 523 (App. Div. 1992) (alteration in original) (quoting Gellert v. Livingston, 5 N.J. 65, 78 (1950)), certif. denied, 133 N.J. 432 (1993).

Challenging Judge Ciuffani's determination that Helen possessed requisite testamentary capacity when she executed the 2002 will, Halkovich argues: 1) the judge should have applied

"heightened scrutiny as a result of the suspicious circumstances" surrounding the will; 2) the judge applied the incorrect legal standard to assess Helen's competency; 3) the judge disregarded competent evidence that Helen lacked the requisite capacity; and 4) the judge disregarded Dr. Crain's "credible and competent testimony" in favor of Dr. Kohutis's "net opinion." We reject these claims.

"In any attack upon the validity of a will, it is generally presumed that 'the testator was of sound mind and competent when he executed the will.'" Haynes v. First Nat'l State Bank, 87 N.J. 163, 175-76 (1981) (quoting Gellert, supra, 5 N.J. at 71).

> The gauge of testamentary capacity is whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of the factors to the others, and the distribution that is made by the will. Testamentary capacity is to be tested at the date of the execution of the will. Furthermore, [a]s a general principle, the law requires only a very low degree of mental capacity for one executing a will. [T]he burden of establishing a lack of testamentary capacity is upon the one who challenges its existence [and] [t]hat burden must be sustained by clear and convincing evidence. A testator's misconception of the exact nature or value of his assets will not invalidate a will where there is no evidence of incapacity. Even an actual mistake by a testator as to the extent of his property does not show as a matter of law that he was wanting in testamentary capacity.

> [Liebl, supra, 260 N.J. Super. at 524-25 (citations omitted) (alterations in original).]

The "suspicious circumstances" Halkovich alludes to are the conflicting testimony regarding Helen's mental state in March 2002, the lack of any "precipitating event" that would have caused her to change the disposition of her assets from the earlier will, and errors and misspellings contained in the handwritten list she provided to Padlo. The very old cases cited by Halkovich do not alter the burden of proof or change the legal standards relating to testamentary capacity. More importantly, Judge Ciuffani evaluated all of the evidence regarding Helen's mental state as of March 14, 2002, and he discounted the importance of any errors or misspellings in the handwritten list. Contrary to Halkovich's contentions, the 2002 will kept some of the dispositions made by the earlier will and rejected others. In any event, "[i]t is well settled in this State that every citizen of full age and sound mind has the right to make such disposition of property by will or deed as he or she in the exercise of individual judgment may deem fit." Casternovia v. Casternovia, 82 N.J. Super. 251, 257 (App. Div. 1964).

Similarly, the contention that Judge Ciuffani applied the wrong legal standard is unpersuasive. Halkovich cites the

judge's statement that at the time of executing the 2002 will, Helen was able to care for herself and argues "this [is] not the test for testamentary capacity," and the finding was contrary to the weight of the evidence. However, a fair reading of the judge's entire written opinion makes clear that the judge did not misapprehend the standard for assessing testamentary capacity, nor did he make a factual finding that was not supported by the evidence. The reality is that Helen made the appointment to see Padlo, she was prepared to make a new will and Padlo, who had extensive experience, did not question her capacity. Moreover, when her relatives involuntarily removed her from her home, Helen was in fact caring for herself without assistance.

Halkovich's final two arguments regarding Helen's testamentary capacity lack sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E). Applying our standard of review, we cannot conclude that Judge Ciuffani's factual findings and assessment of the credibility of the expert testimony were "'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App.

Div.), certif. denied, 40 N.J. 221 (1963)). We also agree with Judge Ciuffani that Dr. Kohutis's opinions were not inadmissible net opinions.

Halkovich also contends that Judge Ciuffani erred in concluding the 2002 will was not the product of undue influence. We again must disagree.

A will which on its face appears to be validly executed, may be set aside if it is tainted by "undue influence." Haynes, supra, 87 N.J. at 176. The Court has defined undue influence as

> 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, generally by means of a will or inter vivos transfer in lieu thereof.
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> [In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008).]

"It denotes conduct that causes the testator to accept the 'domination and influence of another' rather than follow his or her own wishes." Id. at 303 (quoting In re Neuman, 133 N.J. Eq. 532, 534 (E.& A. 1943)). "Ordinarily, the burden of proving undue influence falls on the will contestant. Nevertheless, we have long held that if the will benefits one who stood in a confidential relationship to the testator and if there are additional 'suspicious' circumstances, the burden shifts to the

party who stood in that relationship to the testator." Ibid. (quoting In re Rittenhouse's Will, 19 N.J. 376, 378-79 (1955)).

Here, the judge rejected Halkovich's wholly-circumstantial suppositions as evidence of Brek's influence over Helen. We see no basis to disturb those conclusions given the lack of any evidence to the contrary.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION