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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001826-MR

TAMARA SLUSS — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 13-CI-00151

ESTATE OF GLORIA B. SLUSS,
LISA B. CULP, EXECUTRIX, and
LISA B. CULP, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES AND NICKELL, JUDGES.

COMBS, JUDGE: Tamara Sluss appeals from an order of the Boyd Circuit Court granting summary judgment in this probate matter. At issue was a challenge to the validity of a will executed by Tamara's mother, Gloria B. Sluss. After our review, we affirm.

Gloria B. Sluss died on April 12, 2012. She was survived by two adult daughters, Tamara Sluss and Erica Sluss Rosales, and three grandchildren: Whitney Rosales, Delfino Rosales, and Christopher Rosales. Whitney, Delfino, and Christopher are Erica's children. Gloria was also survived by her sister, appellee Lisa B. Culp.

The majority of Gloria's assets, including a checking account, an investment account, and a life insurance policy, passed outside the probate estate to her sister, Lisa. Gloria's will, executed on August 5, 2008, devised and bequeathed the remainder of her assets to Lisa. In precatory language included in a hand-written memorandum, Gloria asked Lisa to give to Erica her home and its contents; to distribute the liquid assets included in her estate among Whitney, Delfino, and Christopher; and to divide her jewelry between Erica and Tamara.

Within a week of Gloria's death, the will was proven by the testimony of Gurney Johnson -- the attorney who prepared the will and served as one of the two witnesses to its execution. Lisa was appointed executrix.[1]

Tamara filed this action contesting the will in February 2013. In her deposition, Tamara admitted to having had a rocky relationship with Gloria. After a period of discovery, Lisa filed a motion for summary judgment. The trial court

[1] With the exception of funds placed into escrow to cover the cost of this litigation, Lisa used the assets that came to her as a result of Gloria's death to establish a revocable trust for the benefit of Whitney, Christopher, and Delfino.

entered summary judgment in favor of Lisa on November 17, 2016. This appeal followed.

On appeal, Tamara asserts that the sole question to be decided is whether Gloria was "under the influence of alcohol and/or drugs at the time she signed her will . . . or even if she was not, then what was her mental state?" Tamara contends that she was entitled to a trial by jury on the issues of her mother's testamentary capacity and Lisa's allegedly undue influence upon her.

When a trial court grants summary judgment, we must determine whether it erred by concluding that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. To avoid summary judgment, the party opposing its entry must present **at least some** affirmative evidence to show that there exists a disputed issue of material fact to be resolved at trial. *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001) (citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991)).

The privilege of testators to dispose of their property in ways they see fit is zealously guarded by the courts. *Bye v. Mattingly*, 975 S.W.2d 451 (Ky. 1998) (citing *American National Bank & Trust Co. v. Penner*, 444 S.W.2d 751 (Ky. 1969)). The degree of mental capacity required to make a will is minimal. *Bye* (citing *Nance v. Veazey*, 312 S.W.2d 350 (Ky. 1958)). In order to execute a

will, a testator must: "(1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose." *Bye*, 975 S.W.2d at 455 (internal citations omitted). There is a strong presumption in favor of testamentary capacity that cannot be overcome by remote or speculative evidence. *Id.*

By all accounts, Gloria struggled with alcoholism. However, there is absolutely no evidence in the record to suggest that she was under the influence of alcohol or any other mind-altering substance at the time that she executed her will on August 5, 2008. In fact, Tamara conceded in her deposition that Gloria had "lucid moments" in 2008 -- the year the will was executed -- which gave her some hope that her mother would find sobriety. Tamara failed to produce sufficient affirmative evidence to indicate that Gloria lacked the testamentary capacity necessary to execute her will on August 5, 2008, as a consequence of her alcoholism.

Additionally, Tamara's unsupported allegation that Gloria suffered with brain damage as a result of her alcoholism is wholly speculative and does not constitute evidence of a lack of her testamentary capacity. Tamara admitted that she had no personal knowledge of Gloria's mental state at or around the time the will was executed. In fact, the testimony indicates that Tamara had little contact with her mother. Tamara's evidence did not indicate that Gloria lacked knowledge

of her family or the nature of her estate. Tamara's bare and unsubstantiated allegation of Gloria's infirmity fails to present a genuine issue of material fact. The trial court did not err by concluding that Lisa and Gloria's estate were entitled to judgment as a matter of law.

Finally, without reference to any proof whatsoever, Tamara contends that "[t]he signs of undue influence in this case are so prolific that there exists at the very least, many genuine issues of material fact" that preclude summary judgment. We disagree.

Undue influence is not simply cultivated through acts of kindness or appeals to feelings. Nor is it established by arguments geared toward merely persuading a testator's donative intent. *Kentucky Trust Co. v. Gore*, 302 Ky. 1, 192 S.W.2d 749, 753 (1946). Instead, undue influence is a level of persuasion or manipulation that destroys the exercise of a testator's own judgment. *Rothwell v. Singleton*, 257 S.W.3d 121 (Ky. App. 2008). Undue influence must be shown to have been exercised at the time of the will's execution and is generally shown through reference to the facts and circumstances leading up to its execution. *McKinney v. Montgomery*, 248 S.W.2d 719 (Ky. 1952). Some circumstances are regarded as especially indicative of undue influence. *Belcher v. Somerville*, 413 S.W.2d 620 (Ky. 1967). They are known as "badges" of undue influence. *Id.*

They include the following:

1. A will unnatural in its provisions;
2. A physically weak, mentally impaired testator;
3. Participation by the beneficiary in the physical preparation of the will and possession of it following its execution;
4. Efforts by the beneficiary to restrict contact between the testator and other persons;
5. A lately developed and comparatively short period of close relationship between the testator and the principal beneficiary.

Id. (Summarizing the badges of undue influence set forth in the case.) The trial court concluded that Tamara had failed to show the existence of a genuine issue of material fact with respect to this issue because the evidence that she presented failed to indicate **any** of the "badges" of undue influence.

In leaving her modest estate to her sister, Gloria executed a will that was not unnatural in its provisions -- particularly in light of the precatory language included in the memorandum addressed to Lisa. The evidence indicated that Gloria and Lisa had shared a close and loving relationship from childhood on and that Lisa never tried to restrict Gloria's contact with anyone. There was absolutely no indication that Lisa participated in the preparation of the contested will or that she even retained possession of it following its execution. There was also insufficient evidence to show that that Gloria was physically weak or mentally impaired at the time that she executed her will. The evidence indicated only that Gloria was exercising her own judgment when she executed her will. The trial

court did not err by concluding that any alleged evidence of the "badges" of undue influence was insufficient to permit submission of the issue to a jury.

We affirm the judgment of the Boyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Ashland, Kentucky

BRIEF FOR APPELLEE:

Patrick M. Hedrick
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