COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2519 **Cir. Ct. No. 2015PR46**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF JUDITH J. BORN:

LESTER A. BORN,

PETITIONER-APPELLANT,

V.

GREGORY A. BORN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Lester A. Born appeals an order for summary judgment denying Lester's petition to admit Judith (Judy) J. Born's unsigned 1991

will into probate. On Gregory A. Born's summary judgment motion, the circuit court dismissed Lester's petition and, after determining that Lester lacked standing to challenge Judy's October 16, 2014 will, granted Gregory's petition to admit the 2014 will into probate. Lester argues that summary judgment was inappropriate because he established material facts creating a genuine dispute as to whether Judy was unduly influenced to revoke her 1991 will. We disagree and affirm.

BACKGROUND

¶2 Judy and Bob Born were married in 1980. Bob had five adult children from a previous marriage. Judy had no children. Judy's sole intestate heir was her sister, Esther Tanger. In 1991, Judy and Bob executed separate but functionally identical wills. Each left the testator's estate to the surviving spouse and named the surviving spouse as the estate's personal representative. Both provided that if the spouse predeceased the testator, the estate would go to Bob's son, Lester A. Born, upon the testator's death. The wills also named Lester as the first alternative personal representative in the event the other spouse was deceased or unable to serve.

¶3 Bob died on March 22, 2014, and as his personal representative, Judy probated his 1991 will. Lester hired an attorney to object to Judy's request to probate Bob's estate on the ground that the will required Judy to survive Bob by four months. It is undisputed that some time on or before May 22, 2014, Judy

revoked her 1991 will.[1] Thereafter, she executed a will dated September 29, 2014, and a will and trust dated October 16, 2014. Gregory Born, Bob's grandson, benefitted from Judy's 2014 wills. Lester did not.

¶4 Judy died on November 6, 2014. Lester petitioned to admit an unsigned copy of Judy's 1991 will into probate. Gregory filed an objection and a petition to admit Judy's 2014 wills into probate. Lester objected, alleging that Judy's 2014 wills were the product of undue influence by Gregory and his wife, Brooke Born.

¶5 Gregory filed a motion for summary judgment requesting that the circuit court deny Lester's petition and grant Gregory's petition. The motion sets forth facts alleging that Judy deliberately and personally destroyed her 1991 will because she did want it to be effective and, in particular, did not want her estate to pass to Lester. Further, the motion alleged facts supporting the conclusion that Judy's decision to revoke her 1991 will was not the product of undue influence. It averred that professionals and relatives alike considered Judy to be a strong-willed, decisive person, and attached supporting depositions. Together with supporting documents, it asserted that Judy was competent, lived independently and drove on her own, had outside friends and interests, and handled her own finances. The motion alleged that while Judy was alive, Lester knew that she was upset with him and that he no longer expected to be her sole beneficiary.

[1] According to the deposition of Attorney Buchholz, early on in the process of probating Bob's estate, Judy informed him she had destroyed her will "some time ago." Attorney Buchholz could not recall the exact date of this conversation but testified that the latest date it could have occurred was on May 22, 2014, when Lester filed his objection to probating Bob's will. Though Buchholz testified he believed the conversation occurred earlier than that, the parties agreed to use the May 22, 2014 date for purposes of their legal arguments.

¶6 In his response opposing summary judgment, Lester asserted that Judy's 1991 will existed at the time of Bob's death on March 22, 2014, and that between March 2014 and October 2014 Judy was unduly influenced by Gregory to destroy the 1991 will and create a new will and trust.

¶7 At the summary judgment hearing, the circuit court determined that in order to have standing to challenge the 2014 wills, Lester needed to show that Judy's revocation of her 1991 will was the product of undue influence. The circuit court explained that Lester had a legal right to appear in court and take a position concerning the 1991 will because he was its named beneficiary. However, the court went on to explain, if it was determined that the 1991 will was properly revoked, Lester would lack standing to challenge the admission of the 2014 wills into probate because he was neither a named beneficiary nor a legally recognized intestate heir.

