DOCKET NO. KNL-CV22-5022984-S	:	**SUPERIOR COURT**
FULLER, JANCIS	:	**JD OF NEW LONDON**
V.	:	**AT NEW LONDON**
PROBATE APPEAL	:	**MAY 17, 2024**

MEMORANDUM OF DECISION

This is an appeal from the Probate Court's decree dated September 16, 2021. By way of decree, the Probate Court found the will of Harvey Fuller dated August 6, 2014, valid. By finding the will valid, the Probate Court found that Harvey Fuller's assets should be transferred according to the terms of the will to Griselda Urena. On January 18, 2022, the plaintiff, Jancis Fuller, filed an appeal of the Probate Court's decree. The court held a hearing on the appeal on September 28, 2023; September 29, 2023; October 25, 2023; and December 6, 2023. Both sides introduced evidence through testimony and exhibits. The court has reviewed the evidence. For the following reasons, the appeal is dismissed.

Facts

On August 6, 2014, Harvey Fuller executed and signed a document titled Last Will and Testament of Harvey K. Fuller [hereinafter referred to as "the will."] Attorney Eugene Cushman prepared the will after meeting with Harvey Fuller at his law office. Harvey Fuller's execution of the will was witnessed by Jason Westcott and Wendy McLean at Griselda Urena's house. McLean is Attorney Cushman's paralegal. Prior to the execution of the will, McLean asked Harvey Fuller a series of questions regarding how he was doing and what kind of day it

was. McLean observed Harvey Fuller to be competent and he did not appear to be under the influence of alcohol. McLean had met with Harvey Fuller over the course of several years. On the day of the execution of the will, Harvey Fuller recognized McLean based on their prior dealings. Urena was not present in the room when the will was executed.

Harvey Fuller was seen by a visiting nurse on August 6, 2014, from 7:45am to 8:30am. Nothing in the medical record from that date indicates that he had any diminished capacity that day.

The terms of the will provide that, upon his death, Harvey Fuller's property would be transferred to Urena. The terms of the will provide that Harvey Fuller "deliberately made no provision for the benefit of [his] four (4) children" including the plaintiff. The terms of the will further provide that Urena had not unduly influenced Harvey Fuller and that he was making the provisions freely because of the "thoughtful, kind and loving care" that she gave him over the last years of this life.

The plaintiff began a period of incarceration on June 30, 1995, and was recently released from incarceration. Her father, Harvey Fuller, visited her once in the fall of 2012 while she was incarcerated. The last letter that she received from Harvey Fuller was in 2008 or 2009. She was incarcerated on the date that the will was executed.

Harvey Fuller met Urena during a hospitalization that occurred at some time prior to July 2012. At that time, Urena was working at the hospital as a patient care technician. After Harvey Fuller was discharged, Harvey Fuller returned to his home and he contacted Urena, asking her to help him with his caregiving. Harvey Fuller and Urena entered into a contract on

July 31, 2012, whereby Urena would provide meals and take care of Harvey Fuller's general hygiene, medication, escorting him to doctor's appointments, the pharmacy and grocery and ensure that all his basic needs were met. In exchange, Urena was paid $20 per hour and reimbursed for out-of-pocket expenses.

At some point, Harvey Fuller permanently moved into Urena's house. When Harvey Fuller came to live with Urena, she charged him $700 a week for his full-time care. Urena did not ask Harvey Fuller to leave her anything in his will. Urena did not know the contents of the will until Harvey Fuller died.

Harvey Fuller's son, Martin Fuller visited Harvey Fuller several times while Harvey Fuller lived at Griselda Urena's house. During those visits, Martin Fuller felt that his father was of sound mind and was aware of his surroundings.

Harvey Fuller died on November 21, 2017. Up until three (3) days prior to his death, Harvey Fuller lived with Urena and her family. He became a member of her family, repeatedly thanking Urena for taking care of him.

Discussion

"A will contest generally occurs when one contests the validity of a will on grounds including lack of testator capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation of the will by a later will." (Citation omitted; internal quotation marks omitted.) *In re Estate of Andrews,* Superior Court, Docket No. CV89-0103372-S (August 8, 1991, *Lewis, J.*). Connecticut General Statutes § 45a-250 provides: "[a]ny person eighteen years of age or older, and of sound mind, may dispose of his estate by will."

"Probate appeals are not civil actions." (Citations omitted; internal quotation marks omitted.) *Burnell v. Chorches,* 173 Conn. App. 788, 796, 164 A.3d 806 (2017). "When an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common-law jurisdiction, but of a Probate Court." (Citations omitted; internal quotation marks omitted.) *Bassford v. Bassford,* 180 Conn. App. 331, 337, 183 A.3d 680 (2018). "When . . . no record . . . was made of the Probate Court proceedings, the absence of a record requires a trial de novo." (Internal quotations and citations omitted.) *Przekopski v. Przekop,* 124 Conn. App. 238, 243-44, 4 A.3d 844 (2010). "Our law provides that '[a]n appeal from probate is not so much an appeal as a trial de novo with the Superior Court sitting as a Probate Court and restricted by the Probate Court's jurisdictional limitations . . . At the trial de novo, a will's proponent retains the burden of proving, by a preponderance of the evidence, that the will was executed in the manner required by statute . . . . The proponent must prove anew that the will's execution was in compliance with the statute in effect at the time it was executed . . . . To be valid, [a] will must comply strictly with the requirements of [the] statute . . . . Because the offer for probate of a putative will is in essence a proceeding *in rem* the object of which is a decree establishing a will's validity against all the world . . . the proponent must at least make out a prima facie case that all statutory criteria have been satisfied even when compliance with those criteria has not been contested.' " (Italics in original.) *Bassford, supra,* 180 Conn. App. at 338-39.

