

Rel: March 26, 2021

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Nel Brock

v.

Philip Kelsoe

**Appeal from Morgan Circuit Court
(CV-18-20)**

SELLERS, Justice.

Shirley Temple Carr Ralph ("Mrs. Ralph") executed a will naming Philip Kelsoe ("the proponent") the executor and sole beneficiary of her

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estate. Mrs. Ralph's sister, Nel Brock, contested the will, arguing that Mrs. Ralph had lacked the mental capacity to execute the will and that the will was the product of undue influence on the part of the proponent. The Morgan Circuit Court entered a summary judgment in favor of the proponent, and Brock appealed. We reverse and remand.

I. Facts and Procedural History

Mrs. Ralph executed her will on March 21, 2017; she died on April 13, 2018, at the age of 76. Mrs. Ralph was predeceased by her husband who died in January 2017 and two children -- both of whom had no issue.¹ Immediately after Mr. Ralph died, the proponent, one of Mrs. Ralph's neighbors, began assisting Mrs. Ralph with various tasks, including taking her shopping, undertaking general household chores, helping her refinance the mortgage on her house, driving her to doctors' appointments, having her prescriptions filled, and dispensing all of her medications. According to the proponent, Mrs. Ralph had asked him in March 2017 for the recommendation of an attorney who could draft a power of attorney for

¹Mrs. Ralph's son died in December 2001, and her daughter died in August 2016.

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her. The proponent recommended Mark Johnson, made an appointment for Mrs. Ralph to meet with Johnson, drove her to that appointment, and waited in the lobby while she consulted with Johnson. On March 21, 2017, the proponent drove Mrs. Ralph back to Johnson's office, at which time she executed a power of attorney in favor of the proponent and a will naming him executor and sole beneficiary of her estate.² According to the proponent, Mrs. Ralph never mentioned beforehand that she was executing a will. The proponent stated that, after Mrs. Ralph executed the will, she asked him to keep it, as well as the power of attorney, in the proponent's safe. The proponent did not tell Mrs. Ralph's family about the will. The proponent also indicated that Mrs. Ralph had added his name on her checking account. At some point after Mrs. Ralph executed the will, the proponent approved of or allowed one of his acquaintances, Kathy Mitchell, to move into Mrs. Ralph's home. Mrs. Ralph signed a contract

²In the will, Mrs. Ralph devised all of her "real property" to the proponent. Although Mark Johnson, the drafting attorney, testified that Mrs. Ralph had wanted the proponent to have "everything," including her personal property, the will did not include a residuary clause; Johnson testified that the omission was unintentional.

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agreeing to pay Mitchell \$600 a month to live with her, run errands, and help around the house, etc. The agreement also provided that, after Mrs. Ralph died, Mitchell would take possession of a specific vehicle owned by Mrs. Ralph. After the death of Mrs. Ralph, the proponent petitioned the Morgan Probate Court to admit the will to probate. Brock filed a will contest, alleging that Mrs. Ralph had lacked the mental capacity to execute the will because of "mind altering" medications she had been prescribed and was taking at the time the will was executed. Brock also argued that the will was the product of undue influence on the part of the proponent. The will contest was transferred to the circuit court pursuant to § 43-8-198, Ala. Code 1975. The proponent moved the circuit court for a summary judgment, which Brock opposed. After a hearing, the circuit court entered a summary judgment in favor of the proponent. Brock appealed.

II. Standard of Review

This Court reviews a summary judgment de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Rule

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56(c), Ala. R. Civ. P.; Nettles v. Pettway, 306 So. 3d 873 (Ala. 2020). The movant for a summary judgment has the initial burden of producing evidence indicating that there is no genuine issue of material fact. Once the movant produces evidence establishing a right to a summary judgment, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. We consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor.

Id.

III. Analysis

A. Testamentary Capacity

The law presumes that every person of legal age has the capacity to execute a will, and the person challenging the will has the burden of proving a lack of testamentary capacity. Allen v. Sconyers, 669 So. 2d 113 (Ala. 1995). A testator has testamentary capacity when, at the time the will is executed, the testator (1) knows his or her estate and the property to be devised and bequeathed, (2) knows the natural objects of his or her bounty, and (3) understands that he or she is making a will.

