THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven, Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of Vinton Willis Tucker, Respondents.

Appellate Case No. 2016-000096

Appeal From York County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5638
Heard March 15, 2018 – Filed April 10, 2019

AFFIRMED

Syretta R. Anderson, of Anderson Law Firm, of Rock Hill, for Appellant.

B. Michael Brackett, of Moses & Brackett, PC, of Columbia, for Respondents.

MCDONALD, J: In this action challenging the validity of a will, Vinton Willis Tucker's (Decedent's) niece, Carol DeHaven, contends the circuit court erred in affirming the probate court's order granting summary judgment in favor of Ben R. Smith (Nephew) and Margaret P. Kelly (Niece) (collectively, Respondents). DeHaven argues summary judgment was improper because she presented sufficient evidence to the probate court of both undue influence and the existence

of a confidential or fiduciary relationship, thus establishing a presumption of invalidity. We affirm.

Facts and Procedural History

Respondents are the children of Decedent's sister-in-law, who was the sister of Decedent's wife, Edith Pursley Tucker (Wife). After Wife died, her family remained close to Decedent.

In November 2011, Decedent was hospitalized at Carolinas Medical Center for ten days due to "injuries in a large part of his body." According to Niece, hospital doctors indicated Decedent's injuries were inconsistent with a fall, which his caregiver, Brenda Snow, reported as the cause of his injuries. On December 13, 2011, Decedent moved to Westminster Towers in Rock Hill. When he was admitted, a social worker noted Decedent's family shared information seeking to prohibit the former caregiver, Snow, from visiting Decedent.[1]

On January 14, 2012, a physical therapist became concerned when she was unable to wake Decedent. She was eventually able to rouse him, but he was groggy. EMS transported Decedent to Piedmont Medical Center, where doctors diagnosed him with a 7.7 cm distal abdominal aneurysm.

Emergency room physician Jason Ratterree located the aneurysm and explained the condition to Decedent on the evening of January 14th. As to Decedent's mental condition, Dr. Ratterree noted Decedent was "oriented in time, place, and person. Grossly appropriate mood and affect." When asked in his deposition what this notation meant, Dr. Ratterree replied, "He was totally normal. . . . He knew where he was at that time and did not appear to be having any abnormal behavior and was conversational with me."

Niece testified in her deposition that Decedent sought to make a new will that same evening, after he learned of the aneurysm. Niece recalled Decedent took the news of the aneurysm quite seriously because he "had always been a very healthy person." After the doctor discussed the diagnosis and left the hospital room,

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[1] Niece testified that when Decedent was hospitalized in November, his doctors and nurses believed his injuries were the result of "some kind of abuse," rather than a fall. Although no charges were filed against Snow, doctors were concerned about Decedent returning to his home because they believed Snow was abusing him.

Decedent asked Niece to write a will for him and inquired whether she would "be willing to put it down on paper the way he wanted it." Niece acted as scrivener for the will, which Decedent dictated to her in the presence of two witnesses. The two witnesses confirmed that Decedent raised the subject of a new will and Niece wrote down the terms as Decedent requested and according to his instructions.

Decedent remained at Piedmont Medical Center until January 20, 2012, when he returned to Westminster Towers. On February 8, 2012, he executed a durable power of attorney for health care naming Niece as his primary decision maker. A social worker from Westminster Towers testified there had been issues with a previous healthcare power of attorney Decedent signed while hospitalized; thus, he executed the February 2012 document.

Decedent passed away on May 12, 2012. On May 17, 2012, the probate court granted Respondents' application for informal probate and appointment of personal representatives. On the application, Respondents listed the date of the execution of the will as January 14, 2012 (the Will). They listed twelve nieces and nephews, including themselves, as the Will's named devisees. A niece from Decedent's side of the family, Margaret Dudley, and two nephews, Wayne Scott and Kevin Scott, were listed in the application for informal probate as intestate heirs who were not devisees named in the Will.

On May 10, 2013, Mary Jean Tucker Swiger, Decedent's sister, petitioned the probate court for formal testacy and appointment and sought to set aside the informal probate, claiming Respondents initiated the request for informal probate with an invalid will. Swiger further asserted Respondents had exerted undue influence upon Decedent and sought removal of Respondents as co-personal representatives of Decedent's estate. In the petition, Carol DeHaven, Swiger's daughter, is listed as a successor-in-interest.

Respondents answered and counterclaimed for formal testacy and appointment based upon the terms of the Will. Respondents admitted Swiger was Decedent's sole-surviving sibling but denied that "status as a sole surviving sibling itself establishes standing."

