**NUMBER 13-16-00091-CV**

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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## IN THE ESTATE OF JOSE M. RODRIGUEZ, DECEASED

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**On appeal from the County Court at Law No. 3 of Cameron County, Texas.**

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# MEMORANDUM OPINION

**Before Justices Contreras, Benavides, and Longoria**
**Memorandum Opinion by Justice Longoria**

This appeal concerns the Last Will and Testament of decedent Jose M. Rodriguez ("Rodriguez"). Appellant Celia Ortega ("Celia") challenges a jury verdict against her in a will contest brought by her brother, appellee Juan A. Rodriguez ("Juan"). We affirm.

## I. BACKGROUND

### A. Rodriguez's Retirement

Rodriguez retired from his job in Houston in 1987 with plans to return to Brownsville. Before leaving, Rodriguez conveyed his house in Houston to his daughter

Celia and her husband, Angel Ortega ("Angel"). In return, the Ortegas conveyed to Rodriguez a house they owned on Tecuan Street in Brownsville. Rodriguez lived there after his return and worked as a taxi driver. He also owned a *pesera*—a type of taxi—in Matamoros, Mexico which he rented to an operator for a fee.

Multiple witnesses who knew Rodriguez during this time in his life described him as a "strong" man who was not easily influenced. When describing Rodriguez's relationship with his nine children, Juan testified that "[w]e all respected dad, and if he said that something would be one way, we would all do as he said." Celia, Angel, and Artemio Caballero, the husband of one of Rodriguez's nieces, gave similar testimony regarding Rodriguez's personality and his relationship with his children.

The record reflects that Rodriguez was a generous man who frequently made gifts or loans to his children and others. Rodriguez kept written records of his transactions, even those which involved his children. Rodriguez would carefully note any amount that was repaid and sign his name next to it.

**B. The Ortegas Return to Brownsville**

In 1997, the operator of Rodriguez's *pesera* died, and Rodriguez invited the Ortegas to return home so that Angel could operate the business. Angel accepted, and the Ortegas moved back to Brownsville and lived with Rodriguez. The Ortegas later purchased a lot located on Sinaloa Street using funds Rodriguez acquired from the sale of land he owned in Matamoros.[1] The Ortegas built a new house on the lot (the "Sinaloa Property") and included a bedroom for Rodriguez in case he wanted to live with them.

[1] Angel testified that he had given Rodriguez money for the land in Matamoros, and that both men considered it to belong to Angel, but title remained in Rodriguez's name until the sale.

In April 2003, Rodriguez sold the house on Tecuan Street for $50,350 and moved in with the Ortegas on Sinaloa Street. Both Angel and Celia testified that Rodriguez decided the next year that he wanted to buy a house of his own. After Rodriguez was unable to find a house he liked in his price range, Angel suggested that Rodriguez purchase the Sinaloa Property for the same price he received from the sale of his house on Tecuan Street. According to Angel and Celia, Rodriguez agreed.

Celia and Angel accompanied Rodriguez to the office of attorney Noe Garza to sign a deed transferring title to the property. Even though Angel and Celia each testified that the transaction was a sale, the deed recited that the consideration was "[l]ove of, and affection for, Grantee." Attorney Garza testified that he had no knowledge that any money was being exchanged as part of the transfer, and Celia agreed she never informed Garza that the transfer was part of a sale. Rodriguez immediately executed a second deed transferring title of the Sinaloa Property back to the Ortegas while reserving a life estate for himself. Attorney Garza explained that he recommended that Rodriguez reserve a life estate so that he would have an interest in the Sinaloa Property. The second deed contained identical language regarding the consideration for the transfer.

During the same visit with Garza, Rodriguez also executed a self-proving will naming Celia as his sole beneficiary and a separate "declaration" stating that he wished Celia to be his guardian should he ever become incapacitated. Angel and Celia testified that Rodriguez brought up the idea of making a will for the first time in Garza's office, and that as far as they were concerned the only purpose of the visit was to transfer title to the Sinaloa Property.