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Smith v. Vice, 641 So. 2d 785, 786 (Ala. 1994). The key inquiry is whether the testator had testamentary capacity on the day the will was executed, which may be inferred from a witness's observation of the testator's mental and physical condition either before or immediately after execution of the will. Fletcher v. DeLoach, 360 So. 2d 316 (Ala. 1978).

In this case, the evidence is conflicting regarding Mrs. Ralph's mental state immediately before and at the time of the execution of the will. In support of his motion for a summary judgment, the proponent presented the deposition testimony of Mark Johnson, the attorney who drafted the will. According to Johnson, when he met with Mrs. Ralph, he was satisfied that she was legally competent to execute a will. Johnson characterized Mrs. Ralph as "happy and pleasant" and stated that she appeared lucid at the time she signed the will. Johnson stated that Mrs. Ralph had told him that she wanted the proponent to have her entire estate because the proponent "was a good neighbor." When questioned by the proponent's attorney, Johnson stated that he had asked Mrs. Ralph numerous qualifying questions, including whether she had children:

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"Q. Do you remember specifically what qualifying questions you might have asked?

"A. Did she have any children? Did she -- where are they living? I think [Mrs. Ralph said] they were living out of state, I believe. And they never came around. She was kind of getting ill about that, I believe. She was kind of upset at that point. But you could tell that visually bothered her. And so -- then she wanted to leave [everything to the proponent] because he was such a good neighbor, and he helped her so much.

"....

"Q. Did you advise her ... that by not putting her relatives in the will, they would not be entitled to disbursement under the will?

"A. Yes, uh-huh. I think I also put [that] in the will, which is pretty much my common standard practice, if I know the children's names, it says intentionally omit the following."

Notably, Johnson's testimony regarding Mrs. Ralph's children is troubling because Mrs. Ralph had no children living at the time she met with Johnson and there is no declaration in the will regarding omitted children. Therefore, it is not clear whether Mrs. Ralph actually told Johnson that she had children who were living or whether Johnson simply did not recall the entirety of his conversation with Mrs. Ralph when they met. More critically, the will failed to comply with Mrs. Ralph's direction because

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there was no residuary clause to bequeath her personal property to the proponent. The lack of clarity as to these material facts could lead a jury to infer that Mrs. Ralph was unable to appreciate the division of her property such that the will she signed was not a true expression of her intentions, thus making summary judgment inappropriate.

In response to the proponent's summary-judgment motion, Brock submitted the affidavit of Dr. David Clay Campbell, who had treated Mrs. Ralph from December 2014 until April 2018, when she died. According to Dr. Campbell, Mrs. Ralph experienced "extreme and debilitating grief" after her husband died. He stated that she had been diagnosed with "generalized anxiety disorder, fibromyalgia, chronic kidney disease, hypertension, rheumatoid and osteoarthritis." He stated that, to treat those conditions, he had prescribed several medications that induce "mind-altering" effects, including Ambien, Percocet, Flexeril, Lyrica, trazodone, and Xanax. Dr. Campbell described in detail the effects of each of those drugs and stated that the use of all of them concurrently renders the user incapable of possessing mental capacity for any act beyond the most basic functions. Dr. Campbell explained that, while

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taking those type of medications, some people may appear alert and awake and be able to converse at a basic level. He stated that, despite such an outward appearance, "the cognitive functioning and memory of this person would be severely impaired." Dr. Campbell indicated that, on March 13, 2017, he examined Mrs. Ralph because she wanted to discuss her medications. During that visit, Dr. Campbell stated, Mrs. Ralph appeared "frail" and "disheveled," was exhibiting a "wobbly gait," and reported that she had been falling at least once a week. He further indicated that, at that time, she was suffering from "confusion, significant weight loss [approximately 40 lbs.], fatigue, and weakness," and that she was "depressed and anxious." Dr. Campbell stated that he had "explicitly" discussed with Mrs. Ralph the medications she was taking, specifically Ambien, Percocet, Lyrica, trazodone, and Xanax, and that she had confirmed that she was taking those medications as prescribed. Dr. Campbell finally stated that he understood that Mrs. Ralph had executed a will on March 21, 2017, and that he had examined Mrs. Ralph again on March 30, 2017, at which time she indicated that she was taking all of her medications as prescribed. Finally, Dr. Campbell stated that, in his