Swiger sought a temporary order to restrain Respondents from acting as personal representatives of Decedent's estate. Swiger also requested Respondents be required to post a bond. The probate court denied Swiger's motion for a temporary restraining order but granted her motion for a restricted bank account in lieu of bond.

Respondents moved for partial summary judgment, arguing no genuine issue of material fact existed to support Swiger's claims of undue influence, fraud, or lack of jurisdiction. Respondents further asserted the Will was executed with the appropriate formalities.

At the summary judgment hearing, Respondents moved to substitute DeHaven as a petitioner in the case so the caption would read "Swiger by her attorney-in-fact Carol DeHaven" due to Swiger's mental incapacity. Petitioner consented, and the probate court granted the motion to substitute. After the probate court granted Respondents' motion for partial summary judgment, DeHaven appealed to the circuit court, which affirmed the probate court.

Respondents moved to dismiss DeHaven's appeal to this court, arguing DeHaven, acting as Swiger's attorney-in-fact, engaged in the unauthorized practice of law by filing the appeal. Respondents also claimed the notice of appeal was defective because DeHaven failed to include the probate court's order with the filing of the notice. DeHaven filed a return, asserting she had the authority to appeal on behalf of Swiger, who is now deceased,[2] as her "legal representative" because the probate court allowed her to substitute for Swiger. This court denied the motion to dismiss but ordered DeHaven to retain counsel. Counsel for DeHaven filed a notice of appearance on May 3, 2016.

On May 4, 2016, Respondents again moved to dismiss the appeal, arguing DeHaven lacked standing to prosecute the appeal because DeHaven's status as Swiger's "attorney-in-fact" terminated upon Swiger's death, and DeHaven had not provided any information indicating a personal representative had been appointed, an executor had been appointed, or a probate estate had been opened. This court denied the motion to dismiss but ruled Respondents could raise the standing issue during briefing.

Standard of Review

"An action to contest a will is an action at law, and in such cases reviewing courts will not disturb the probate court's findings of fact unless a review of the record discloses no evidence to support them." *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010).

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[2] Swiger passed away on October 6, 2015.

"In reviewing the grant of [a] summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCP." *In re Estate of Smith*, 419 S.C. 111, 116, 796 S.E.2d 158, 160 (Ct. App. 2016) (second alteration by court) (quoting *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438–39 (2003)).

> Rule 56(c) states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id. (citation omitted). "[I]n cases requiring a heightened burden of proof . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009). "Since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003).

I. Standing

Respondents argue this court lacks jurisdiction because DeHaven, who filed the notice of appeal, lacked authority or standing to prosecute the matter. We disagree.

Appeals from the probate court are governed by the South Carolina Probate Code. *See Dorn v. Cohen*, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017) (per curiam) (holding the court of appeals erred in applying the general appellate jurisdiction statute to determine the immediate appealability of an interlocutory or intermediate order because the probate code governs appeals from the probate court). The South Carolina Probate Code allows a person "interested" in a final order of a probate court, including intestate heirs, to appeal to the circuit court. *See* S.C. Code Ann. § 62-1-308(a) (Supp. 2018) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303."); S.C. Code Ann. § 62-1-201(23) (Supp. 2018) (defining "interested person" to include heirs and "persons having priority for appointment as personal representative and other fiduciaries representing interested persons"); S.C. Code Ann. § 62-1-201(20)

(Supp. 2018) ("'Heirs' means those persons . . . who are entitled under the statute of intestate succession to the property of a decedent.").

DeHaven is Decedent's niece through Swiger, his sister. Therefore, the Probate Code affords DeHaven standing in her own right to pursue this appeal because she is an intestate heir of Decedent and, therefore, an "interested person." *See* S.C. Code Ann. § 62-2-103(3) (Supp. 2018) (providing for intestate succession where there is no surviving spouse, issue, or parent "to the issue of the parents or either of them by representation"); S.C. Code Ann. § 62-2-103(4) (Supp. 2018) ("[I]f there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent. . . ."). Swiger died on October 6, 2015, after the probate court granted summary judgment. However, DeHaven was listed as a successor-in-interest in Swiger's petition to the probate court, and upon the consent motion of the parties at the summary judgment hearing, the probate court amended the case caption to list DeHaven as a party through Swiger due to Swiger's mental incapacitation. Thus, we find DeHaven has standing to pursue this appeal.

