SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5593-15T3

IN THE MATTER OF THE ESTATE OF WILLIAM J. MALLAS, Deceased.

Argued January 30, 2018 – Decided March 6, 2018

Before Judges Reisner, Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. P-229203.

Marco M. Benucci argued the cause for appellant Angelina Picciolo (Wronko Loewen Benucci, attorneys; Marco M. Benucci, of counsel and on the joint brief).

Richard M. Sasso argued the cause for appellant Frank Picciolo (Thomas A. Szymanski, on the joint brief).

Ronald J. Busch argued the cause for respondent Nicole Zablocki (Busch and Busch, LLP, attorneys; Ronald J. Busch, on the brief).

PER CURIAM

Following a bench trial, appellants Frank Picciolo and Angelina Picciolo,[1] husband and wife, appeal from an October 15, 2013 Probate Part "order of judgment"[2] requiring Angelina to disgorge all funds and distributions she received from an annuities transfer Frank completed while acting as attorney-in-fact for the late William C. Mallas (Mr. Mallas), appellants' neighbor. Prior to his death, Mr. Mallas executed a power of attorney (POA) naming Frank as attorney-in-fact, a new will naming Angelina as a beneficiary, and later a codicil appointing Frank as executor.

While the trial court upheld the POA, will, and codicil, the court nevertheless determined Frank "failed to prove . . . that no undue influence was exerted" upon Mr. Mallas regarding the purchase of an Allianz Life Insurance Company (Allianz) annuity, which designated Angelina as sole beneficiary. As a result, the court ordered Angelina to disgorge all Allianz-related benefits and ordered the Allianz beneficiary changed to "the Estate of William Mallas." For the reasons that follow, we affirm.

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[1] For ease of reference, and intending no disrespect, we refer to the parties by their first names.

[2] Appellants also challenge numerous related orders that followed concerning related issues, including counsel fees, surcharge of Frank for failing to properly account for his actions as attorney-in-fact, and denial of reconsideration motions.

I

We discern the following facts from the trial record. On June 19, 2006, Mr. Mallas executed a will that divided his estate evenly between his brother Peter and respondent, decedent's niece Nicole Zablocki (Nicole). On March 12, 2008, Mr. Mallas signed a POA designating Frank as his attorney-in-fact. The trial court described Frank as "a good friend, neighbor and [confidant]."

In August 2008, Frank used the POA to transfer funds contained in a long-standing Bristol Myers Squibb IRA into two annuities, in roughly equal amounts, with New York Life and ING. Both annuities listed the Estate of William Mallas as beneficiary.

On November 13, 2008, Mr. Mallas executed a new will, designating Angelina,[3] his brother Peter, and Nicole as one-third residuary beneficiaries. On the same date, Mr. Mallas executed a new POA, again appointing Frank as his attorney-in-fact, but naming a different alternate attorney-in-fact. On September 22, 2009, Mr. Mallas executed a codicil, which named Frank as executor and Angelina as alternate executor. Attorney Robert C. Nisenson prepared these three documents and attended to their execution. On the same date Mr. Mallas signed the codicil, Frank used his POA

[3] Because Frank had IRS liens, he suggested Mr. Mallas name Angelina in the will, rather than himself.

to transfer the New York Life and ING annuities into one annuity with Allianz, and designate Angelina as sole beneficiary.

Notably, the sales agent for the Allianz transaction testified that Frank directed him to make Angelina, instead of himself, the primary beneficiary because Frank had an IRS lien against him. The sales agent also testified that he met with Frank and Angelina on several occasions, but he never met with Mr. Mallas. When the agent requested to meet Mr. Mallas, Frank told the agent it "wouldn't be feasible to go meet him."

At his deposition, Frank testified that the Allianz sales agent met with Mr. Mallas in his home. At trial, Frank changed his testimony, claiming he had confused the Allianz sales agent with a bank employee who handled the accounts of Mr. Mallas.

At trial, Angelina admitted that Frank told her about the Allianz transaction when it occurred in 2009, recalling, "He told me that I was going to get this — receive this gift because he couldn't accept it. . . . Because of [his] tax lien." She also admitted she "had very little contact with Mr. Mallas," and "never set foot in his house."

On September 24, 2009, Adult Protective Services (APS) received a report that Mr. Mallas was the victim of financial exploitation. Based on this referral and conduct of Mr. Mallas at an unannounced visit, APS subpoenaed the bank records of Mr.

Mallas and found "numerous checks written out to Paperboard Foodsavers Properties." Upon investigation, APS discovered that "the only person associated with [Paperboard Foodsavers Properties] was . . . Angelina Picciolo." Subsequently, APS initiated a guardianship proceeding, and on April 9, 2010, the Chancery Division entered a judgment of incapacity and appointed an attorney as guardian for Mr. Mallas.