¶8 Given the undisputed fact that Judy destroyed her 1991 will, the circuit court determined that Gregory set forth a prima facie case showing that the 1991 will should be denied admission to probate. The circuit court considered the uncontroverted deposition of Attorney Buchholz, who testified that Judy told him that she had destroyed her 1991 will and did not want her farm to go to Lester, and that the will would have been destroyed on or before May 22, 2014. The circuit court then concluded that the assertions set forth in Lester's response, even if true, failed to support a finding of undue influence in the revocation of Judy's 1991 will. Lester appeals.

DISCUSSION

¶9 Lester argues that the circuit court improperly granted summary judgment because there was a genuine factual dispute concerning whether Judy

was unduly influenced in the destruction of her 1991 will and in the creation and execution of her 2014 wills. As a preliminary matter, we agree with the circuit court's analysis and conclusion that in order to have standing to challenge the admission of the 2014 wills, Lester would need to establish undue influence in the revocation of Judy's 1991 will. Only interested parties can petition for admission of a will. WIS. STAT. § 856.07 (2013-14).[2] "One must have some interest in the disallowance of a will in order to object to its probate." ***In re Buffington's Estate***, 249 Wis. 172, 174, 23 N.W.2d 517 (1946); *Cf.* ***In re Hunt's Will***, 122 Wis. 460, 463-65, 100 N.W. 874 (1904) (observing that a non-heir legatee named in a prior will "which might be valid if that under consideration were rejected, can be recognized as a party aggrieved to appeal" from the subsequent will's probate). Because it is undisputed that Judy destroyed her 1991 will and remained intestate for a time before executing her 2014 wills, Lester has no interest in the allowance or disallowance of Judy's 2014 wills, absent a valid challenge to the revocation of the 1991 will.

¶10 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. ***Id.*** If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether the opposing party's affidavits establish a disputed material fact that would entitle the opposing

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2). In doing so, we view the materials in the light most favorable to the party opposing the motion. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. However, to counter summary judgment, the opponent must show more that the "'mere existence of *some* alleged factual dispute between the parties …; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoted source omitted). A factual issue is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Id.*** (quoted source omitted).

¶11 On appeal, the parties agree that Judy revoked her 1991 will on or before May 22, 2014, and Lester does not dispute that Gregory established a prima facie case for summary judgment. Therefore, we must determine if Lester's response established a genuine issue of material fact concerning whether Judy was unduly influenced in the revocation of her 1991 will.

¶12 Undue influence may be proven under a four-element or a two-element test. *See* ***In re Estate of Friedli***, 164 Wis. 2d 178, 184-85, 473 N.W.2d 604 (Ct. App. 1991). The four-element test requires proof of susceptibility, opportunity, disposition, and coveted result. ***In re Estate of Vorel***, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981). In determining susceptibility, "[f]actors to be considered are age, personality, physical and mental health, and ability to handle business affairs." ***In re Estate of Kamesar***, 81 Wis. 2d 151, 159, 259 N.W.2d 733 (1977). "If consideration of these factors demonstrates that the testator was unusually receptive to the suggestions of others and consistently deferred to them on matters of utmost personal importance, then the first element is established." ***Johnson v. Merta***, 95 Wis. 2d 141, 156-57, 289 N.W.2d 813 (1980).

¶13 We conclude that the facts alleged in Lester's response do not create a genuine dispute as to whether Judy was susceptible to undue influence. Citing to the deposition of Attorney Klippel, Lester asserts that Judy was in poor physical health. Attorney Klippel stated that on August 28, 2014, Judy told him she had congestive heart failure. To suggest that Judy was in poor mental health, Lester simply asserts that she had just lost her long-time husband. These statement assertions do not contradict the facts established in Gregory's summary judgment papers through Judy's treating physician that in May and June 2014, she was in good health, taking "good care" of herself, her diabetes was improving, she was driving and adjusting well to life as a widow, living an active life, doing her own finances, not lonely or isolated, and not depressed.

