

Monday, September 26th, 2016
11:00 a.m. to 1:00 p.m.
(Belo Mansion)

In the Matter of the Estate of Frederic B. Asche, Jr., Deceased Cause No. 05-15-00102-CV
Fifth District Court of Appeals

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The Facts

In 1977, Frederic Asche, Jr. (“Tex”) married Sarah Asche (“Sallie”). The couple did not have any children of their own, but Tex had five children from previous marriages. In 1995, Tex executed a will that gave Sallie the right to his estate during her lifetime. On September 26, 1997, Tex suffered a stroke, causing permanent paralysis on his right side among other impairments.

In 1998, shortly after his stroke, Tex met with his attorney, Rust Reid, to review and update his will. Sallie was not present during the meeting. Reid documented all of his encounters with Tex including his meeting with Tex, a follow-up conversation with Tex, and the execution ceremony for the 1998 will. The new will gave Sallie Tex’s estate outright, meaning all of his property would transfer directly to Sallie upon his death.

Tex received a second opinion on the 1998 will from his neighbor, Don Godwin, who was an estate planner. Tex told Godwin that he did not want to make any provision for his children because he believed they were adequately provided for. In June 1998, Tex signed the will drafted by Godwin, which also left his estate outright to Sallie.

In 2004, Tex met with Tim Tehan, an estate planning attorney, to review his 1998 will. Sallie was not present during the meeting. Tex told Tehan that he thought his children were adequately provided for, so he wanted to leave his estate to Sallie. In 2005, Tex executed a will drafted by Tehan that gave Sallie the right to his estate outright if she survived him.

On October 6, 2011, Tex passed away, and his entire estate transferred to Sallie. In the spring of 2012, shortly after Tex’s death, Sallie passed away from leukemia. Sallie left her estate, including the estate she inherited from Tex, to Baylor Hospital to fund bone marrow transplants for indigent patients. She did not leave anything to Tex’s five children.

The Trial Court Proceeding

Tex’s children—Fritz Asche, Vale Asche Elkins, Craig Asche, Lisa Mittnacht, and Rick Asche—filed a lawsuit to set aside their father’s will. Texas Capital Bank, the executor of Tex’s estate, sought to enforce Tex’s 2005 will. Mary Susan Barnhill, the executor of Sallie’s estate, sought to preserve the right of Sallie’s estate to receive Tex’s estate under the 2005 will. Baylor intervened and joined the lawsuit. A party can intervene in a lawsuit when the party has an interest that would be affected by the lawsuit. Baylor has an interest in the lawsuit because Sallie left her estate to Baylor.

The children argued that their father lacked capacity to update his will following his stroke. The children also argued that Sallie unduly influenced Tex to change his will. The children relied in part on the expert testimony of Dr. Lisa Clayton. Dr. Clayton testified that Tex lacked capacity to change his will every day following his stroke in 1997. At trial, Baylor and the executors of Tex’s and Sallie’s estates moved to strike Dr. Clayton’s testimony, but the trial court denied the motion.

The children also sued to invalidate Management Trust, a trust that Tex had created. Texas Capital Bank is the trustee for Management Trust. Texas Capital Bank argued that the court did not have jurisdiction over the trust because Texas Capital Bank was not properly served in its capacity as the trustee of Management Trust.

In a 5-1 decision, the Jury found that Tex lacked capacity and that Sallie unduly influenced Tex to change his will. Baylor and the executors of Tex's and Sallie's estates filed a motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict asks the trial judge to overrule a jury's verdict. The trial judge overruled part of the jury's verdict and ordered that Tex's 1995 will be entered into probate. Probate is the judicial procedure that establishes a document as a valid will.

The Appeal

The executor of Tex's estate, the executor of Sallie's estate, and Baylor ("Appellants") filed their notice of appeal. In their brief, the appellants argue that the trial court erred in finding that Tex lacked capacity and was unduly influenced to sign the will documents. They claim that the trial court erred in admitting Dr. Lisa Clayton's testimony, and that a new trial is required because of jury misconduct. They also argue that the trial court lacked jurisdiction over the case, which would mean that the court could not enter a valid ruling.

Tex's children ("Appellees") also filed a notice of appeal. In their brief, the children argue that the trial court erred in granting appellants' motion for judgment notwithstanding the verdict.

The Attorneys

Each party is represented by experienced attorneys. The attorneys prepared briefs and will present the parties' arguments to the appellate court. Baylor is represented on appeal by Raymond LaDriere, II, Eric Hansen, Nina Cortell, and Ben Mesches. Texas Capital Bank is represented on appeal by Eric Gambrell and Richard Cella. Tex's children are represented by Jim Hartnett, Jr., Will Hartnett, Fred Hartnett, Kevin Spencer, and Zachary Johnson.

