2011 IL App (1st) 110969-U

FOURTH DIVISION
December 22, 2011

Nos. 1-11-0969 & 1-11-1006 (consolidated)



IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| *In re* ESTATE OF ROCHELLE BRENNER, | ) | Appeal from the |
| | ) | Circuit Court of |
| Deceased | ) | Cook County |
| | ) | |
| (Alberta Brenner-Taylor, | ) | No. 08 P 5346 |
| | ) | |
| Petitioner-Appellee | ) | Honorable |
| | ) | James G. Riley, |
| v. | ) | Judge Presiding. |
| | ) | |
| Sharon Hirsch, | ) | |
| | ) | |
| Respondent-Appellant | ) | |
| | ) | |
| (Gary S. Benson, | ) | |
| | ) | |
| Intervenor-Appellant)). | ) | |

JUSTICE STERBA delivered the judgment of the court.
Justices Lavin and Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ *1* *HELD*: The circuit court erred in granting summary judgment where the statute relied on by the court does not require a guardian to seek the approval of the probate court prior to the execution of a will by the ward on her own behalf, and where genuine issues of

material fact exist concerning whether the will was the product of undue influence. Moreover, the circuit court erred in finding that the guardian and the attorneys committed gross misconduct and breached their fiduciary duties where the statute in question does not provide any procedures for the circumstance in which a ward desires to execute her own will.

¶ 2 Petitioner-appellee Alberta Brenner-Taylor filed a petition to contest the last will and testament of Rochelle Brenner, alleging that the will was the product of undue influence exerted upon Brenner by respondent-appellant Sharon Hirsch, Brenner's guardian. Brenner-Taylor's motion for summary judgment was granted, and the final order contained findings related to intervenor-appellant Gary S. Benson. The circuit court denied Benson's motion to intervene and also denied motions to reconsider filed by both Benson and Hirsch. On appeal, Hirsch contends that the circuit court erred in granting summary judgment because: (1) respondents had not been provided with an opportunity to respond to the motion and necessary discovery had not been completed; (2) a testator who had been adjudicated a disabled person may have sufficient testamentary capacity to execute a valid will; (3) the guardian was not required by law to petition the court for authority to have the ward execute a will; (4) genuine issues of material fact exist concerning whether the guardian exerted undue influence where no evidence was presented that the guardian procured the will, and even if a presumption of undue influence was raised, the guardian is entitled to an opportunity to rebut that presumption. Benson also appeals, contending that the circuit court erred in denying his motions to intervene and to reconsider where the circuit court's order contained findings related to him and no other party could adequately represent his interests. For the following reasons, we reverse the order of the circuit court granting summary judgment and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On September 22, 2004, in a separate guardianship proceeding, an order was entered declaring Brenner to be a disabled person and appointing Hirsch as plenary guardian of her estate and person. Although the guardianship proceeding was initiated by the Cook County Public Guardian, Brenner-Taylor, Brenner's daughter, and Hirsch, the wife of Brenner's nephew, Edward Hirsch, filed cross petitions seeking to be named Brenner's guardian. Benson appeared in the guardianship proceeding as an attorney for Hirsch.

¶ 5 In November 2004, Benson referred Brenner to attorney Gregg Odway for the preparation of her will. Odway was a sole practitioner who rented an office from Benson. There is evidence in the record that at some point Odway also filed an appearance on behalf of Hirsch in the guardianship proceeding, but Hirsch states in her brief that she was not aware of Odway representing her in any capacity. Brenner executed a will on December 9, 2004, in the presence of Odway and two other witnesses who were licensed attorneys. The execution of the will was videotaped. The will named Edward and Sharon Hirsch as the sole legatees and no bequests were made to Brenner's two daughters, Brenner-Taylor and Adriana Faye Brenner (now Moore). Benson was appointed to serve as the executor and Guaranty Trust Company was named as successor executor.

¶ 6 Although the videotape is not included in the record, Brenner allegedly explains on the videotape why she does not want her daughters to receive any money from her estate and why she wants everything to go to her nephew and his wife. According to documents filed in the proceedings below by Benson, Brenner told him that she had not seen Moore for approximately

20 years and had not seen Brenner-Taylor for approximately seven years and had rarely spoken to her during that time. Brenner also told Benson that her grandson, David Brenner, Brenner-Taylor's son, "tricked her and stole $300,000" from her. Benson further explained that after he began representing Hirsch in the guardianship proceedings, Brenner accompanied Hirsch to Benson's office on several occasions and indicated to him that she wanted to recover the $300,000 from her grandson and she wanted to prepare a will to make sure that neither her grandson nor her daughters would receive any money from her estate.

