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2019 IL App (3d) 180173-U

Order filed August 8, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

<i>In re</i> ESTATE OF FRANCIS H. HOYT III,)	Appeal from the Circuit Court
Deceased)	of the 12th Judicial Circuit,
)	Will County, Illinois,
(Raymond Hoyt, Shelby Hoyt and Mary)	
Hoyt, as heirs at law,)	
)	Appeal No. 3-18-0173
Petitioners-Appellants,)	
)	
v.)	
)	
Craig Stimpert, Individually, as Legatee under)	
the Last Will and Testament of Francis H.)	Circuit No. 2013 P 679
Hoyt III, and as Executor of the Estate of)	
Francis H. Hoyt III, Deceased; James Tacchia,)	
as Legatee under the Last Will and Testament)	
of Francis H. Hoyt III, Deceased; Lisa)	
Westerman, as Legatee under the Last Will)	
and Testament of Francis H. Hoyt III,)	
Deceased; Betty Peterson, as Legatee under)	
the Last Will and Testament of Francis H.)	
Hoyt III, Deceased; and Jill Williams, as)	
Legatee under the Last Will and Testament)	
of Francis H. Hoyt III, Deceased,)	
)	
Respondents-Appellees).)	
)	
<hr/> RAYMOND HOYT, Individually and as)	
Special Representative of the Estate of MARY)	
HOYT, and SHELBY HOYT, Heirs at Law of)	
the Estate of FRANCIS H. HOYT III, Deceased,))	

)	Circuit No. 2014 L 697
Plaintiffs-Appellants,)	
)	
v.)	
)	
LISA WESTERMAN, Individually and as)	
Executor of the Estate of JAMES TACCHIA,)	Honorable
)	Barbara N. Petrunaro,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* In a consolidated will contest and breach of fiduciary duty action, the trial court's evidentiary rulings barring testimony, based primarily on the Dead-Man's Act, were upheld. The jury's finding that the deceased had the testamentary capacity to execute his will was not against the manifest weight of the evidence. And, a directed verdict in favor of the deceased's healthcare power of attorney was upheld because he had no duty to prevent the deceased's suicide.

¶ 2 Two actions involving the estate of the deceased, Francis H. Hoyt, III, were consolidated for trial. The petitioners in both actions, the deceased's relatives, appealed from trial court orders in favor of respondents, who were all legatees under the deceased's will.

¶ 3 **FACTS**

¶ 4 The deceased, Francis H. Hoyt III, also known as Butch, died from a self-inflicted gunshot wound on September 3, 2013. He left a will that was executed just a few days prior, on August 29, 2013. The executor named in the will, the respondent Craig Stimpert, filed a petition to probate the will. The petitioners, Raymond Hoyt, Shelby Hoyt, and Mary Hoyt, the brother, the niece, and the mother, respectively, of the deceased, filed a petition to set aside the deceased's will, alleging lack of capacity by the deceased and undue influence by the respondent James Tacchia (2013 P 0679). The same petitioners then filed a complaint against Tacchia,

alleging breach of fiduciary duty and wrongful death in that he failed to take actions to prevent the deceased from committing suicide (2014 L 0697).¹ The cases were consolidated for purposes of trial.

¶ 5 Stimpert, individually and as the administrator of the deceased's estate, and Tacchia filed several motions *in limine* and a motion to bar. Some of those evidentiary rulings are at issue in this appeal. The respondents sought to bar any testimony or evidence that Tacchia was a fiduciary of the deceased with regard to claims of incapacity and undue influence. Since the issue of fiduciary duty was one for the court, the trial court ruled that any such evidence would be barred in front of the jury and the court reserved the issue on the evidence presented to it.

¶ 6 The respondents also sought to bar any testimony or evidence with regard to statements made by the deceased pursuant to the Dead Man's Act (735 ILCS 5/8-201 (West 2016)). The court granted the motion with regard to interested parties, specifically, Gina Hoyt, Raymond Hoyt, and Stimpert.