II. Undue Influence

"Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity." S.C. Code Ann. § 62-3-407 (Supp. 2018). "Undue influence must be shown by unmistakable and convincing evidence, which is usually circumstantial." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. "In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear upon the testamentary act.'" *Id.* at 219, 578 S.E.2d at 335 (quoting *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976)).

"A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 394 (Ct. App. 1999). To send the issue of undue influence to the jury, the contestant must show more than general influence—"there [must be] additional evidence that such influence was actually utilized." *Howard v. Nasser*, 364 S.C. 279, 289, 613 S.E.2d 64, 69 (Ct. App. 2005) (quoting *Mock*, 266 S.C. at 277, 222 S.E.2d at 774).

"The influence necessary to void a will must amount to force and coercion." *Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013). "The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. "In order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice." *In re Estate of Cumbee*, 333 S.C. at 671, 511 S.E.2d at 394. "If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be undue influence." *Howard*, 364 S.C. at 289, 613 S.E.2d at 69 (quoting *In re Last Will & Testament of Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985)).

"Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *In re Estate of Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (quoting *Brown v. Pearson*, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). "The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence." *Hairston*, 387 S.C. at 447, 692 S.E.2d at 553 (citation omitted). However, "although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will." *Howard*, 364 S.C. at 288, 613 S.E.2d at 68–69.

> To summarize, "[w]here the contestants introduce testimony raising a presumption of undue influence by a beneficiary sustaining a confidential or fiduciary relation toward the testator, the issue should be submitted to the jury, as where, *in addition to* the factor of confidential relations, there *also* appear the further facts of an unnatural disposition making the person charged with the undue influence chief beneficiary, and that such person generally dominated the testatrix."

Id. at 289, 613 S.E.2d at 69 (alteration by court) (quoting *Moorer v. Bull*, 212 S.C. 146, 149, 46 S.E.2d 681, 682 (1948) (emphasis added)).

Initially, we note the probate court's finding of testamentary capacity was not challenged; therefore, it is the law of the case. *See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

We acknowledge DeHaven's argument that the record contains conflicting inferences regarding Decedent's wishes, but we find such conflicting wishes related to the former caregiver, Snow—not DeHaven or Decedent's blood relatives. Decedent executed the Will on January 14, 2012. Thereafter, on February 5, 2012, Marcy Thomas, Decedent's social worker, reported:

> [Decedent] spoke at length about nieces and nephews and his will. He understands that they want to be included in his will. He said "this is why they are not in my will." He clearly stated that he "loved his 'little girl' very much and she took good care of him" and he "wanted her to have the money he designated her to have in his will." [Decedent] stated how upset he was when one nephew came and asked for his money to be divided evenly.

Thomas opined Decedent was "having a very cognitively clear afternoon" the day they had this discussion, which occurred almost three weeks after the execution of the Will. But, there is no evidence that Decedent attempted to change his will at any point after its January 14th execution, despite this cognitive clarity. Therefore, we find the circuit court correctly affirmed the probate court's grant of summary judgment because DeHaven failed to provide more than a scintilla of evidence to establish undue influence was exerted upon Decedent *when he executed the Will*. *See Russell*, 353 S.C. at 219, 578 S.E.2d at 335 ("In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear upon the testamentary act.'" (alteration by court) (quoting *Mock*, 266 S.C. at 277, 222 S.E.2d at 774)).

Decedent had numerous nieces and nephews—those on his wife's side of the family, who are devisees under the Will, and those on his side, whom he chose not to include. In their interrogatory responses, Respondents claimed Decedent did not even want his side of the family to be notified of his death. Although this conversation did not identify which specific nieces and nephews Decedent sought

to exclude, other evidence in the record established Respondents were not among the disinherited group of relatives from Decedent's own side of the family.

Nephew believed any statement by Decedent that he wanted to give his money to "his little girl," likely referred to Snow, the former caregiver. Niece knew Snow was included in Decedent's prior will and stated Decedent told her he wanted to "look after" Snow. However, Nephew testified Decedent's attorney told Nephew to destroy the prior will due to the conflict of interest presented by Snow's involvement and her influence over Decedent, along with the abuse concerns raised upon Decedent's admission to Carolinas Medical Center.

The only evidence DeHaven provided to suggest the words in the Will were not Decedent's own was the testimony of Dr. James Jewell, a physician at Decedent's nursing home who indicated he would "be surprised that given the situation . . . that these words would be [Decedent's]." He clarified, "It would depend on the person themselves, whether they were legalese oriented in that way. I'm not saying that they wouldn't necessarily understand what was here." Dr. Jewell admitted he did not remember Decedent well and had visited Decedent only two or three times. Dr. Jewell further testified it was unlikely he had formally assessed Decedent's mental status.