After Mr. Mallas died on June 19, 2010, Frank filed a verified complaint seeking to probate the November 13, 2008 will and the September 22, 2009 codicil. Two of decedent's nieces, Nicole and Pamela Sulewski,[4] challenged decedent's will, codicil, POA, and the Allianz transaction.

In August 2013, the Chancery Division conducted a seven-day trial. In a written opinion, the court held the March 12, 2008 POA, the November 13, 2008 will, and the September 22, 2009 codicil were all valid, finding Mr. Mallas had the required capacity to execute each document and the benefit of independent counsel. However, the court also concluded that Frank "failed to prove that the Allianz transaction was not the product of undue influence." The court therefore invalidated the Allianz beneficiary designating Angelina "as the sole beneficiary and order[ed] that

[4] Pamela subsequently dismissed her claims with prejudice.

the beneficiary be changed to "the Estate of William Mallas[,] . . . consistent with [his] November 12, 2008 [w]ill."

The court further concluded that Frank "failed to properly account" for his actions using the POA; as a result, the court also removed Frank as executor because, "[a]s a result of this [c]ourt's decision, the Estate of William Mallas has substantial claims against him."

II

A trial court's findings of fact are binding on appeal if supported by "adequate, substantial, and credible evidence." Rova Farms Resort, Inc. v. In'vrs Ins. Co. of Am., 65 N.J. 474, 484 (1974). Such findings made by a judge in a bench trial "should not be disturbed unless they are so wholly insupportable as to result in a denial of justice." Id. at 483-84. Factual findings that "are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case" enjoy deference on appeal. State v. Johnson, 42 N.J. 146, 161 (1964).

Our Supreme Court has "firmly established in our case law" that a will may be set aside based upon a demonstration that it was procured through undue influence. In re Estate of Stockdale, 196 N.J. 275, 302 (2008). The concept of undue influence connotes "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 . . . ." Id. at 302-03. This is generally accomplished "by means of a will or inter vivos transfer in lieu thereof." Id. at 303.

Typically, the challenger of a will maintains the burden of proof in showing undue influence. Ibid. However, that burden shifts when a beneficiary "stood in a confidential relationship to the testator and if there are additional 'suspicious' circumstances" present. Ibid. (citing In re Rittenhouse's Will, 19 N.J. 376, 378-79 (1955)). If the confidential relationship is not a professional one, as in an attorney-client relationship, the burden may be overcome by a preponderance of the evidence. Ibid. (citing In re Catelli's Will, 361 N.J. Super. 478, 487 (App. Div. 2003)).

A confidential relationship exists when "the testator, 'by reason of . . . weakness or dependence,' reposes trust in the particular beneficiary, or if the parties occupied a 'relation[ship] in which reliance [was] naturally inspired or in fact exist[ed].'" Stockdale, 196 N.J. at 303 (alteration in original) (quoting In re Hopper, 9 N.J. 280, 282 (1952)). Additionally, a confidential relationship is present "when the circumstances make it certain that the parties do not deal on

equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." In re Codicil of Stroming, 12 N.J. Super. 217, 224 (App. Div. 1951). To find suspicious circumstances that shift the burden, those suspicions "need only be slight." Stockdale, 196 N.J. at 304; see also Haynes v. First Nat'l State Bank, 87 N.J. 163, 176-78 (1981).

Similar principles apply for setting aside inter vivos gifts and property transfers on the grounds of undue influence. To establish a presumption of undue influence and shift the burden of proof, a challenger must show either that "the donee dominated the will of the donor, Seylaz v. Bennett, 5 N.J. 168, 172 (1950); Haydock v. Haydock, 34 N.J. Eq. 570, 574 (E. & A. 1881), or . . . a confidential relationship exist[ed] between [the] donor and donee, In re Dodge, [50 N.J. 192, 227 (1967)]; Mott v. Mott, 49 N.J. Eq. 192, 198 (Ch. 1891)." Pascale v. Pascale, 113 N.J. 20, 30 (1988); see also Sipko v. Koger, Inc., 214 N.J. 364, 376, (2013). However, inter vivos gifts, unlike wills, do not require challengers to show suspicious circumstances to set them aside. Id. at 30-31.

To rebut the presumption after the burden switches, the beneficiary of a gift challenged for undue influence must establish his or her case by clear and convincing evidence. Id. at 31. The

beneficiary must prove "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.'" Ibid. (citing Dodge, 50 N.J. at 227).

