REL: December 13, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180845

Jacqueline M. Rothwell and Franklin L. Molitor

v.

Ronald T. Molitor, Barbara K. Vogelpohl, and Steve Molitor

Appeal from Madison Circuit Court
(CV-08-953)

MOORE, Judge.

Jacqueline M. Rothwell and Franklin L. Molitor ("the contestants") appeal from a judgment entered by the Madison Circuit Court ("the circuit court") in favor of Ronald T.

Molitor, Barbara K. Vogelpohl, and Steve Molitor ("the proponents") in a will contest. We reverse the circuit court's judgment.

Procedural History

On April 24, 2008, Ronald T. Molitor ("Ronald") filed in the Madison Probate Court ("the probate court") a petition to probate the will of Lilly Molitor, the mother of the proponents and the contestants. On June 9, 2008, the probate court granted letters testamentary to Ronald.

On June 25, 2008, the contestants filed in the circuit court a verified petition requesting that the administration of the estate be removed from the probate court to the circuit court; they also attacked the will, alleging, among other things, that Lilly had lacked testamentary capacity. The contestants named Ronald, Barbara K. Vogelpohl ("Barbara"), and Lilly's estate as defendants in the will contest. The defendants answered the petition on August 18, 2008. Ronald, Barbara, and the estate subsequently filed a counterclaim for attorney's fees, and the contestants replied to that counterclaim. Ronald, Barbara, and the estate then filed an amended answer.

On June 24, 2010, the circuit court severed the administration proceedings from the will contest and dismissed the estate from the will contest.

On September 14, 2011, the contestants amended their verified petition to add Steve Molitor ("Steve") as a defendant in the will contest. Steve answered the petition on November 28, 2011.

A trial was eventually held on November 26, 2018. At the trial, the signature page of Lilly's will, as well as the alleged self-proving affidavit, were introduced into evidence. Without objection from the proponents, the contestants introduced testimony pointing out that the alleged self-proving affidavit contained an error. Specifically, the name of one of the witnesses was listed as the testator in the notary's acknowledgment. Furthermore, the second witness and the name of the notary were listed as the two witnesses on the notary's acknowledgment.

On February 25, 2019, the circuit court entered a judgment stating, in pertinent part:

> "The matter ... that was set for trial before this Court was a contest by the [contestants] of Lilly H. Molitor's Last Will and Testament, based in part on the allegation of lack of testamentary

capacity, undue influence and coercion. These allegations relate to the Will executed by Lilly Molitor[,] the parties' Mother[,] which in effect disinherited the [contestants].

"When the validity of a will is being challenged, the trial court is guided by the general principle: 'Instead of indulging suspicion or conjecture to destroy the validity of wills, the courts are bound to support them against mere suspicion or conjecture; bound to support them, when any theory or hypothesis maintaining them, is as probable as that which is suggested to defeat them.' Barnewall v. Murrell, 108 Ala. 366, 368, 18 So. 831, 841 (1895). Lastly, the purpose of requiring the signature of two witnesses 'is to remove uncertainty as to the execution of wills and safeguard testators against frauds and impositions.' Culver v. King, 362 So. 2d 221, 222 (Ala. 1978).

> "'The law presumes that every person has the capacity to execute a will, and the burden is on the contestant to prove the lack of testamentary capacity. To possess testamentary capacity, one must be able to recall the property to be devised, the desired disposition of the property, and the persons to whom he or she wishes to devise the property. If the testator knows his estate and to whom he wishes to give his property and understands that he is executing a will, he has testamentary capacity. A person may execute a valid will, even if he or she is not competent to transact ordinary, everyday affairs.' Ex parte Helms, 873 So. 2d 1139[, 1147] (Ala. 2003).

"The [contestants] also allege undue influence. The law in the state of Alabama is clear that one alleging dominance of a child over a parent must prove that 'time and circumstances have reversed the

> order of nature, so that the dominion of the parent has not merely ceased, but has been displaced, by subservience to the child.' Hawthorne v. Jenkins, 182 Ala. 255, 260, 62 So. 505, 506 (1913). Thus, for the burden of proof to shift, it is clear that our cases require proof of more than a reversal of the traditional roles of parent as care giver and child as care recipient; they require proof that the parent's will has become subordinate to the will of the child. It is also clear from our cases that the mere relationship of parent and child alone, even when coupled with some activity on the part of the child in securing the preparation of legal papers for the parent, is not sufficient to prove subservience on the part of the parent, so as to shift to the child the burden of proving an absence of undue influence. Furrow v. Helton, 13 So. 3d 350 (Ala. 2008).
>
> "The Court heard testimony from all witnesses and upon consideration of the pleadings, the testimony and Alabama law, the Court finds ... the Last Will and Testament of Lilly Molitor to be valid and enforceable. As a result thereof, it is Ordered, Adjudged and Decreed by this Court that this case be returned to the Probate Court of Madison County, Alabama for further proceedings."

