MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Martha L. Westbrook
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Charles R. Grahn
Jennifer F. Perry
Indianapolis, Indiana

John A. Cremer
Jonathan E. Lamb
Fishers, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Patricia Rexroat,

Appellant,

v.

Mark Constantine for Specific Performance,

Appellee

March 20, 2023

Court of Appeals Case No. 22A-PL-1100

Appeal from the Boone Superior Court

The Honorable Matthew C. Kincaid, Judge

Trial Court Cause No. 06D01-2201-PL-25

Memorandum Decision by Chief Judge Altice
Judges Brown and Tavitas concur.

Altice, Chief Judge.

Case Summary

[1] The unsupervised estate of Robert L. Stogsdill (the Estate), by Patricia Rexroat—the Estate's personal representative—appeals the trial court's judgment in favor of Mark Constantine on his claim against the Estate for specific performance of a contract to devise. The Estate presents the following issues for our review:

> I. Did the trial court err in permitting witnesses to testify in violation of Indiana's Dead Man's Statutes[1]?
>
> II. Was Constantine's claim time-barred by a two-year Statute of Limitations?
>
> III. Did the trial court err in concluding that Constantine's claim was not barred by the Statute of Frauds?[2]
>
> IV. Was the trial court without authority to order specific performance of the contract?
>
> V. Were the trial court's findings of fact and conclusions of law erroneous and incomplete?

---

[1] Ind. Code § 34-45-2-4 *et. seq*.

[2] Ind Code § 32-21-1-1.

VI. Must the judgment be set aside because the alleged contract to devise violated public policy?

[2] We affirm.

Facts and Procedural History

[3] Stogsdill died testate in Indianapolis on May 23, 2019, at age seventy-seven. His last will and testament dated May 23, 2013 (the 2013 Will), was admitted to probate, and Rexroat—Stogsdill's domestic partner and sole beneficiary under the 2013 Will—was appointed personal representative of the Estate on June 6, 2019.

[4] Rexroat and Stogsdill resided together for approximately thirty years until Stogsdill's death. The 2013 Will stated that he and Rexroat had acquired various assets as joint tenants with rights of survivorship and that those assets would pass to Rexroat upon his death by operation of law.

[5] The 2013 Will also set forth the following no contest clause:

> if any party not provided for in this will should contest this will, I hereby affirm that they were intentionally omitted, and it is my express desire such party receive nothing from my Estate, and if the will is contested, and as a result the party contesting the same is awarded a share out of my estate, I hereby revoke any such distribution.

Appellant's Appendix Vol. II at 51.

[6] Constantine was born on February 9, 1971, in Indianapolis. He lived with his parents and attended Beech Grove schools until he moved to Wanamaker, where he began attending sixth grade in Franklin Township. During that time, Stogsdill was dating and living with Constantine's sister in Beech Grove. Constantine occasionally went to their residence to cut grass, wash cars, or perform chores at the bars and houses that Stogsdill owned. Stogsdill paid Constantine for his work and occasionally gave him extra cash.

[7] When Constantine turned thirteen, he moved in with his sister and Stogsdill because he was having difficulty adjusting to the new school and not getting along with his parents. Shortly after Constantine moved in, there were instances where Stogsdill performed oral sex on Constantine and masturbated in front of him. After "at least four" of those incidents, Constantine reported the abuse to his parents. *Transcript Vol. II* at 75. Although Constantine's mother took him to a doctor, "nothing came of the visit," and no action was pursued against Stogsdill. *Id.* Stogsdill had told Constantine on several occasions to "keep quiet" and the incidents "needed to stay between [them] because" Stogsdill "could get in trouble." *Id.* at 74.

[8] After residing with Stogsdill for about one year, Constantine moved to Fountaintown in 1984, to live with another family to be away from Stogsdill. At some point, however, Stogsdill walked into a Fountaintown store where Constantine was working. At that time, Stogsdill threatened Constantine and warned him to "keep his mouth shut about the things that had happened or

they were gonna find [him] and [his] family in a dumpster where [they] belonged with the rest of the trash." *Id.* at 77.

[9] Constantine reported that exchange to his parents, and he moved back in with them in 1985. Approximately one week later, Constantine's father reported that Stogsdill wanted Constantine to work on his properties. Constantine agreed to do the work, and shortly thereafter, Stogsdill resumed the sexual abuse. Constantine did not tell anyone or report the abuse to police because of Stogsdill's prior threats against him and his family. As the abuse continued, Stogsdill assured Constantine that he would "take care of [him]" and give him his "entire estate" as long as Constantine "kept his mouth shut, did not report the sexual abuse to police, did not file anything against him, and did not cause any trouble." *Id.* at 78, 92-93. According to Constantine, Stogsdill made these promises "all the time." *Id.* at 92.

[10] Sometime in 1985, Constantine moved into a house that Stogsdill owned and lived there for a "couple of years." *Id.* at 80. Stogsdill retained a key to the residence, and Constantine did not pay rent. During that time, when Constantine "was fourteen or fifteen," he began driving Stogsdill to various bars and to doctor's appointments. *Id.* at 78. The molestation episodes increased, the nature of the sexual abuse changed to include anal sex, and Stogsdill began providing Constantine with alcohol and drugs and a car to drive. Stogsdill also gave Constantine cash and other gifts and was Constantine's sole source of income. As soon as Constantine turned sixteen, he withdrew from school at Stogsdill's insistence.

