IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

IN THE MATTER OF THE ESTATE OF)	
)	CIVIL NO. ST-11-CV-329
SAMUEL G. CLEMENS,)	
)	ACTION FOR WILL CONTEST
Deceased.)	
)	

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SMITH, ALAN D., Magistrate

MEMORANDUM OPINION
(Filed: September 20, 2012)

Summary

The Contestant in this action requests that the Court declare the will invalid because the testator was of unsound mind and unduly influenced by three of his children and one beneficiary under the will. The evidence was insufficient to prove the testator was of unsound mind at the time of execution of the will. Although the Contestant's evidence was sufficient to raise a rebuttable presumption of undue influence, the proponents of the will overcame this presumption by clear and convincing evidence.

Facts

Samuel G. Clemens ("Clemens") died on June 21, 2008, as a widower, leaving the following eleven children and heirs: Gloria Nickeo ("Gloria"), Claude Parker ("Claude"), Clarence Francis ("Clarence"), Genova Singleton ("Genova"), Lynette Thomas ("Lynette"), Gweneth Clemens ("Gweneth"), Malcolm Clemens ("Malcolm"), Alexton Clemens ("Alexton"), Pathrona Clemens ("Pathrona"), Francine Joseph ("Francine"), Thornel Clemens ("Thornel"), and Elvis Nickeo ("Elvis") (collectively the "Heirs").[1] The Will devised Clemens' real property to his wife, who predeceased him, and the reminder thereof to his daughters, Pathrona and Francine, and

[1] Eleven children/heirs are listed in the Petition for Administration, filed on April 6, 2010 in the *Estate of Clemens*, Super. Ct. Probate No. ST-10-PB-32. Thornel Clemens, however, is not listed as a son and heir of Clemens in the Petition for Probate and for Issuance of Letters Testamentary, filed on May 11, 2010, in the *Estate of Clemens*, Super. Ct. Probate No. ST-10-PB-44.

bequeathed his personal property to his daughter, Gloria, and his grandson, Elvis. He left nothing to his other children.

On June 9, 2010, Genova filed a Declaration of Will Contest pursuant to 5 V.I.C. § 1262[2] and Super. Ct. R. 193,[3] challenging the validity of the Last Will and Testament of Clemens,[4] dated April 14, 2008 (the "Will). Genova's Declaration alleges that Clemens was of unsound mind and was unduly influenced by Gloria, Elvis, Francine and Pathrona and that their actions "caused" the mental disorientation and alienation of his natural affection for his remaining children. Genova does not contest or challenge the formalities regarding execution of the Will, as set forth in Virgin Islands law, and concedes they were fully complied with.[5]

Unsound Mind

Genova asserts that the Will is invalid because Clemens lacked testamentary capacity.[6] Two sections of the Virgin Islands probate code apply here, one applicable to real property and the other to personal property. With respect to real property, "[a]ll persons, except idiots, persons of unsound mind and persons under eighteen years of age, may devise . . . by last will and testament . . . ."[7] For personal property, "[e]very person of the age of eighteen years or upwards, of sound mind and memory, and no others, may give and bequeath . . . by will in writing."[8] The key terms in these statutes are "sound mind" and "unsound mind", neither of which is defined. In the absence of any codified definitions, the court in the *Estate of Savain* looked to case law from Florida, which defined "sound mind" as having three elements: "[(1)] the ability of the testator to 'mentally understand in a general way the nature and extent of the property to be disposed of, and [(2)] the testator's relation to those who would naturally claim a substantial benefit from the will, as well as [(3)] a general understanding of the practical effect of the will as executed.'"[9] The Restatement's test adds a fourth element; the testator must be able to form the desire for his property to be disposed of in accordance with his will.[10] The most critical issue is whether the

[2] "Any person interested under a . . . will . . . may have determined any question of . . . validity arising under the instrument. V.I. CODE ANN. tit. 5, § 1262 (1997).

[3] "Any person claiming any interest in an estate may . . . file a pleading designated "Declaration of Contest," wherein he shall set forth his interest in the estate and the nature and basis of his objection to the document or documents offered as the will of the testator." SUPER. CT. R. 193.

[4] First names will be used when more than one named person share a common surname

[5] *See* V.I. CODE ANN. tit. 15, § 13 (1996).