The Oral Argument

The Fifth District Court of Appeals will hear this appeal on September 26, 2016, at the Belo Mansion in Dallas. The Appellants and the Appellees will each have twenty minutes to address the court. During this time, the attorneys will present their arguments, and the judges will ask questions regarding the case and applicable law. The Appellants' lawyers will argue first, followed by the Appellee's lawyers. Once the the Appellee's lawyers have concluded, the Appellants' lawyers will have five more minutes for a final rebuttal argument.

Fifth District Court of Appeals

The Fifth District Court of Appeals is an intermediary court, which hears both civil and criminal cases and has jurisdiction over appeals from both district and county courts located in Dallas, Collin, Grayson, Hunt, Rockwall, and Kaufman Counties. The court consists of a chief justice and twelve other judges, all of whom are elected and hold their offices for terms of four

years. Ordinarily, three judges will preside over oral arguments. After an oral argument, the judges will review the briefs and the trial court record. After they have fully considered the case, the three judges will vote and decide the outcome of the case. For a panel of three to reach a final decision, two of the three judges must agree. Decisions issued by the Fifth District Court of Appeals can be appealed to either the Texas Supreme Court, which hears only civil cases, or the Texas Court of Criminal Appeals, which hears only criminal cases. To learn more about the Fifth District Court of Appeals, visit <http://www.5thcoa.courts.state.tx.us/>.

The Legal Standard

The Fifth District Court of Appeals reviews decisions of trial courts, but it does not preside over trials. No new witnesses or evidence are introduced during an appeal because the appellate court's role is to review the trial court's decision.

- When determining whether the evidence is legally sufficient to support the jury verdict, the appellate court asks whether the evidence would allow a reasonable juror to make the finding. The appellate court also weighs all of the evidence to determine whether the jury verdict is clearly wrong and unjust.
- When determining whether the trial court erroneously admitted evidence, the appellate court determines whether the trial court abused its discretion. The trial court abused its discretion if the admission of the evidence probably caused an improper judgment.
- When determining whether a new trial is required because of juror misconduct, the appellate court determines whether the conduct was material and probably resulted in legal injury to the complaining party.
- When determining whether the trial court erred in granting a party's motion for judgment notwithstanding the verdict, the appellate court will affirm the trial court if no evidence supports the jury's finding or if the evidence establishes the issue as a matter of law. An issue is a matter of law if it involves the courts inquiry into the law that applies to the case.

The Disputed Issues

Is the evidence sufficient to show that Tex lacked capacity to execute the will?

A testator is a person who leaves a will when he or she dies. A testator has mental capacity to execute a will when he understands that he is making a will, the effect of making a will, and the nature and extent of his property. A testator must know his next of kin, the individuals that he would most likely leave his estate to (usually spouse or children), and the claims upon them. A testator must have sufficient memory to understand the elements of the business transacted and remember the elements long enough to form a reasonable judgment about them.

When determining whether a testator lacked capacity to execute a will, the main issue is whether the testator had capacity on the specific day the will was executed. Evidence of the testator's state of mind on other days can be used to show the testator's state of mind on the date of execution, but the evidence must show that a condition affecting capacity was persistent and likely present on the date the will was executed.

Appellants argue that no evidence supports the jury's findings that Tex lacked capacity on the dates of execution. They argue that the only evidence of Tex's capacity on the dates of execution came from Tex's lawyers, who each confirmed that Tex fully understood his choice to leave his estate to Sallie. They also argue that Tex's children relied only on evidence of Tex's capacity from other dates, but did not prove that Tex had a persistent condition affecting his capacity that was likely present on the date the will was executed.

Is the evidence sufficient to show that Tex signed the will documents as a result of undue influence?

In order to win on the undue influence claim, the children were required to prove each of the following elements: (1) the existence and exertion of an influence in the execution of a will; (2) the influence effectively weakened or overpowered the mind of the testator at the time of the will's execution; and (3) the testator would not have executed the will but for that influence.

The children must have provided some concrete and satisfactory proof for each of the three elements. The exertion of an influence cannot be inferred from opportunity alone. A testator's weakened physical and mental condition is not evidence that an influence exists; it only indicates the testator's susceptibility to an influence. A will is considered unduly influenced if it expresses the wishes of the one exerting the influence rather than the wishes of the testator.

First, Appellants argue that there is no evidence that Sallie exerted an influence in the making of Tex's will. They contend that Sallie was not present for the execution of the wills, and neither the video nor any other evidence reveals any inappropriate control or influence exerted by Sallie.