¶ 7 The respondents sought to bar the petitioners' retained expert's testimony. When arguing the motion *in limine*, petitioners' counsel stated that the expert, although he had treated the deceased for his motorcycle accident almost 20 years earlier, was only going to be called to testify as to head injuries in general. The trial court barred any testimony by the expert based upon anecdotal information from family members and any opinions based on that and limited his testimony to head injuries in general.

¶ 8 The deceased's will left significant assets, including vehicles and real property, to Tacchia. It left a 25% interest in his business's building to Raymond and a 25% interest in the same building to Shelby, and left the remaining 50% interest in the building to Tacchia. The

¹James Tacchia passed away prior to trial.

deceased's interest and common stock was left to Tacchia and Stimpert, equally. The will also left real estate to Jill Williams. It did not leave anything to the deceased's mother.

¶ 9 Raymond Hoyt testified that the deceased was his brother. Raymond testified that their mother, Mary Hoyt, had dementia and was living in a facility when the deceased died. Raymond testified that he never told their mother about the deceased's death and did not know if she would have understood anyway. He described his relationship with the deceased as good.

¶ 10 Amanda Horckey had been engaged to the deceased from 1991 to 1996, and they remained friends after they broke up. Horckey testified that she knew all of the deceased's family members and described the deceased's relationship with them as good. She did not have much contact with the deceased's family in the few years prior to the deceased's death. Horckey testified that the deceased had a problem with his brother Raymond a few years prior to his death, but they were still family and were social to each other. The deceased would see his brother at the nursing home while visiting their mother and they would talk. In her deposition, Horckey stated that she did not know if they had a falling out, but she knew that they did not talk. Horckey described the deceased as a social drinker, but she did not think that he was an alcoholic. She stopped talking to him about two weeks before his death because he was mean and snappy, which was out of character for him. She called him the Friday before he died and he called back the next day and left a voice message. She was surprised that the deceased left property to Tacchia and Stimpert in his will. She testified that the deceased was always a strong person, but he was more emotional in the weeks prior to his death.

¶ 11 The videotaped deposition of Roxanne Hancock was admitted. Hancock was the deceased's ex-wife; they had been divorced since 1982 and she had last seen him in 2002 or 2003. They maintained a friendship, though, and Hancock testified that they talked once or twice

a week. Hancock testified that she thought the deceased had a drinking problem during their marriage. After the deceased's motorcycle accident in 1996, his brother Raymond temporarily ran the deceased's trucking business, but later the deceased returned to running it himself. Hancock testified that Raymond and the deceased generally had a good relationship, but they had some points of contention. Hancock testified that in the two or three months before his death, the deceased had talked about concerns regarding his trucking business. In the months before he died, he was concerned about a large contract with the United States Postal Service (USPS) and his break up with his fiancée, Louise Schuller. Hancock was not concerned about the deceased, though, until the week prior to his death. The deceased sounded depressed and he called Hancock to let her know of his three bank account numbers. After his death, Hancock found out that the deceased had put her name on one of his money market accounts. She was a little surprised that the deceased had not left anything to Mary, his mother, because they were close, but Mary was already in a nursing home and Raymond was taking care of her.

¶ 12 Louise Mager, formerly known as Louise Schuller, testified that she and the deceased had been together for 12 years, engaged for the last 5 of those years. She testified that Tacchia had been friends with the deceased since the 1960s and Tacchia was one of the deceased's best friends. She testified that during their 12 years together, she had seen the deceased's mother on a couple of occasions and had only met Raymond once at the nursing home on Mother's Day. On that day, the deceased saw Raymond's vehicle in the parking lot, and he turned to leave, but Mager testified that she convinced the deceased that his mother was more important. Mager testified that she and the deceased broke up on July 5, 2013. She did not notice the deceased being upset or depressed in the months prior to his death.