The plaintiff challenges the will based on lack of testamentary capacity. It has long been the law of our state that "the testator may not have sufficient strength of mind and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by his will. The question, ... resolves itself into this[:] were his mind and memory sufficiently sound to know and understand the business in which he was engaged, at the time when he executed his will." *Comstock v. Hadlyme Ecclesiastical Society,* 8 Conn. 254, 265 (1830).

The burden of proof with respect to testamentary capacity is on the proponent of the will, in this case, Urena. *Deroy v. Estate of Baron,* 136 Conn. App. 123, 128, 43 A.3d 759 (2012). "While there is a presumption of sanity in the performance of legal acts, the party that presents a will still bears the burden of going forward with his [or her] proof, and only then does the burden shift to the opponents to prove incapacity." (Internal quotation marks omitted.) *Id.*

"What constitutes testamentary capacity is a question of law . . . To make a valid will, the [testator] must have had mind and memory sound enough to know and understand the business upon which [he] was engaged, that of the execution of the will, at the very time [he] executed it . . . Whether [he] measured up to this test is a question of fact for the trier." (Internal quotation marks omitted.) *Bassford, supra*, 180 Conn. App. at 340.

As stated by the court in *Bassford, supra*, "[o]ur law provides that it is a testator's capacity at the time of the will execution that is relevant. The fundamental test of the [testator's] capacity to make a will is [his] condition of mind and memory at the very time when [he]

executed the instrument . . . While determining the question as to the mental capacity of a testator evidence is received of his conduct and condition prior and subsequent to the point of time when it is executed, it is so admitted solely for such light as it is may afford as to his capacity at that point in time and diminishes in weight as time lengthens in each direction from that point." *Bassford*, supra, 180 Conn. App. at 341. "Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary capacity. One's memory may be failing and yet his mind not be unsound. One's mental powers may be weakening, and still sufficient testamentary capacity remain to make a will." *Dripps v. Meader,* 94 Conn. 559, 560, 109 A. 808 (1920). Thus, "an individual may possess the mental capacity necessary to make a will although incapable of transacting business generally." *Deroy,* supra, 136 Conn. App. at 128. "The law recognizes degrees of mental unsoundness, and not every degree of mental unsoundness or mental weakness is sufficient to destroy testamentary capacity. Absolute soundness of mind and memory in every respect is not essential to testamentary capacity. There is no particular degree of mental acumen which may be set up to serve as a standard of testamentary capacity." (Internal quotation marks omitted). Id. at 136.

One has testamentary capacity if "at the very time he undertakes to make a will [he] is possessed of sufficient intelligence and memory to fairly and rationally know and comprehend the effect of what he is doing, the nature and condition of his property, who are or should be the natural objects of his bounty, and his relations to them, the manner in which he wishes to

distribute his estate among, or withhold it from them, and the scope and bearing of the will he is making." *Appeal of Kimberly*, 68 Conn. 428 (1896); *Bassford*, supra, 180 Conn. App. at 341.

Here, the defendant has proven that on August 6, 2014, Harvey Fuller had testamentary capacity sufficient to make the will; by contrast, the plaintiff has not proven incapacity. Although Harvey Fuller suffered from certain medical conditions and had a history of drinking alcohol, these were insufficient to defeat his testamentary capacity at the time he signed the will. The evidence demonstrates that on August 6, 2014, Harvey Fuller had mind and memory sound enough to know and understand the business upon which he was engaged—namely, that he wanted to leave his estate to the woman who took care of him and that he intended to disinherit his children.

The plaintiff relied on the testimony and report of Dr. Michael Feltes in support of her argument that Harvey Fuller was not of sound mind when the will was executed. The court, as the finder of fact, does not find Dr. Feltes to be credible. In particular, Dr. Feltes issued a report on August 27, 2019, that included various statements such as Harvey Fuller was "not an alcohol drinker" and "he appeared cognitively intact." On August 1, 2020, Dr. Feltes made substantive changes to the August 27, 2019, report at the plaintiff's request. After making the changes, the report now reads that Harvey Fuller "was a habitual drinker" and the phrase "cognitively intact" was crossed out. Several other changes were made to the report, however, these are the most substantive and significant changes made to the report. Dr. Feltes had not treated Harvey Fuller since January 2012 and in fact Dr. Feltes testified that it would be

conjecture on his part to state whether or not Harvey Fuller could understand the terms of the will. The court puts no weight in Dr. Feltes's testimony or reports.

