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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Estate of Dean C. Kreiger, Deceased,

Jerry J. Finton, Jr.,

Appellant-Petitioner,

v.

Nancy Wigent, Administrator of The Estate of Dean C. Kreiger, Deceased,

Appellee-Respondent.

March 11, 2021

Court of Appeals Case No. 20A-PL-1661

Appeal from the Huntington Circuit Court

The Honorable Kenton Kiracofe, Special Judge

Trial Court Cause No. 35C01-1504-PL-259

Tavitas, Judge.

Case Summary

[1] Jerry Finton Jr. appeals the trial court's grant of summary judgment to Nancy Wigent, Administrator of the Estate of Dean Kreiger. Finton contends that

Kreiger's 2003 will was the result of undue influence and Kreiger's unsoundness of mind. After Kreiger's 2015 death, Finton contested the will. After years of delays for various reasons, Wigent finally provided Finton with releases regarding Kreiger's medical records in December 2019. Before Finton could complete discovery and obtain all of the medical records, Wigent filed a motion for summary judgment. Finton sought a denial of the motion for summary judgment and requested a continuance pursuant to Indiana Trial Rule 56(F), but the trial court did not respond to the motion. The trial court then granted Wigent's motion for summary judgment. Finding that the trial court should have granted Finton's motion pursuant to Rule 56(F), we reverse and remand with instructions.

Issues

[2] Finton raises numerous issues. We address, however, one dispositive issue, which we restate as whether the trial court abused its discretion when it failed to grant Finton's motion pursuant to Indiana Trial Rule 56(F).[1]

Facts

[3] Dean Kreiger had two daughters, Roberta Stellar and Nancy Wigent. Finton is Stellar's son. In December 2002, Kreiger executed a durable general power of attorney, which granted Wigent and her husband the ability to act on behalf of

[1] Finton also argues that the trial court abused its discretion in ruling on Finton's motion to strike and Wigent's motion to strike and erred by granting Wigent's motion for summary judgment. Given our disposition of Finton's argument regarding the Rule 56(F) motion, we need not address these other issues.

Kreiger in "all possible matters and affairs affecting property owned by" Kreiger. Appellant's App. Vol. II p. 67. In January 2003, Kreiger executed a self-proved will[2] that bequeathed: (1) $2,000.00 to Stellar if she was living at the time of Kreiger's death; (2) $10,000.00 each to two granddaughters; (3) $1,000.00 to a church; and (4) $500.00 each to three charities. Kreiger bequeathed the residuary estate to Wigent and, if she was not living at the time of Kreiger's death, to Wigent's children. In the will, Kreiger named Wigent as the "Executrix (personal representative)." Appellant's App. Vol. III p. 55.

[4] In late 2012 or early 2013, Kreiger was admitted to a long-term care facility due to Alzheimer's disease. Kreiger died in February 2015 at the age of ninety-one. In March 2015, Wigent, as personal representative, filed a petition for probate of the will, issuance of letters testamentary, and for unsupervised administration. The trial court then entered an order probating the self-proved will and authorizing the issuance of letters testamentary for unsupervised administration. Stellar filed an objection to unsupervised administration, requested supervised administration, and requested an accounting of Kreiger's assets.

[5] On April 13, 2015, Stellar separately filed a complaint to contest Kreiger's purported will and to object to the probate of the will. Stellar argued that the

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[2] *See* Indiana Code Section 29-1-5-3.1 for an explanation of a self-proved will. "[A] self-proving clause creates a rebuttable presumption that the will was properly executed." *Scribner v. Gibbs*, 953 N.E.2d 475, 481 (Ind. Ct. App. 2011).

will was the product of undue influence upon Kreiger and that Kreiger was not of sound mind when he executed the will.

[6] Shortly thereafter, Stellar provided discovery requests to Wigent, as the personal representative of the Estate. Among the requests for production of documents, Stellar requested a list of Kreiger's medical providers from 2002 until his death and a medical release form for each of the medical providers identified. Wigent refused to provide either the list or the medical release form because she claimed that the "medical records after 2002 until [Kreiger's] death are irrelevant." Appellant's App. Vol. II p. 62.