¶ 13 The petitioners' expert, Dr. Michael Gelbort, testified that he was a clinical neuropsychologist. The trial court overruled the defense counsel's objection to questions about the deceased's motorcycle accident and Dr. Gelbort testified that the deceased was his patient after a motorcycle accident in 1996. The deceased was not wearing a helmet at the time of the accident and was found unconscious and not breathing by some bystanders. The deceased was in a rehabilitation unit for about three weeks, showing symptoms of a left hemisphere focal injury and signs and symptoms of hypoxia. Dr. Gelbort described the type of brain injury suffered by the deceased as an acquired traumatic brain injury. Dr. Gelbort was then allowed to testify as to permanent limitations suffered by patients with similar brain injuries. Dr. Gelbort testified that people with brain injuries were weaker overall, with less resilience, and could suffer from emotional issues. Dr. Gelbort had occasion to treat people who subsequently committed suicide.

¶ 14 Police Officer Fernando Urquidi responded to the scene of the deceased's death on September 3, 2013. At the scene, Urquidi spoke to Tacchia. The trial court ruled that the Dead Man's Act did not bar Tacchia's statements that the deceased had been distraught that his girlfriend broke up with him, that the business had lost a big contract, and that the deceased had met with an attorney and changed his will.

¶ 15 Portions of James Tacchia's deposition was read to the jury as evidence. Tacchia owned a truck and worked for the deceased. Tacchia had known the deceased since 1960. Tacchia testified that Mager had been the deceased's fiancée for about 10 years, and she broke up with the deceased in July 2013. In August 2013, the deceased called Tacchia and said that the deceased was going to have a new will drawn up. Tacchia could not remember if he knew at the time that the deceased put Tacchia's name on one of his bank accounts the same day he did his will. Tacchia testified that the deceased drank alcohol every day. The deceased had been

drinking more than usual in the two weeks prior to his death. Tacchia testified that the deceased was upset about the loss of the USPS contract, his fiancée, and the fiancée's children, who had damaged his home. Tacchia was aware that the deceased owned some firearms. Since the fiduciary claim was to be decided by the court, the testimony that Tacchia was the deceased's healthcare power of attorney, which was executed on the same day as the new will, and that he accepted that appointment, was not read to the jury.

¶ 16 James Stadler was a close friend of the deceased for 43 years and was with him the night before his death. Stadler testified that the deceased had a gun on him outside the bar. Stadler took it from the deceased and put it in the deceased's pickup truck and went back in the bar. The deceased was upset, and Stadler drove the deceased home around 5 p.m. and stayed with him about an hour. Stadler returned to the bar, and the deceased also returned to the bar about a half hour later. The deceased asked Stadler if Stadler took his gun, and Stadler told him it was in the deceased's truck. The deceased was in a completely different mood by that point—he sat down and was eating and drinking—and he did not seem drunk. Stadler and his wife then left the bar. Stadler testified that the deceased's relationship with his family was tumultuous, but the deceased was close to his mother. In the weeks prior to the deceased's death, Stadler noticed that the deceased was devastated about his break up with his fiancée.

¶ 17 Stimpert testified outside the presence of the jury. He was also with the deceased at the bar the night before his death. The deceased was emotional the night before he died, and the deceased had been more emotional in the couple of months before his death. Tacchia told Stimpert that he had been concerned about the deceased in the time before his death because the deceased had been talking about the business and about killing himself.

¶ 18 Tacchia's estate moved for a directed finding in the wrongful death action (2014 L 0697). The trial court granted the motion. The jury returned a verdict in favor of the respondents in the will contest proceeding (2013 P 0679).

¶ 19 ANALYSIS

¶ 20 The petitioners appealed, arguing that: (1) the trial court erred in limiting and barring testimony under the Illinois Dead Man's Act, (2) the jury's conclusion that the deceased had testamentary capacity to create the August 29, 2013, will was against the manifest weight of the evidence, and (3) the trial court erred in directing a verdict for Tacchia on the breach of fiduciary duty claim.