[11] At some point, Rexroat and Stogsdill began living together in a residence close to Constantine's. One evening, Rexroat walked over to Constantine's and told him that she had been fighting with Stogsdill. Rexroat referred to Stogsdill as a "sick f**k" and the two "shared stories about what Stogsdill had been doing to [them, sexually]." *Id.* at 87. During that conversation, Constantine told Rexroat that Stogsdill had sexually abused him when he was a minor.

[12] Shortly after Constantine's twenty-third birthday, Constantine told Stogsdill that he "just couldn't do it anymore." *Id.* at 89. Constantine then changed the locks to his residence and the sexual episodes stopped. Sometime later, Stogsdill met with Constantine and Rexroat. During that meeting, Stogsdill asked each what they wanted from his estate. Constantine responded that Stogsdill "should give [him] what [he] said [he] was going to give him." *Id.* at 95. Stogsdill agreed, but stated that it "is automatically off the table . . . if [Constantine] said anything [to the authorities]." *Id.* Rexroat took notes at the meeting and prepared a list of Stogsdill's properties that was to be used in the preparation of Stogsdill's will. That list identified four properties that would go to Constantine individually, one to Constantine and Rexroat jointly, and the residuary of the estate to Constantine. All the real properties on the list included street addresses and parcel numbers.

[13] In April 1995, Constantine and Stogsdill went to attorney Richard Brown's office, where Stogsdill executed a will (the 1995 Will) that devised the properties listed on the asset sheet to Constantine, as well as personal property

other than household goods and the residuary estate. Brown retained the asset sheet and placed it in Stogsdill's estate planning file.

[14] On July 25, 1997, Constantine accompanied Stogsdill to Brown's office where Stogsdill executed a new will (the 1997 Will). This will added a parcel of real property that would be devised to Constantine. In all other respects, that will mirrored the 1995 Will. Stogsdill executed the 1997 Will and provided Constantine with a copy. In 2013, and unbeknownst to Constantine, Stogsdill repudiated the 1997 will and executed the 2013 Will that gave nothing to Constantine.

[15] Six months after Stogsdill died in 2019, Constantine filed a claim against the Estate for "specific performance of contract to devise," *appellee's appendix vol. II* at 43, along with a separate action to enforce a claim as to non-probate assets. Constantine alleged that Stogsdill had breached the contract to devise him the property described in the 1997 Will because Constantine fully performed his part of the agreement "by never once contact[ing] the authorities." *Id.* at 44.

[16] Constantine further asserted that Stogsdill "wrongfully and unlawfully breached and rescinded the agreement to devise" by executing the 2013 Will that left him nothing. *Id.* Thus, Constantine sought specific performance of the contract. In the alternative, Constantine sought judgment under the principles of promissory estoppel that precluded the Estate and non-probate transferees from denying the agreement's validity. Constantine also sought a constructive trust as to any

unreasonable transfers that Stogsdill may have made during his life that contravened the contract to devise.

[17] At the bench trial on Constantine's claim that commenced on January 25, 2022, Constantine's older brother, Chris, testified that Constantine, while a teenager, told him that Stogsdill was molesting him. Jimmy E. Clark, an acquaintance of Stogsdill and a patron of one of his taverns, testified that he observed Stogsdill refer to Constantine as his "boy toy" and that he had witnessed Stogsdill sexually harass Constantine in public. *Id.* at 5. Clark further testified that Stogsdill's son, Carl—who was deceased at the time of trial—was aware of the molestations and admitted to Clark that Stogsdill had also molested him.

[18] A friend of Rexroat's, and a customer at one of Stogsdill's bars, Toni Vance, testified in a deposition that she frequently observed Stogsdill treat Constantine "like a slave" and that Stogsdill had a reputation of "being kind of a pervert." *Id.* at 11. Vance also testified that she attended Stogsdill's calling. When she saw Rexroat and asked how she was doing, Rexroat replied that she "was not sure yet based on what [Constantine] was going to do." *Id.* at 12.

[19] Michael Whitaker, who had been residing with Constantine, testified that he met Stogsdill and Constantine in 1997. Whitaker claimed that the two were friends, and that on at least three occasions, Stogsdill admitted to Whitaker that he had sex with Constantine "when [Constantine] was a minor," and that "as long as [Constantine] kept his mouth shut, Stogsdill would take care of [Constantine] when [Stogsdill] was dead." *Transcript Vol. II* at 45. Stogsdill

also told Whitaker that "if [Constantine] went to the police or turned him in for anything, [Constantine] wouldn't get nothing." *Id.* Whitaker believed that Stogsdill's promises amounted to "hush money." *Id.* at 46.

[20] Rexroat testified that Stogsdill never lied and that she believed him to be "honorable and pure in his motives." *Id.* at 21. The two lived together since 1987 or 1988 and she "shared the same bed with him." *Appellant's Appendix Vol. II* at 38. Rexroat further testified that she had no knowledge of a contract between Stogsdill and Constantine and she did not know why Stogsdill would leave Constantine property or appoint him executor of the Estate in the 1995 Will. Rexroat claimed that she had never heard rumors about Stogsdill engaging in sexual activity with Constantine and that she first learned of Constantine's sexual abuse allegations after Stogsdill had died.

[21] Following the two-day trial, the trial court issued extensive findings and conclusions and entered judgment for Constantine on April 13, 2022. As relevant to this appeal, the order provided:

Findings of Fact

> 23. When [Constantine] was thirteen years old and living with [Stogsdill], [Stogsdill] sexually abused [Constantine]. The sexual abuse continued thereafter while [Constantine] continued to live with [Stogsdill].
>
> . . .