The plaintiff herself testified in support of her claims. The plaintiff, however, had only seen her father once since 1995 and that visit occurred in the fall of 2012. The plaintiff had not received a letter from her father since 2008 or 2009. The plaintiff's testimony regarding Harvey Fuller's testamentary capacity and state of mind on August 6, 2014, and even the days leading up to August 6, 2014, could not possibly be based on personal observations. Thus, the court does not credit this testimony. The plaintiff has not met her burden of showing that Harvey Fuller lacked the requisite testamentary capacity to execute the will.

The plaintiff also challenges the will based on the undue influence by Urena. "Ordinarily, the burden of proof on the issue of undue influence rests on the one alleging it . . . . In will contests, we recognize an exception to this principle when it appears that a stranger, holding toward the testator a relationship of trust and confidence, is a principal beneficiary under the will and that the natural objects of the testator's bounty are excluded. . . . The burden of proof, in such a situation, is shifted, and there is imposed upon the beneficiary the obligation of disproving, by [clear and convincing evidence], the exertion of undue influence by him." *Holloway v. Carvalho*, 206 Conn. App. 371, 388, 261 A.3d 57 (2021). As stated by the Supreme Court of Connecticut, "[m]any years ago, this court held the following to be a correct statement of what constituted undue influence sufficient to invalidate a will: The degree of influence necessary to be exerted over the mind of the testator to render it improper, must from some cause or by some means be such as to induce him to act contrary to his wishes, and to

make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment. That his free agency and independence must have been overcome, and that he must, by some dominion or control exercised over his mind, have been constrained to do what was against his will, and what he was unable to refuse and too weak to resist. But that moderate and reasonable solicitation, entreaty or persuasion, though yielded to, if done intelligently and from a conviction of duty, would not vitiate a will in other respects valid." (Internal quotation marks omitted; internal alterations omitted.) *Lee v. Horrigan,* 140 Conn. 232, 237-38, 98 A.2d 909 (1953), citing *Appeal of St. Leger,* 34 Conn. 434 (1867).

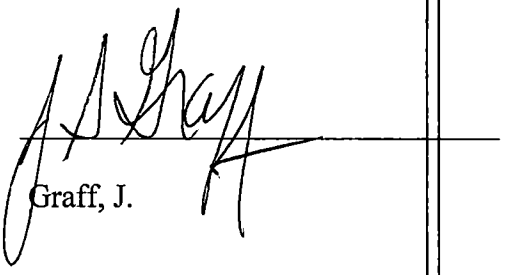
"Undue influence is the exercise of sufficient control over a person, whose acts are brought into question, in an attempt to destroy his [or her] free agency and constrain him [or her] to do something other than he [or she] would do under normal control . . . . It is stated generally that there are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence . . . . Relevant factors include age and physical and mental condition of the one alleged to have been influenced, whether he [or she] had independent or disinterested advice in the transaction; . . . consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his [or her] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] whole worth . . . failure to provide for all of his [or her] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties." (Internal quotation marks omitted.) *Tyler v. Tyler,*

151 Conn. App. 98, 105-06, 93 A.3d 1179 (2014); see also *Dinan v. Marchand,* 279 Conn. 558, 560 n.1, 903 A.2d 201 (2006). "Undue influence must be proven by clear and convincing evidence. Proof of a plan, design, or disposition to gain control and influence testamentary provisions generally may be used . . . . The courts have held that direct and positive proof is not needed to prove undue influence. Circumstantial proof such as family relations, the testator's physical and mental condition and dependence upon others can be used. The contesting party has the burden of laying a foundation of such material facts as fairly and convincingly lead to a conclusion of undue influence. There must be proof not only of undue influence but also that its operative effect was to cause the testator to make a [w]ill which did not express actual testamentary desires. The contesting party must lay down a factual foundation that, but for the actions of the party claiming under the [w]ill, the testator would have made a different disposition. . . . Undue influence focuses on the mind of the testator at the time of execution of the will and the defendant's control or power over the testator, irrespective of whether the defendant's conduct is tortious." (Internal quotation marks omitted). *Coppola v. Keeran*, Superior Court, judicial district of New Haven, Docket No. NNH CV17-6068306-S (November 20, 2018, *Pierson, J.*).

Here, Urena has proven by clear and convincing evidence that there was no undue influence by her over Harvey Fuller. Urena was unaware that Harvey Fuller named her as the beneficiary when he signed the will. Moreover, Urena was not present at the time Harvey Fuller executed the will and did not know what the will said until after Harvey Fuller died. In sum, the credible evidence fails to show that Urena exerted any influence on the testator in the

preparation and execution of the will, let alone undue influence. The record is devoid of credible evidence that Urena attempted to destroy Harvey Fuller's free agency, overcame his free agency and independence, or constrained him to do something other than what he would do under normal control. Thus, the defendant has disproven, by a clear preponderance of the evidence, that she exercised undue influence over Harvey Fuller.

The appeal is dismissed.



Graff, J.