Applying these standards here, the trial judge reasonably determined that a confidential relationship existed between Mr. Mallas and Frank, finding it "clear that Mr. Mallas depended upon [Frank] in many respects." After finding a confidential relationship, and suspicious circumstances surrounding the execution of each of the challenged documents in the case, the judge concluded that Frank "met his burden of proving that there was no undue influence exerted by him in connection with the November 13, 2008 Will, the November 13, 2008 [POA] and the September 22, 2008 [c]odicil." Frank met his burden because, "[i]n connection with each of those documents[,] Mr. Mallas was represented by independent counsel, Mr. Nisenson."

Addressing the Allianz transaction, the judge came to a different conclusion, finding that appellants failed to carry their burden of proving the absence of undue influence. He explained that Frank's own expert,

> Dr. Goldwasser, testified that Mr. Mallas was not capable of understanding a complicated transaction like the Allianz transaction. Mr. Mallas did not have the benefit of independent counsel or[,] for that matter[,] even direct

> interaction with [the sales agent] who sold the Allianz product. [Frank] contends that it was Mr. Mallas who made this sophisticated business decision. There was no need for Mr. Mallas to enter into the Allianz transaction at that time. If Mr. Mallas wanted to leave more to [Frank] (through [Angelina]), he certainly could have given instructions to Mr. Nisenson in connection with the preparation of the [c]odicil. The codicil could have included not only a designation of a different [e]xecutor, but it could have also designated that [Angelina] would receive a larger share of his estate.

We are mindful of our limited scope of review. Although a probate judge's post-trial factual findings concerning issues of capacity and undue influence are not automatically controlling, such findings "are entitled to great weight [on appeal] 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), (quoting Gellert v. Livingston, 5 N.J. 65, 78 (1950)). Unless the trial judge's findings are "so manifestly unsupported or inconsistent with the competent, reasonably credible evidence" the factual conclusions should not be disturbed. Id. at 524 (citing Leimgruber v. Claridge Assocs., 73 N.J. 450, 456 (1977)).

Such a "manifest" lack of evidential support simply has not been demonstrated by appellants on this appeal. The record is replete with proof of the confidential relationship between Mr.

Mallas and Frank and the highly suspicious circumstances regarding the Allianz transaction; in contrast, the record contains no credible evidence to rebut the presumption of undue influence.

Appellants argue the trial court erred when it considered the "Allianz transaction as a whole rather than simply" focusing on the designation of beneficiary. Specifically, they argue the trial court erred in relying upon expert testimony that decedent would not have been capable of understanding the Allianz transaction's complexity. We disagree. The expert testimony in question came from appellants' own expert. The testimony severely undermined Frank's testimony that Mr. Mallas made the decision to change to the Allianz annuity, and that "he read every line of everything . . . ." Even if we were to limit our focus to "the designation of beneficiary," the record lacks any credible evidence to prove the designation was not the product of undue influence.

Appellants also argue that the judge's factual findings are against the weight of the evidence. We disagree. Our review of the record reveals substantial, credible evidence supporting the trial judge's decision.

Appellants further argue that Angelina's status as a third-party beneficiary entitles her to retain the Allianz annuity as a matter of law because she was merely a passive recipient rather

than a participant in her husband's actions. In opposition, Nicole cites N.J.S.A. 46:2B-8.13(a), which prohibits attorneys-in-fact from giving themselves gifts without express authority, and argues this provision should apply since Frank admitted the designation of Angelina was merely a ploy to avoid tax liens, a contention that Angelina has no basis to dispute.

"[A] court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 412 (E. & A. 1938) (citations omitted). "[A] court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

Here, the judge crafted an equitable remedy that accounted for the fact that there was no credible evidence that Mr. Mallas authorized the Allianz transaction or that he intended to use the Allianz transaction to nullify the estate plan he established, with the benefit of counsel, in his will and codicil. Moreover, the judge found credible the testimony of appellants' own expert, Dr. Goldwasser, that by September 2009, Mr. Mallas was no longer capable of understanding a complicated transaction like the Allianz transaction. Since the record indicates the designation

of Angelina as beneficiary of the Allianz annuity did not represent an intention of Mr. Mallas to benefit Angelina, but instead reflected Frank's scheme to avoid his IRS liens, the trial court reasonably concluded, "[Angelina] cannot benefit from her husband's wrongful conduct and be 'unjustly enriched' thereby." Angelina had little contact with Mr. Mallas and her testimony provided no basis for any reasonable expectation she would receive the proceeds of the Allianz annuity, particularly where, as here, the court found the transaction unauthorized and the product of undue influence.[5]

The balance of appellants' arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[5] We also find relevant that Angelina is the spouse of the person responsible for the unauthorized transaction and the undue influence. See Palisades Safety & Ins. Ass'n v. Bastien, 175 N.J. 144, 151 (2003) (denying personal injury protection coverage for the wife, who was "in a unique position to be aware of the other spouse's interactions with the insurer of the household's vehicles[,]" where the named insured husband falsely represented no other persons of driving age resided in the household).