¶ 7 Brenner died on August 7, 2008. On August 13, 2008, Brenner-Taylor filed a petition for letters of administration. Upon learning of the existence of the will, Brenner-Taylor subsequently filed a motion to appoint a special administrator, alleging conflicts of interest on the part of Benson and further noting that Benson had failed to petition for admission of the will to probate or declare his refusal to act as required by statute. The circuit court denied the motion to appoint a special administrator and ordered that the will be admitted to probate. On October 29, 2008, Benson executed a declination of office. The circuit court issued an order that same day entering Benson's declination of office and ordering successor executor ATG Trust Company (as successor to Guaranty Trust) to appear at the next hearing. On November 19, 2008, the circuit court entered an order admitting the will to probate and appointing ATG Trust as executor.

¶ 8 Brenner-Taylor filed a petition to require proof of will on December 30, 2008. After a formal hearing, a transcript of which is not included in the record, the circuit court entered an order on April 21, 2009, confirming the previously admitted will. In the meantime, on April 16,

2009, Brenner-Taylor filed a petition to contest admission of the will to probate, naming ATG Trust, Hirsch, and Edward Hirsch as respondents. Brenner-Taylor attached the physician report that was prepared in connection with the guardianship proceeding by Dr. Mark Amdur, following his psychiatric evaluation of Brenner on May 21, 2004. The report indicates, *inter alia*, that Brenner lacked testamentary capacity because she defined the meaning of a will imperfectly, showed confused and considerable delay in identifying her daughters, was vulnerable to undue influence, and her "pressured" speech made it difficult for her to formulate a plan to allocate her estate. Discovery commenced on the petition to contest the will, with interrogatories being served on Brenner-Taylor, Hirsch, and ATG Trust. ATG Trust filed an answer to the interrogatories on January 10, 2010, and included a DVD containing the videotaped execution of the will. Brenner-Taylor did not file an answer to the interrogatories.

¶ 9 On August 12, 2010, Brenner-Taylor filed a motion for summary judgment, again attaching the physician report that was prepared by Dr. Amdur for the guardianship proceeding. Brenner-Taylor also attached an affidavit prepared by Dr. Amdur in which he stated that he had viewed the DVD of the will execution and the mental status findings were less severe than when he performed his evaluation in May. However, he went on to state that the DVD was insufficient in his opinion, based on a reasonable degree of medical certainty, to demonstrate testamentary capacity. Dr. Amdur also said that he could not state with any degree of certainty that the video would rebut any presumption of undue influence.

¶ 10 On October 22, 2010, ATG Trust filed a motion to strike Dr. Amdur's affidavit on the grounds that Brenner-Taylor's *ex parte* communication was improper and violated the estate's

privacy rights. Moreover, Dr. Amdur was not disclosed by Brenner-Taylor as an expert witness as required, and when ATG Trust invited Brenner-Taylor to amend her response to disclose Dr. Amdur as an expert witness, Brenner-Taylor responded that Dr. Amdur was an "occurrence witness." ATG Trust argued that Dr. Amdur does not meet the requirements for an occurrence witness because he was not present at the execution of the will and therefore, could only be a controlled expert. However, due to the privacy issues involved, ATG Trust argued that Dr. Amdur should not be allowed to appear even as a controlled expert witness and requested that his affidavit be stricken and he be barred from testifying.

¶ 11 Following the hearing on ATG Trust's motion to strike the affidavit on November 19, 2010, the circuit court entered an order in which, on the court's own motion, it construed Brenner-Taylor's motion for summary judgment as a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)). The circuit court granted ATG Trust 21 days to file a response to the motion to dismiss and Brenner-Taylor 14 additional days to answer the response. A transcript of the hearing on the motion to strike is not included in the record. According to the response filed by ATG Trust, at the hearing, the circuit court declared the will void *ab initio* for either or both of the following reasons: (1) Brenner had been adjudicated a disabled adult and was under the appointment of a plenary guardian, and (2) the court having jurisdiction of the guardianship never entered an order authorizing the ward to execute a will, nor did any attorney seek the guardianship court's approval to allow this execution. ATG Trust argued that a section 2-619 motion would be inappropriate in this case, and that Illinois law allows an adjudicated disabled adult to execute a will without the need for a

guardianship court's prior approval.

¶ 12 On January 6, 2011, the converted motion to dismiss pursuant to section 2-619 was heard by a different judge in the circuit court. The judge stated that he did not understand why the motion for summary judgment had been converted to a section 2-619 motion and counsel for both sides agreed that it was a motion for summary judgment and should not have been converted to a section 2-619 motion. In response to questions posed by the circuit court, counsel for ATG Trust confirmed that a judgment had been entered against Hirsch for misspent funds and there was an agreement that Surety would pay approximately $200,000 to the estate.