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professional opinion, Mrs. Ralph was "incapable of knowingly executing a legal document" such as will:

"During this time, Mrs. Ralph, in my professional opinion, was incapable of knowingly executing a legal document such as a Last Will and Testament. Her grief, depression, her physical illnesses and the pain arising from them, and her faithful use of the mind-altering medications prescribed to her would, in my reasonable medical opinion, render her mentally incapable of understanding what she was doing."

Although Dr. Campbell did not examine Mrs. Ralph on March 21, 2017, the day she executed her will, his testimony cannot be discounted because he examined her before and after that time and provided an expert opinion on her general mental capacity. Given the conflicting evidence from the drafting attorney and the treating physician, we conclude that the question whether Mrs. Ralph possessed testamentary capacity to execute the challenged will is a question of fact that is not appropriate for resolution by a summary judgment. See Ex parte Helms, 873 So. 2d 1139 (Ala. 2003) (holding that (1) evidence of the testator's consumption of Lortab before and after the date she executed her will, (2) evidence of the effects and side effects of Lortab, and (3) evidence of the

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testator's physical pain and mental distress were sufficient to rebut the legal presumption in favor of the testator's testamentary capacity and to create a genuine issue of fact to be decided by the finder of fact); see also Denson v. Moses, 2 So. 3d 847 (Ala. Civ. App. 2008) (holding that genuine issue of material fact existed as to testamentary capacity based on doctor's equivocal testimony questioning the testator's competency to execute will and testimony of the drafter of the will who believed that the testator was competent to execute will). Cf., however, Maxwell v. Dawkins, 974 So. 2d 282 (Ala. 2006) (affirming summary judgment in will contest, noting that the contestant had failed to identify any evidence in the record, from a medical expert or otherwise, indicating that medications such as Xanax, Percocet, morphine, and Oxycontin had affected the testator's mental acuity).

B. Undue Influence

In order to establish a prima facie case of undue influence, the person contesting the will is required to offer evidence

"(1) that a confidential relationship existed between a favored beneficiary and the testator; (2) that the influence of or for the beneficiary was dominant and controlling in that relationship;

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and (3) that there was undue activity on the part of the dominant party in procuring the execution of the will."

Clifton v. Clifton, 529 So. 2d 980, 983 (Ala. 1988).

With regard to the first element, "[a] confidential relationship arises when one comes to rely upon and trust another in one's important affairs." Sconyers, 669 So. 2d at 117. It is undisputed that, after Mr. Ralph died, the proponent assisted Mrs. Ralph with various tasks, both personal and business in nature. Mrs. Ralph also added the proponent's name on her checking account, executed a power of attorney in favor of the proponent, and executed a will naming the proponent as executor and sole beneficiary of her estate. The proponent concedes that he had a confidential relationship with Mrs. Ralph at the time she executed the will. However, he disputes that he was a favored beneficiary. This Court has defined a "favored beneficiary" as:

"One who, in the circumstances of the particular case, has been favored over others having equal claim to the testator's bounty. An unnatural discrimination, leading to a natural inference that advantage has been taken by one in position so to do; and shown to have been busy in getting such will executed."