29. Within weeks of returning to work for [Stogsdill], [Stogsdill] resumed sexually abusing [Constantine].

30. Constantine did not report [Stogsdill] at that time due to the threats from [Stogsdill].

. . .

34. [Stogsdill's] sexual abuse of [Constantine] continued until [Constantine] turned twenty three years old. During this time, [Stogsdill] initiated sex with Constantine by either going to [Constantine's] home or calling [him]. [Constantine] never initiated sex with [Stogsdill]. The sexual abuse continued and [Constantine] did not report [Stogsdill] or put an end to the abuse due, in part, to the threats by [Stogsdill] against [Constantine].

35. At all times, [Constantine] lived in a home owned by [Stogsdill] or in a home where [Stogsdill] paid for the rent.

. . .

39. At one point in time [Stogsdill] inquired with an attorney about the statute of limitations for bringing a claim for child abuse and believed the statute of limitations to be age thirty.

. . .

44. During his life, [Stogsdill] repeatedly promised [Constantine that he] would inherit his estate if [Constantine] did not report [Stogsdill] to the authorities that [Stogsdill] had sexually abused [Constantine].

45. The first promise occurred when [Constantine] returned from living . . . in Fountaintown and started working for [Stogsdill] for the second time.

46. [Stogsdill] frequently made this promise to [Constantine] and [Constantine] would agree that he would not get [Stogsdill] in trouble.

. . .

49. The promise between [Stogsdill] and [Constantine] was brought up during [a] meeting [that included Rexroat] at [Stogsdill's] home. [Stogsdill] offered [Constantine] his estate, excepting only certain properties, if [Constantine] did not report [Stogsdill's] sexual abuse to the authorities or obtain counsel and file a civil lawsuit against [Stogsdill]. [Constantine] accepted the offer.

50. During the meeting, [Rexroat] wrote down various properties and whether [Constantine] or someone other than [Constantine] would inherit the properties (Asset Sheet). The Asset Sheet is contained in Attorney Richard Brown's estate planning file for [Stogsdill].

51. [Stogsdill] and [Constantine's] contract required that [Stogsdill's] interest in any assets, except for those assets listed on the Asset Sheet that were to go to someone other than [Constantine], would go to [Constantine].

52. The parties' contract did not distinguish between probate and non-probate transfers. The parties' contract was for [Stogsdill's] interests in any assets, however titled, to the extent that said asset was not identified on the Asset Sheet as a property that would go to someone other than [Constantine].

53. On April 21, 1995, [Stogsdill] executed his 1995 Last Will. Only those properties on the Asset Sheet that were listed as properties not going to [Constantine] are listed as properties not going to [Constantine] in the 1995 Last Will. With the exception of household goods located in [Rexroat's] home, [Constantine] inherits [Stogsdill's] personal effects and the residue of his estate.

56. [Stogsdill's] 1997 Last Will mirrors his 1995 Last Will as it pertains to [Constantine]. The changes between the 1997 Last Will and the 1995 Last Will concern who will receive the properties that [Constantine] was not to receive under the contract.

57. [Stogsdill] had a copy of the 1997 Last Will given to [Constantine] at Richard Brown's office and confirmed the contract with [Constantine], who again accepted the terms. [Constantine] retained his copy of the 1997 Last Will for over twenty four (24) years and presented his copy at trial.

58. With the exception of those properties listed as not going to [Constantine] on the Asset Sheet, the contract did not allow for the creation or ownership of joint properties with rights of survivorship, to the extent said titling would deprive [Constantine] [of Stogsdill's] interests therein at [Stogsdill's] passing.

. . .

64. [Constantine] would have filed a civil suit and contacted the authorities had he known [Stogsdill] was going to breach the contract.

65. The Richard Brown file contains a note subsequent to [Stogsdill's] passing that provides that 'we are unable to help Mr.

Constantine as a will from 2013 was already probated. . . . advised to contact John Cremer if he wishes to pursue.'

. . .

69. [Rexroat] testified that she first learned of [Constantine's] allegations that [Stogsdill] had sexually abused [Constantine] when [Constantine] filed his Claim after [Stogsdill's] passing. [Rexroat] testified that she never heard a rumor from any source that [Stogsdill] had sexual relations with [Constantine]. She also testified that [Stogsdill] was someone who was pure in his motives and was honorable in every respect.

. . .

71. Leslie Peters testified that [Stogsdill] was known to initiate inappropriate sexual jokes that there were rumors going around about what had happened to [Constantine] and that [Stogsdill] shared sexual fantasies that were lewd in nature.

72. Jimmy Clark testified that [Stogsdill] sexually harassed [Constantine] in public and called him his boy toy.

73. [Rexroat's] testimony that she was unaware of the contract between [Stogsdill] and [Constantine] is . . . not credible. [Rexroat] testified that she had no knowledge of the contract and did not specifically know why [Stogsdill] was leaving [Constantine] property and appointing [Constantine] executor in his 1995 Last Will.

74. [Constantine] testified that [Rexroat] was present at [Stogsdill's] house when the Asset Sheet was prepared and the deal discussed.

75. Terri Vance, [Rexroat's] friend, testified that following [Stogsdill's] passing, [Rexroat] shared concerns with Terri at a funeral calling for [Stogsdill] that [Constantine] could cause problems.