[7] In July 2015, Stellar filed a motion to compel discovery. Stellar requested an order compelling Wigent to execute releases for Kreiger's medical records from 2002 to the date of his death. A hearing on the matter was repeatedly continued by the parties and the trial court. In June 2016, Stellar filed a request for a hearing on the motion to compel discovery, but a hearing was not scheduled on Stellar's request. There was no further action in the matter until August 2017, when Stellar filed a motion for payment of expenses and a motion for a status conference. The trial court scheduled a hearing on the matter, but the hearing was continued at Wigent's request.

[8] In September 2017, Finton was substituted as a party for Stellar as a result of Stellar's death.[3] No further action was taken on the case until September 2018,

[3] Given the substitution, we will refer to Finton, rather than Stellar, throughout this opinion.

when Finton filed a motion for accounting, a motion for a ruling on the objection to the unsupervised administration, and a motion for payment of attorney fees and expenses. A hearing was ultimately held in November 2018, but the trial court did not issue an order regarding the hearing. In December 2018, the trial court recused from the matter, and a special judge was assigned.

[9] In August 2019, the trial court held a hearing on Finton's motion for an accounting, Finton's motion for a ruling on his objections to unsupervised administration and request for supervised administration, and Finton's motion for payment of expenses. The trial court ordered that Wigent had ten days to provide "subpoenas for medical records relating to Dean C. Kreiger's initial diagnosis of dementia"; Finton had ten days "from receipt to execute said subpoenas"; Finton "must have all intended depositions scheduled within 45 days;" and the motion for an accounting and payment of fees remained under advisement. Appellant's App. Vol. II p. 117. In October 2019, the trial court issued another order and denied the motion for an accounting, denied the motion for payment of expenses, and granted the request for supervised administration of the Estate.

[10] In October 2019, Wigent supplemented her responses to discovery. Contrary to the trial court's August 2019 order, Wigent provided medical releases for

"treatment provided prior to January 16, 2003, the date of the execution of decedent's Will."[4] *Id.* at 168. In responses to interrogatories, Wigent stated:

> To the best of my knowledge, Dean C. Kreiger was never diagnosed nor has had medical work ups for dementia, Alzheimer's Disease, diminished mental capacity and/or senile dementia. I am further unaware of any symptoms exhibited by the decedent which would have caused such diagnosis.

Id. at 171.

[11] On November 22, 2019, Finton filed a motion for rule to show cause and a motion to remove Wigent and appoint a special administrator. Finton argued, in part, that: (1) the time limitation in the medical release provided by Wigent conflicted with the trial court's order regarding medical releases; and (2) based upon medical records that Finton had been able to obtain, Wigent's responses regarding Kreiger's lack of a dementia/Alzheimer's Disease diagnosis were demonstrably false. Finton requested sanctions pursuant to Indiana Trial Rule 37 and asked that Wigent be found in contempt. Wigent filed a response and noted that, on December 2, 2019, she executed a release for Kreiger's medical records without any time limitation. After a hearing, the trial court issued an order denying Finton's motion for rule to show cause and Finton's petition to remove the personal representative.

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[4] Although the release is dated September 19, 2019, Finton claims that it was provided on October 23, 2019. *See* Appellant's Br. p. 23; Appellant's App. Vol. II p. 155. Wigent does not clarify the date the document was provided to Finton.

[12] On January 17, 2020, Wigent filed a motion for summary judgment. Wigent argued that: (1) she was entitled to summary judgment on Finton's claim for attorney fees; and (2) there is no evidence to rebut the presumption that Kreiger was of sound mind at the time he executed his will and that he did so voluntarily and without any undue influence. In support of Wigent's motion, she designated her affidavit and the affidavit of David Brewer, Kreiger's attorney when he executed the will.

