

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-758

No. COA22-345

Filed 15 November 2022

Durham County, No. 20E994

IN THE MATTER OF THE ESTATE OF KAY ONNIE RAGLAND RESPESS

ALICIA A. RICKS, Caveator,

v.

SHERMAN T. RAGLAND, Propounder.

Appeal by Alicia A. Ricks from Order entered 10 November 2021 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 7 September 2022.

Alicia Ricks, caveator-appellant, Pro se.

Gary K. Berman, for propounder-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Alicia A. Ricks (Caveator) appeals from an Order entered in favor of Sherman T. Ragland (Propounder) on 10 November 2021 granting Propounder's Motion for Summary Judgment. The Record before us tends to reflect the following:

¶ 2 Kay Onnie Respass (Decedent) passed away on 19 December 2019.

Propounder—Decedent’s brother—offered Decedent’s purported Last Will and Testament (Will) for probate on or about 18 February 2020. The purported Will dated 4 October 2019 provided:

I, KAY ONNIE RESPESS a resident of the State of North Carolina, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by

I KAY ONNIE RESPESS in sound mind give my property on 4014 LUDGATE Dr , DURHAM NC

To my brother SHERMAN THEODORE RAGLAND he is to take over all house payments mortgage and taxes at the time of my death

¶ 3

On or about 28 August 2020, Caveator, daughter of Decedent, filed a Caveat seeking to invalidate Decedent’s Will on grounds of undue influence and lack of testamentary capacity.¹ In particular, Caveator alleged, in relevant part:

3. [Propounder], the brother of decedent and resident of Durham County, filed the Paper writing as Public record, but he did not initially offer it for probate nor did he seek to administer the Estate; Instead he used the document to gain illegal entry to the decedent[']s property with the assistance of a locksmith and the not probated document was also used to infiltrate decedent[']s mortgage information.

4. The Caveator is the daughter of the decedent . . . and former administrator of her Estate which she performed all legal duties according to Estate Administrative laws[.]

¹ The Caveat in the Record on Appeal is not file-stamped, signed, or dated. However, Propounder makes no issue of these deficiencies and acknowledges the Caveat was filed 28 August 2020.

. . . .

5. Caveator believes that the 2019 Paper Writing, filed February 18, 2019, should be set aside and NOT admitted for Probate a second time nor certified as the Last Will and Testament of Decedent because:

- a. Upon information and belief, at the time of execution of the Purported Paper Writing, the decedent lacked Testamentary Capacity by reason of both mental and Physical weakness and infirmity[.] The decedent had just been released from the hospital, three days prior to signing of document, for heart failure and low blood oxygen leading to her brain. The decedent also demonstrated obvious signs of dementia before Paper Writing and until the time of her death.
- b. Upon information and belief, the execution of the 2019 Paper Writing was obtained by undue influence:
 - I. [Propounder] had an opportunity to exert undue influence by procuring the document himself without the benefit of council and without notifying the Caveator which is a legal Heir.
 - II. [Propounder] had a disposition to exert influence because he would not receive anything under the laws of intestacy.
 - III. The 2019 Paper Writing also indicates fraud as Ragland has a long history of violence against the Caveator and legal heir of [Decedent] which includes several threats and attempts on Caveator[']s life.
 - IV. The 2019 Paper Writing also indicates fraud because [Propounder] offered bribes to heir, Deborah Hayes in an attempt to disinherit the Caveator[;] . . . [Propounder] also asked legal heir, Deborah Hayes to lie to attorney and tell

them she was the only heir of [Decedent], in an attempt to defraud and disinherit the Caveator and legal heir.

V. The 2019 Paper Writing [i]ndicates fraud and undue influence because it leaves the entirety of decedent[']s real property to [Propounder] without consideration of her daughters whom she shared a loving relationship.

¶ 4 On 24 May 2021, Propounder filed a Motion to Strike the allegations in Paragraphs 3 and 4 as irrelevant and immaterial. The trial court granted Propounder’s Motion to Strike on 9 June 2021, and both paragraphs were stricken.

¶ 5 On 2 September 2021, Propounder filed a Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In support of this Motion, Propounder filed his Affidavit and an affidavit from Wendy Gilchrist.² Propounder’s Affidavit stated, in relevant part: (1) Decedent was his sister; (2) Decedent executed her last Will on 4 October 2019; (3) Decedent’s Will expressed Decedent’s desire Propounder inherit her real estate; (4) Decedent was mentally competent when executing her Will; and (5) when executing her Will, Decedent “knew what property she had, knew its approximate value, knew who her closest relatives were, knew the contents of the will, knew who the natural objects of her bounty were, [and] knew the effects of the will”. Further, Propounder’s Affidavit also stated, when Decedent executed her Will, she was not under duress, was not unduly influenced by

² Gilchrist’s affidavit authenticates Decedent’s medical records.

anyone, and was not under any false assumption about what would happen to her real estate if she did not give the real estate to Propounder.