II. Conclusions of Law

1. The Court finds that a prima facie case for [Constantine's] Claim was made through the testimony of Michael Whitaker, Jimmy E. Clark, Leslie Peters, Chris Constantine, and Toni Vance. . . .

2. [Constantine] and [Stogsdill] entered into a binding contract to devise wherein [Stogsdill] was to leave everything he owned at death, except for those assets that [Stogsdill] and [Constantine] agreed would not go to [Constantine]. The agreed upon assets that do not go to [Constantine] are those assets that do not go to [Constantine] under the Asset Sheet, [Stogsdill's]1995 Last Will, or [Stogsdill's] 1997 Last Will ("Excepted Assets").

3. In return, [Constantine] was required to: not report to the authorities that [Stogsdill] had sexually abused him, and was required to not file a civil lawsuit against [Stogsdill] concerning the abuse.

4. But for the Excepted Assets, the contract to devise is enforceable as to [Stogsdill's] interest in properties owned prior to his death, including jointly owned property, that transferred as non-probate transfers as defined by I.C. 32-17-13-1. The parties' contract to devise was not limited to probate assets, nor was the distinction between probate and non-probate estate discussed by the parties.

5. While [the Estate] contains land and while I.C. 32-21-1-1 (b)(4) precludes a person from bringing an action concerning land that is not reduced to writing and signed by the party against whom the action is sought, here [Stogsdill] executed an estate plan in furtherance of the contract to devise and provided [Constantine] with a copy of the executed plan, thus removing the contract to devise from the prohibitions of I.C. 32-21-1.1(b)(4).

. . .

7. The contract to devise does not violate a public policy. . . .

. . .

9. [Constantine's] Claim is granted as to all probate assets of [Stogsdill's] Estate, but for the Excepted Assets.

10. With respect to non-probate transfers, but for the Excepted Assets, [Constantine's] Claim is granted as to [Stogsdill's] interests in any nonprobate assets that transferred as non-probate transfers as defined by I. C. 32-17-13-1, which judgment can be enforced in [the other] cause number.

Judgment is for the Claimant, [Constantine], and against the Estate of [Stogsdill] and that the Contract to Devise the entirety of his estate, including certain real property, excepting certain specific bequests in exchange for [Constantine] not disclosing sexual abuse committed by [Stogsdill] upon [Constantine] is ENFORCEABLE and that [Constantine] is entitled to specific performance of the contractual obligations undertaken by [Stogsdill].

Appellee's Appendix Vol. II at 39, 41.

[22] The Estate now appeals.

Discussion and Decision

I. The Dead Man's Statute

[23] The Estate argues that Constantine should not have been permitted to testify about the alleged contract to devise pursuant to the Dead Man's Statute. More particularly, the Estate claims that Whitaker's testimony about the existence of the contract was inadmissible hearsay and should have been excluded. Thus, the Estate maintains that Constantine was not competent to testify because there was insufficient prima facie evidence of the contract to devise.

[24] The Dead Man's Statute provides that "a person (1) who is a necessary party to the issue or record; and (2) whose interest is adverse to the estate; is not a competent witness as to matters against the estate." I.C. § 34-45-2-4(d). The statute prohibits testimony by survivors in certain circumstances in proceedings that involve a decedent's estate, and its main purpose is to protect a decedent's estate from spurious claims. *Arnett v. Estate of Beavins by Beavins,* 184 N.E.3d 679, 684 (Ind. Ct. App. 2022); *Gabriel v. Gabriel*, 947 N.E.2d 1001, 1009 (Ind. Ct. App. 2011). The Dead Man's Statute "guard[s] against false testimony by a survivor by establishing a rule of mutuality, wherein the lips of the surviving party are closed by law when the lips of the other party are closed by death." *Gabriel,* 947 N.E.2d at 1009. When an executor or administrator of an estate is one party, adverse parties are generally not competent to testify about

transactions concerning the decedent that took place during the decedent's lifetime. *Id.*

[25] On the other hand, the Dead Man's Statute does not render the claimant incompetent for all purposes; rather application of the statute "is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party." *Bergal v. Bergal*, 153 N.E.3d 243, 254 (Ind. Ct. App. 2020), *trans. denied.* Also, a claimant who is otherwise an incompetent witness under the Dead Man's statute may testify if a prima facie case has been made through the testimony of a disinterested witness. *Wilhoite v. Beck,* 230 N.E.2d 616, 620 (Ind. Ct. App. 1967). Prima facie means "at first sight, on first appearance, or on the face of it." *Buhring v. Tavoletti*, 905 N.E.2d 1059, 1064 (Ind. Ct. App. 2009). For purposes of a contract, a prima facie case includes evidence of an offer, acceptance, and consideration. *Zimmerman v. McColley*, 826 N.E.2d 71, 74 (Ind. Ct. App. 2005).

[26] We further note that a trial court's ruling on witness competency "will not be reversed absent a clear abuse of discretion." *Kalwitz v. Estates of Kalwitz*, 759 N.E.2d 228, 232 (Ind. Ct. App. 2001), *trans. denied*. An abuse of discretion will be found only if the ruling is against the logic and effect of the facts and circumstances before the court. *Id*. We will not reweigh the evidence or substitute our judgment for that of the trier of the fact. *Kedrowitz v. State,* 199 N.E.3d 386, 398-99 (Ind. Ct. App. 2022).

A. Whitaker's Testimony

[27] At the outset, the Estate asserts that Whitaker's testimony should have been excluded on the grounds that it was inadmissible hearsay. The Estate argues that his testimony was not admissible because "Whitaker was repeating what Stogsdill told him." *Appellant's Brief* at 26.

