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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF LILLIAN BAVOLACCO

PROBATE COURT, STRATFORD PROBATE DISTRICT

MARCH 2017

EDITOR'S SUMMARY & HEADNOTES

Two of Decedent's sons objected to a first Will prior to its admission to probate. The sons argued that the first Will was procured as a result of lack of testamentary capacity and undue influence by the Decedent's daughter and a third son. Pursuant to an Agreement, the first Will was withdrawn, and a second Will was admitted instead. The sons then objected to the payment of attorney's fees, arguing that they were neither just nor reasonable because that they were incurred as a result of defending a will that was procured through undue influence. The Court found that the attorney represented the Executrix in defense of the will contest in good faith and that there was no evidence whatsoever that he participated in unduly influencing the Testator. The Court also found that the objection to the payment of the attorney's fees in this matter was a collateral attack on its previous Decree that admitted the second Will. Accordingly, the Court denied the Objection and ordered the Executrix to pay the attorney's fees from the Estate assets.

1. Burden of Proof: Undue Influence

Contestant must prove undue influence by clear and convincing presentation of material facts. Contestant may also present circumstantial evidence.

2. Evidence: Standard of Proof

The clear and satisfactory evidence standard requires proof that is "highly probable" that there is a "substantial greater probability" that the facts alleged

are true rather than false, and it demands a "higher standard of belief" on the part of the trier.

3. Undue Influence: Elements Of

There are four elements of undue influence: (1) a person who is subject to the influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence.

4. Undue Influence: Evidence Of

To prove undue influence, the court must consider each of the four elements of undue influence to determine whether the accused's conduct caused the testator to dispose of the estate differently than the testator would have if left to the testator's own discretion.

5. Undue Influence: Burden of Proof

The "natural objects of the testator's bounty" are those who would take under the laws of intestacy, or next of kin, but no presumption of undue influence arises where such natural objects of the testators' bounty are excluded from the testamentary plan. Such an exclusion is always open to explanation, and during an intra-family dispute, it is the party suggesting undue influence that must prove it, as it is assumed that the family members will have a loving, close relationship.

6. Probate Court: Powers

All orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud.

7. Judgment: Collateral Attack

An attack upon a judgment which is merely incidental to the principal claim or defense of a party is quite generally regarded as "collateral." A collateral attack upon a judgment is an attempt to avoid, defeat or evade it, or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it, and attempts to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose. Only in exceptional circumstances, such as fraud, mistake or a like equitable ground, may a court consider an equitable attack upon a probate court order or decree.

Opinion

The ongoing saga of this poor Decedent's Estate continues as the Court is asked to sustain an Objection made by an Heir to the payment of legal fees to an attorney for the Estate. The fees in question were incurred in the defense of a will contest brought by that Heir. However, the Will in dispute was withdrawn from probate as a result of a Stipulated Settlement Agreement (the "Settlement Agreement"), which was then memorialized in a Court Decree, dated December 15, 2015, (the "Decree").

Lillian Bavolacco (the "Decedent") died a resident of Stratford on January 27, 2015. A Last Will and Testament, which she executed on October 3, 2014 ("October Will"), was submitted to probate. Before this October Will was admitted, two of her sons, John Bavolacco ("John") and Kevin Bavolacco ("Kevin"), objected to its admission. John and Kevin were specifically omitted from the October Will and the residuary estate was left equally to the Decedent's daughter Gina Fawver, who was also named Executrix ("Executrix" or "Gina"), and another son, James Bavolacco ("James"). John and Kevin were represented by Attorney Carmine Perri ("Attorney Perri").

The proponent of the October Will, Gina, initially retained the services of Attorney Lori Dion ("Attorney Dion"), who drafted the October Will, to represent the Estate. However, Attorney Andrew Knott ("Attorney Andrew Knott") filed an Appearance in lieu of Attorney Dion, and on behalf of Gina and James. Various motions were filed by the Parties, which were acted upon by the Court, until a trial for the admission of the October Will was scheduled on December 15, 2015. Kevin and John base their objections to the October Will on the theories of lack of testamentary capacity and undue influence exerted on the Decedent by Gina and James.

On the scheduled trial date, the Parties came to the Settlement Agreement which the Court incorporated into the Decree. Specifically, the Decree stated that:

> the parties stipulate and agree that the Last Will and Testament of the decedent dated October 3, 2014 shall not be admitted to probate and shall be withdrawn, and that the Last Will and Testament of the decedent dated May 2, 2014 shall be admitted to probate. Kevin Bavolacco and John Bavolacco hereby stipulate and agree to withdraw any and all objections to the admission of the May 2, 2014 Last Will and Testament. (The "May Will").