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Cook v. Morton, 241 Ala. 188, 192, 1 So. 2d 890, 892 (1941). The phrase "having equal claim to the testator's bounty" does not refer to the laws of descent and distribution but, rather, pertains to the facts of the particular case. Windham v. Pope, 474 So. 2d 1075, 1077 (Ala. 1985). In other words, a court must determine within a subset of possible beneficiaries those individuals or institutions who under normal circumstances could expect to receive a devise or bequest from a testator but are precluded from benefiting because of the actions of someone outside of this group. The proponent contends that he was not a favored beneficiary because Mrs. Ralph was a widow and had no surviving children; thus, he says, there was no evidence indicating that she was closer to some other person or persons than she was to him. The proponent relies on the deposition testimony of Johnson, who stated that Mrs. Ralph had wanted to leave her entire estate to the proponent because her family "didn't help her much" and "didn't come around." However, it is unclear from Johnson's testimony whether he used the term "family" to reference Mrs. Ralph's children, her siblings, or both. For example, in his deposition, Johnson made no mention of specific family members such as siblings. However,

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as indicated, he did reference children, stating that "I think [Mrs. Ralph said] they were living out of state," "they never came around," and "she wanted to leave [everything to the proponent] because he was such a good neighbor." As indicated, Mrs. Ralph did not have any children living at the time she met with Johnson. In any event, Brock testified in her deposition that Mrs. Ralph was close to her family, i.e., her siblings, and that, immediately after Mr. Ralph died, the proponent had "inserted" himself into Mrs. Ralph's business and personal affairs and had taken affirmative measures to isolate Mrs. Ralph from her family. According to Brock, the proponent changed the locks on Mrs. Ralph's house, forwarded her telephone to his telephone, took charge of her medical affairs, and neglected to tell the family whenever he took Mrs. Ralph to the hospital and/or whenever she was admitted to the hospital. Brock also stated that, in January 2017, while at Mr. Ralph's funeral, Mrs. Ralph had discussed making a will and that Mrs. Ralph had subsequently told Brock that she "wanted her things to go to the family." Carla Highfield, Mrs. Ralph's niece, submitted an affidavit stating that, after Mr. Ralph died, Mrs. Ralph had gathered all of her siblings and had told them that, if anything

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happened to her, she wanted her three remaining siblings "to get everything" and that she had asked her brother, James, if he would be her power of attorney. Viewing the evidence in a light most favorable to Brock, we conclude that she presented substantial evidence from which a jury could infer that the favoritism Mrs. Ralph showed the proponent by making him the sole beneficiary of her estate was an unnatural discrimination because, prior to the time the proponent befriended Mrs. Ralph, she had had a close relationship with her siblings and had wanted them to have her property, thus implying that Mrs. Ralph's siblings had had an equal claim to her benevolence but that the proponent had placed himself in an advantageous position at their expense, preventing their inheritance.

With regard to the second element of undue influence, this Court has held that "the fact that a beneficiary controls the personal, business, and household affairs of a testator is evidence of a dominant and controlling influence." Hayes v Apperson, 826 So. 2d 798, 804 (Ala. 2002). "Whether the beneficiary was the dominant party in the relationship is usually a question of fact for the jury, and the jury may review the often

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circumstantial evidence as to whether there were controlling influences over the testator's behavior." Sconyers, 669 So. 2d at 117. Although the proponent concedes that he enjoyed a confidential relationship with Mrs. Ralph, he denies being the dominant party in that relationship because, he says, Mrs. Ralph kept and balanced her own checkbook, prepared and filed her own taxes, cooked breakfast on a daily basis, ordered her own medication, and paid her bills by telephone. In response, Brock relied on her prior testimony that, after Mr. Ralph died, the proponent had "inserted" himself into Mrs. Ralph's personal and business affairs and had taken affirmative measures to isolate her from her family. Brock stated that, after that time, it became very difficult to see or talk to Mrs. Ralph and that Mrs. Brock had become "guarded and depressed." Brock also relied on the affidavit of David Cobb, who had been a longtime friend and neighbor of the Ralphs. Cobb stated in his affidavit that, as long as he had known the Ralphs, he had never met the proponent until after Mr. Ralph died unexpectedly, at which time, he said, the proponent began coming around Mrs. Ralph's house on a daily basis. Cobb stated that, on one occasion, Mrs. Ralph had asked him to check on one of her riding