[13] In response, on the same day, Finton filed a verified motion for relief pursuant to Indiana Trial Rule 56(F). Finton noted that Wigent did not provide the proper medical release until December 2019; that Wigent has delayed responding to discovery; and that Finton had not yet received all of Kreiger's medical records. Finton requested the following:

> In the interests of justice, Petitioner submits that the Court should summarily deny the summary judgment motion without prejudice, hold a status conference to determine the status of discovery, and then set a briefing schedule for a later time, but only after depositions are complete. Petitioner respectfully submits that he should be allowed thirty (30) days after obtaining all of the Decedent's medical records and depositions have been taken.

Appellant's App. Vol. III p. 77. Later, upon noticing that his motion was not listed on the CCS, Finton filed a notice with the trial court and refiled the motion. The trial court, however, did not respond to Finton's motion.

[14] On February 14, 2020, Finton filed a response to Wigent's motion for summary judgment and designated, in part, Stellar's 2015 affidavit, Finton's affidavit, Finton's deposition, and some of Kreiger's medical records. Finton contended:

> Petitioner's deposition testimony establishes that in 2000, 2 years before the Decedent executed his will, he didn't recognize his only grandson or recall his oldest daughter, Roberta, even after being prompted by reminders by his wife, who admitted he had "Dementia". Roberta's Affidavit establishes that the Decedent ". . . would frequently repeat himself, lose his train of thought and talk nonsense. He often would ramble on about past events, such as the death of his son Doug, who committed suicide in September of 1989 and the death of his second wife, Phyllis. He frequently contradicted himself by saying one thing and then saying the exact opposite thing."

Id. at 98. Finton contended that Wigent failed to meet her burden of proof and that summary judgment should be denied. Finton also asked that Wigent's affidavit and Brewer's affidavit be stricken. Wigent filed a reply and a motion to strike certain portions of Stellar's affidavit, Finton's affidavit, and the medical records.

[15] After a hearing, the trial court issued a written order addressing Finton's motion to strike, Wigent's motion to strike, and Wigent's motion for summary judgment. The trial court denied Finton's motion to strike Brewer's affidavit and partially granted Finton's motion to strike Wigent's affidavit. Regarding Wigent's motion to strike, the trial court granted the motion to strike certain portions of Stellar's affidavit and Finton's affidavit on hearsay grounds. The

trial court denied Wigent's motion to strike the medical records. Regarding the motion for summary judgment, the trial court found:

> The Court therefore holds that there is no genuine issue of fact which is material to Finton's claim that the Will was the product of undue influence or that Kreiger was of unsound mind at the time that he made the Will. The Court further holds that Wigent is entitled to judgment as a matter of law on the Verified Complaint to Contest Purported Will of Dean. C. Kreiger and Objection to Probate, and therefore ORDERS that the Defendant's Motion for Summary Judgment on the request for an order invalidating the Will is GRANTED.

Appellant's App. Vol. II p. 45. The trial court also granted summary judgment to Wigent on Finton's request for attorney fees. Finton now appeals.

Analysis

[16] Finton challenges the trial court's failure to grant his motion under Indiana Trial Rule 56(F). We review the trial court's ruling on a motion pursuant to Trial Rule 56(F) for an abuse of discretion. *Coleman v. Charles Court, LLC*, 797 N.E.2d 775, 781 (Ind. Ct. App. 2003). "An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it." *Id.* "To establish that the trial court abused its discretion, the party appealing the ruling must show both that good cause existed to grant the motion and that it was prejudiced by the denial of the motion." *Erwin v. Roe*, 928 N.E.2d 609, 614 (Ind. Ct. App. 2010).

