SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1456-21

IN THE MATTER OF THE
ESTATE OF
ELIZABETH B. COUNSELMAN.

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Submitted February 28, 2023 – Decided June 28, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. 275445.

Farrell & Thurman, PC, attorneys for appellants Mercer Street Friends, Homefront, and Rescue Mission of Trenton (James M. Farrell and George H. Flammer, Jr., on the briefs).

Faegre Drinker Biddle & Reath LLP, attorneys for cross-appellants American Friends Service Committee, United for a Fair Economy, and Friends Committee on National Legislation (Jack N. Frost, Jr., and Justin M. Ginter, on the brief).

Fox Rothschild LLP, attorneys for respondent Carl Oxholm, III (R. James Kravitz, of counsel and on the brief; Carmella R. Campisano, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent the State of New Jersey (Melissa H. Raksa, Assistant Attorney General, of counsel; Steven C. Hordis, Deputy Attorney General, on the brief.)

PER CURIAM

In this dispute of an estate valued at more than $4 million, the Probate court entered a summary judgment order: (1) probating the unsigned last will and testament of decedent Elizabeth B. Counselman; (2) appointing plaintiff Carl Oxholm III as executor; and (3) awarding him counsel fees. The order is challenged by Mercer Street Friends, Homefront, Rescue Mission of Trenton, American Friends Service Committee, United for a Fair Economy, and Friends Committee on National Legislation (collectively "the charities"), whose estate share was decreased in the unsigned will from a previously signed will. The State of New Jersey, which participates in its common law role as protector of the public interest in charitable gifts, also responds to this appeal.

Appellants contend the court erred in summarily granting Oxholm's application and denying their request for discovery to resolve genuine disputes of material fact concerning whether Counselman: (1) had the requisite testamentary capacity to direct preparation of the unsigned will; (2) was unduly influenced by Oxholm to direct preparation of the unsigned will; and (3) intended the unsigned will to be her last will and testament.

A probate action is typically resolved summarily under Rule 4:83-1 but, for good cause shown, it may be decided in a plenary hearing under Rule 4:67-5. Based upon the genuine dispute of material issues regarding the preparation and approval of the unsigned will, we reverse and remand for the court to allow the parties to engage in discovery and, thereafter, resolve the dispute either summarily or through a plenary hearing.[1]

I

In October 2020, Counselman, who was suffering from cancer, contacted New York attorney Robert L. Greene to discuss changes to her 2017 will. She was not married and did not have any children. She initially indicated she wanted the new will to leave eighty percent of her estate to her cousins and twenty percent to nine charities; however, she later settled on seventy and thirty percent, respectively.

Around the same time, the sixty-six-year-old Counselman submitted to a mental status examination with Rosemarie Scolaro Moser, Ph.D., and Sarah Friedman, Psy.D. The doctors issued a November 10, 2020 report, opining Counselman had "areas of mild cognitive decline" that "may be consistent with

[1] In separate August 5, 2022 orders, the court denied a motion by Oxholm and cross-motions by Mercer Street Friends, Homefront, and Rescue Mission of Trenton seeking summary disposition.

a frontotemporal dementia." They recommended Counselman's "financial matters should be monitored closely by trusted advisors, family, and friends" because she "appears to be vulnerable to exploitation." According to the report, Oxholm, Counselman's cousin, attended the examination along with Debra Watson, one of Counselman's close friends.

On May 19, 2021, Greene provided Counselman a draft of her new will. Counselman allegedly advised Greene that she was satisfied with its contents, and they scheduled a will signing for June 9. On that date, Greene met with Counselman and the proposed witness to the signing, Cheyanne Boyd, but Counselman was too weak to sign the will. Greene met with Counselman on June 16, but again she was too weak to sign the will. Counselman died three days later without signing the will.

Counselman executed an initial will in 2010, which was changed in 2013 and 2017. The 2017 will left the entire estate to the charities, changing the 2013 will, which left approximately two-thirds of her estate to ten cousins, including Oxholm, and the other third to six non-profit organizations, including three of the charities. Oxholm was the sole executor of the new will, whereas the 2017 will designated him co-executor with the Glenmede Trust Company and Robert

D. Sumner, and both the 2010 and 2013 wills designated him as the co-executor with Glenmede.

In September 2021, Oxholm filed a Chancery Division complaint to probate Counselman's unsigned will. On December 9, the court, finding there were no genuine disputes of material fact, granted summary relief to Oxholm under Rule 4:67.

The court recognized the unsigned will did not satisfy the formal requirements of N.J.S.A. 3B:3-2 but determined the document was intended by Counselman to be her last will and testament and admitted it under N.J.S.A. 3B:3-3. The court, citing In re Prob. of Will & Codicil of Macool, 416 N.J. Super. 298, 310 (App. Div. 2010), determined Oxholm established "by clear and convincing evidence that [Counselman] actually reviewed the [unsigned] will and thereafter gave her final assent to it." The court specifically held: (1) "[Counselman] read and reviewed the [unsigned] [w]ill multiple times"; (2) Counselman gave her assent to the will when she emailed Greene expressing her satisfaction and looking to schedule a signing; (3) Counselman "appeared determined" to execute the will by arranging two more signings after the failed first attempt due to her poor health; (4) the preparation of the unsigned will followed the pattern of her execution of prior wills in 2010 and 2013; and (5)

the certifications of Greene, Watson, and another close friend, Leila Shahbender, asserted Counselman's intended to sign the will.