[28] Hearsay is defined as "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evid. Rule 801(c). And under Evid. R. 802, hearsay evidence is not admissible unless the evidence rules "or other law provides otherwise."

[29] In accordance with Evid. R. 801(d)(2)(A), a statement is not hearsay if the statement is offered against an opposing party and "was made by the party in an individual or representative capacity." To illustrate, in *Hebel v. Conrail, Inc.*, a railroad police officer sued the railroad—his employer—to recover compensation for injuries sustained from exposure to toxic chemicals while he was guarding a train derailment site. 475 N.E.2d 652, 655 (Ind. 1985). Hebel died prior to trial, and his personal representative was substituted as the plaintiff in the action. *Id*. As to whether the chemicals contributed to Hebel's health conditions and death, the trial court permitted the railroad to introduce—in accordance with the business records exception to the hearsay rule—an exhibit that consisted of Hebel's medical records for a multi-year period that preceded the chemical exposure. *Id*. at 658-59. Following a jury trial and a judgment for the railroad, this court reversed. Our Supreme Court granted transfer and concluded, among other things, that the court of appeals "erroneously held that

a violation of OSHA regulations was admissible as evidence of negligence per se." *Id.* at 656.

[30] In its discussion, the *Hebel* Court determined that the railroad had not laid a proper foundation under the business records exception to the hearsay rule for the admission of Hebel's entire medical file because it was unclear who had prepared most of the records. *Id*. However, the only portion of the disputed exhibit that was damaging to Hebel's case was a form that he had signed during a physical examination that he underwent three months after the chemical exposure. That form set forth a list of "yes-or-no questions" about the symptoms that Hebel had experienced since his last examination, and he answered those questions by checking the appropriate boxes. Hebel indicated that he had not suffered any symptoms that would have restricted his ability to work. *Id.* at 660. Our Supreme Court determined that the "statements of Hebel . . . were admissible as the admissions of a decedent against his personal representative." *Id*.

[31] In these circumstances, Stogsdill's statements—as recounted by Whitaker—are analogous to the evidence that was presented in *Hebel.* More particularly, they are statements by Stogsdill as admissions by a decedent against Rexroat as the personal representative of the Estate. Thus, the trial court did not err in admitting those statements at trial.

B. Prima Facie Evidence of a Contract and Constantine's Testimony

[32] We now turn to the Estate's contention that Whitaker's testimony—and that of other witnesses—did not sufficiently establish prima facie evidence of the contract to devise that would permit Constantine to testify. The Estate claims that Whitaker never testified about the existence of a contract to devise. However, Whitaker testified that Stogsdill stated he had prepared a will in connection with an agreement made with Constantine. Whitaker had been acquainted with Stogsdill since 1996, and had engaged in numerous business dealings with him. Whitaker further testified that he, Stogsdill, and Constantine would frequently socialize, and at some point in 2001, Stogsdill admitted to Whitaker that he had sex with Constantine when Constantine was a minor. Stogsdill also told Whitaker on three different occasions that as "long as [Constantine] kept his mouth shut . . . [Stogsdill] would take care of [Constantine] when [Stogsdill] was dead." *Transcript Vol. II* at 45. Stogsdill then admitted to Whitaker that he had prepared a will in connection with the agreement he made with Constantine. Neither Constantine nor anyone else had told Whitaker about the agreement before Stogsdill did, but Whitaker later confirmed the existence of the agreement with Constantine. Whitaker's testimony was clearly prima facie evidence of the contract to devise between Stogsdill and Constantine.

[33] Also, Clark—an acquaintance of Constantine, Rexroat, and Stogsdill, and a frequent customer at Stogsdill's bars—corroborated Whitaker's account when he testified that he overheard Stogsdill refer to Constantine as his "boy toy" and saw Stogsdill make "sexual advances" toward Constantine. *Appellee's Appendix*

Vol. II at 5. Clark further testified that Stogsdill's son, Carl—who predeceased his father—told him that Stogsdill sexually abused both him and Constantine.

[34] Similarly, Constantine's brother, Chris, testified that Stogsdill told him in 1997 that Constantine would always be taken care of, that Constantine had told him of Stogsdill's abuse, and that Constantine had retained the original copy of the 1997 Will that Stogsdill had given him.

[35] In light of this testimony, it is apparent that Whitaker and the other witnesses established prima facie evidence of the contract to devise. Moreover, other corroborative evidence of the contract included the 1995 and 1997 wills, Stogsdill's decision to name Constantine—an unrelated individual who was in his early twenties—as executor and residuary beneficiary of his estate, the asset list that Rexroat prepared, and Constantine's retention of the original copy of the 1997 will for over twenty years. For all these reasons, we conclude that the trial court did not abuse its discretion in finding that there was sufficient prima facie evidence of the contract to devise.

[36] We note, however, notwithstanding our conclusion that a prima facie case for the contract's existence was established, the Estate goes on to assert that Constantine's testimony was barred because the *trial court* did not call him to testify, in accordance with I.C. § 34-45-2-10(c).[3] We note, however, that the

---

[3] This statute provides that

"(a) In all cases in which:

Estate did not object to the admissibility of Constantine's testimony on this basis at trial. Thus, the alleged error is waived on appeal. *See, e.g., In re Paternity of Baby W.,* 774 N.E.2d 570, 577 (Ind. Ct. App. 2002) (holding that a party may not object on one ground at trial and argue a different basis on appeal), *trans. denied*. Moreover, the record reflects that Constantine testified *after* the prima facie case had been established.