Celia had been a signatory on Rodriguez's checking account at IBC Bank since the Ortegas returned to Brownsville in 1997. The month after the visit with Garza, Celia obtained a check from Rodriguez's account in the amount of $50,681.77 made out to Rodriguez or herself. She used the check to open a savings account in her and Rodriguez's names at Bank of America. Celia also used a $2,000 check she wrote on the same IBC account to open a joint checking account at the same bank. Celia testified that she opened the new accounts on Rodriguez's instruction because he was experiencing "problems" with IBC Bank, but she could not explain the nature of the problems. Celia later gradually moved the $50,681.77 into another account solely in her name. The Ortegas used the funds to pay for construction of their new home on a lot they owned in Los Fresnos, Texas.

The Ortegas moved into their new home in Los Fresnos in 2008, but Rodriguez remained at the Sinaloa Property. According to Celia, Rodriguez did not go with them to Los Fresnos because his other children stated they would refuse to visit him there. Around this time, Celia wrote two checks on Rodriguez's account at IBC Bank that were returned for insufficient funds. Rodriguez removed Celia as a signatory on his account and substituted her sister, Maria. Rodriguez became ill with kidney disease the same year but continued to work until he was admitted to a nursing home in 2009. Rodriguez died on April 10, 2010, at the age of eighty-five.

**C. Legal Proceedings**

Celia applied to admit Rodriguez's will to probate in May 2011. Juan filed an objection, alleging that Rodriguez lacked testamentary capacity or, alternatively, executed the will through undue influence. Celia moved for summary judgment on both

issues. The trial court granted summary judgment to her on the issue of testamentary capacity but denied it on the issue of undue influence.

The issue of undue influence was tried to a jury. Juan's theory was that Celia had gained complete control over Rodriguez's affairs and used that influence to obtain all of his property for herself. Celia's theory was that Rodriguez was a "man to give orders" rather than obey them, and who gave all of his property to Celia because that was his own desire. The jury found that Rodriguez executed both the will and the deed returning title to the Ortegas through undue influence. The trial court rendered judgment on the verdict and invalidated both instruments. This appeal followed.

### D. Issues on Appeal

Celia argues in four issues on appeal: (1) the evidence is legally insufficient to support the jury's verdict regarding the will; (2) the evidence is legally insufficient to support the jury's verdict regarding the second deed; (3) the trial court had no jurisdiction to invalidate the deed because the statute of limitations had run; and (4) the trial court had no jurisdiction to invalidate the deed without first determining whether the Sinaloa Property was part of Rodriguez's estate.

## II. Discussion

### A. Does Legally Sufficient Evidence Support the Verdicts?

Celia argues in her first two issues that the evidence is legally insufficient to support a finding that Rodriguez executed both instruments through undue influence.[2]

[2] We address these two issues together because the underlying facts and legal issues are the same. *See Turner v. Hendon*, 269 S.W.3d 243, 252 (Tex. App.—El Paso 2008, pet. denied) (observing that the rules guiding an undue-influence analysis apply "substantially alike to wills, deeds, and other instruments").

### 1. Standard of Review

When a party attacks the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, the party must demonstrate that "no evidence" supports the adverse finding. *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). We will sustain a legal sufficiency challenge if, among other things, "the evidence offered to prove a vital fact is no more than a scintilla." *Id*. "Evidence does not exceed a scintilla if it is so weak as to do no more than create a mere surmise or suspicion that the fact exists." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (internal quotation marks omitted). We review the record and consider evidence favorable to the finding if a reasonable factfinder could, and disregard contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We view the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that supports it. *Id.* The final test for legal sufficiency is always "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

### 2. Applicable Law

Undue influence in procuring a deed or will is grounds for setting aside the instrument. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). Proof of a claim of undue influence has three elements: (1) the existence and exertion of an influence; (2) that subverted or overpowered the testator's mind at the time he executed the instrument; (3) so that the testator executed an instrument he would not otherwise have executed but

for that influence. *Id*. The contestant bears the burden of introducing "tangible and satisfactory proof" of each element. *Id.*

The contestant may establish undue influence by direct or circumstantial evidence, but it is more frequently established by the latter. *In re Estate of Johnson*, 340 S.W.3d 769, 777 (Tex. App.—San Antonio 2011, pet. denied) (op. on reh'g). Circumstances used to establish undue influence "must be of a reasonably satisfactory and convincing character," and cannot be "equally consistent with the absence of the exercise of such influence." *Rothermel*, 369 S.W.2d at 922; *see In re Estate of Johnson*, 340 S.W.3d at 777. "This is so because a solemn testament executed under the formalities required by law by one mentally capable of executing it should not be set aside upon a bare suspicion of wrongdoing." *Rothermel*, 369 S.W.2d at 922–23.