The May Will bequeathed various personal property to two grandchildren; devised real property owned by the Decedent at 33 Sikorsky Place in Stratford to Kevin; left two-thirds of the residuary estate to Kevin and Gina, and one third of the residuary estate to James, less $10,000, which was to be equally divided between Kevin and Gina; and appointed Gina as Executrix. Again, John was

expressly omitted.

Also included in the Settlement Agreement, and recited in the Court's Decree, was that other real property, which was previously owned by the Decedent at 50 Kasper Drive in Stratford, and which was transferred to Gina and James on October 3, 2014, be conveyed back to her Estate. This transfer was the subject of a separate superior court lawsuit between the Parties that was withdrawn, and was also part of the Parties' Settlement Agreement and the Decree.

Attorney Barry Knott ("Attorney Barry Knott") then filed an Appearance in lieu of Attorney Andrew Knott on January 11, 2016. On July 22, 2016, Attorney Andrew Knott submitted an "Application for Hearing on Denied Claim" with the Court, pursuant to Conn. Gen. Stat. § 45a-362 (2017). This Application stated that his fee for professional services rendered to the Estate had not been paid. The Court scheduled a hearing on September 9, 2016. At the hearing, Attorney Perri disclosed that his clients, Kevin and John, objected to the payment of Attorney Andrew Knott's fees by the Estate. The basis of their objection was that the fees requested were not "just and reasonable," under Conn. Gen. Stat. § 45a-294(a) (2017). The fees were incurred in defending the October Will, which was not admitted to probate. Kevin and John alleged that this Will was procured as a result of undue influence exerted by Gina and James upon their mother, and thus not "just and reasonable."

Attorney Perri relied upon the case *Hannafin v. Carr*, No. CV 990078828S, 2000 WL 157943 (Conn. Super. Ct. Jan. 26, 2000), in support of his position. In that case, the probate court had determined, after a trial, that the will in question was procured by undue influence and denied its admission to probate. *Id.* at *1. When the proponent of the will, the proposed executrix, sought to have the fees and expenses that she incurred in connection with that will contest paid by the estate, the probate court denied the request on the same basis, holding that because of the undue influence exerted by the executrix upon the decedent, the fees sought were not "just and reasonable." *Id.* at *4. The superior court, on appeal, upheld that decision.

A full evidentiary hearing was scheduled in this Court on November 15, 2016. The sole issue to be tried was whether the October Will, although withdrawn from probate by the Settlement Agreement, was the result of undue influence. Instead of a full evidentiary hearing, the Parties agreed to submit deposition transcripts taken in anticipation of the October Will and lifetime transfer contests. They also waived their right and opportunity to offer further direct evidence and cross examination. The Court, accordingly, proceeded on that basis.

[1] [2] Proof of the existence of undue influence, such as would invalidate a decedent's last will and testament, must be established by clear and convincing evidence. *Berkowitz v. Berkowitz*, 147 Conn. 474, 477, 162 A.2d 709, 710 (1960); *In Re Estate of Borowski*, 22 QUINNIPIAC PROB. L.J. 1, 4

(2008); *Estate of George Zrinchak*, 21 QUINNIPIAC PROB. L.J. 209, 213 (2008). "Clear and convincing evidence" is proof that it is "highly probable" that there is a "substantial greater probability" that the facts alleged are true rather than false, and it demands a "higher degree of belief" on the part of the trier. *Lopinto v. Haines*, 185 Conn. 527, 533-34, 441 A.2d 151, 155-56 (1981) (citing *Dacey v. Connecticut Bar Ass'n*, 170 Conn. 520, 537, 368 A.2d 125, 134 (1976)); *In Re: Estate of Sharon Rita Derene*, 29 QUINNIPIAC PROB. L.J. 104, 108 (2016).

[3] [4] Four elements must be proven in order to establish undue influence in the procurement of a will. First, there must be a person who is subject to undue influence; second, there must exist an opportunity to exert such undue influence; third, a disposition to exert undue influence; and fourth, a result that indicates that the alleged undue influence did in fact occur. *Pickman v. Pickman*, 6 Conn. App. 271, 275, 505 A.2d 4, 7 (1986) (quoting 25 Am. Jur. 397-98, Duress and Undue Influence § 36). There must be a showing of some evidence of participation in the procurement of the will, *Appeal of Richmond*, 59 Conn. 226, 246-47, 22 A. 82, 85 (1890); *Hills v. Hart*, 88 Conn. 394, 401, 91 A. 257, 259 (1914), and not merely of the opportunity to control the testamentary plan, but use of that opportunity. *See Appeal of Fitzpatrick*, 87 Conn. 579, 583, 89 A. 92, 94 (1913).