¶ 21 I. Evidentiary Rulings

¶ 22 The petitioners contend that the trial court erred in limiting and barring testimony under the Illinois Dead Man's Act (735 ILCS 5/8-201 (West 2016)). Specifically, the petitioners contend that the motion *in limine* barring testimony or evidence regarding statements made by the deceased was overly broad and vague because it did not specifically advise the parties what witnesses could or could not say during testimony. The petitioners also contend that the trial court misapplied the Dead Man's Act to the testimony of Dr. Gelbort, Raymond Hoyt, Gina Hoyt, and Stimpert. The petitioners argue that: (1) Raymond and his wife should not have been prevented from testifying regarding the deceased's relationship with Raymond in response to testimony that they were not close, (2) Dr. Gelbort's testimony was improperly limited, (3) Stimpert should have been allowed to testify in front of the jury, and (4) the petitioners should have been allowed to present to the jury evidence regarding the healthcare power of attorney and Tacchia's fiduciary duty to show undue influence.

¶ 23 A motion *in limine* permits a party to obtain an order excluding inadmissible evidence and prohibiting comment concerning such evidence during closing argument. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 871 (2004). Trial judges should attempt to enter narrow *in limine* orders, anticipate proper evidence that might be excluded by the orders, and make the orders clear and precise so that all parties concerned have an accurate understanding of their limitations. *Id.* We review evidentiary rulings for an abuse of discretion. *Hoffman v. Northeast Illinois Regional Commuter R.R. Corp.*, 2017 IL App (1st) 170537, ¶ 41.

¶ 24 The respondents sought and were granted a motion *in limine* under the Dead-Man’s Act. The order banned testimony or evidence regarding statements made by the deceased or events involving the deceased in the presence of an interested witness. To render a witness incompetent to testify under the Dead-Man’s Act, the potential witness must have an interest in the judgment that will result in a direct, immediate monetary gain or loss. *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 33. The Dead-Man’s Act specifically states that an “interested person” does not include a person who is “interested solely as executor” or other fiduciary capacity. 735 ILCS 5/8-201(West 2012); *Danhauer*, 2013 IL App (1st) 123537, ¶ 33.

¶ 25 The petitioners contend that they were prevented from asking Raymond and his wife questions regarding Raymond’s relationship with the deceased after Mager testified that she only met Raymond once in 12 years and that the deceased wanted to leave when he saw Raymond’s vehicle. They argue that Raymond was prohibited from testifying regarding his care for the deceased after his accident, his work for the deceased’s business, or regarding the time spent together with their mother. See 735 ILCS 5/8-201(a) (West 2016) (There is an exception to the Dead Man’s Act when: "If any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place

in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.")

¶ 26 In response to a jury question, Raymond was allowed to characterize his relationship with the deceased. The trial court did not rule, though, that Raymond could only characterize the relationship. Rather, the petitioners' attorney responded to an objection from the defense that she was not seeking for Raymond to give a long answer and that she would make sure Raymond knew what he could say. She did not argue for any specific instances and did not make an offer of proof. Raymond testified that his relationship was good with the deceased both before and after the deceased's accident. Any error in not allowing testimony regarding specific instances would be invited error. *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 154.

¶ 27 The petitioners also contend that Dr. Gelbort's testimony was improperly limited because he was not allowed to rely on anecdotal evidence about the deceased's current behavior to testify regarding the permanency of his head injury. The petitioners argue that the Dead-Man's Act only precluded interested parties from testifying regarding any conversations with the deceased and that Dr. Gelbort, as an expert, could rely on the information from the family. The anecdotal evidence was the same evidence that the petitioners were barred from testifying about directly pursuant to the Dead Man's Act. Dr. Gelbort could not testify as a treating physician based upon evidence barred by the Act. Thus, the trial court did not abuse its discretion in limiting his expert testimony when the current behavioral information was based only on information from interested witnesses. See *In re Estate of Justus v. Justus*, 243 Ill. App. 3d 737, 740-41 (1993) ("the [Dead-Man's] Act will not allow parties to do by indirect means what they are prohibited from doing directly").

¶ 28 The petitioners argue that Stimpert should have been allowed to testify before the jury. He testified that he was with the deceased the night before he died. He thought the deceased had been more emotional in the three or four weeks prior to his death. Stimpert also testified that he spoke with Tacchia within two days after the deceased's death, and the Tacchia indicated that he had been concerned about the deceased and the deceased had talked about killing himself. In the will contest action, Stimpert was an interested witness to which the Dead Man's Act applied, so his testimony was properly excluded before the jury.