We analyze ten factors to determine whether the evidence establishes the elements of undue influence:

> (1) The nature and type of relationship existing between the testator, the contestants and the party accused of exerting such influence;
>
> (2) The opportunities existing for the exertion of the type of influence or deception possessed or employed;
>
> (3) The circumstances surrounding the drafting and execution of the testament;
>
> (4) The existence of a fraudulent motive;
>
> (5) Whether there has been an habitual subjection of the testator to the control of another;
>
> (6) The state of the testator's mind at the time of the execution of the testament;
>
> (7) The testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted;

(8) The words and acts of the testator;

(9) Weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise;

(10) Whether the testament executed is unnatural in its terms of disposition of property.

*In re Estate of Graham*, 69 S.W.3d 598, 609–10 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Rothermel*, 369 S.W.2d at 923). Factors one through five relate to the first element; factors six through nine relate to the second element; and the tenth factor relates to the third element. *See Rothermel*, 369 S.W.2d at 923. The factors are not equivalent to the elements of undue influence, and proof satisfying every factor is not necessary to support a finding of undue influence. *See generally id.*; *In re Estate of Graham*, 69 S.W.3d at 609–11.

**3. Analysis**

**a. Existence and Exertion of an Influence**

Regarding the nature and type of relationship between Celia, Rodriguez, and Juan, Rodriguez generally had a good relationship with all of his children. Rodriguez's relationship with Celia, however, was evidently much closer: the Ortegas moved in with Rodriguez when they returned to Brownsville rather than with any of Celia's siblings, and Rodriguez made Celia a signatory on his bank account. When Rodriguez sold his house on Tecuan Street years later, he moved in with the Ortegas. This evidence is equally relevant to whether Celia had an opportunity to influence him. By living with Rodriguez for so many years, Celia had a greater opportunity than her siblings to exert influence on Rodriguez. Her opportunity to exert an influence is not dispositive, but it is a factor for the jury to consider. *See In re Estate of Graham*, 69 S.W.3d at 611.

Regarding the circumstances surrounding the execution of the instruments, both Celia and Angel testified that they were selling the Sinaloa Property to Rodriguez and went to Attorney Garza to transfer title. Garza, however, testified he had no knowledge of a sale, and both of the deeds Garza prepared reflect that the transfers were gifts. Furthermore, no money was exchanged. Celia later used checks from Rodriguez's account in an amount slightly larger than the purported sale price to open two accounts at a different bank, but Rodriguez's name was on both accounts. Celia explained at trial that she opened the accounts at Rodriguez's instruction because he was having unspecified "problems" with IBC Bank. That Celia put Rodriguez's name on the new account and acted at his direction implies that Rodriguez regarded the funds as his own rather than as Celia's payment for the Sinaloa Property, which is what she contends. Celia's decision to keep the money in the joint account at Bank of America until she and Angel began actually building the house in Los Fresnos supports this implication. The circumstances surrounding the execution of the instruments support a finding of undue influence.

With regard to the existence of a fraudulent motive, Celia argues that none existed because there is no evidence she ever obtained a financial advantage over Rodriguez. We disagree. The trial court admitted numerous checks that Celia wrote on the IBC account after Rodriguez came to live with the Ortegas. The checks paid for normal household expenses such as insurance, the cable bill, and purchases at stores such as Wal-Mart. Celia testified that she always wrote checks on that account at Rodriguez's direction, but Juan testified that Celia said she personally paid for household expenses during this time. A reasonable jury could disregard Celia's testimony and credit Juan's,

inferring that Celia was taking advantage of her access to Rodriguez's money to finance her own expenses. *See City of Keller*, 168 S.W.3d at 820. Based on this evidence, the jury could infer the existence of a fraudulent motive.

