

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2017-ES-32-0286
2018-CP-32-0315

IN RE: The Estate of Leroy Fulmer

Mattie Lou Fulmer,
Plaintiff,

vs.

Elizabeth S. Gainey, as PR, Elizabeth S.
Gainey, Individually, and Dennis C. Gainey

Defendants.

ORDER

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SC Court of Appeals

INTRODUCTION

This matter comes before the court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on Mattie Lou Fulmer's (Plaintiff) and Elizabeth S. Gainey's (Defendant) Motions for Reconsideration, filed on November 25 and 26, 2019, respectively. Plaintiff filed her Motion to Reconsider based on the court granting Defendant's Motions for Summary Judgment as to the Elective Share and Exempt Property. Defendant filed her Motion to Reconsider based on the Court omitting a ruling as to Mr. Fulmer's Unhampered Chance to Revoke his Will and Deed, and the Court's denial of Summary Judgment as to Undue Influence and the establishment of the Defendant's fiduciary relationship with Mr. Fulmer. The Motions were filed as a result of this court's Order Granting Summary Judgment in part and Denying Summary Judgment in part, filed on November 14, 2019. After review of the documents on file and the arguments made by counsel, the Court denies both parties' Motions for Reconsideration.

ANALYSIS

A) Plaintiff's Motions

1) *Elective Share and Exempt Property*

Plaintiff argues that the Personal Representative for Mr. Fulmer's estate received all the pleadings either through the PR or through the PR's attorney by the statutory date. The court has reconsidered this matter, but does not find any issue of law or fact that was overlooked or not addressed. The motion to alter or amend as to these points is denied.

B) Defendant's Motions

1) *Unhampered Chance to Revoke or Repudiate*

The court omitted ruling on this argument in its Order dated November 14, 2019. Defendant argues that Mr. Fulmer had an unhampered chance to revoke or change his will and repudiate his deed once he entered White Oak Manor on January 5, 2017, and therefore any alleged undue influence is destroyed. In support of this argument, Defendant cited to deposition testimony from Dr. Michael Bernardo, Henrietta Gill, and Gina Tuten. Defendant specifically cites to these depositions for the purpose of establishing that Mr. Fulmer was competent and had an unhampered chance to revoke and repudiate his will and deed, both executed on October 14, 2016. The court finds this is an additional issue of fact for the fact finder at trial and accordingly denies Defendant's Motion for Reconsideration as to this ground.

Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333–34 (2003). The analysis of a will or a deed to determine whether undue

influence existed during either's execution should not be changed based on the discrepancy between the classifications of the two documents. Dixon v. Dixon, 362 S.C. 388, 398 n.7, 608 S.E.2d 849, 854, n.7 (2005).

While not exhaustive, the Russell court set out circumstances in which a testator could be considered competent to revoke a will. Although the testator in Russell was deemed to have had an unhampered opportunity to revoke his will, the court finds Russell to be distinguishable from the facts at hand. The testator in Russell, for three years following the execution of his will, was mentally competent enough to work until the day of his death; drive himself to work every day; frequently attend social engagements with family and colleagues; and meet with his attorney on numerous occasions, where he signed a will, codicils, and trust documents. *Id.* In the instant case, Mr. Fulmer's latest will and deed were executed on October 14, 2016. Just over two (2) months later, Mr. Fulmer began his stay with White Oak Manor. Dr. Bernardo Depo. Pg. 11-12. Prior to the execution of his latest will and deed, Mr. Fulmer was admitted into Hospice Care, only after his family could no longer continue caring for him. *Id.*

While there is testimonial evidence supporting the Defendant's argument that Mr. Fulmer could have revoked his will and repudiated his deed, the court finds more than a scintilla of evidence exists creating a factual dispute as to Mr. Fulmer's ability to revoke his will or repudiate his deed which creates an issue to be decided by a jury and precludes the court from granting Defendant's Motion for Summary Judgment on this matter.

2) *As to the Remaining Grounds of Defendant's Motion to Reconsider*

The court has reconsidered these matters, but does not find any issue of law or fact that was overlooked or not addressed. The motion to alter or amend as to these points is denied.

CONCLUSION

For the foregoing reasons, the court DENIES both the Plaintiff's and Defendant's Motions to Reconsider.

IT IS SO ORDERED.

[ELECTRONIC SIGNATURE PAGE TO FOLLOW]



Lexington Common Pleas

Case Caption: Leroy Fulmer , plaintiff, et al VS Elizabeth S Gainey , defendant, et al

Case Number: 2018CP3200315

Type: Order/Amend

So Ordered

s/Walton J. McLeod, 2765