¶ 13 The circuit court noted that the issue was whether Brenner-Taylor had established undue influence as a matter of law. At a later point during the hearing, the circuit court again stated that the current hearing was on a motion "to find out whether or not the facts rise to the point where as a matter of law they equal undue influence." The circuit court then concluded that there were sufficient facts to establish undue influence as a matter of law. The circuit court noted that the attorneys who were involved in the disability proceeding were also involved in drafting the will, and that one of the attorneys drafted the will and the other was named the executor. The circuit court further noted that the guardian and her husband were legatees under the will and that there was a statute that provided a vehicle for bringing issues of estate planning for a disabled adult to court.

¶ 14 The circuit court entered a written order on January 7, 2011 noting that the issue before it was whether, as a matter of law, certain parties were guilty of undue influence in the procurement of the will. The order stated, in relevant part:

"5. This Court further finds that 755 ILCS 5/11a-18 was designed to protect the ward, to offer a forum to inform the court of the wishes and desires of the ward, a forum to assess testamentary capacity, a forum which would afford a ward an independent attorney and a current medical examination. An opportunity for notice to interested parties.

6. No petitions were ever filed in the disabled court seeking authority to do estate planning pursuant to 755 ILCS 5/11a-18 and no notice ever given of the will.

7. The failure of the guardian, Sharon Hirsh [*sic*] and Attorney Odway and Attorney Benson to follow the Probate Rules and Practice is gross misconduct and deprived Rochelle Brenner of any meaningful opportunity to create an estate plan free of undue influence.

8. The Court further finds that Attorney Odway, Attorney Benson, and the guardian; Sharon Hirsh [*sic*] breached their fiduciary obligation to the ward and to the wards [*sic*] estate by failure to petition the guardianship court."

The circuit court declared the will null and void, revoked the letters of office issued to ATG Trust as successor executor, and reinstated Brenner-Taylor's original petition for letters of administration.

¶ 15 Benson filed a motion to intervene on the grounds that the circuit court had made findings related to him in its January 7, 2011, order and that his interests may not be adequately represented and/or may be arguably bound by the court's order. The motion was denied on

February 22, 2011. Both Hirsch and Benson filed motions to reconsider.

¶ 16 In his motion to reconsider, Benson explained that he was the one who discovered in February 2008 that Hirsch had misappropriated approximately $160,000 from the guardianship accounts, that he promptly contacted the various banks involved and had the assets frozen, and then appeared on an emergency basis to advise the court of the possible impropriety. Benson then requested and was granted leave to withdraw as the attorney for the estate.

¶ 17 Benson further explained that when he contacted Odway about the referral, he explained to him that Brenner was disabled and under a guardianship, so Odway would need to do some research and make sure that it was okay for her to prepare a will. Odway later advised Benson that he had done the research and that it seemed like Brenner met the requirements for a person with diminished capacity to make a will. Benson advised him, on the basis of materials he had received either in seminars or from his professional liability carrier, that he may want to videotape the execution of the will in the event that Brenner's capacity was challenged at a later date and Odway agreed. Moreover, Benson stated that he originally suggested Brenner use Attorney Title Guaranty Trust Company as the executor of the will but Brenner said she would rather have Benson as executor.

¶ 18 At the hearing on the motion to reconsider, counsel for Hirsch argued that discovery had not been completed and all of the evidence had not been presented. Specifically, it was noted that no facts had been presented on the issue of procurement. The circuit court responded that it had basically ruled that it was "undue influence as a matter of law *per se*." Counsel argued that case law requires that procurement be shown. The circuit court stated that it found undue

influence based upon a violation of probate law.

¶ 19 Counsel for Benson argued that although he was never a party to the case and was never given the opportunity to present any information to the court, the circuit court issued findings against him. Counsel also raised the fact that a legal malpractice suit had subsequently been filed against Benson and the circuit court said, "Well, that's a tough road to overcome, isn't it?" The circuit court denied both motions to reconsider. Hirsch and Benson timely filed their respective appeals.

¶ 20 ANALYSIS

¶ 21 Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). We review *de novo* an order granting summary judgment. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). In reviewing a grant of summary judgment, the appellate court will construe the record strictly against the movant and liberally in favor of the nonmoving party. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 748 (2008).

¶ 22 Hirsch first contends that the summary judgment motion was premature because the respondents had not had the opportunity to respond to the motion and necessary discovery had not been completed. Brenner-Taylor argues that both Benson and Hirsch were respondents and that neither of them were "prevented in any meaningful way" from responding to the motion for summary judgment. Brenner-Taylor contends that all of the respondents, including ATG Trust, Benson and Hirsch, failed to respond to the summary judgment motion.