¶14 Lester also asserts that Judy was unusually receptive to Gregory's suggestions as demonstrated by the deposition of William Born. William testified that at Gregory's suggestion, Judy purchased a smartphone, replaced her "30 some inch … old style" television set with a bigger flat-screen model, and bought a new riding lawn mower after Greg mentioned she should have a new model instead of her "old decrepit one." Aside from the lack of any factors indicating Judy's susceptibility, *see* ***Kamesar***, 81 Wis. 2d at 159, William's statements do not begin to demonstrate that Judy was unusually receptive or consistently deferential to Gregory's suggestions on matters of utmost personal importance. *See* ***Johnson***, 95 Wis. 2d at 156-57.

¶15 Acknowledging that Gregory presented clear facts showing that Judy had a strong personality and could handle her own business affairs following Bob's death, Lester argues that he needed to present only "slight evidence" of Judy's unusual susceptibility because he established the existence of the other three prongs. ***Vorel***, 105 Wis. 2d at 116 ("If the objector proves three of the

elements by clear, satisfactory, and convincing evidence, there need be only slight proof on the fourth."). He contends that the circuit court improperly considered susceptibility a "threshold element that must be met before looking to the other three elements." We disagree. Lester's summary judgment evidentiary submissions also fail to establish a material dispute on the remaining three elements. For example, as to opportunity, Lester points to allegations that Gregory and Brooke spent the night with Judy following Bob's death, and that Gregory drove Judy to a lawyer's appointment in April 2014. Lester presents no evidence of what occurred on the night Bob died or if the parties did anything other than sleep after a long and emotional day. As to the lawyer's meeting, Gregory was excluded from and not in the room when Judy discussed a new will with her attorney.

¶16 We also conclude that Lester did not sufficiently establish the existence of facts supporting the two-element undue influence test so as to defeat summary judgment. Under the two-element test, the objector must prove "'a confidential or fiduciary relationship … between the testator and the beneficiary coupled with the existence of 'suspicious circumstances.'" ***Vorel***, 105 Wis. 2d at 117 (quoted source omitted). If both elements are proven by the objector, it raises a rebuttable presumption of undue influence. ***Kamesar***, 81 Wis. 2d at 164.

¶17 Lester continues to emphasize that Judy gave Gregory power of attorney on October 7, 2014. This in no way establishes that Gregory had a confidential or fiduciary relationship with Judy at the time she revoked her 1991 will on or before May 22, 2014. Lester also asserts that there is evidence that Judy turned over her financial matters to Gregory as early as the day of Bob's funeral and that this establishes a fiduciary relationship prior to the destruction of Judy's 1991 will. However, the facts alleged in Lester's evidentiary submissions do not

bear this out.[3] Lester presents no evidence that Judy was dependent on Gregory's financial advice or that he actually handled her financial affairs by, for example, paying her bills or signing her checks. In light of the averments in Gregory's summary judgment motion establishing that Judy handled her own financial and legal affairs during the time she destroyed her 1991 will, Lester has failed to establish a genuine factual dispute concerning the non-fiduciary nature of Gregory's relationship with Judy.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] Lester points to his own deposition testimony concerning events at Bob's funeral:

> Q [by Gregory's attorney]: So, your testimony is that Greg told you, at the funeral, what?
>
> A: That he was in charge of taking care of things.
>
> Q: Okay. And was there something odd about that?
>
> A: No. 'Cause he would have been pretty tight with them.
>
> Q: Okay. Tight before Grandpa died?
>
> A: Yeah.
>
> Q: Okay. Tight in what way?
>
> A: Just being, like we discussed before, taking him to the hospital, taking him to the doctor.

This testimony does not establish a fiduciary relationship between Gregory and Judy.