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OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PROBATE PART
MONMOUTH COUNTY
DOCKET NO. MON-P-410-24

IN THE MATTER

OF

ESTATE OF SUZANNE CALLOW
BERRYMAN,

Decedent.

OPINION

Decided: March 9, 2026.

Louis E. Granata, P.C. (Louis E. Granata, Esq.,
appearing), attorneys for plaintiff Wayne Callow.

Lomurro, Munson, LLC (Eric H. Lubin, Esq.,
appearing), attorneys for defendant/third-party plaintiff
Jaclyn Berryman.

Elaine M. Diamantides, Esq., attorney for defendant/third-party plaintiff Austin Berryman.

Weiner Law Group LLP (Michael Mietlicki, Esq., appearing), attorneys for third-party defendants Patricia Marrese and Kathleen Mietus Riviere.

FISHER, P.J.A.D. (t/a, retired on recall).

Two motions are before the court in this will contest. One – filed by defendant Jaclyn Berryman and joined in by defendant Austin Berryman – seeks a declaration, by way of summary judgment, that Suzanne Callow Berryman’s August 12, 2024 Will – which disinherits her children, Jaclyn and Austin, in favor of her brother, plaintiff Wayne Callow, and third-party defendants Patricia Marrese and Kathleen Mietus Riviere – is invalid either because it was not properly witnessed or because one of the Will’s witnesses should not be credited. The second motion – filed by Wayne and joined in by Patricia and Kathleen – seeks to bar testimony from Jaclyn’s and Austin’s experts about Suzanne’s state of mind and whether she was subjected to undue influence.

Because the onus Jaclyn and Austin would place on a will’s witness far exceeds what is required and conflates the concept of what is sufficient to make a valid will under N.J.S.A. 3B:3-2 with what makes a will self-proving under N.J.S.A. 3B:3-4, and because the doctrine of substantial compliance, see In re

Will of Ranney, 124 N.J. 1, 10 (1991); In re Estate of Peters, 107 N.J. 263, 281 (1987), arguably counsels against strict formalism in these circumstances, summary judgment must be denied. The motion to bar expert testimony must also be denied, but without prejudice, because the sufficiency or propriety of the offered expert testimony will be better illuminated at trial.

I

Jaclyn's summary judgment motion questions whether Suzanne's Will fails to comply with N.J.S.A. 3B:3-2, which requires that a valid will must be witnessed by two individuals. On its face, Suzanne's Will meets this standard because it bears the signatures of two witnesses (Louis E. Granata, Esq., and Robert Devino); the Will also purports to be self-proving because it contains the attestation by a notary (Donna Fitz), so, in fact, three individuals attended the Will's solemnization and signed the Will. In moving for summary judgment, Jaclyn and Austin would have the court look behind the Will's appearance by contending that one of the witnesses, Robert Devino, did not understand his role and, therefore, should not be counted when applying N.J.S.A. 3B:3-2's two-witness requirement.

The Supreme Court has held that a witness to a will serves both an observatory and a signatory function. See Peters, 107 N.J. at 274. In layperson's

terms, a witness must watch and sign. But Jaclyn argues that the “observatory function includes ensuring the testator ‘is of sound mind and not acting under any constraint or undue influence.’” JB Br at 1 (quoting In re Estate of Gerhardt, 336 N.J. Super. 157, 164 (Ch. Div. 2000)). Jaclyn extrapolates from what the late Chancery Judge Theodore Z. Davis said in Gerhardt, that Devino “cannot be a witness because he did not even know that he was supposed to be determining whether the [d]ecedent was under undue influence or constraint when signing the will.” Ibid. (emphasis added). They claim Devino does not come up to this standard because he testified at his deposition that he did not read and was otherwise unfamiliar with the attesting language on the Will above where he signed the document for the second time.¹ In considering this argument, the court must not only consider what the law requires but also the particulars of Suzanne’s Will; this latter aspect will be discussed first so that the former might be placed in context.

¹ Devino testified he had never heard of the terms “undue influence” or “under constraint,” and that he did not do “any investigation” to determine whether Suzanne “was being influenced by anyone else” or whether she “was under any type of constraint to make [her] will” when he observed and signed. Devino Dep. at 11, 14, 21. He also testified that he had never “read that paragraph [referring to the attesting language above his second signature] before.” Id. at 23.

Movants' argument, it is important to observe, does not appear to distinguish between the witnessing of a will's execution and the participation in the attestation clause needed to make the Will self-proving. In looking at this Will, the witnesses (Granata and Devino) signed twice. Above the location where they first signed as witnesses, the document states that in their presence the testator

all of the pages of the foregoing Will . . . [and] [a]t the same time and at the Testatrix's request . . . [the witnesses] hereby sign our names as attesting witnesses in the presence of the Testatrix and of each other.