Significantly, DeHaven did not set forth any evidence that Respondents restricted visitation with respect to her side of the family. The evidence in the record reflects Respondents sought only to prohibit Snow from visiting Decedent, and there is no evidence that Snow ever attempted to visit or contact Decedent while he lived at Westminster Towers. *Contra In re Estate of Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (noting the record contained evidence of undue influence where although testator had access to visitors, her son admitted he monitored her conversations with her other son via a baby monitor and testator created hand signals to communicate with her visitors); *Byrd v. Byrd*, 279 S.C. 425, 429, 308 S.E.2d 788, 790 (1983) (finding evidence of undue influence where "[t]here was also evidence of a purpose and design . . . to restrict the visits and to prevent communications between the testator and his children prior to and following the date of the execution of the will"). DeHaven provided no proof of actual restricted visitation nor evidence to establish how any alleged restricted visitation could have influenced Decedent's execution of the Will.

Similarly, there is scant evidence in the record suggesting family members from DeHaven's side of the family ever attempted to visit Decedent during any alleged

restrictive period. For example, in their interrogatory responses, Respondents explained:

> When [Decedent] received notice from Margaret Dudley [, Decedent's niece on his side of the family,] that she and others were planning to visit during their travel to Florida, [Decedent] requested that he not be left alone with them because they were only interested in his money. He stated that these relatives only visited with him in years past so that they would have a free place to stay when they went to Florida.

The record contains no indication as to when (if ever) any unsuccessful attempted visit took place. Even when viewed in the light most favorable to DeHaven, this interrogatory response constitutes, at most, a mere scintilla of evidence of restricted visitation—and suggests Decedent himself sought the restriction. This is insufficient for a claim of undue influence to survive a properly supported summary judgment motion. *See Russell*, 353 S.C. at 218, 578 S.E.2d at 334 (recognizing a party arguing undue influence must provide more than a scintilla of evidence to survive a summary judgment motion).

Viewing the evidence in the light most favorable to DeHaven, a confidential or fiduciary relationship did exist between Decedent and Respondents because Niece held Decedent's healthcare power of attorney and Nephew held Decedent's power of attorney. *See M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." (quoting *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004))); *In re Estate of Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (finding son had a fiduciary relationship with his mother, the testator, because he had her power of attorney and managed all of her finances, including keeping her checkbook).[3]

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[3] Respondents assert Dehaven's argument as to the rebuttable presumption presented by a "confidential or fiduciary relationship" is unpreserved. We find the question is preserved because the probate court's order addressed the undue influence argument at length, noting Decedent never expressed concerns to the disinterested third parties to whom he had unfettered access "about Respondents' treatment of him or about the powers of attorney he executed naming Respondents as his agents." Further, the probate court addressed the question of rebuttable

However, sufficient evidence exists to rebut any presumption of undue influence created by the existence of these fiduciary relationships. Nephew was not present when the Will was dictated and drafted, and the healthcare power of attorney naming Niece is dated February 8, 2012—three weeks after the execution of the Will. A social worker from Westminster Towers met with Decedent frequently, without family members present, and Decedent could have shared any concerns with her during their discussions. In fact, Decedent told the social worker on January 3, 2012, less than two weeks before the execution of the Will, that although he and his family disagreed about whether he should return home, he knew his family wanted to help him. Finally, while it appears Respondents were involved in determining Decedent's living arrangements, there is no evidence in the record that the powers of attorney were ever otherwise utilized. *See In re Estate of Anderson*, 381 S.C. 568, 575, 674 S.E.2d 176, 180 (Ct. App. 2009) (finding no undue influence existed when grandsons had a fiduciary relationship with testator by way of power of attorney but there was no evidence the powers of attorney were utilized). Even if Respondents had some influence over Decedent's disposition of his estate, such influence did not amount to undue influence because Decedent had the testamentary capacity to dispose of his estate, and DeHaven failed to provide sufficient evidence that Decedent's will was in any way restrained or overcome. *See Howard*, 364 S.C. at 289, 613 S.E.2d at 69 ("If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be undue influence." (quoting *In re Last Will & Testament of Smoak*, 286 S.C. at 424, 334 S.E.2d at 809)).

Conclusion

Based on the foregoing, the summary judgment orders of the probate court and circuit court are

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

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presumptions in the context of undue influence as well as the unwillingness of courts to "impose upon beneficiaries who occupy such a position of trust the burden of proving an absence of improper influence . . . ."