[6] Before trial, during trial, and after trial, Singleton never made it clear to the Court whether she was asserting that Clemens was of unsound mind independent from alleged undue influence or whether she was arguing that Clemens was of unsound mind solely as a consequence of alleged undue influence. The Declaration of Contest as well as representation of counsel indicates the latter. However, Singleton's post-trial brief seems to indicate the former. Nevertheless, the Court recognizes that unsound mind and undue influence are two well-recognized and separate bases to contest a last will and testament. Therefore the Court will consider both.

[7] V.I. CODE ANN. tit. 15, § 2.

[8] § 7.

[9] *Estate of Savain*, 39 V.I. 91, 100 (Terr. Ct. 1998).

[10] RESTATEMENT (THIRD) OF PROPERTY § 8.1(b) (2003). "[T]he testator must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property." *Id.*

testator was of sound mind (i.e., whether these elements were absent or present) at the time of execution[11] Genova, as the Contestant, bears burden of proof...[12]

Genova offered very little evidence to support her contention that Clemens was of unsound mind when he executed the Will. With respect to this contention, the testimony was as follows: Lynette testified that Clemens had been diagnosed with diabetes and prostate cancer. She further testified that he was on painkillers, particularly morphine, during a period of time that included the execution of the Will. Mary Piper, a former co-worker of Clemens' wife, who often visited him and his wife in their final years, testified that the day after Clemens executed the Will, he denied knowing about the document when she approached and questioned him about it. Genova testified that Clemens was "weak" but admitted that Clemens recognized her as well as Lynette as his daughters. Elvis testified that Clemens returned to St. Thomas from Georgia in February 2008, approximately two months before executing the Will at which time Clemens recognized him, was happy to see his wife, and was happy to see his home. Finally, Jonathan Challenger, a church friend of Clemens, testified that he drove Clemens to the location where he executed the Will, that he witnessed the execution, and that he believed Clemens to be in his right mind.

Soundness of mind, for purposes of executing a will, requires only that the testator have the ability to form an understanding of the natural objects of his bounty and his property. The evidence presented here shows that shortly prior to execution of the Will, Clemens affirmatively recognized specific family members (e.g., his wife, daughter, and grandson) as well as specific property (his home). Furthermore, although Piper testified that Clemens was unaware of the Will the day after its execution, this testimony alone is not sufficient to support a finding that Clemens was incapable of understanding and/or desiring for the Will to dispose of his property upon his demise. Therefore, based on the Court's review and analysis of the evidence, Genova failed to prove by a preponderance of the evidence that Clemens was of unsound mind on April 14, 2008.

Undue Influence

Genova next asserts that the Will is invalid because Clemens was unduly influenced, specifically by Gloria, Elvis, Joseph and Pathrona.[13]

> "Undue influence is not a concept susceptible of unitary definition. The essence of the idea is the subversion of another person's free will in order to assent to an agreement."[14] Where a testator is improperly induced to execute an instrument, in reality, the instrument is not that of the testator as the judgment of another person has been substituted.[15] The proper inquiry for a court is "not just whether

[11] § 8.1 cmt. c.
[12] § 8.1 cmt. f.
[13] It is unclear whether Singleton asserts that each of the four individually unduly influenced Clemens to make the devises and bequeaths or whether there was a collaborative effort and/or conspiracy among the four.
[14] *Savain*, 39 V.I. at 104 (*quoting Francois v. Franvois*, 599 F.2d 1286 (3d. Cir. 1979)).
[15] *Id.* (*citing In re Estate of Caron*, Probate No. 141/77, slip op. at 22 (Terr. Ct. Apr. 28, 1986)).

> persuasion induced the transaction but whether the result was produced by the domination of the [other's] will . . . by the person exerting undue influence.[16]

Relying strictly on *Estate of Savain* and prior cases cited in that opinion, Genova argues that sufficient evidence was presented to create a rebuttable presumption that the Will was executed as a result of undue influence.