¶ 23 The record does not support Brenner-Taylor's assertions. First, it is clear from the record that Benson was never a party to these proceedings. The petition to contest the will named ATG Trust, Hirsch, and Edward Hirsch as respondents. The record also discloses that Benson was no longer representing Hirsch at the time these proceedings commenced. Thus, Benson could not have filed a response to the summary judgment motion. The record is equally clear that ATG Trust did, in fact, respond to the summary judgment motion. As Hirsch notes, ATG Trust appropriately responded by first filing a motion to strike the affidavit attached to the motion for summary judgment. See *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 950 (2004) (noting that the failure to obtain a ruling on a motion to strike an affidavit operates as a waiver of the objections to the affidavit).

¶ 24 At the hearing on ATG Trust's motion to strike, instead of ruling on that motion, the circuit court declared the will void *ab initio, sua sponte* converted the summary judgment motion to a section 2-619 motion to dismiss, and ordered ATG Trust to file a response to the 2-619 motion. The record is clear that ATG Trust filed a response in accordance with this order, addressing the issues raised by the circuit court regarding whether a disabled person may execute a will and whether a guardian is required to seek approval before a ward may execute a will. At the hearing on the 2-619 motion, the circuit court reinstated the original summary judgment motion and issued its ruling on that motion without allowing any additional response from the parties. Thus, it is clear to this court that in light of the somewhat convoluted proceedings below, the respondents were not able to obtain a ruling on their motion to strike the affidavit and subsequently were never afforded the opportunity to respond to the original summary judgment

motion.

¶ 25 Hirsch next contends that the circuit court erred in finding that the will was the product of undue influence as a matter of law. Hirsch argues that a person who has been adjudicated disabled may still have sufficient testamentary capacity to execute a valid will, and that the statute cited by the circuit court does not require a guardian to seek approval of the court before a ward can execute a will, nor does it provide that a will executed by a ward without court approval is *per se* the product of undue influence. Finally, Hirsch contends that genuine issues of material fact exist on the claim of undue influence where Brenner-Taylor has presented no evidence that Hirsch procured the will, while Hirsch has presented evidence that she did not procure the will. Moreover, even if Brenner-Taylor raised the presumption of undue influence, Hirsch is entitled to an opportunity to rebut that presumption.

¶ 26 The circuit court's ruling was based primarily on its interpretation of section 11a-18 of the Probate Act of 1975 (Act) (755 ILCS 5/11a-18 (West 2008)). The circuit court stated that under section 11a-18, the guardian and the attorneys were required to file a petition seeking the authority to undertake estate planning. The circuit court found that the failure of the guardian and the attorneys to petition the guardianship court constituted gross misconduct and a breach of their fiduciary obligations to the ward. Therefore, the circuit court concluded that Brenner was subject to undue influence as a matter of law. For the following reasons, we disagree with the circuit court.

¶ 27 The duties of the estate guardian are set forth in section 11a-18 of the Act. 755 ILCS 5/11a-18 (West 2008). Section 11a-18(a-5) provides that upon petition of the guardian and after

notice to all interested persons, the probate court may authorize the guardian to exercise any or all powers over the estate that the ward could exercise if present and not under disability. 755 ILCS 5/11a-18(a-5) (West 2008). A noninclusive list of possible actions follows, which includes "modifying by means of codicil or trust amendment the terms of the ward's will or any revocable trust created by the ward." 755 ILCS 5/11a-18(a-5)(11) (West 2008). A plain reading of this statute indicates that if a guardian wishes to modify the terms of a ward's will, and thus, by extension, wishes to execute a will on behalf of a ward, he must first petition the court for approval and notice must be provided to the interested parties. However, we find nothing in this language to indicate that if the ward wishes to execute his own will, the guardian must first petition the probate court for approval. The purpose of this statute is clearly to provide judicial oversight and protection for the ward from actions taken on his behalf by the guardian, but it does not address what procedures are to be followed, if any, in the circumstance where the ward wishes to execute a will on his own behalf.