Second, Appellants argue that no evidence exists that any claimed influence weakened or overpowered Tex at the time of the will's execution because the children only showed that Tex was susceptible to an influence. Appellants contend that the children failed to show that Tex was overpowered by the influence.

Third, Appellants argue that no evidence exists to show that Tex would not have executed the wills but for Sallie's influence. They contend that the evidence shows that it was Tex's decision to leave his estate to Sallie outright, and Tex signed the testamentary documents that he personally directed his lawyers to prepare.

Did the trial court err in admitting Dr. Lisa Clayton's testimony?

Appellants argue that Dr. Lisa Clayton's testimony was improperly admitted for two reasons. First, Appellants argue that Dr. Clayton's testimony was inadmissible because there is an analytical gap between Tex's medical records and Dr. Clayton's opinions. According to Appellants, Dr. Clayton did not explain the methodology or procedures that she used in order to form her opinions. Appellants claim that an objective methodology is required in order for expert testimony to be admitted into evidence.

Appellants also claim that the medical records do not provide support for Dr. Clayton's opinions. Dr. Clayton's testimony focused on a Tex's 2008 CT scan. Dr. Clayton testified that there was a "fist-size" hole in Tex's brain. Dr. Clayton testified that the damage to Tex's brain

was similar to dementia. However, Appellants contend that the CT scan report only mentions a “small” lesion and does not mention anything about lack of capacity. Appellants also emphasize that Dr. Clayton conceded that her dementia diagnosis did not necessitate a finding of lack of capacity.

Is a new trial required because of juror misconduct?

The trial court denied Appellants motion for a new trial. Appellants are entitled to a new trial if they can prove (1) jury misconduct occurred, (2) the juror misconduct was material, and (3) the jury misconduct probably caused injury.

Appellants claim that juror misconduct occurred because one of the childrens’ lawyers sent a LinkedIn invitation to one of the jurors during the trial. Jurors are required to report any misconduct to the judge. The juror who received the invitation did not disclose the invitation to the court.

Appellants claim that the misconduct was material. Appellants argue that favors have a tendency to create a sense of obligation in jurors’ minds. The juror confessed that he believed that the connection on LinkedIn would be helpful to his business. The perception that his business would be more successful due to the LinkedIn connection could have led the juror to feel an obligation to the childrens’ lawyer.

Appellants claim that the misconduct probably caused injury because the juror’s vote was the deciding vote. In other words, without his vote, the jury could not have returned a verdict in favor of the children.

Did the trial court lack jurisdiction because the trustee was not made a party to the suit?

Jurisdiction is the court’s authority over the parties of a lawsuit. In order for a court to have jurisdiction over a trust, the trustee must be made a party to the lawsuit. The children sued to invalidate Management Trust, a trust that Tex created. Texas Capital Bank is the trustee for Management Trust. Appellants claim that the trial court did not have jurisdiction over the trust because Texas Capital Bank was not properly served in its capacity as the trustee of Management Trust.

Did the trial court err in granting Appellants’ motion for judgment notwithstanding the verdict?

Five formalities must be met in order for a court to enter a will into probate. The formalities are: (1) the will must be in writing; (2) Tex must have signed the will in person; (3) Tex must have been eighteen years of age or older when the will was signed; (4) the will must be attested to by two or more creditable witnesses above the age of 14 who signed their name in the presence of Tex; and (5) Tex must have signed the with the intent to transfer his property after death.

The children argue that the trial court erred by granting Appellants’ motion for judgment notwithstanding the verdict because the evidence did not establish as a matter of law that the 1995 will was executed with the formalities required by law.

There are two different ways to admit a will to probate. The will can contain a self-proving affidavit, or testimony can be presented in court to probate the will. Tex's will did not have a self-proving affidavit, so testimony was required to probate the will. Courts require that the testimony that is presented in court prove that the will was executed with the proper formalities.

The will that was submitted to the court for probate was a blank copy. Rust Reid testified about the will. Reid's name was listed as a witness in the blank copy of the will, but Reid did not remember any details of the execution of the will. The children claim that Reid's testimony was not enough to prove as a matter of law that the will satisfied all of the formalities required to probate a will.

The Decision and the Opinions

After the attorneys present their oral arguments, the Fifth District Court of Appeals may take several weeks or months to decide the appeal. The Fifth District Court of Appeals decision and any opinion written by the judges will be made available for review at <http://www.dallasbar.org/appealing>. In addition, the opinions can be viewed at <http://www.search.txcourts.gov/Case.aspx?cn=05-15-00232-CR&coa=coa05>