

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of SHIRLEY BERG, Deceased.

MARILYN SILVERSTEIN,

Petitioner-Appellant,

v

SUE THOMAS,

Respondent-Appellee.

UNPUBLISHED

August 29, 2006

No. 268584

Oakland Probate Court

LC No. 03-289560-DE

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Petitioner, Marilyn Silverstein, appeals the trial court's order that granted summary disposition to respondent, Sue Thomas, denied Ms. Silverstein's motion for summary disposition, and denied her motion for the return of estate assets. We affirm.¹

I. Execution of the Will

Marilyn Silverstein filed objections to the probate of Shirley Berg's will dated June 13, 2003, and asserted that she is entitled to the assets of the estate rather than Sue Thomas. Ms. Silverstein now argues that the will was not properly executed. This issue is not preserved because the trial court did not address it and, therefore, we review it for plain error. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-*

¹ We note that both parties have attempted to expand the record on appeal by attaching additional pages of testimony to their appeal briefs. Because our review is limited to the record established in the trial court, we will not consider this additional evidence. *Sherman v Sea Ray Boats, Inc.*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

Coluni, 240 Mich App 333, 336; 612 NW2d 838 (2000), applying *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).²

Ms. Silverstein asserts that the will was not properly witnessed by Annie Sears and John Schulte. MCL 700.2502(1)(c) provides that a will must be signed by two witnesses, “each of whom signed within a reasonable time after he or she witnessed either the signing of the will . . . or the testator’s acknowledgment of that signature or acknowledgment of the will.” The will also contains an attestation clause that states that Ms. Berg signed the will in the presence of the witnesses and that the witnesses signed the will in front of each other.

An attestation clause “gives rise to a presumption that the will was executed in conformity with the recitations in the clause.” *Estate of Clark*, *supra* at 392-393. The party challenging the will may rebut this presumption through witness testimony. *Id.* at 393. However, testimony that contradicts an attestation clause must be “received with caution” and should be considered by the trier of fact. *Id.* at 395-396, quoting *In re Dettling’s Estate*, 351 Mich 335, 340; 88 NW2d 252 (1958).

Annie Sears signed Ms. Berg’s will in front of Robert Gracely and Ms. Berg, but she could not remember whether she or Ms. Berg signed the will first and she did not specifically remember seeing Ms. Berg sign it. However, a witness’s failure to recall certain aspects of the execution will not prevent a will from being admitted into probate. *Id.* at 395. Other than her recollection of the details of the signing, Ms. Silverstein did not present any evidence that would call into question whether Ms. Sears signed the will in conformity with MCL 700.2502. Accordingly, the evidence did not rebut the presumption that Ms. Sears signed the will in conformity with the attestation clause.³ With regard to John Schulte, however, the evidence showed that he did not see Ms. Berg sign the will or acknowledge her signature on the will. Indeed, Mr. Schulte testified that he signed the will at a separate location and that he never met or saw Ms. Berg. Similarly, Mr. Gracely testified that, after Ms. Berg signed the will, he took it

² The trial court granted respondent summary disposition under MCR 2.116(C)(8) and (C)(10). Because the trial court considered evidence outside the pleadings, we review the decision using the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). We review de novo a trial court’s decision on a motion for summary disposition. *Rose v Nat’l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider “the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Id.* Summary disposition is appropriately granted “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

³ To the extent Ms. Silverstein suggests that Ms. Sears should not have witnessed the signing because she is related to Ms. Thomas, we note that even if Ms. Sears had some personal interest in the will, “[t]he signing of a will by an interested witness does not invalidate the will or any provision of it.” 700.2505(2). Ms. Silverstein presented no evidence to show that Ms. Sears could not properly witness the execution of the will.

to Mr. Schulte for his signature. Accordingly, the unrebutted evidence shows that Mr. Schulte did not witness the will as set forth in MCL 700.2502.

However, Mr. Schulte's failure to comply with MCL 700.2502 is not fatal to the will's admission to probate. MCL 700.2503 provides:

Although a document . . . was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

(a) The decedent's will.

Ms. Thomas presented clear and convincing evidence that Ms. Berg intended the document to be her will. The record reflects that Ms. Berg called Mr. Gracely in June 2003 and told him that she wanted to update her will or complete her estate planning documents. Ms. Berg further explained to Mr. Gracely that she wanted Sue Thomas to be her personal representative and that she wanted to leave her 50 percent of her estate. Ms. Berg also specified that she wanted to leave 50 percent of her estate to the same charities as provided in her previous will. Ms. Berg specifically told Mr. Gracely that she did not want to execute a prior will that included Ms. Silverstein because she had not heard from Ms. Silverstein in two years. Mr. Gracely made the requested changes, and Berg reviewed and approved them one or two days before she executed the will. Mr. Gracely's testimony constitutes clear and convincing evidence that Ms. Berg intended for the June 13, 2003, will to be her last will and testament.

II. Preparation of the Will

Ms. Silverstein asserts that the will was illegally prepared by Mr. Gracely, a non-lawyer. Mr. Gracely does not have any formal legal training or a license to practice law. However, he assisted Berg in preparing the will and collected a fee for his services. MCL 600.916 prohibits the unauthorized practice of law. Preparation of a will for another constitutes the practice of law and may not be performed by one who is not a licensed attorney. *Dressel v Ameribank*, 468 Mich 557, 565; 664 NW2d 151 (2003). However, Ms. Silverstein fails to explain how this affects the validity of the will and she has, therefore, abandoned this issue.⁴

III. Testamentary Capacity

Ms. Silverstein argues that Ms. Berg lacked the testamentary capacity to execute her will. One executing a will must be able to comprehend the nature and extent of her property, recall the

⁴ "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

natural objects of her bounty, and determine and understand the disposition of property that she desires to make. *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953); *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001). The party challenging a testator's competency bears the burden of establishing incompetency at the time the will was executed. *Sprenger's Estate*, *supra* at 521.