¶ 29 The petitioners also contend that they should have been permitted to present evidence to the jury regarding Tacchia's healthcare power of attorney. They argue that the evidence was relevant to the deceased's mental capacity to make the will and evidence of undue influence by Tacchia. A healthcare power of attorney, though, does not give rise to a general fiduciary duty and does not create a presumption of undue influence in property or financial transactions between the power's principal and agent. *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 26. Thus, the trial court did not abuse its discretion in limiting the evidence of Tacchia's healthcare power of attorney. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 646 (2010). In a related argument, the petitioners contend that the trial court erred in refusing their jury instructions on undue influence. Specifically, the petitioners proffered Illinois Pattern Jury Instructions, Civil, Nos. 200.03, 200.03.05 (2006) (hereinafter IPI Civil (2006)). Both instructions were given to the jury, but IPI Civil (2006) No. 200.03 was modified to remove the word "fiduciary." The petitioners' attorney did not object to that change, making it an invited error. See *Bruntjen*, 2014 IL App (5th) 120245, ¶ 154.

¶ 30 II. Testamentary Capacity

¶ 31 The petitioners argue that the evidence was overwhelming that the deceased did not have the capacity to create the August 29, 2013, will. They argue that there was significant testimony that the deceased was unable to conduct his regular business and unable to act rationally in the ordinary affairs of his life. He was suicidal, not acting rationally, and did not know the natural objects of his bounty. The petitioners also contend that Tacchia and Stimpert unduly and unlawfully influenced the deceased, making the August 29 will invalid. A reviewing court will only reverse a jury verdict if it is against the manifest weight of the evidence. *Eid v. Loyola University Medical Center*, 2017 IL App (1st) 143967, ¶ 28.

¶ 32 To establish lack of testamentary capacity, a petitioner must show that, at the time the will was executed, the testator lacked the sufficient mental ability to know and remember the natural objects of his bounty, to comprehend the kind and character of his property, and to make a planned disposition of his property. *DeHart v. DeHart*, 2012 IL App (3d) 090773, ¶ 16. The natural objects of a testator's bounty include those people related to him by ties of blood or affection, *i.e.*, those who are or should be considered to be recipients of his bequests. *Id.* The law presumes every man to be sane and of sound mind until the contrary is proved, with the burden resting upon the party who asserts it to prove lack of testamentary capacity. *In re Estate of Bonjean's Estate*, 90 Ill. App. 3d 582, 586 (1980). The act of suicide, or attempted suicide, is not, *per se*, proof of insanity, but is a fact to be considered, with all other facts, in determining the testamentary capacity of the testator. *Id.*; *Wilkinson v. Service*, 249 Ill. 146, 152 (1911).

¶ 33 We find the jury's conclusion that the deceased had testamentary capacity was not against the manifest weight of the evidence. The jury heard evidence regarding the deceased's mood and behavior, his accident and subsequent years of running a business, and the fact of the deceased's suicide. The suicide, however, was several days after the will was executed. The fact

that the deceased did not leave any property to his mother was also reasonable under the circumstances. At the time the deceased executed the will, the deceased's mother was in a nursing home. Raymond testified that he never even told their mother that the deceased died, because she would not have understood. The petitioners argue that the fact that the deceased gave property to Jill Williams in his will was evidence that he did not know the objects of his bounty. According to their briefs, Williams never filed an appearance, and no one knew her. The respondents do not seem to address this allegation. However, it appears from the record that Williams receives service of process at the address of the real estate of the bequest from the deceased. The fact that the deceased made a bequest to a person not known to the petitioners is not sufficient to prove lack of testamentary capacity.

