Opinion issued July 3, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00803-CV

IN THE ESTATE OF J. RICHARD HARRELL, Deceased

On Appeal from the 12th District Court
Grimes County, Texas
Trial Court Case No. 33726

MEMORANDUM OPINION

After J. Richard Harrell died, his daughter, Sherry Grumbles, contested the validity of his will. Sherry alleged Richard lacked testamentary capacity to sign the will. The jury found that Richard had testamentary capacity at the time he signed the will. In two issues, Sherry argues that the evidence is legally and factually insufficient to support the jury's findings.

We affirm.

Background

On November 19, 2012, Richard signed a will. The 2012 will replaced a will he had signed in 1999. The 2012 will gave certain property to David Kimich, the son of a close friend and neighbor, Judy Kimich. The will gave another parcel of property to Judy's other son, Walter Kimich, Jr. Finally, the will gave everything else, including a third parcel of property, to Richard's brother, Gary Harrell. The will specifically identified that Sherry was his daughter and that Richard intended to give nothing to her under the will. The will named Gary as the executor. Richard's last name is misspelled throughout the will as "Harell." Gary's last name was spelled correctly.

Richard died on April 26, 2016. Gary filed an application to probate the will. Sherry filed a contest to the application. Sherry disputed that Richard had testamentary capacity when he signed the will in 2012. The dispute went to trial. Sherry argued Richard lacked testamentary capacity in 2012 because he suffered from alcohol abuse and a hoarding disorder. She relies on Richard's failure to recognize his name was misspelled as proof of his lack of testamentary capacity.

Gary presented the testimony of Catherine Kenjura, the attorney who drafted the will at Richard's request, and two of her employees who witnessed Richard sign the will. Catherine testified that she met with Richard once before he signed it to

discuss what he wanted in the will. Catherine and the witnesses testified that they could not remember the specific details of the day Richard came to discuss creating the will or the day Richard signed it. They each testified, however, that, if it had seemed that Richard lacked testamentary capacity, they would have remembered something like that and they would not have let him sign the will.

Gary, Richard's younger brother, testified. He lives in California but made frequent trips to Texas to visit his brother and parents when they were still alive. He testified that he drove Richard on his first trip to Catherine's law office to discuss drafting the will. Gary was not part of the meeting or otherwise involved in the will's preparation. Gary acknowledged that Richard probably drank more than he should, but he denied that Richard was alcoholic or had any other drinking-related disorders. He also disagreed that Richard was a hoarder. Instead, Gary testified, Richard was a bachelor who lived in a messy bachelor pad. While he would frequently buy multiples of things, Richard often gave away to friends the extra items he bought.

Judy testified similarly. Judy's family lived next door to one of the properties Richard owned. Judy testified that she was very close with Richard and that her family considered Richard to be part of the family. He would share holiday meals with them and attend baptisms and birthdays. She testified that Richard drank a lot

but denied that Richard had any drinking disorders. She also testified that Richard had a very messy house but disagreed that he was a hoarder.

Judy testified that she drove Richard to Catherine's law office on the day he signed the will. She did not know Richard was signing a will that day and was not involved in the signing. Richard was behaving normally that day and was not drunk.

She acknowledged an incident where Richard shot at her husband through a shut door. While Richard's parents were still alive, they had called her and asked her to check on Richard. The door was locked. They tried knocking to get him to answer the door, but got no response. Her husband tried to open the door, and Richard shot through the door. No time period was given for this incident.[1]

Sherry testified that her father was an alcoholic and anyone who had a close relationship with him had problems with him. She explained that he almost always had a drink in his hand. Sherry testified medical records indicated that he had dementia as of 2006.

Sherry's husband, Curtis, agreed that Richard had dementia as of 2006 and that Richard drank heavily. After Richard's death, Curtis took some pictures and videos of the state of clutter in Richard's home. The pictures and videos were

[1] Gary testified that his and Richard's father died in 2012, and their mother died after Richard died.

admitted into evidence. Curtis admitted that he had not seen any diagnosis of dementia in Richard's medical records.

Sherry also presented the testimony of Kit Harrison, a psychologist. Kit performed a post-mortem psychological evaluation of Richard. Kit diagnosed Richard with alcohol use disorder and obsessive-compulsive disorder exhibited with hoarding. He testified that these disorders presented "significant evidence of diminished or lack of testamentary capacity at the time he executed the Will in 2012."

Kit testified he reviewed Richard's medical records, talked to Sherry and Curtis, and reviewed the pictures and videos Curtis took. To reach the diagnosis of alcohol use disorder, Kit relied on two mentions of alcohol use in Richard's medical records, Sherry and Curtis's description of Richard's drinking habits, and the fact that Richard "was being treated characteristically with thiamine therapy, which is given to patients that have used alcohol on a chronic basis." Kit acknowledged there could be other reasons Richard was taking thiamine. To reach the diagnosis of obsessive-compulsive disorder, Kit relied on Sherry and Curtis's description of Richard's living conditions and the pictures and videos of Richard's home.

Standard of Review

In a legal-sufficiency review, the court determines whether reasonable and fair-minded people could arrive at the factfinder's conclusion, after considering all

evidence that supports the verdict, and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We will conclude that the evidence is legally insufficient to support the finding only if (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810. We review the evidence in the light most favorable to the judgment. *Id.* at 822.