> Where the donor of a gift is aged and physically infirm and a relationship of trust and confidence existed between the donor and the donee, the gift is presumed to have been induced by fraud or undue influence and the burden shifts to the donee to show affirmatively and by clear and convincing evidence that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.[17]

The test for determining whether a confidential relationship existed is set forth in *Savain*: "the amount of time the beneficiary spent with the testat[or]; whether the beneficiary handled many of the testat[or]'s personal or business affairs; and whether the testat[or] ever sought the advice of the beneficiary."[18] The proponents of the Will have not questioned the applicability of this interpretation of the law.[19]

To determine whether a presumption of undue influence has been raised, the Court must first consider the circumstances surrounding Clemens and his relationships with those alleged to have unduly influenced him. Clemens was 86 years old when the Will was prepared and executed and was, based on the testimony of several witnesses, physically infirm. Lynette testified that Clemens had been diagnosed with diabetes and prostate cancer. She further informed the Court that he was in pain upon his return to St. Thomas, which was shortly before the preparation and execution of the Will, and took, what she believed was morphine. Piper testified that Clemens was usually asleep when she saw him and that he often didn't want to eat. Genova also testified that Clemens was weak. There was undisputed agreement that Elvis was Clemens' primary caretaker, which included tasks such as cooking for Clemens, making sure he bathed, and administering medication. Gloria also testified that Clemens executed a power of attorney approximately a week before executing the Will, which granted her certain powers to manage his affairs. Based on this evidence, Genova has raised a presumption of undue influence as to Gloria and Elvis but has failed to raise the presumption as to Joseph and Pathrona. Therefore, her claim that Joseph Pathrona unduly influenced Clemens is rejected.

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[16] *Id.* (*quoting Francois*, 599 F.2d at 1292).
[17] *Id.* (*quoting Francois*, 599 F.2d at 1292).
[18] *Id* at 106. (*citing In re Estate of Smith*, 481 N.W.2d 471, 474 (S.D. 1992); *Estate of Caron*, Probate No. 141/77).
[19] Although the proponents could have raised several issues regarding the applicability of the test applied in *Savain*, i.e. what must be demonstrated for the rebuttable presumption to arise, the effect of the beneficiaries under a will being natural objects of the testator's bounty, what constitutes a confidential relationship, as well as what the new burden of proof on the beneficiaries is to rebut the presumption, they did not. Therefore, the Court will not disturb this precedent. See RESTATEMENT (THIRD) OF PROPERTY § 8.3 comt. f, comt. g, and comt. h (2003).

Regarding Gloria and Elvis, however, the burden is on the proponents of the Will to prove by clear and convincing evidence that they did not, individually or jointly, unduly influence Clemens. The proponents have met this burden.

Although the proponents called no witnesses to testify on the issue of undue influence, there was clear and convincing evidence offered by the Contestant's witnesses that Clemens' desire was for Francine to have the house because she had no husband but did have children. This is consistent with Paragraph SECOND of the Will. There was also sufficient testimony support the finding, which the Court now makes, that Clemens independently decided to have the Will prepared and executed and that neither Gloria nor Elvis influenced this decision. Further testimony made clear that Clemens independently sought outside assistance, including from the pastor and members of his church, to recommend a disinterested attorney, to transport him to the attorney's office, and to be subscribing witnesses. Additionally, it was uncontested that while at the lawyer's office, Clemens and his wife spoke with the attorney outside of the presence of Gloria or Elvis before executing the Will. The entire process took approximately ninety (90) minutes. Finally, Erwin Peters and Jonathan Challenger, both of whom were subscribing witnesses, testified that Clemens was not being controlled by anyone. Therefore, as in *Savain*, the proponents have overcome the presumption.[20]

Conclusion

The Court finds that Will Contestant, Genova Singleton, failed to prove that Samuel Clemens was of unsound mind at the time of execution of the Will. She also failed to provide evidence to raise a presumption of undue influence as to Francine Joseph and Pathrona Clemens and then failed to prove actual undue influence. Although Singleton successfully raised a presumption of undue influence as to Gloria Nickeo and Elvis Nickeo, the presumption was rebutted through the clear and convincing testimony of the witnesses, including witnesses called by the Contestant. Accordingly, the Declaration of Will Contest will be dismissed with prejudice.

DATED: September 20, 2012

ALAN D. SMITH
Magistrate of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY: ______________________
JEWEL A. SPRAUVE
Court Clerk Supervisor 9/21/12

[20] *See Savain*, 39 V.I. at 107.