¶ 6

In opposition to Propounder’s Motion for Summary Judgment, Caveator filed two affidavits: one from herself and one from Deborah Hayes, who is also Decedent’s daughter. In Caveator’s Affidavit, she asserted Decedent did not own a computer or printer and “was not computer literate to create any legal documents.” Caveator also asserted she provided and acted as Decedent’s familial caregiver two years prior to Decedent’s death and as such, she has “firsthand actual knowledge” Decedent refused medical treatment for heart failure and low blood oxygen to the brain on 1 October 2019, three days prior to the execution of Decedent’s Will. Hayes’s affidavit alleged “[o]n information and belief [Decedent] was under the mistaken assumption that if she did not execute a will leaving her real property to an individual, the property would be forfeited to the state upon her death.” Hayes’s affidavit also alleged that in January 2020—months after the execution of the Will and after the death of Decedent—Propounder asked Hayes to tell an unidentified attorney Hayes was the only daughter of Decedent and that Hayes declined to do so.

¶ 7

A hearing on Propounder’s Motion for Summary Judgment was held on 8 November 2021 in Durham County Superior Court. On 10 November 2021, the trial court entered its Order granting Summary Judgment, concluding there was no genuine issue of material fact and entering judgment for Propounder. Caveator

timely filed written Notice of Appeal on 29 November 2021.

Issues

¶ 8

On appeal, Caveator advances two arguments: (I) summary judgment was improper because she contends she forecast evidence Decedent’s Will was the product of undue influence; and (II) summary judgment was also improper because she forecast evidence Decedent lacked testamentary capacity to make the Will.

Analysis

¶ 9

“Our standard of review of an appeal from summary judgment is de novo[.]” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). “A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party’s claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). “If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.” *Id.* (citations omitted). “If the moving party satisfies its burden of proof, then the burden

shifts to the non-moving party to ‘set forth specific facts showing that there is a genuine issue for trial.’ ” *Id.* at 369-70, 289 S.E.2d at 366 (quoting N.C. Gen. Stat. § 1A-1, Rule 56 (e) (2021)). “The non-moving party ‘may not rest upon the mere allegations of his pleadings.’ ” *Id.* Additionally, conclusory statements of opinion “as opposed to statements of fact, are not properly considered on a motion for summary judgment.” *In re Whitaker*, 144 N.C. App. 295, 299, 547 S.E.2d 853, 857 (2001).

I. Undue Influence

¶ 10 Caveator first contends the trial court erred in granting Summary Judgment because “[w]hen viewed in the light most favorable to the non-moving party, Decedent was a person who was subject to influence, and Propounder had the opportunity to exert influence. Further, there was some evidence that Propounder had the motive and disposition to exert influence.” We disagree.

¶ 11 “In the context of a will caveat, ‘[u]ndue influence is more than mere persuasion, because a person may be influenced to do an act which is nevertheless his voluntary action.’ ” *In re Will of Sechrest*, 140 N.C. App. 464, 468, 537 S.E.2d 511, 515 (2000) (quoting *In re Will of Buck*, 130 N.C. App. 408, 413, 503 S.E.2d 126, 130 (1998), *aff’d*, 350 N.C. 621, 516 S.E.2d 858 (1999)). “The influence necessary to nullify a testamentary instrument is the ‘fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.’ ” *Whitaker*, 144 N.C. App. at 300, 547 S.E.2d

at 857-58 (citations and quotation marks omitted). “The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence.” *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003) (citation omitted).

¶ 12

The North Carolina Supreme Court has acknowledged:

It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

In re Andrews, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980). Undue influence “is ‘generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.’ ” *In re Will of Mueller*, 170 N.C. 28, 29, 86 S.E. 719 (1915) (quoting *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910)). Our Courts have identified several factors that may be relevant in determining whether a will was procured under undue influence over the testator, including:

“1. Old age and physical and mental weakness;

2. that the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;

3. that others have little or no opportunity to see him;
4. that the will is different from and revokes a prior will;
5. that it is made in favor of one with whom there are no ties of blood;
6. that it disinherits the natural objects of his bounty;
7. that the beneficiary has procured its execution.”

Andrews, 299 N.C. at 55, 261 S.E.2d at 200 (quoting *Mueller*, 170 N.C. at 30, 86 S.E. at 720 (1915)). Although the caveator is not required to demonstrate the existence of every factor to prove undue influence, the caveator must establish a *prima facie* case. *See id.* at 55, 261 S.E.2d at 200 (“[T]he burden of proving undue influence is on the caveator and [they] must present sufficient evidence to make out a *prima facie* case in order to take the case to the jury.”). In summary:

For influence to be undue, “there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing [her] to make a will which [she] otherwise would not have made.”