We conclude the evidence for the first element is legally sufficient because it permits a rational jury to find the existence and exertion of an influence.

**b. Overpowered Rodriguez's Mind**

With regard to whether Rodriguez was susceptible to influence, Juan, Celia, Angel, and Artemio Caballero all agreed that Rodriguez was normally not the type of man to do something against his will. Celia further testified that she always acted at Rodriguez's direction. Nevertheless, there is evidence which permits a reasonable jury to conclude that Rodriguez was uniquely susceptible to Celia's influence. Rodriguez allowed Celia greater leeway with his affairs than anyone else. Even though he normally kept track of his finances, he allowed her to remain as a signatory on his bank account until the funds in it were depleted and two checks she wrote bounced.

The evidence regarding Rodriguez's words and acts and his state of mind at the time of the visit with attorney Garza was conflicting. Garza testified that in his opinion Rodriguez "understood exactly what he was doing," and Celia testified that she did not force him to execute either instrument. But the jury could also consider Rodriguez's words and actions during the visit. Rodriguez never mentioned that any money was to be exchanged even though Garza was supposed to be handling the transfer of the property. Furthermore, even though Rodriguez habitually kept records of even small transfers of funds, he never asked Garza to put anything reflecting the sale in writing or made a record

of it himself.[3] Also relevant to his state of mind is that Celia selected Garza, took Rodriguez to his office, and was present for most of the visit. A reasonable jury could resolve the conflict in the evidence in favor of Juan, and we must defer to that resolution. *See id*.

We conclude that the evidence for the second element is legally sufficient because it permits a rational jury to conclude that Rodriguez's mind was overcome during the execution of both instruments.

**c. No Execution Without the Influence**

Determining whether the testator would not have executed the instruments but for the influence is usually predicated on whether the disposition of property was unnatural. *See Rothermel*, 369 S.W.2d at 923. The mere fact that a division of property is unequal is not enough to show that it is unnatural; a person of sound mind has the legal right to dispose of his property as he wishes. *Id.* "[I]t is only where all reasonable explanation in affection for the devise is lacking that the trier of facts may take this circumstance as a badge of disorder or lapsed mentality or of its subjugation." *Id.* at 924. The jury is the ultimate judge of the credibility and weight to be given to competing explanations for an unequal division of property. *In re Estate of Johnson*, 340 S.W.3d at 784 (citing *Craycroft v. Crawford*, 285 S.W. 275, 278 (Tex. Comm'n App. 1926, holding approved)).

[3] Celia argues separately regarding the second deed that Rodriguez had testamentary capacity and that his capacity, coupled with his actions during the visit with Garza, indicated that he intended to deed the property back to Angel and Celia. We agree that, because Rodriguez had testamentary capacity, he knew executing the second deed would transfer title to the Sinaloa Property back to the Ortegas. *See generally In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi 2004, pet. denied) (defining testamentary capacity in part as understanding the effect of executing the instrument). But undue influence assumes the existence of testamentary capacity that is "subjected to and controlled by a dominant influence or power." *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). For the reasons set out in the body of this opinion, we find a scintilla of evidence to support a finding that Rodriguez's mind was overcome by undue influence.

When taken together, both instruments give all of Rodriguez's property to Celia and leave nothing for her seven living siblings. Juan argues that this disposition was unnatural because Rodriguez was generous with all of his children and would not have disinherited seven of them, especially when one of them is disabled. Celia responds that she provided a reasonable explanation: Rodriguez naming her as his sole beneficiary was her reward for spending "her entire life serving" him. Furthermore, Rodriguez had never provided her with the same financial assistance as he gave her other siblings, and this arrangement made up for that.