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lawnmowers and that, while doing so, the proponent showed up, confronted him "aggressively," and told him he was not allowed to be there and to leave. Cobb also stated that, on another occasion, he and Brock went to see Mrs. Ralph because they could not get in touch with her by telephone. Cobb stated that they found Mrs. Ralph in her house motionless and nonresponsive and, that, when they attempted to transport her to the hospital, the proponent showed up and announced that "he was in charge" and told them to "stand back," at which time, Cobb said, the proponent put Mrs. Ralph in his vehicle and transported her to the hospital. Finally, Dr. Campbell stated the following in his affidavit regarding his experience with the proponent:

"Finally, I also witnessed [the proponent] attend the appointments with Ms. Ralph. This began almost immediately after Ms. Ralph's husband's death. [The proponent] was a domineering and controlling presence. He attempted to speak for Ms. Ralph; he attempted to make decisions for her; he tried to influence her; he questioned her medication; he acted as though he had control over her. I immediately suspected that [the proponent] was not acting in the best interest of Ms. Ralph. I was alarmed at the behavior he exhibited. Due to her grief, her extreme depressed state, the pain and physical illness, and the effect of her medications, she was especially susceptible to being taken advantage of."

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Viewing the evidence in a light most favorable to Brock, we conclude that she presented substantial evidence from which a jury could infer that Mrs. Ralph had a confidential relationship with the proponent and that the proponent was the dominant party in that relationship.

The final element of an undue-influence claim is whether the beneficiary actively interfered or was unduly active in procuring the will. Direct evidence regarding undue influence in the procurement of a will is rarely available; thus, this element too may be proved by circumstantial evidence. Ex parte Helms, 873 So. 2d 1139 (Ala. 2003). The evidence indicates that Mr. Ralph died on January 30, 2017, at which time the proponent began assisting Mrs. Ralph with various tasks, including accompanying her to doctors' appointments and dispensing all of her medications. During that time, Mrs. Ralph added the proponent's name to her checking account and, according to the proponent, asked for the recommendation of an attorney who could prepare a power of attorney for her. The proponent recommended Johnson, and he took Mrs. Ralph to meet with Johnson. On March 21, 2017, less than two months after Mr. Ralph died, Mrs. Ralph executed a power of attorney in favor of the

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proponent and a will naming him the sole beneficiary of her estate. The proponent took possession of the will, placed it in his safe, and concealed it from Mrs. Ralph's family. Given the circumstances surrounding the timing of the execution of the will, the proponent's dominion over the will, and Dr. Campbell's testimony regarding Mrs. Ralph's deteriorating physical and mental state, we conclude that a jury could infer that the proponent was unduly active in the procurement of the will. As indicated, Dr. Campbell stated that, around the time Mrs. Ralph executed the will, her health had deteriorated both mentally and physically, she was under the influence of "mind-altering" medications, and she was easily susceptible to being taken advantage of. Accordingly, Brock presented substantial evidence of all the elements necessary to submit her claim of undue influence to a jury.

IV. Conclusion

We reverse the circuit court's summary judgment in favor of the proponent and remand the cause for further proceedings.

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REVERSED AND REMANDED.

Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs specially.

Parker, C.J., concurs in the result.

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MITCHELL, Justice (concurring specially).

I concur with the majority opinion and write specially to highlight the differences between the evidence presented here and the evidence presented in Taylor v. Hanks, [Ms. 1190203, Feb. 26, 2021] ___ So. 3d ___ (Ala. 2021), another recent appeal asking us to determine whether there was substantial evidence that medication had rendered a person incapable of making testamentary decisions. In contrast to the evidence in Taylor, which I believed was deficient, see Taylor, ___ So. 3d at ___ (Mitchell, J., concurring in the result), the evidence presented in this case directly addressed how the medication Shirley Temple Carr Ralph ("Mrs. Ralph") took affected her mental state. Indeed, this case exemplifies how, in practice, a party should produce evidence that would permit a finding that a testator lacked capacity because of the medication he or she was taking.

A party challenging a testator's capacity must produce evidence showing (1) the specific medication the testator was taking at or around the time he or she made the contested testamentary decision and (2) how that medication affected the testator's mental acuity. Maxwell v.