In re Will of Campbell, 155 N.C. App. 441, 455, 573 S.E.2d 550, 560 (2002) (alterations in original) (quoting *In re Will of Prince*, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713-14 (1993) (citations omitted)).

In this case, in the Caveat, Caveator alleges the existence of fraud and undue influence primarily based on general allegations Propounder has a “long history of

violent acts” against Caveator and upon general allegations of attempted bribery and effort to convince Hayes to lie to an attorney. Caveator’s own affidavit makes no further mention of these allegations. Hayes’s affidavit makes no mention of bribery or violence and reveals any effort to mislead the unidentified attorney only occurred after Decedent’s death. As such, Caveator’s allegations of Propounder’s undue influence over Decedent are just that: mere allegations unsupported by any forecast of evidence. In briefing on appeal to this Court, moreover, while Caveator makes arguments as to the existence of the various factors relevant to undue influence, Caveator fails to explain how those factors resulted in undue influence in this case or identify specific facts which would place the issue of undue influence in question. To the contrary, Caveator’s arguments amount to no more than conclusory statements of opinion. *See generally Whitaker*, 144 N.C. App. at 302, 547 S.E.2d at 858 (“[C]onclusory statements of opinion are not evidence properly considered on a motion for summary judgment.”).

¶ 14 In sum, Caveator failed to present specific facts showing that the Will was executed solely as a result of Propounder’s fraudulent and overpowering influence over Decedent. *Whitaker*, 144 N.C. App. at 302, 547 S.E.2d at 859. Thus, Caveator failed to carry her burden of establishing the existence of a genuine issue of material fact as to whether Decedent’s Will was the product of undue influence. Therefore, the

trial court did not err in granting Summary Judgment in favor of Propounder on the issue of undue influence.

II. Testamentary Capacity

¶ 15 Caveator next argues the trial court erred in granting summary judgment in favor of Propounder on the issue of Decedent's lack of testamentary capacity. Specifically, Caveator contends "[Decedent's] medical records themselves demonstrate the decedent's very severe medical illness during October 2019, with physical signs and symptoms of low blood pressure and low oxygen levels. This surely could have impaired her ability to make rational decisions."

¶ 16 "A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *Buck*, 130 N.C. App. at 412, 503 S.E.2d at 130 (citing *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960)). "[A] presumption exists that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *Sechrest*, 140 N.C. App. at 473, 537 S.E.2d at 517 (citation omitted). General testimony regarding a testator's deteriorating physical health and mental confusion standing alone is insufficient to negate the existence of testamentary capacity at the time of the execution of a will. *See Buck*, 130 N.C. App.

at 413, 503 S.E.2d at 130 (concluding general testimony regarding testator's deteriorating physical health and mental confusion did not negate his testamentary capacity and was insufficient to establish a *prima facie* case of lack of testamentary capacity).

¶ 17 In the present case, the Caveat contains only general allegations concerning Decedent's blood pressure and oxygen levels in the days preceding the execution of the Will. Caveator's Affidavit opposing summary judgment simply re-asserts these generalized contentions. This general evidence, while indicative of Decedent's physical condition, did not negate Decedent's testamentary capacity at the time she executed her will. *See id.* Moreover, while the Caveat also alleges Decedent "demonstrated obvious signs of dementia" prior to the execution of her Will, the Record on Appeal, including Decedent's medical records, does not reflect any evidence to support this allegation. Likewise, in her arguments to this Court, Caveator relies solely on conclusory, speculative statements of opinion as to how Decedent's health conditions "could have" impaired Decedent's testamentary capacity without identifying specific facts to overcome summary judgment. *See Whitaker*, 144 N.C. App. at 302, 547 S.E.2d at 859.

¶ 18 In sum, Caveator's allegations and affidavit fails to set forth specific facts showing that Decedent was incapable of executing a valid will at the time she did so, notwithstanding her alleged health conditions. *See id.* Thus, Caveator has failed to

establish any issue of material fact as to Decedent's testamentary capacity to make the Will at the time of its execution. Therefore, the trial court properly entered Summary Judgment for Propounder on the issue of Decedent's testamentary capacity. Consequently, we conclude the trial court did not err in entering its Order granting Summary Judgment to Propounder.³

Conclusion

¶ 19 Accordingly, for the foregoing reasons, we affirm the trial court's Order granting Summary Judgment to Propounder.

AFFIRMED.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).

³ Because of our resolution of this case on these grounds, it is not necessary to address a separate argument by Caveator that the trial court erred in relying on her failure to respond to Requests for Admission as a basis for granting Summary Judgment. Our analysis does not rest on Caveator's failure to respond to these requests.