In a factual-sufficiency review, we examine all of the evidence and set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Unlike a legal-sufficiency review, a factual-sufficiency review requires us to review the evidence in a neutral light. *See Woods v. Kenner*, 501 S.W.3d 185, 196 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Plas–Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989)).

Analysis

For a will to be admitted to probate, the will's proponent must establish that the will was properly executed and that the testator had testamentary capacity at the

time of execution. *Guthrie v. Suiter*, 934 S.W.2d 820, 829 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Estate of Danford*, No. 14-16-00972-CV, 2018 WL 2012401, at *3 (Tex. App.—Houston [14th Dist.] May 1, 2018, no pet. h.). A self-proved will establishes the prima facie burden that the will has been properly executed. *See* TEX. EST. CODE ANN. § 256.152(a)(2), (b) (West Supp. 2017) (requiring proof that testator was of sound mind when will is not self-proved but eliminating requirement for self-proved wills); *In re Estate of Arrington*, 365 S.W.3d 463, 467 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Estate of Danford*, 2018 WL 2012401, at *3. At that point, the burden shifts to the contestant to present evidence of lack of testamentary capacity, while the burden of proof remains with the applicant. *Schindler v. Schindler*, 119 S.W.3d 923, 931 (Tex. App.—Dallas 2003, pet. denied).

A testator has testamentary capacity when he possesses sufficient mental ability at the time of execution of the will to (1) understand the effect of making the will and the general nature and extent of his property, (2) know his next of kin and the natural objects of his bounty, and (3) have sufficient memory to assimilate the elements of executing a will, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them. *Estate of Danford*, 2018 WL 2012401, at *3 (citing *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890)). The inquiry is focused on the testator's capacity on the day the

will was signed. *Estate of Danford*, 2018 WL 2012401, at *3. Evidence of the testator's state of mind at other time periods is relevant if it is indicative of the state of mind at the time the will was signed. *Rich v. Rich*, 615 S.W.2d 795, 797 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). "Texas law follows the general rule that where no general insanity is shown, but only some specific insane delusion or monomania, the will is valid unless the terms of it appear to have been directly influenced by the infirmity." *Id.*

There is no dispute that Richard's will was self-proving. Accordingly, Gary satisfied his prima facie burden of proof that Richard had testamentary capacity. *See* EST. § 256.152(a)(2), (b) (requiring proof that testator was of sound mind when will is not self-proved but eliminating requirement for self-proved wills); *Estate of Arrington*, 365 S.W.3d at 467; *Estate of Danford*, 2018 WL 2012401, at *3. The evidence can only be legally-insufficient, then, if Sherry disproved as a matter of law Richard's testamentary capacity. *See City of Keller*, 168 S.W.3d at 810 (holding evidence can be legally insufficient when it conclusively establishes opposite of vital fact).

Sherry points out that the attorney that drafted the will and the witnesses to Richard's signing could not remember the event with any particularity. This was not required. *See Estate of Arrington*, 365 S.W.3d at 467 (holding proffer of self-

proving will was prima facie evidence of its validity and no further evidence was needed).

Sherry also points out that she was the only party to present an expert witness on Richard's mental capacity. She argues that the jury was required to credit her expert and discredit the lay testimony. For support, Sherry relies on *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968). In *Lee*, the Texas Supreme Court held,

> Since there is no direct testimony in the record of acts, demeanor or condition indicating that testator lacked testamentary capacity on October 2, 1961, testator's mental condition on that date may be determined from lay opinion testimony based upon the witnesses' observations of testator's conduct either prior or subsequent to the execution.

Id. This excerpt stands for the proposition that evidence of the testator's testamentary capacity at times other than the day the will was signed can be relied on to show his testamentary capacity on that date. *See Horton v. Horton*, 965 S.W.2d 78, 85 (Tex. App.—Fort Worth 1998, no pet.) (citing *Lee*, 424 S.W.2d at 611). *Lee* did not hold, however, that expert testimony excludes the consideration of lay testimony. In fact, *Lee* did not concern expert testimony at all. *See Lee*, 424 S.W.2d at 611 (considering testimony of friends and family of testator in reviewing evidence of testamentary capacity).

We hold the evidence is legally sufficient to support the jury's verdict.

For factual sufficiency, there was a lot of conflicting evidence about whether and how often Richard drank to excess and how that affected his mental functioning

in general. There was also conflicting evidence about whether Richard's messiness in his house rose to the level of a hoarding or obsessive-compulsive disorder. More significantly, there was little evidence provided to establish how any disorders Richard had would have affected his testamentary capacity. Kit testified that Richard had alcohol-use disorder and obsessive-compulsive disorder exhibited with hoarding and that these disorders affected his testamentary capacity. But the jury was not given details on how these disorders affected Richard's ability to know the nature and extent of his property, know his next of kin, understand how to execute his will, or understand the effect of making his will. *See Estate of Danford*, 2018 WL 2012401, at *3 (identifying elements of testamentary capacity); *Rich*, 615 S.W.2d at 797 (holding will of someone with mental disorder is valid unless evidence shows that it was influenced by mental disorder).

We hold the evidence is factually sufficient to support the jury's verdict. We overrule Sherry's two issues on appeal.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Brown, and Caughey.