[5] The "natural objects of the testator's bounty" are those who would take under the laws of intestacy, or next of kin, *Page v. Phelps*, 108 Conn. 572, 585, 143 A. 890, 893 (1928), but no presumption of undue influence arises where such natural objects of the testator's bounty are excluded from the testamentary plan. *See Downey v. Guilfoile*, 93 Conn. 630, 632, 107 A. 562 (1919). During an intra-family dispute, it is the party suggesting undue influence that must prove it, as it is assumed that the family members will have a loving, close relationship. *Berkowitz*, 147 Conn. at 476 (1960). A testator will often have a "closer relationship with some family members than others and utilize the will making process to reward those family members who have been most *loyal* and provided the greatest service to the testator during her times of need." *In Re: Estate of Helen Bogdziewicz*, 19 QUINNIPIAC PROB. L.J. 1, 6-7 (2005) (emphasis in original). Even though one child or children may receive a larger portion of an estate than others, no presumption of undue influence arises regardless of how close a relationship existed between all of them. *See Berkowitz*, 147 Conn. at 477-78 (1960).

The Parties waived their right to undertake a trial on the issue presented, but instead submitted the deposition transcripts of three individuals. Two were the witnesses to the October Will. Their testimony disclosed no evidence of undue influence on the part of Gina or James. The witnesses to the October Will testified that the October Will was executed by the Decedent at James' house and although each indicated that they were unaware of her physical and mental condition, they acknowledged under oath that she was over eighteen years of age and of sound mind, Conn. Gen. Stat. § 45a-250 (2017), and that they subscribed to the same in the Decedent's presence. Conn. Gen. Stat. § 45a-251 (2017).

The third deposition transcript was that of Attorney Dion, who drafted the October Will. She testified that she was contacted by James to prepare a new will for the Decedent. (Dep. transcript of Attorney Lori Dion, Sept. 11, 2015, 17:3-5, 23:22-24). Attorney Dion e-mailed her standard "will questionnaire" form to James (Dep. 16:12-22), which was completed and returned by U.S. mail together with a "marked up copy" of an earlier will from 2012. (Dep. 13:16-20). Attorney Dion testified that she does not know who completed this form (Dep. 20:18-25, 21:1), "presumes" that it was completed by James (Dep. 37:14-25), and that she prepared the October Will based upon the information set forth therein. James then scheduled the execution of the October Will at his home. (Dep. 42:14-16). Attorney Dion met with the Decedent alone in the kitchen (Dep. 77:11-14) and testified that she reviewed its contents with her. Attorney Dion had never met the Decedent before (Dep. 14:24-25). Attorney Dion reviewed the October Will with the Decedent, "page by page" (Dep. 78:19-25), including Article IV, within which the Decedent "makes no further provisions for" either Kevin or John. (Dep. 79:10-25, 80:1-4). Attorney Dion testified that the Decedent "went into specific details" about one of her son's divorce, "how she helped that person out afterwards" (Dep. 80:5-12), and "had no questions" about the October Will. (Dep. 83:24, 25, 84:1-3). Attorney Dion expressly denied that the Decedent was unduly influenced in executing the October Will. (Dep. 81: 4-25).

Although it may have been better practice for Attorney Dion to have met with the Decedent prior to the day that the Decedent executed the October Will, it was her office practice to have a new client prepare a "will questionnaire" form. (Dep. 15: 5-15). Attorney Dion e-mailed this form to James, who was her "contact person" (Dep. 16:22), and the form was returned to her via U.S. mail. Based upon its contents, Attorney Dion prepared the October Will. Attorney Dion testified that she "does not know" who completed the form (Dep. 20:23-25), but "presumes" that James did. (Dep. 37:14-25).

What the Court finds most striking about Attorney's Dion's deposition testimony is James' involvement in the preparation and execution of the October Will. James "found" her (Dep. 17:3-5), was the "contact person" (Dep. 16:22), and "may have conveyed" the Decedent's "wishes verbally" (Dep. 22:20-25). Attorney Dion had a conversation with James "about the old will" (Dep. 28:23-25, 31:18-23), and James discussed with Attorney Dion that his relationship with Kevin "was not good." (Dep. 33:11-25, 33:11-25, 35:13-25). James scheduled the October Will's execution at his home (Dep. 42:14-16), supplied the two witnesses (Dep. 43:3-7), had a "conversation" with Attorney Dion (Dep. 50:15-17), and Attorney Dion "relied on" the marked-up copy of the will executed in 2012 which James provided. (Dep. 51:13-15).