The court, citing the report of Drs. Moser and Friedman, found there was no proof overcoming "the presumption [Counselman] had the requisite testamentary capacity" because of "her metabolizing cancer, related medications, and advanced age." The court found Counselman's health and age "do[] not create a genuine issue of material fact as to [her] capacity."

Finally, the court concluded that, although a confidential relationship existed between Oxholm and Counselman, there were no suspicious circumstances to support a finding of his undue influence on her decision to change her estate planning. The court noted Oxholm did not receive a disproportionate share of Counselman's estate compared to other cousins and that he even spent $11,000 of his own money to pay Counselman's estate's bills.

II

Based upon our review of the record, we conclude the court erred in granting Oxholm summary relief without first allowing discovery as requested by the charities and the State because there are genuine disputes of material facts concerning Counselman's testamentary capacity to create a new will and

Oxholm's involvement with Counselman's purported decision to distribute less of her estate to the charities.

A.

In accordance with Rule 4:83-1, all probate actions "shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to R. 4:67." Rule 4:67-5 states if "the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon." Furthermore, "the court for good cause shown may order the action to proceed as in a plenary action." R. 4:67-5.

Pretrial discovery should be liberally allowed. "Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Jenkins v. Rainner, 69 N.J. 50, 56 (1976). Discovery is permissible "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." R. 4:10-2(a). Though not defined in the discovery rules, "relevant evidence" is defined in our evidence rules as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. See Camden

Cnty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Env't Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

In accordance with N.J.S.A. 3B:3-3, unsigned wills[2] can be admitted to probate when "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute [a will]" and "(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it." Macool, 416 N.J. Super. at 310. The charities and the State contend this standard was not satisfied in the court's summary disposition of this dispute.

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[2] N.J.S.A. 3B:3-2 requires a will to be:

> (1) in writing;
>
> (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and
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> (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will . . . or the testator's acknowledgment of that signature or acknowledgment of the will.

B.

In granting summary relief without discovery, the court determined the certifications submitted by Oxholm established (1) Counselman reviewed the unsigned will with Greene, and (2) the unsigned will carried out Counselman's intent. Greene's certification asserted there was "no doubt in my mind" that Counselman intended to execute the unsigned will. Watson's certification asserted the terms of the unsigned will were consistent with Counselman wishes. Watson stated Counselman told her that she was "at peace with [the] will" that Greene prepared because "a percentage of her financial assets would go to her family and the remainder to charity." Shahbender's certification asserted Counselman stated her lawyer "had updated her will so that the larger percentage would be split between 10 [(including Oxholm)] of her 12 first cousins and the remaining portion would go to specific charities she wanted to support."

These certifications fail to establish that Counselman read the will and that it set forth her wishes. As we expressed in Macool, the record contains no clear and convincing evidence from which a court ruling on summary disposition could conclude that Counselman "confer[red] with counsel after reviewing the document to clear up any ambiguity, modify any provision, or express . . . final assent." 416 N.J. Super. at 309; see also In re Purrazzella, 134

N.J. 228, 240 (1993) (recognizing that a court must possess "a firm belief or conviction as to the truth of the allegations sought to be established" to satisfy the clear and convincing standard) (quoting Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960)). This is unlike the situation in In re Estate of Ehrlich, 427 N.J. Super. 64, 74-75 (App. Div. 2012), where the unsigned will was prepared and reviewed by the testator—a trusts and estates attorney—who gave final assent to the will through a handwritten notation stating he sent the original to the executor and trustee of his estate, and "in the years following the drafting of this document . . . repeatedly orally acknowledged and confirmed the dispositionary contents therein to those closest to him in life."

Here, the court should have afforded the charities and the State the opportunity to conduct discovery regarding the assertions by Greene, Watson, and Shahbender, as well as Boyd's observations of Counselman at the two failed will signings. Discovery will allow the charities and the State to investigate Counselman's alleged decision to change her will shortly after Oxholm increased his role in her life. As the State contends, Oxholm became increasingly involved in Counselman's estate in August 2020, about two months before Greene was charged by Counselman to draft a new will in October 2020, increasing Oxholm's share of the estate. This coincidental timeline demands explanation

because it creates suspicious circumstances. See In re Prob. of Will & Testament of Catelli, 361 N.J. Super. 478, 484-85 (App. Div. 2003) (finding suspicious circumstances where the beneficiary retained his own attorney to draft the documents without consultation with the decedent, drastically changed the prior will, and granted himself immediate control over all the decedent's assets through an inter vivos trust). A will contestant has the burden of proving undue influence unless "the will benefits one who stood in a confidential relationship to the testatrix and there are additional circumstances of a suspicious character present which require explanation"; in which case, undue influence is presumed, and the burden shifts to the will's proponent to rebut that presumption. In re Will of Rittenhouse, 19 N.J. 376, 378-379 (1955).

Moreover, contrary to the court's finding, Counselman's mental examinations evince concerns about her cognitive decline and her ability to make financial decisions. Coinciding with Counselman directing Green to change her will, Drs. Moser and Friedman opined that her "financial matters should be monitored closely by trusted advisors, family, and friends" because she "appears to be vulnerable to exploitation." Oxholm claims there is no evidence that, despite his confidential relationship with Counselman, he unduly influenced her decision to change her will. We pass no judgment on whether he

did, in fact, unduly influence the will change. The circumstances, however, require that the charities and the State be permitted to conduct discovery addressing the issue.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.