[17] Pursuant to Indiana Trial Rule 56, a nonmoving party must respond to a motion for summary judgment within thirty days by either: (1) filing a response; (2) requesting a continuance under Trial Rule 56(I); or (3) filing an affidavit under Trial Rule 56(F). *Mitchell v. 10th & The Bypass, LLC*, 3 N.E.3d 967, 972 (Ind. 2014). If the nonmoving party fails to do so, the trial court cannot consider summary judgment filings of that party subsequent to the thirty-day period. *Id.*

[18] Trial Rule 56(F) is at issue here and provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[19] Wigent filed her motion for summary judgment on January 17, 2020. Immediately after Wigent filed her motion for summary judgment, Finton filed his verified motion pursuant to Trial Rule 56(F) in a timely manner.[5] Finton's motion requested the following relief:

> In the interests of justice, Petitioner submits that the Court should summarily deny the summary judgment motion without prejudice, hold a status conference to determine the status of

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[5] The parties do not dispute that the motion was verified pursuant to Indiana Trial Rule 11(B*). Cf. Coleman*, 797 N.E.2d at 782 ("The Estate failed to file any affidavits with the trial court. Therefore, because the Estate failed to comply with the dictates of Ind. Trial Rule 56(F), the trial court did not abuse its discretion by denying the Estate's motion for enlargement of time.").

> discovery, and then set a briefing schedule for a later time, but only after depositions are complete. Petitioner respectfully submits that he should be allowed thirty (30) days after obtaining all of the Decedent's medical records and depositions have been taken.

Appellant's App. Vol. III p. 77. Upon noticing that his motion was not listed on the CCS, on February 5, 2020, Finton filed a notice with the trial court and refiled the motion before the thirty-day deadline expired. The trial court, however, did not respond to Finton's motion. On February 14, 2020, Finton filed a response to Wigent's motion for summary judgment so that he could respond to the motion for summary judgment within the thirty-day deadline.

[20] Finton had been requesting a release to obtain Kreiger's medical records since 2015. After numerous delays caused by both parties and the trial court, motions to compel, and the passage of several years, Wigent finally provided the requested releases on December 2, 2019. Only a few weeks later, Wigent filed her motion for summary judgment. In his verified motion, Finton pointed out that he had not yet received all of the requested medical records from providers due to the holidays, the fact that some providers had moved, and the fact that time was needed to locate older medical records. Under these circumstances, we conclude that Finton showed "good cause" for the trial court to grant the motion. *Erwin*, 928 N.E.2d at 614.

[21] Moreover, we conclude that Finton was "prejudiced" by the trial court's failure to grant the motion. *Id.* Pursuant to Indiana Code Section 29-1-7-17, any interested person may contest the validity of a will based on "(1) the

unsoundness of mind of the testator; (2) the undue execution of the will; (3) that the will was executed under duress or was obtained by fraud; or (4) any other valid objection to the will's validity or the probate of the will." *See also Moriarty v. Moriarty*, 150 N.E.3d 616, 629 (Ind. Ct. App. 2020), *trans. denied*. The burden of proof in a will contest is on the opponent of the will. Ind. Code § 29-1-7-20.

[22] Finton contested the will based upon alleged undue influence and Kreiger's alleged unsoundness of mind. Finton accurately argued that the "date of onset of [Kreiger's] mental decline is the key issue in this case." Appellant's App. Vol. III p. 75. Kreiger's medical records were essential to determining when Kreiger's dementia manifested and determining Kreiger's state of mind when he executed the 2003 will. Because discovery was not complete as a result of Wigent's delay in providing the medical releases, Finton's ability to designate evidence in response to Wigent's motion for summary judgment was hindered here. Therefore, Finton was prejudiced.

[23] Finton has demonstrated both that good cause existed to grant the motion and that he was prejudiced by the denial of the motion. Accordingly, we conclude that the trial court abused its discretion when it failed to grant Finton's motion pursuant to Trial Rule 56(F). We reverse and remand with instructions that the trial court should either "refuse the application for judgment or . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or . . . make such other order as is just" pursuant to Trial Rule 56(F).

Conclusion

[24] The trial court abused its discretion when it failed to grant Finton's motion pursuant to Trial Rule 56(F). Accordingly, we reverse and remand with instructions.

[25] Reversed and remanded.

Bailey, J., and Robb, J., concur.