Conn. Gen. Stat. § 45a-294 allows expenses incurred by the "executor" to be paid. *Hannafin*, 2000 WL 157943, dealt with undue influence exerted by the executrix upon the testator. James was not the executor in either will. Gina is under both. When asked if she had any conversations with Gina prior to the

October Will's execution, Attorney Dion answered, "I don't recall any." (Dep. 42:17-20). Attorney Dion testified further that although both Gina and James were present at James' home when this Will was executed (Dep. 74:1-4), they were not in the kitchen at the time when it was executed.

The Court cannot clearly and convincingly find, based upon the evidence presented, that Gina participated in or procured the October Will in question. James certainly facilitated in the preparation and execution of this October Will. However, whether this October Will was the result of undue influence exerted by James upon his mother is not dispositive of this matter.

The Court does find that by entering into their Settlement Agreement to have the October Will withdrawn from probate and the May Will admitted, Kevin and John have made any issue concerning the execution of the October Will immaterial and of no consequence. Whatever claims they may have had concerning the October Will were relinquished upon their execution of their Settlement Agreement. *Warner v. Merchants Bank and Trust Co.*, 2 Conn. App. 729, 733-34, 483 A.2d 1107, 1110 (1984). Conn. Gen. Stat. § 45a-294(a) clearly states that the court may allow to the executor his just and reasonable expenses in defending the will, "whether or not the will is admitted to probate." The October Will was not admitted to probate by the express terms of the Settlement Agreement.

Further, in *Hannafin*, 2000 WL 157943 at *1, the fees in question were those claimed by the executrix in defending a will that was not admitted to probate after a trial. The Court found that she unduly influenced the decedent in the making and execution of the will. *Id.* Clearly, the executrix should not be rewarded for her wrongdoing and accordingly her fees were found to be unjust and unreasonable on this basis.

In the present matter, the requested attorney's fees for the Estate are being challenged. This attorney, however, did not prepare the October Will, nor participate in its execution. He was engaged solely to represent the Executrix in her defense of a will contest, which was withdrawn. In good faith, he devoted his professional time and energies to that task, and this Court is not inclined to extend the remedy established by the Superior Court in *Hannafin*, 2000 WL 157943, to an attorney at law representing the Estate where there is absolutely no evidence whatsoever that he participated in unduly influencing the Testator.

[6] Finally, Conn. Gen. Stat. § 45a-24 (2017) clearly states that "all orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud." The Court memorialized the Settlement Agreement in the Decree.

[7] An attack "upon a judgment which is merely incidental to the principal claim or defense of a party is quite generally regarded as collateral." *Miller v. McNamara*, 135 Conn. 489, 495, 66 A.2d 359, 362 (1949). A collateral

attack upon a judgment is an attempt to avoid, defeat or evade it, or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it, and attempts to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose. *Lewis v. Planning and Zoning Comm'n of Town of Clinton et al.*, 49 Conn. App. 684, 688-89, 717 A.2d 246, 249-50 (1998); *Holliday v. Johnson*, No. CV115029509S, 2012 WL 527617, at *4 (Conn. Super. Ct. Jan. 24, 2012). "Only in exceptional circumstances, such as fraud, mistake or a like equitable ground, may a court consider an equitable attack upon a probate court order or decree." *Ferris v. Faford*, 93 Conn. App. 679, 691, 890 A.2d 602, 611 (2006).

There is no allegation that the Decree was the result of fraud or mistake, nor was any appeal taken therefrom. Our Courts have long adhered to the doctrine disfavoring collateral attacks upon final judgments, especially when that judgment is entered as a result of an informed stipulation, *Sousa v. Sousa*, 322 Conn. 757, 787-89, 143 A.3d 578, 597-99 (2016), and sound public policy underlies the bar upon such collateral attacks. *Gangemi v. Zoning Bd. of Appeals of Town of Fairfield*, 255 Conn. 143, 155-56, 763 A.2d 1011, 1018 (2001). The Decree was the result of the Settlement Agreement, which was a product of informed negotiations between the Parties. The Court finds that the Objection to the payment of the attorney's fees in this matter is such a collateral attack upon the Decree.

For the foregoing reasons, the Objection made by Kevin and John to the payment of Attorney Andrew Knott's fees for representing the Estate is DENIED, and the Executrix is ORDERED to pay the same from the Estate assets.

It is so ORDERED.

Dated at Stratford, Connecticut, this 2nd day of March, 2017.

/s/

Kurt M. Ahlberg, Judge