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Dawkins, 974 So. 2d 282, 287 (Ala. 2006). The appellant Nel Brock did that here through the affidavit of Dr. David Clay Campbell, a physician who had treated Mrs. Ralph for over three and a half years before her death.

Dr. Campbell's testimony established, first, the various medications -- Ambien, Percocet, Flexeril, Lyrica, trazodone, and Xanax -- that Mrs. Ralph was taking during the period she executed the challenged will. Notably, this went beyond simply reciting the medications that Mrs. Ralph had been prescribed. Rather, Dr. Campbell stated that he confirmed at an appointment eight days before Mrs. Ralph executed the challenged will, and again at an appointment nine days after Mrs. Ralph executed that will, that she was actually taking those medications. Dr. Campbell said that Mrs. Ralph expressly acknowledged at the second appointment that she was taking all of her medications, and he concluded that, "[b]ased on my numerous examinations of [Mrs. Ralph] and my discussions with her, I am confident she used these medications as prescribed for the entire period they were prescribed." Dr. Campbell's testimony constitutes substantial evidence from which a fair-minded

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person could reasonably conclude that Mrs. Ralph was under the influence of these medications at the time she executed the challenged will. Cf. Maxwell, 974 So. 2d at 287 (noting that while the evidence indicated that the decedent took various medications in the later years of his life, there was no evidence indicating what medications he "had taken on the date or near the time he revoked his will").

Second, Dr. Campbell testified about the side effects of the medications that Mrs. Ralph was taking. Importantly, this testimony was not merely a generic summation of the possible side effects a medication might have, as can be found on the warning labels that accompany all prescription medications. Rather, Dr. Campbell specifically discussed the side effects that Mrs. Ralph experienced as a result of taking those medications. For example, with regard to Xanax, Dr. Campbell explained that it could impair "cognitive functioning and memory retention." He then went on to state that Mrs. Ralph "experienced mental impairment while taking Xanax" and that they even discussed this side effect but "she elected to continue [its use] as the benefits of the drug on her emotional state and mental health were significant."

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Finally, Dr. Campbell testified that several of the medications that Mrs. Ralph was taking could cause confusion and mental impairment on their own and that their combined use could compound those side effects. Crucially, he stated that he had observed those side effects in Mrs. Ralph "on several occasions" and that during their appointments he was aware "that her mental faculties were severely impaired." This testimony indicating how the medications Mrs. Ralph took actually affected her mental acuity -- not just how those medications might hypothetically affect anyone who takes them -- would permit a fact-finder to conclude that the medications were having that effect on Mrs. Ralph when she executed the challenged will.

In contrast, the evidence presented in Taylor was lacking. While the hospitalized testator's medical records indicated that he was taking narcotic pain medication when he executed his will, ___ So. 3d at ___, there was no evidence showing how the medicine actually affected him. The Court simply reasoned that "[t]he use of narcotic pain medications might have influenced [the testator's] mental state." ___ So. 3d at ___ (emphasis added). I declined to join that analysis because, while the

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plaintiff had produced warning labels for the testator's medications that indicated they "may impair" the mental abilities of individuals who take them, there was no evidence that the testator "was in fact affected in that manner." Taylor, ___ So. 3d at ___ (Mitchell, J., concurring in the result). Accordingly, I concluded, it would be improper to speculate that he had. Id.; see also Schaaf v. Astrue, 602 F.3d 869, 876 (7th Cir. 2010) (explaining that it would "be speculation to assume that [the appellant] automatically suffers from [common] side effects" of the prescription medication he had been taking); Maxwell, 974 So. 2d at 287 (holding that a will contestant had failed to establish the existence of a genuine issue of material fact about the testator's capacity because the contestant had produced no evidence indicating that the testator's medications had "affected his mental acuity in any way").

In my view, Taylor is an outlier and the majority opinion today accurately demonstrates the type of evidence that is required to establish that a testator lacked capacity because of the medication he or she was taking. Future litigants attempting to make such a showing should consider the majority opinion in this case when compiling their evidence

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and ensure that they put forth evidence demonstrating not merely that the testator has taken medication that has the potential to affect his or her mental capacity, but that the medication in fact did so.