[37] For all these reasons, we conclude that the trial court did not abuse its discretion in permitting Constantine to testify about the contract to devise and his testimony was not barred by the Dead Man's Statute.

II. Statute of Limitations

[38] The Estate argues that Constantine's claim is barred by a two-year statute of limitations. More particularly, the Estate asserts that although "Constantine's claim is denominated a contract claim, the underlying nature of the suit is a tort action, . . . which is governed by I.C. § 34-1-2-2, a two-year statute of

---

(1) executors, administrators, heirs, or devisees are parties; and

(2) one (1) of the parties to the suit is incompetent under this chapter to testify against the parties described in subdivision (1);

the assignor or grantor of a party making the assignment or grant voluntarily shall be considered a party adverse to the executor or administrator, heir, or devisee.

(b) However, in all cases referred to in sections 4 through nine of this chapter, any party to the suit has the right to call and examine any adverse party as a witness.

(c) The court may require any party to a suit or other person to testify. Any abuse of the court's discretion under this subsection is reviewable on appeal.

limitations." *Appellant's Brief* at 30. The Estate contends that because the alleged contract to devise did not occur until 1995 and the "statute of limitations ran on February 8, 1992,"[4] Constantine has no claim against it. *Id.*

[39] We initially observe that the Estate did not raise a statute of limitations argument at the trial court level. Thus, the issue is waived. *See, e.g., Salsbery Pork Producers, Inc. v. Booth,* 967 N.E.2d 1, 3 (Ind. Ct. App. 2012) (holding that the failure to raise an issue before the trial court waives that issue on appeal). Waiver notwithstanding, we note that Constantine's claim against the Estate was for breach of the contract to devise, and such claims are "governed by the Indiana Probate Code." *Markey v. Estate of Markey,* 38 N.E.3d 1003, 1007 (Ind. 2015). And Ind. Code § 29-1-14-1(a) provides that claims against estates must generally be filed within three months after the date of the first published notice to creditors. Here, Rexroat—the Estate's personal representative—first published notice to creditors on June 17, 2019, and Constantine filed his claim on September 13, 2019, which was *less* than three months after the first notice to creditors. In short, the Estate's argument that Constantine's claim against the Estate is actually a tort action that is barred by a two-year statute of limitations is misplaced. We therefore conclude that Constantine filed his claim against the Estate in a timely fashion. *See id.*

---

[4] The Estate maintains that because Constantine was thirteen and therefore a minor under a legal disability "the first time he was touched by Stogsdill," *appellant's brief* at 30, the time for bringing a cause of action was extended until two years after that disability was removed. *See* I.C. § 34-1-2-5.

III. The Statute of Frauds

[40] The Estate argues that the judgment must be set aside because the alleged contract to devise did not satisfy the Statute of Frauds. More particularly, the Estate maintains that Constantine's claim fails because the properties that were to be devised to him were not sufficiently identified.

[41] I.C. § 32-21-1-1(b)(4) provides that

> (b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent:
>
> . . .
>
> (4) An action involving any contract for the sale of land.

[42] We initially observe that a person may make a valid contract binding himself "to make a particular disposition of his property by last will and testament." *In re Estate of Von Wendesse*, 618 N.E.2d 1332, 1336 (Ind. Ct. App. 1993), *trans. denied*. And the execution of a will pursuant to a verbal promise to devise particular property may constitute a sufficient memorandum of the agreement to satisfy the Statute of Frauds. *Newman v. Huff*, a 632 N.E.2d 799, 804 (Ind. Ct. App. 1994), *trans. denied*. Even if the promisor later changes or revokes the will, it still stands "as a written memorandum of the contract" that will satisfy

the Statute of Frauds. *Id*. The "only inquiry which the law justifies in case of an agreement to devise or bequeath property, founded on a valid consideration, is as to the validity of the agreement, and whether or not it was entered into fairly, without surprise or imposition, and whether it is reasonable, and not against public morals." *Roehl v. Haumesser*, 15 N.E. 345, 349 (Ind. 1887).

[43] Notwithstanding the Estate's contention that the Statute of Frauds cannot be avoided here because the particular properties were not adequately identified in the alleged agreement, our Supreme Court in *Roehl* observed that

> The contract as it is alleged to have been set forth in the letters, which are said to be lost, was that the decedent 'would make a will, and devise and bequeath to [the plaintiff] the one-half of all his estate.' It is contended that the contract is wholly void for want of a sufficient description or identification of the real estate to be devised. This position is not sustainable. *There is no reason why a contract to devise real estate should be more specific in respect to the description of the real estate to be devised than a devise itself, or than a deed or mortgage. A devise of all or of any aliquot part of the real estate of which a testator should die seized would not be open to serious question*.

15 N.E. at 348 (emphasis added). The *Roehl* Court also determined that the contract to devise one-half of the decedent's estate to the plaintiff "evidently had reference to such property as he should die seized of," which "was capable of being ascertained and made certain" and, although general, was "entirely free from ambiguity." *Id*. Thus, it concluded that the contract was sufficient to sustain an action for specific performance, or for damages for its breach. *Id*.