In the second location, the witnesses "declare[d] to the undersigned authority," referring to the notary public (Fitz), that

the Testatrix signed and created this instrument as her Last Will and Testament and that she signed it willingly; that each of us, in the presence and hearing of the Testatrix, hereby signs this Last Will and Testament as witness to the signing thereof by the Testatrix; and that to the best of our knowledge the Testatrix is 18 years of age or older, of sound mind and under no constraint or undue influence.

The language above the first signatures establishes Granata and Devino's roles as witnesses to the Will's execution. N.J.S.A. 3B:3-2 does not require any particular language (or any language at all) expressing the witnesses' role. The second statement, under which the witnesses signed the document for the second

time, is that which would make the Will “self-proving” under N.J.S.A. 3B:3-4.² Jaclyn’s motion is based on Devino’s deposition testimony in which he stated he had no familiarity with the second statement³ or its meaning. See n.1. Because the second statement and the second signatures weren’t necessary to make this a valid will – they only purport to make Suzanne’s Will self-proving – for that reason alone the motion must be denied.

Moreover, the court rejects the argument that a witness’s signatory and observatory roles encompass an investigatory role. It is certainly true that an individual should not act as a witness if it appears during the ceremony that the testator is under duress or speaking or acting in a way that would call into question the soundness of the testator’s mind or the voluntariness of the

² A will being self-proved is not a necessity for making a will valid. The self-proving quality merely makes the document easier to probate. See Senate Judiciary Comm. Statement to L. 1991, c. 255, in which the committee observed that the “advantage to a will’s being ‘self-proved’ [through the method described in N.J.S.A. 3B:3-4] is that the will, unless contested, can be admitted to probate without testimony from the subscribing witnesses.”

³ This is the language Devino said he had never read before. See n.1, above. The court does not interpret his deposition testimony – at least for summary judgment purposes – to suggest that he did not understand the language of the first statement to which he also put his hand as a witness.

testator's act. But that does not require the witness to conduct an independent examination or allow for an interrogation of the testator into the possibility of undue influence or coercion. It is enough, as may be assumed at this stage,⁴ that the witness was present and observed the solemnization, saw nothing concerning, and signed the document. That is, a witness is obligated to observe the testator execute the document,⁵ and then the witness must sign the document for the purpose of expressing that he witnessed the testator's execution of the will and that the document on which the signatures appear is in fact the paper that is later presented for probate.⁶ Witnesses are not obligated to independently

⁴ At this time, the motion's opponents – Wayne, Patricia and Kathleen – are entitled to a view of the evidence in a light most favorable to them. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

⁵ Even the observatory aspect need not be strictly applied, as Kentucky's highest court recognized in Smith v. Neikirk, 548 S.W.2d 156, 158 (Ky. 1977) (holding that "the fact that [a witness] may have had her back turned at the moment of execution does not disqualify her as a witness") (cited with apparent approval in Ranney, 124 N.J. at 10).

⁶ The difference between the Court's two seminal decisions on this subject – Peters and Ranney – helps point out how signatures are required (the signatory function) but their particular location on the document isn't necessarily relevant. In Ranney, the witnesses signed a self-proving attestation but not the will itself, 124 N.J. at 3, while the witnesses in Peters did not sign at all, 107 N.J. at 265. In the former, the doctrine of substantial compliance opened the door on remand to a potential finding of validity, 124 N.J. at 15, but what occurred in Peters

investigate; they are only obligated to observe and sign. To be sure, witnesses must decline signing if they question the testator's intentions or believe undue influence has been wielded from what they have observed during the ceremony.⁷ N.J.S.A. 3B:3-2 does not impose any greater duty.

Gerhardt, on which movants greatly rely, does not suggest otherwise. Gerhardt instead only confirms that, in that particular case, the testator appeared to the witness to be competent and, as well, appeared at that particular time to not be "acting under any constraint or undue influence." 336 N.J. Super. at 164. Whether Devino, at trial, will say something consistent or inconsistent with that limited function may or may not suggest he was a sufficient witness within the meaning of N.J.S.A. 3B:3-2. But we are now at the summary-judgment stage,

would have stretched the substantial compliance doctrine too far for the Supreme Court and was found fatal, 107 N.J. at 283.

⁷ Devino testified at his deposition that there was nothing "unusual" about the ceremony, that he had no "reason to believe that [Suzanne] didn't understand what she was signing," that he had no "reason to believe that she was being pressured or controlled by anyone else," that he saw "everybody else in the room," and that Suzanne did not "appear confused or disoriented at any time [he was] with her." Devino Dep. at 30-31. This is enough to defeat the summary judgment motion as framed.

and Devino's deposition testimony does not reveal any patent inadequacy in the exercise of his signatory and observatory obligations.

