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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4722-15T2

IN THE MATTER OF THE ESTATE OF MARY PATRICIA MOLINSKI.

Submitted January 16, 2018 – Decided February 6, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Essex County, Docket No. CP-0120-2016.

Diana Marsh, appellant pro se.

Cammarata, Nulty & Garrigan, LLC, attorneys for respondent Edward Molinski, Executor of the Estate of Mary Patricia Molinski (John P. Nulty, Jr., on the brief).

PER CURIAM

Diana Marsh contests the 2012 will of her mother, Mary Patricia Molinski, who died on October 22, 2015, at the age of seventy-six. Molinski had a son, Edward M. Molinski, and three daughters, Marsh, Janice Palmeri, and Donna McWilliams. The testator left her entire estate, net of expenses, to her son, and Palmeri; and nothing to Marsh and McWilliams.

Marsh contends Palmeri unduly influenced their mother; or, alternatively, their mother lacked testamentary capacity. After a summary hearing, see R. 4:83-1 and R. 4:67-1, the Probate Part dismissed Marsh's verified complaint with prejudice. Having carefully reviewed the record and the applicable legal principles, we affirm, substantially for the reasons set forth in Judge Walter Koprowski's thorough oral opinion.

We add the following brief comments. Marsh focuses her appellate argument on the omission of any mention of her or McWilliams in their mother's will. The will did not include a provision expressly disinheriting them. Rather, it included a bequest "to my beloved daughter, JANICE PALMERI, and my beloved son, EDWARD M. MOLINSKI, in equal shares, share and share alike, provided they survive me."[1] Marsh contends the law requires that a will expressly name disinherited children, in order to be effective.

We have found no support for that assertion, and Marsh provides none. Rather, the omission of disinherited children's names in a will is at best, circumstantial evidence that the testator did not actually or freely intend to disinherit them.

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[1] The will also stated that if Palmeri or Molinski predeceased her — which they did not — then that child's share would pass per stirpes to their children, whom the testator named after describing them as "[m]y beloved grandchildren."

However, that evidence and the other evidence Marsh presented — as Judge Koprowski ably reviewed — was insufficient to vault Marsh's high burden to establish undue influence or lack of capacity. See In re Estate of Stockdale, 196 N.J. 275, 303 (2008) (stating that the will's opponent generally bears the burden to prove undue influence); In re Niles Trust, 176 N.J. 282, 300 (2003) (stating that "undue influence, as a form of fraud, must be proven by clear and convincing evidence"); see also Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 175-76 (1981) (stating that it is presumed a testator was competent and of sound mind when he or she executed the will); In re Livingston's Will, 5 N.J. 65, 71 (1950) (same).

The attorney who drafted the will certified he met the testator for the first time when she sought his services in 2012. She found his name in a church bulletin. He had no relationship with the will's beneficiaries. He stated the testator simply did not disclose she had children other than Palmeri and Molinski. Had she done so, he would have counseled her to include a provision expressly addressing the disinherited children.

Nonetheless, the attorney stated he did not believe the testator's omissions resulted from incapacity or undue influence. He noted the testator appeared at his office alone; she responded cogently and appropriately to questions put to her; articulated

her desires clearly; and did not appear to lack mental capacity or to be under another's influence.

Marsh provided no expert medical evidence, or the certification of anyone who actually observed her mother, to establish that her mother was suffering from a mental defect or an incapacity of the mind. By contrast, Palmeri, Molinski, and the will's drafter all certified that she was of sound mind when or around the time she made her will.

As for Marsh's claim of undue influence, she relies primarily on allegations that she maintained a loving relationship with her mother (a fact disputed by her siblings, but one the court presumed in her favor); her sister was strong-willed and opinionated; and there is no other explanation for her disinheritance. That is not enough.

"Not all influence is 'undue' influence." Livingston's Will, 5 N.J. at 73. Even if Palmeri urged her mother to favor her and her brother – which Palmeri denied – "[p]ersuasion or suggestions . . . will not suffice." Ibid. A will opponent must establish influence "such as to destroy the testator's free agency and to constrain him [or her] to what he [or she] would not otherwise have done in the disposition of his [or her] worldly assets." Ibid.

We recognize the burden may shift to a will's proponent to prove the absence of undue influence, if the opponent first establishes that "the will benefits one who stood in a confidential relationship to the testatrix"; and "there are additional circumstances of a suspicious character present which require explanation." In re Rittenhouse's Will, 19 N.J. 376, 378-79 (1955). However, Marsh did not meet that threshold showing.

"[T]he mere existence of family ties does not create . . . a confidential relationship," Vezzetti v. Shields, 22 N.J. Super. 397, 405 (App. Div. 1952), notwithstanding that "[a]mong the most natural of confidential relationships is that of parent and child." Pascale v. Pascale, 113 N.J. 20, 34 (1988). Marsh was required to show there was dominance of one party over the other, or inequality of dealing. See Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 402 (App. Div. 2007). She failed to do so. Cf. Haynes, 87 N.J. at 176 (finding a confidential relationship between a mother and child where the mother was "afflicted by the debilitations of advanced years, was dependent upon her sole surviving child with whom she lived and upon whom she relied for companionship, care and support").

No doubt, the unanticipated disinheritance of a child must sting. In search of an explanation, it is understandable that the child may contend the act was a product of undue influence.

However, to set aside the solemn directions of a testator, who cannot speak in defense of her wishes, a greater showing is required than Marsh has presented here.

Affirmed.

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