¶ 34 “ ‘Undue influence sufficient to invalidate a will is that influence [that] prevents the testator from exercising his own free will in the disposition of his estate or that deprives the testator of free agency and renders the will more than that of another than his own.’ ” *DeHart*, 2012 IL App (3d) 090773, ¶ 22 (quoting *In re Estate of Julian*, 227 Ill. App. 3d 369, 376 (1991)). The mere conclusion that the testator was influenced by the dominant nature of the disproportionate beneficiary is insufficient. *Id.*

“ ‘The *prima facie* elements of undue influence are: (1) a fiduciary relationship between the testator and a substantial and comparatively disproportionate beneficiary under the will; (2) a testator in a dependent situation in which the substantial and disproportionate beneficiaries are in dominant roles; (3) a testator who reposed trust and confidence in such beneficiaries; and (4) a will prepared or procured and executed in circumstances wherein such beneficiaries were instrumental or participated.’ ” *Id.*

¶ 35 There is no evidence of any link between the deceased’s friendship with Tacchia and the deceased’s new will. The only possible evidence of undue influence is the fact that Tacchia was named the deceased’s power of attorney for healthcare. A power of attorney gives rise to a general fiduciary relationship between the grantor of the power and the grantee as a matter of law. *Id.* ¶ 23. However, a healthcare power of attorney only creates a fiduciary relationship with regard to the scope of the power of attorney. *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 23. Thus, a healthcare power of attorney, by itself, does not create a presumption of undue influence in property or financial transactions between the power’s principal and agent. *Id.* In addition, an agent must accept the powers delegated by the principal to create the fiduciary relationship, and in the context of the healthcare power of attorney, that requires exercise of the granted powers. *Id.*; 755 ILCS 45/4-10(b) (West 2016). Thus, the jury’s verdict was not against the manifest weight of the evidence.

¶ 36 III. Healthcare Power of Attorney

¶ 37 Lastly, the petitioners argue that Tacchia knew that the deceased had threatened to kill himself and Tacchia’s failure to seek medical treatment for the deceased was a breach of his fiduciary duties pursuant to the healthcare power of attorney. The trial court directed a verdict in favor of Tacchia, finding that there was not “sufficient evidence to survive on this claim.”

¶ 38 Section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2016)) allows the respondent to make a motion for a directed finding at the close of the petitioner’s case in a bench trial. To rule on such a motion, the circuit court must engage in a two-step analysis. *Atkins v. Robbins, Salomon & Patt, Ltd.*, 2018 IL App (1st) 161961, ¶ 53. First, the court must decide whether the petitioner has presented a *prima facie* case as a matter of law or, rather, whether it has produced some evidence of every element necessary to its cause of action. *Id.* If not, the

court should grant the motion and enter judgment in favor of the defendant. *Id.* If the petitioner has presented a *prima facie* case, then the court must consider the totality of the evidence and determine if the petitioner has presented sufficient evidence to establish the *prima facie* case. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 276 (2003). Whether petitioners have failed to present a *prima facie* case as a matter of law is reviewed *de novo*, but if the trial court moves to the second prong and considers the totality of the evidence and determines that sufficient evidence does not exist to establish the *prima facie* case, the review is manifest weight of evidence. *Id.* at 275.

¶ 39 As noted above, the power of attorney for healthcare did not create a general fiduciary relationship. If the healthcare power of attorney is exercised, the statute immunizes the agent who acts or fails to act in good faith. 755 ILCS 45/4-8(d) (West 2016). The court directed a finding on the basis of lack of evidence, a conclusion that was not against the manifest weight of the evidence.

¶ 40 Of note, Tacchia did not have a duty to foresee and prevent the deceased's suicide. While Tacchia knew that the deceased was depressed, owned a gun, and had threatened suicide, the deceased was an adult who lived in his own home, ran a business, and he used his own gun. See *Chalhoub v. Dixon*, 338 Ill. App. 3d 535 (2003) (Stepfather had no duty to prevent the suicide of his stepson, even though the stepfather's gun was used and the stepfather was aware that the stepson was suicidal. The stepson was an adult who lived in a separate apartment.). Additionally, to the extent that Tacchia had a duty to act under the healthcare power of attorney, the statute provides immunity.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of Will County is affirmed.

¶ 43

Affirmed.