[44] Following the reasoning of *Roehl,* Stogsdill's conduct in executing the 1995 and 1997 Wills is probative of the existence of the agreement that he made with Constantine. The 1995 Will identifies four properties to be bequeathed to Constantine individually and one to Constantine and Rexroat jointly, with the residuary of Stogsdill's estate to Constantine. All the properties were identified by physical addresses and parcel numbers. And the 1997 Will mirrors the former will and identifies one additional property that goes to Constantine. Those wills comport with the disposition set forth in the list of properties that Rexroat generated when she, Constantine, and Stogsdill met to discuss the specifics of the devises that Stogsdill planned to include in his will.

[45] Additionally, Stogsdill had Constantine accompany him to Brown's office in 1997, where he executed that will and gave Constantine a copy. This was sufficient evidence for the trial court to determine that Stogsdill made an agreement to devise the entirety of his estate—with the exception of certain identified assets—to Constantine. Stogsdill's later revocation of the 1997 Will in violation of the contract does not negate the conclusion that there were written memoranda of the contract sufficient to satisfy the Statute of Frauds. *See Newman,* 632 N.E.2d at 804 (observing that "when read in combination, the real estate transaction documents *and* the provision in the [decedent's will] established a 'written memorandum' of the contract satisfying the Statute of Frauds") (emphasis in original). In light of these circumstances, we conclude that the contract to devise adequately identified the properties that were to go to Constantine, in that they were capable of being ascertained and "free from

ambiguity." *See* 15 N.E. at 348. Thus, we reject the Estate's contention that the agreement to devise did not sufficiently identify the properties to satisfy the Statute of Frauds.

IV. Specific Performance

[46] The Estate argues that the judgment must be set aside because the trial court lacked authority to order specific performance. The Estate maintains that the trial court was precluded from ordering "the personal representative to perform a transfer of real property now in the hands of third parties." *Appellant's Brief* at 41.

[47] The power of a court to compel specific performance is an extraordinary remedy that is not available as a matter of right. *Kesler v. Marshall,* 792 N.E.2d 893, 896 (Ind. Ct. App. 2003), *trans. denied*. A court of equity will issue a decree of specific performance only if the contract is proved and the terms are so precise as that "neither party could reasonably misunderstand them." *Cline v. Strong,* 100 N.E. 569 (Ind. Ct. App. 1902). If this was not the rule, a court might enforce precisely what the parties never intended or contemplated. *Id.* Additionally, specific performance will not be ordered where there is an adequate remedy at law. *Indiana Union Traction Co. v. Seisler,* 106 N.E. 911, 913 (1914).

[48] The Estate's argument that there is no authority to order specific performance in circumstances such as these has been previously rejected by our courts. More precisely, it was determined in *Stainbrook v. Low,* where the claimant filed a

probate claim in the estate proceeding seeking specific performance regarding a real estate contract, that the decision to grant the remedy of specific performance is a matter within the trial court's sound discretion. 842 N.E.2d 386, 394 (Ind. Ct. App. 2006), *trans. denied.*

[49] Here, the trial court's order required that Constantine inherit under Stogsdill's Estate. The Estate's argument that specific performance cannot be awarded with respect to non-probate assets—such as real estate held as joint tenants with rights of survivorship—is misplaced. More particularly, non-probate transfers include those by a transferor "who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and (A) use the property for the benefit of the transferor; or (B) apply the property to discharge claims against the transferor's probate estate." Ind. Code § 32-17-13-1(a). The non-probate transferee liability provisions under I.C. 32-17-13-1, *et. seq.*, subjects assets that are inherited by a non-probate transferee to a probate claim when (i) due notice is given to the non-probate transferee; (ii) the probate claim is allowed in the probate estate; and (iii) the allowed claim cannot be satisfied by the assets of the Decedent's probate estate. *See* I.C. §§ 32-17-13-6; 32-17-13-2(c).

[50] In applying these provisions to the circumstances here, the record shows that due notice was given to Rexroat—the non-probate transferee and personal representative of the Estate. The trial court allowed the probate claim, and the Estate was insufficient to satisfy the claim, given the terms of the contract to devise between Stogsdill and Constantine. That contract involved *all* assets—

however held—without any distinction between probate assets and non-probate assets. In short, the Estate's contention that the trial court acted beyond its authority in ordering the transfer of non-probate assets to Constantine, fails.

V. Challenge to Findings

[51] The Estate next challenges the trial court's findings of fact and initially claims that the trial court erred in adopting Constantine's proposed findings in its order. The Estate also maintains that the findings were inadequate and did not cover all the issues raised by the evidence and the pleadings and that they were improperly based solely on Constantine's direct testimony. Hence, the Estate contends that the judgment must be set aside because it is "inconsistent with the conclusions of law." *Appellant's Brief* at 2, 36.

[52] Where, as here, a trial court has entered special findings of fact upon a party's motion, we employ a deferential two-tiered standard of review. *Landmark Motors, Inc. v. Chrysler Credit Corp.*, 662 N.E.2d 971, 975 (Ind. Ct. App. 1996). First, we determine whether the evidence supports the findings and then determine whether the findings support the judgment. *Id.* Special findings and the judgment flowing from the findings will be set aside only if they are clearly erroneous. *Id.* In determining whether the findings and judgment are clearly erroneous, we neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* We consider only the evidence in the record that supports the judgment along with the reasonable inferences to be drawn therefrom, and the

trial court's findings will not be disturbed unless the record is devoid of facts or inferences to support the findings. *Id*.

[53] In this case, the Estate first claims that the judgment cannot stand because the trial court primarily adopted the proposed findings of fact that Constantine submitted. In such circumstances, our Supreme Court has observed that

> The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning. . . . For this reason, we do not prohibit the practice of adopting a party's proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court. This is particularly true when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony.

Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001).

[54] Here, it is apparent that the trial court thoroughly reviewed Constantine's proposed findings, as it made several handwritten changes and notations before it entered the final order. And contrary to the Estate's claim that the trial court improperly relied solely on Constantine's testimony as the basis for its judgment, witness credibility was a significant factor in these circumstances, as evidenced by the Estate's attempts during the trial to exclude testimony under the Dead Man's Statute and on hearsay grounds. Moreover, the Estate overlooks the fact that the trial court specifically found Rexroat's testimony to

be not credible. And that certainly influenced its conclusion that Stogsdill contracted to devise his estate to Constantine. We conclude that the findings reflect the considered judgment of the trial court, and we reject the Estate's argument that the judgment must be set aside simply because the trial court adopted—in large part—Constantine's proposed findings.

[55] The Estate then sets forth a list of alleged errors including the contention that the trial court failed to issue findings regarding the statute of limitations, and a claim that the trial court neglected to adequately explain its rulings as to application of the Dead Man's Statute. Additionally, the Estate asserts that the findings failed to address other issues including whether Constantine was granted a windfall because he would be receiving some of the properties that Rexroat and Stogdill jointly owned and failed to properly identify the properties that Constantine would receive.

[56] We note that in nearly every instance, the Estate's attack on the findings amount to impermissible requests to reweigh the evidence or involve matters that are not germane to this appeal. For instance, the trial court did not address the applicability of the statute of limitations because no issue was raised at trial regarding those statues. Additionally, the trial court specifically determined that several disinterested witnesses established a prima facie case in support of the agreement's existence, and it addressed and rejected the Estate's challenges to the Dead Man's Statute in its findings.

[57] As for the Estate's claim that the findings failed to address an alleged "windfall" to Constantine because of Stogsdill's and Rexroat's joint ownership of some of the properties, *see appellant's brief* at 35, the trial court specifically determined that Rexroat would retain her share as to Stogsdill's non-probate assets. To the extent that the Estate (Rexroat) claims entitlement to a survivorship interest, there was no evidence of an agreement between Stogsdill and Rexroat that would have precluded Stogsdill from conveying his interest in the properties at any time prior to his death. In short, the Estate is requesting that we reweigh the evidence and conclude that Constantine is receiving more than that to which he is entitled. We decline that request. *See Landmark Motors,* 662 N.E.2d at 975 (we will not reweigh the evidence or judge the credibility of witnesses). Similarly, while the Estate maintains that "signed and recorded deeds seem to better [sic] evidence of a contract than Constantine presented on his claim to the joint properties," *appellant's brief* at 37-38, that assertion again amounts to an improper request for us to reweigh the evidence and substitute our judgment for that of the trial court.

[58] Finally, as for the Estate's contention that the trial court's order was vague because the properties that would go to Constantine were not adequately identified, the agreement made it clear that Constantine would inherit all of Stogsdill's property, but for the properties set forth in the asset list and the 1997 Will that were specifically devised to others. Those properties included the properties' physical addresses and were adequately identified to support the trial court's order. Hence, we reject the Estate's claim that the identity of the

properties was not ascertainable on the basis that there was not a more specific address or legal description of each. For all these reasons, the Estate's challenges to the adequacy of the findings of fact and conclusions fail.

VI. Public Policy

[59] The Estate asserts that the judgment must be set aside because the purported agreement between Stogsdill and Constantine violates public policy concerns. The Estate asserts that this alleged contract was only about "sex for money." *Appellant's Brief* at 44.

[60] The power "to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional should be exercised only in cases free from doubt." *Lexington Ins. Co. v. Am. Healthcare Providers*, 621 N.E.2d 332, 338 (Ind. Ct. App. 1993), *trans. denied*. Additionally, courts should construe agreements as being valid rather than void. *Glasgo v. Glasgo,* 410 N.E.2d 1325, 1331 (Ind. Ct. App. 1980). On the other hand, courts have refused to enforce contracts on public policy grounds in the following circumstances: (1) agreements that contravene a statute; (2) agreements that clearly tend to injure the public in some way; (3) agreements that are otherwise contrary to the declared policy of Indiana. *HLH Consulting, LLC v. Burd Auto., Inc.*, 146 N.E.3d 1051, 1060 (Ind. Ct. App. 2020).

[61] Here, the contract to devise provided that Constantine would forego his right to bring an action to recover damages against Stogsdill or report the prior sexual

abuse to the police in exchange for the devise of Stogsdill's estate. Indeed, Constantine promised that he would not seek damages for actions that Stogsdill had *already committed.* While Constantine fulfilled his part of the bargain, Stogsdill breached the agreement by disinheriting Constantine in the 2013 Will. In light of these circumstances, we cannot say that the agreement contravened a statute, tended to injure the public in any way, or was contrary to any declared Indiana policy.

VII. Conclusion

[62] In conclusion, we hold that the trial court properly permitted Whitaker and other witnesses to testify about the existence of the contract to devise. As those witnesses and other evidence amounted to prima facie evidence of the agreement, Constantine's testimony was admissible under the Dead Man's Statute. We further conclude that Constantine's claim was not time-barred or precluded by the Statute of Frauds, and that the trial court properly ordered specific performance of the contract to devise. Finally, we conclude that the trial court's findings were not clearly erroneous, and the agreement did not violate public policy.

[63] Judgment affirmed.

Brown, J. and Tavitas, J, concur.