In addition, it bears noting that in Gerhardt the will was witnessed by only one witness and a notary. If the court were to accept movants' expansive view of Gerhardt,⁸ even a rejection of Devino as a witness to the Will would not necessarily preclude a finding of the validity of Suzanne's Will because, in Gerhardt, the court applied the doctrine of substantial compliance, Ranney, 124 N.J. at 10; Peters, 107 N.J. at 281, and found that N.J.S.A. 3B:3-2's requirements were met when the will was witnessed by only one witness and a notary, Gerhardt, 336 N.J. Super. at 164-65. So, even without Devino there would still be, like Gerhardt, one witness (Granata) as well as a notary (Fitz), who attended

⁸ Jaclyn and Austin appear to conflate the legal principles applied in Gerhardt with the judge's particular factual findings in that case. In being persuaded to the sufficiency of the will's solemnization, Judge Davis found after an evidentiary hearing, 336 N.J. Super. at 158, that the notary's execution and observations "ensured the [t]estatrix . . . voluntarily and willingly executed the subject will as her Last Will and Testament, confirmed that she was over eighteen years of age, of sound mind and not acting under any constraint or undue influence," id. at 164. There is nothing within Judge Davis's opinion that would suggest the witness there was required to look beyond what was said and done during the solemnization to reach the conclusions that the testator was not then acting under constraint or undue influence.

the Will's execution and signed the document; that's two, and two is all N.J.S.A. 3B:3-2 requires.

It is also argued by Austin that Devino's testimony cannot be credited because he then and currently suffers from Parkinson's Disease. See AB Br at 4. To be clear, Austin does not argue that Parkinson's Disease alone "automatically disqualifies a witness"; he instead argues that Devino testified at his deposition to short-term memory deficits causing him not to remember "recent conversations." Ibid.⁹ Austin argues that when that medical information is "considered together with Devino's testimony that he never read the attestation paragraph [above his second signature] and did not understand the undue influence/constraint concepts he was purportedly certifying, Devino's subscription cannot reasonably be treated as providing the evidentiary assurances that the witnessing requirement is meant to supply." Ibid.

The court rejects this as well. Jaclyn and Austin may challenge and call into question at trial Devino's ability to recall the solemnization, but this

⁹ Devino testified at his December 2, 2025 deposition that he had been diagnosed with Parkinson's "[f]ive years ago" and that it affects his "short-term memory" by preventing him from "remember[ing] . . . conversation[s]." Devino Dep. at 7-8.

interpretation of Devino’s testimony, and the alleged limitations cited, cannot support summary judgment. There is nothing about which Devino otherwise testified at his deposition to suggest he did not recall the execution of Suzanne’s Will. Indeed, contrary to the court’s experience, it is most unusual to have a witness actually recall a will-signing ceremony. Most often, witnesses are able to identify their signatures but they usually don’t remember the event. Here, Devino testified that he in fact recalled this solemnization, so it is not clear how Devino’s medical condition requires a rejection of his testimony. But even if that is a relevant circumstance, its application is, at best, premature. To rule in movants’ favor on this point would require, without hearing any testimony, a disregard of the letter and spirit of N.J.S.A. 3B:3-7, which declares that “[a]ny individual generally competent to be a witness may act as a witness to a will and to testify concerning execution thereof.”

The motion for summary judgment must, therefore, be denied.

II

The court’s denial of the second motion – a motion that seeks to exclude expert testimony – requires less explanation. The objections to the experts are multiple and include the contentions that both experts: (a) provide only conclusions without the required “why and wherefore” of how they drew those

conclusions, see, e.g., Townsend v. Pierre, 221 N.J. 36, 54 (2015); (b) were allegedly deprived of all information necessary and relevant to the matters on which they would opine; and (c) seek to opine on the ultimate issue and, thus, may be viewed as improperly usurping the trier of fact's role, see, e.g., State v. McLean, 205 N.J. 438, 453 (2011).

Certainly, a pretrial ruling on such questions provides a salutary solution when a case is about to be tried to a jury. A pretrial ruling can either endorse the admissibility of the testimony or, if it is to be excluded, avoid the prejudice or confusion caused by a jury hearing expert testimony later found to be inadmissible. Those concerns, however, aren't relevant here. Since the case will be tried to the bench, no prejudice or confusion will result if the court first hears the testimony and then, if the testimony fails to conform to evidentiary principles, disregard what shouldn't have been allowed.

To be clear, in so ruling, the court hasn't concluded there is or isn't merit to the objections lodged about these experts and what they propose to say at trial. The disposition of these objections will better be reached in the fullness of time. And so, the court merely leaves the matter for trial, at which time the experts may take the stand. The court will then hear what they have to say and determine whether there are grounds to curtail or preclude any or all of their

testimony. In that way, the substance of their testimony, as well as the grounds for the objections to it, may be amplified and illuminated, and the court's ruling on whether to admit or exclude the evidence, in whole or in part, will be more informed than it can be at this time. That is the most optimal approach in a non-jury case.

The motion to bar expert testimony is denied but without prejudice to the movants' right to present their arguments and further object to the testimony at the time of trial.

* * *

An appropriate order has been entered.