¶ 28 This court has previously noted that nowhere in the Act is the guardian directed to obtain approval of a will executed *by the ward*. (Emphasis added.) *In re Estate of Letsche*, 73 Ill. App. 3d 643, 647 (1979). Brenner-Taylor has cited no authority, nor has this court found any, that the law in this area has changed since the *Letsche* decision. The only statute cited in the circuit court's order for the proposition that a petition should have been filed in probate court prior to the execution of the will is section 11a-18. At the hearing on the motions to reconsider, when asked what rule the guardian and the attorneys violated, the circuit court stated that they violated section 11a-18. However, because section 11a-18 does not require a guardian to obtain approval

of a will executed by the ward, the circuit court erred in finding gross misconduct and breach of fiduciary duty by Hirsch, Odway and Benson on the basis that they violated section 11a-18 of the Act (755 ILCS 5/11a-18 (West 2008)).

¶ 29 As previously noted, if Hirsch had attempted to execute the will or engage in estate planning on Brenner's behalf, she would have been required to seek approval from the probate court. However, because Brenner executed the will herself, Brenner-Taylor must show that the will was the product of undue influence by Hirsch. In granting summary judgment to Brenner-Taylor, the circuit court stated that the facts as alleged in this case established undue influence as a matter of law. At the hearing on the motions to reconsider, the circuit court stated that it found undue influence based on a violation of probate law. The court further explained that Hirsch and the attorneys had taken away Brenner's opportunity to express her wishes to the court while she was still alive, and that is why the facts constituted undue influence, *per se*. Because we have determined that section 11a-18 does not require a guardian to seek approval for the ward to execute her own will, we cannot uphold the circuit court's grant of summary judgment on that basis. However, because an order granting summary judgment may be sustained on any ground warranted by the record (*In re Estate of Berry*, 277 Ill. App. 3d 1088, 1092 (1996)), we must consider whether undue influence has been established such that Brenner-Taylor is entitled to judgment as a matter of law.

¶ 30 Undue influence sufficient to invalidate a will is found where there is improper persuasion to the extent that a person's will is overpowered and she is induced to do something she would not do if left to act freely. *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993). "What

constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case." *Id.* The more enfeebled the mind of the testator, the less evidence is required to establish the existence of undue influence. *In re Estate of Roeseler*. 287 Ill. App. 3d 1003, 1018 (1997). In order to raise a presumption of undue influence, the following elements must be established: (1) a fiduciary relationship existed between the testator and a person who substantially benefits under the will; (2) the primary beneficiaries were in a position to dominate and control the dependent testator; (3) the testator reposed trust and confidence in such beneficiaries; and (4) the beneficiaries were instrumental in or participated in the procurement or preparation of the will. *Id.* Once these elements have been established, the burden shifts to the proponents of the will to prove that the influence exerted was insufficient to overcome the will of the testator. *Zachary v. Mills*, 277 Ill. App. 3d 601, 608 (1996).

¶ 31 In the case *sub judice*, in construing the record liberally in favor of the nonmoving party, as we are required to do, we conclude that there are genuine issues of material fact that must be resolved by the trier of fact as to whether Hirsch unduly influenced Brenner in the execution of her will. All parties agree that a fiduciary relationship existed between Brenner and Hirsch. The record further establishes that Hirsch was in a position to dominate and control Brenner because Brenner lived with her, and that Brenner reposed trust and confidence in Hirsch as evidenced in her expressed wish during the guardianship proceeding to live with Hirsch. The final element has not been conclusively established, however, because the record discloses that Hirsch was not present at the actual execution of the will and, in her answer to the interrogatories, she denied having any influence in the drafting of the will. The fact that the attorney who executed the will

may have also represented Hirsch in the guardianship proceeding and was referred to Brenner by Hirsch's attorney does not by itself establish that Hirsch was instrumental in procuring the will. Similarly, the mere suggestion, without supporting evidence that Hirsch may have exerted influence prior to the execution of the will, does not establish that Hirsch was instrumental in procuring or preparing the will. Thus, because genuine issues of material fact exist on the issue of whether or not Hirsch unduly influenced Brenner, the circuit court erred in granting Brenner-Taylor's motion for summary judgment.

¶ 32 As a final matter, we must consider Benson's request that this court also reverse the circuit court's denial of his motion to intervene. Benson's grounds for intervention were based on the circuit court's findings that he committed gross misconduct and breached his fiduciary duty when he was not a party to the proceedings and had no opportunity to present evidence. Because this court has reversed those findings, Benson's motion to intervene is now moot. We note that Benson was listed as a witness on the answers to interrogatories filed by both ATG Trust and Hirsch and, in that capacity, will likely have the opportunity on remand to explain relevant facts related to his involvement with the contested will. Moreover, should the circumstances warrant a motion to intervene on remand, Benson may file a new motion at that time. Thus, we decline to reverse the circuit court's denial of Benson's motion to intervene.

¶ 33 For the reasons stated, we reverse the circuit court's order granting summary judgment and remand for further proceedings.

¶ 34 Reversed and remanded.