We agree that there is more than a scintilla of evidence supporting the jury's decision to believe Juan's explanation and reject Celia's. When considering whether a disposition was unnatural we may consider evidence of Rodriguez's stated desires and previous actions. *Id*. There is no evidence that Rodriguez discussed how he wanted his property divided before his visit with Garza. Nevertheless, the evidence shows Rodriguez had a pattern of special concern for his son Isaac, who was confined to a wheelchair. Isaac lived with Rodriguez in a garage apartment behind the house on Tecuan Street for many years. When Rodriguez sold the house, he negotiated with the seller to permit Isaac to stay and secured an agreement from her that she would pay Isaac $10,000 if she ever decided to evict him. Juan further testified that Rodriguez told him in 2008 that he wanted Isaac to have the Sinaloa Property after his death because Isaac drove him to his dialysis appointments every three days.[4] Based on this pattern of special concern, a reasonable jury could conclude that the disposition worked by both instruments was unnatural because Rodriguez would have made some provision for Isaac.

[4] Juan testified that Isaac had a van modified to permit him to drive.

We conclude the evidence for the third element is legally sufficient because it permits a rational jury to conclude that Rodriguez would not have executed both instruments but for the undue influence.

**d. Conclusion**

After reviewing all of the evidence introduced at trial, we conclude that the evidence is legally sufficient because it permits a reasonable jury to conclude that Juan proved all three elements of undue influence. *See City of Keller*, 168 S.W.3d at 827. We overrule Celia's first two issues.

**B. Statute of Limitations**

Celia argues in her third issue that the trial court had no jurisdiction to set aside the second deed because Juan's claim was barred by the statute of limitations. *See Cosgrove v. Cade*, 468 S.W.3d 32, 35 (Tex. 2015) (observing that a four-year statute of limitations applies to deed-reformation claims). Juan responds that Celia waived this argument by failing to include it in her pleadings.

We agree with Juan. Celia frames this issue as challenging the trial court's jurisdiction, but the substance of the issue is really whether she had an affirmative defense to Juan's suit. The statute of limitations is an affirmative defense which must be affirmatively pled or else it is waived. *Beard v. Comm'n for Lawyer Discipline*, 279 S.W.3d 895, 900 (Tex. App.—Dallas 2009, pet. denied); *see* TEX. R. CIV. P. 94. Celia first raised the defense of limitations in a "Proponent's Motion to Enter Judgment" that she filed after the jury delivered its verdict. She argues on appeal that she had no reason to include the defense in her pleadings because Juan did not plead the issue of undue influence in executing the deed. Celia is correct regarding Juan's pleadings, but it would have been

clear at trial that the parties were trying the issue. The parties extensively questioned the witnesses regarding the two conveyances of the Sinaloa Property and argued over the significance of the surrounding facts and circumstances. Furthermore, Celia did not object to including a question in the jury charge asking the jury to decide whether Rodriguez executed the second deed through undue influence. Celia never requested to amend her pleadings or otherwise raised the defense of limitations before the case was submitted to the jury. Without considering whether the statute of limitations would apply in this case, we conclude that Celia has waived the issue. *See Barras v. Barras*, 396 S.W.3d 154, 169 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that a party waived a limitations defense regarding an issue not included in the pleadings but tried by consent); *see also Beard*, 279 S.W.3d at 900. We overrule Celia's third issue.

**C. Jurisdiction**

Celia argues in her fourth issue that the trial court lacked jurisdiction to set aside the deed because the trial court did not first determine whether the Sinaloa Property formed part of Rodriguez's estate. Celia reasons that the court was required to first appoint a personal representative who must make an inventory and appraisement of estate property. *See generally* TEX. EST. CODE ANN. § 309.051 (West, Westlaw through 2015 R.S.). She further argues that the Sinaloa Property would not form part of the estate because Rodriguez possessed only a life estate in it, an interest which dissolved at his death. Juan responds that Celia has presented no reason why the trial court could not hear his suit before appointing a personal representative.

We agree with Juan. Section 309.051 provides that the personal representative of an estate must file an inventory or appraisement of estate property. *See id.* Nothing

in that section makes the trial court's jurisdiction depend on whether that has occurred. *See generally id.* Celia does not explain the effect of section 309.051 on the court's jurisdiction any further, but argues that the Sinaloa Property was not estate property because the second deed had been public record for almost six years at the time of Rodriguez's death. This part of Celia's argument essentially repeats her statute-of-limitations argument, which we have already held is waived. We overrule Celia's fourth issue.

## III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

Delivered and filed the
2nd day of March, 2017.