Evidence showed that Ms. Berg was depressed and was taking medication. One document indicates that Ms. Berg also experienced cognitive loss or dementia, and another document reflects that she had short-term memory problems. However, none of the documents indicate whether Ms. Berg was able to comprehend the nature and extent of her property or understand the disposition of property. *Sprenger's Estate*, *supra* at 521; *Persinger*, *supra* at 504. While the doctors' testimony does not specifically address these factors either, their testimony did indicate that they agreed that Ms. Berg was competent, alert and oriented, answered questions appropriately, and was capable of making financial decisions.

Evidence also showed that Ms. Berg reviewed the new will and approved the changes one or two days before she signed it and that she reviewed the will again on the day she signed it. Ms. Berg sought to exclude Ms. Silverstein from her will and she reviewed and approved the changes effectuating this intent. Further evidence also established that Ms. Berg continued to pay her bills and was, therefore, able to comprehend financial matters and the content and disposition of her property. *Sprenger's Estate*, *supra* at 521; *Persinger*, *supra* at 504. Accordingly, we hold that the trial court did not err when it granted summary disposition to Ms. Thomas on this ground.

IV. Undue Influence

Ms. Silverstein claims that she presented a prima facie case that Mr. Gracely exerted undue influence on Berg. To prove undue influence, a petitioner must show that the testator was subjected to "threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel" the testator to act against her inclination and free will. *In re Estate of Karmey*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976); *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999). "Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient." *Estate of Karmey*, *supra* at 75. A presumption of undue influence arises upon the introduction of evidence to establish the following: "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *Id.* at 73, quoting *Kar*, *supra* at 537.

Ms. Silverstein has presented no evidence of threats, misrepresentation, undue flattery, fraud, or coercion. In fact, when asked at her deposition if she had any "hard facts" of fraud, duress, or mistake, Ms. Silverstein admitted that she did not have any facts to support her claim. Mr. Gracely was Ms. Berg's financial planner, and he acknowledged that Ms. Berg confided in him and trusted in him over the years. Ms. Silverstein asserts that Ms. Berg's will and power of attorney constitute one transaction and that the joint bank account demonstrates that Mr. Gracely received a benefit from the transactions. However, were we to conclude that the will and power of attorney were part of the same transaction for purposes of determining whether a presumption

of undue influence exists, Ms. Silverstein has failed to show that Mr. Gracely ever received any benefit therefrom. Mr. Gracely wrote checks from the joint bank account, some of which were written after Ms. Berg's death, but there is no indication that Mr. Gracely ever used the funds for anything other than Ms. Berg's needs and expenses. Ultimately, the funds were returned from the joint account and became part of Ms. Berg's estate.

Moreover, the will made no provisions for Mr. Gracely, and the fact that he collected money for his services is not sufficient to constitute a benefit. See *Vollbrecht's Estate v Pace*, 26 Mich App 430, 436; 182 NW2d 609 (1970) (“[a]ppointment of the scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence.”). Though Mr. Gracely may have had an opportunity to influence Ms. Berg, the presumption of undue influence is undermined by the fact that Mr. Gracely did not benefit from the transaction. *Karmey, supra* at 75. Therefore, the trial court correctly granted Ms. Thomas summary disposition on this ground.

V. Petition for Return of Funds

Ms. Silverstein challenges the trial court's denial of her petition for the return of funds to the estate. We review a probate court's award of fees for an abuse of discretion. *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995).

Ms. Thomas acted as the personal representative of Ms. Berg's estate. MCL 700.3715(w) provides that a personal representative, acting reasonably for the benefit of interested persons, may properly “[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties[,]” and the attorney shall receive reasonable compensation. Similarly, a personal representative may receive disbursements from the estate for the payment of reasonable attorney fees incurred in defending a proceeding pursuant to MCL 700.3720. MCR 5.313(E) authorizes a personal representative to pay attorney fees without prior court approval.

Contrary to the trial court's determination, Ms. Silverstein, Ms. Berg's cousin, is an heir and interested person entitled to notice and a copy of the fee agreement pursuant to MCR 5.313(D). MCL 700.1104(m); MCL 700.1105(c); MCL 700.2103(d). Ms. Thomas entered into a written fee agreement with her attorney in August 2003, which satisfies MCR 5.313(E)(1). Ms. Thomas's attorney mailed a copy of the fee agreement and the notice regarding attorney fees to Ms. Silverstein, through her attorney, which satisfies MCR 5.313(E)(2).

Ms. Silverstein argues that she never received a statement for attorney fees and that she had no opportunity to object to the fees. Pursuant to MCR 5.313(E)(3), Ms. Silverstein was entitled to a statement for services and costs upon request. However, there is no indication that Ms. Silverstein ever requested a copy of any statements for services. Similarly, there were no written, unresolved objections to the fees. MCR 5.313(E) provides that a respondent may pay costs without prior court approval, but they remain subject to review by the trial court. Accordingly, albeit for a different reason, we affirm the trial court's ruling on this issue. *Spiek v*

Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).⁵

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

⁵ Ms. Silverstein further asserts that no account was ever filed and that the majority of the services performed were done for Ms. Thomas' benefit as a beneficiary. However, Ms. Silverstein does not provide any argument to develop these assertions, and she has provided no legal support. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson, supra* at 243, quoting *Mitcham, supra* at 203. Therefore, Ms. Silverstein has abandoned this issue.