On March 20, 2019, the contestants filed a postjudgment motion; that motion was denied by operation of law on June 18, 2019. See Rule 59.1, Ala. R. Civ. P. The contestants filed their notice of appeal to the Alabama Supreme Court on July 19, 2019; that court subsequently transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).[1]

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[1]We note that the contestants were authorized to appeal from the order on the will contest pursuant to Ala. Code 1975,

Discussion

On appeal, the contestants argue that the proponents failed to prove that the will was properly executed. Specifically, the contestants contend that the alleged self-proving affidavit does not meet the requirements set forth in Ala. Code 1975, § 43-8-132, and that the proponents failed to properly prove the will by the method set forth in Ala. Code 1975, § 43-8-167.

We initially note that, although the contestants did not specifically raise these issues in their verified petition, they elicited evidence pertinent to these issues, without objection, at the trial. Therefore, we conclude that the issues raised on appeal were tried with implied consent, and the verified petition was therefore deemed amended to conform to the evidence. See Rule 15, Ala. R. Civ. P.

"The respondents ... claiming under the disputed will[] have the burden on [a will] contest ... to prove to the reasonable satisfaction of the court that [the testator] did

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§ 12-22-21(1). See Eustace v. Browning, 30 So. 3d 445, 449 (Ala. Civ. App. 2009). Additionally, the contestants' postjudgment motion tolled the time for taking the appeal. See McGallagher v. Estate of DeGeer, 934 So. 2d 391, 399 n.2 (Ala. Civ. App. 2005).

sign the will propounded for probate and did cause it to be attested by two witnesses who subscribed their names thereto in the presence of the testator." Hancock v. Frazier, 264 Ala. 202, 204, 86 So. 2d 389, 391 (1956).

Section 43-8-132, Ala. Code 1975, provides the method for making a will self-proved; that Code section provides, in pertinent part:

> "(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:
>
> > "'I, ______________, the testator, sign my name to this instrument this ___ day of __________, 19___, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.[]
> >
> > "'______________________
> > "'Testator
> >
> > "'We, ______________, the witnesses, sign our names to this instrument, being

first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.[]

"'______________________
"'Witness

"'______________________
"'Witness

"'State of __________
"'County of __________

"'Subscribed, sworn to and acknowledged before me by ______________, the testator and subscribed and sworn to before me by __________, and __________, witnesses, this ___ day of __________, 19___.

'"SEAL "'(Signed)_____________

"'______________________
"'(Official Capacity of Officer)'

"....

"(c) If the will is self-proved, as provided in this section, compliance with signature requirements for execution is conclusively presumed, other requirements of execution are presumed subject to rebuttal without the testimony of any witness, and

> the will shall be probated without further proof, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit."

In the present case, as noted previously, on the alleged self-proving affidavit, the name of one of the witnesses was listed as the testator in the notary's acknowledgment. Additionally, the second witness and the name of the notary were listed as the two witnesses on the notary's acknowledgment. Therefore, the notary did not, in fact, acknowledge the signature of the testator as required by § 43-8-132. "Because § 43-8-132 is an innovation on the common law, it should be strictly construed." Morrow v. Helms, 873 So. 2d 1132, 1138 (Ala. Civ. App. 2001) (Murdock, J., concurring in the result) (cited with approval in Ex parte Helms, 873 So. 2d 1139, 1144 (Ala. 2003)). Because the alleged self-proving affidavit fails to strictly comply with the statutory requirements of § 43-8-132, we must conclude that the will was not self-proved.

Having determined that the will was not self-proved, we next consider whether the proponents proved that the will was executed properly.

Section 43-8-167, Ala. Code 1975, sets forth the requirements for proving the proper execution of a will; that Code section provides:

> "(a) Wills offered for probate, except nuncupative wills, must be proved by one or more of the subscribing witnesses, or if they be dead, insane or out of the state or have become incompetent since the attestation, then by the proof of the handwriting of the testator, and that of at least one of the witnesses to the will. Where no contest is filed, the testimony of only one attesting witness is sufficient.
>
> "(b) If none of the subscribing witnesses to such will are produced, their insanity, death, subsequent incompetency or absence from the state must be satisfactorily shown before proof of the handwriting of the testator, or any of the subscribing witnesses, can be received; in addition to the methods already provided, the will of a person serving in the armed forces of the United States, executed while such person is in the actual service of the United States, or the will of a seaman, executed while such seaman was at sea, shall be admitted to probate when either or all of the subscribing witnesses is out of the state at the time said will is offered for probate, or when the places of address of such witness or witnesses are unknown upon the oath of at least three credible witnesses, that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal property of all kinds."

In the present case, the contestants presented evidence at the trial indicating that the witnesses to the will had not

testified at the hearing before the probate court. Additionally, neither of the witnesses to the will testified at the trial before the circuit court. The proponents did not provide an explanation for the absence of those witnesses to the circuit court, and they do not contend in their brief to this court that there is any such explanation. Instead, the proponents assert that there was no need for those witnesses to testify because the will was self-proving.

Having already determined that the will did not meet the requirements for a self-proved will, we conclude that, because of the proponents' failure to comply with the requirements set forth in § 43-8-167, the proponents failed to meet their burden of proving that the will was properly executed.

Conclusion

Based on the foregoing, we reverse the circuit court's judgment. The proponents' request for sanctions is denied, and the contestants' motion to strike is denied.

REVERSED AND REMANDED.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.