

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

OPHELIA EVERETT	:	APPEAL NO. C-0601072
	:	TRIAL NO. 2005002414
and	:	
VIRGINIA ROBINSON,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
	:	
THOMAS C. KILCOYNE, EXECUTOR	:	
OF THE ESTATE OF EDWARD T.	:	
HAYES,	:	
	:	
JERROLD POPE,	:	
and	:	
JANE POPE,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In this will contest, plaintiffs-appellants Ophelia Everett and Virginia Robinson (“the contestants”) appeal from the summary judgment entered by the Probate Division of the Hamilton County Common Pleas Court in favor of defendant-appellee Jerrold Pope. Edward Hayes’s will was admitted to probate, and the sole beneficiary of his \$262,675 estate was Jerrold Pope. Jerrold Pope was the son of Hayes’s long-time companion, Jane Pope. Hayes executed two wills, in 1987 and then in 2003, both naming his “friend” Jerrold Pope as the beneficiary. Hayes and Jerrold Pope were

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

OHIO FIRST DISTRICT COURT OF APPEALS

unrelated. The only difference between the 2003 will and 1987 will was that the 1987 will named a different executor. Finally, Hayes also purchased a life insurance policy that named his “family friend” Jerrold Pope as beneficiary.

The contestants are maternal cousins of Edward Hayes, and they sought to invalidate the will by alleging that Hayes (1) lacked testamentary capacity, (2) was unduly influenced by Jane Pope, (3) was fraudulently induced into signing the will, and (4) mistakenly believed that Jerrold Pope was his son. In granting summary judgment in Hayes’s favor, the trial court focused on the lack of evidence that Hayes believed Jerrold Pope to be his biological child. On appeal, the contestants’ contentions amount to one assignment of error: that the probate court erred in granting summary judgment in Jerrold’s favor because genuine issues of material fact remained for trial.

A summary-judgment decision is reviewed de novo.² And when evaluating a decision granting summary judgment, we construe the evidence in a light most favorable to the nonmoving party, in this case the contestants.³

Here Pope was entitled to summary judgment if (1) there was no genuine issue of material fact; (2) he was entitled to judgment as a matter of law; and (3) it appeared that reasonable minds could come to but one conclusion when viewing the evidence in the contestants’ favor, and that conclusion was adverse to them.⁴

The summary-judgment standard placed the burden on Pope as the moving party to identify “those portions of the record that demonstrate[d] the absence of a genuine issue of material fact on the essential elements of [the contestants’] claims.”⁵ Once the moving party discharges that burden, the nonmoving party then has “a

² See *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 546, 2004-Ohio-3130, 812 N.E.2d 976, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

³ See *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

⁴ See *Hollingsworth*, supra, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

⁵ See *id.*, quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264; see, also, Civ.R. 56(C).

OHIO FIRST DISTRICT COURT OF APPEALS

reciprocal burden to set forth specific facts by the means listed in Civ.R. 56(E) to show that a triable issue of fact exists.”⁶

We initially note that a will must be in writing, signed at the end by the testator, and attested and subscribed in the presence of the testator by two or more competent witnesses who saw the testator subscribe or heard him acknowledge his signature.⁷ A will that has been admitted to probate is prima facie valid.⁸ Contestants have the burden to offer evidence suggesting that genuine issues of material fact exist regarding fraud and undue influence.⁹ The burden of proof in a will contest is on the contestants, who must produce evidence that provides a reasonable basis for sustaining their claim.¹⁰

To support a claim for undue influence, a contestant must establish (1) a susceptible testator, (2) the opportunity for another to exert the influence, (3) the fact of influence, and (4) the improper result of such influence.¹¹ General influence, however strong or controlling, is not undue influence unless it is brought to bear directly upon the act of making the will. If the will or codicil, as finally executed, expresses the will, wishes, and desires of the testator, the will is not void because of undue influence.¹² “The fact that the will of the testator of admitted testamentary capacity disposes of his property in an unnatural manner, unjustly, or unequally, and however much at variance with expressions by the testator concerning relatives or the natural objects of his bounty, does not invalidate the will, unless undue influence was actually exercised on the testator.”¹³

⁶ See *id.*, quoting *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.3d 45, 47, 517 N.E.2d 904.

⁷ R.C. 2107.03.

⁸ See *Doyle v. Schott* (1989), 65 Ohio App.3d 92, 582 N.E.2d 1057; R.C. 2107.74.

⁹ *Id.*

¹⁰ See *Gannett v. Booher*, 12 Ohio App.3d 49, 55, 465 N.E.2d 1326.

¹¹ See *Doyle v. Schott*, 65 Ohio App.3d at 95-96, citing *West v. Henry* (1962), 173 Ohio St. 498, 184 N.E.2d 200.

¹² *West*, *supra*.

¹³ *Id.*

In this case, the contestants assert that an inference of undue influence could have been reasonably and lawfully drawn because Hayes was exposed to Jane Pope for at least 40 years; their relationship was more than platonic; and Jane Pope had the opportunity to exert her influence over Hayes. In support of this argument, contestants cite the testimony of Ken McCullars and Laura Maull.

McCullars and Hayes were members of the Gothic Lodge, a branch of the Masons. The lodge maintains a charity fund, which provides a monetary benefit to a designated third party when a member dies. McCullars testified that, over 20 years earlier, Hayes had told him that the beneficiary would be Jerrold Pope and that Jerrold Pope was his son. On the beneficiary-designation form, McCullars placed an “s” in parentheses after Pope’s name, and McCullars testified that he believed that the “s” was a mark that could have reflected a statement by Hayes that Pope was his son.

Laura Maull was a long-time companion of Hayes. Their romantic involvement fluctuated over various periods of time and in varying levels of intimacy until about 1985. Maull testified that Hayes had always spoken of Jerrold Pope as his son. The trial court concluded, based on this testimony, that a reasonable mind could not conclude that Hayes had actually believed that Jerrold Pope was his son—particularly in light of the references in the wills and in the life-insurance policy to Jerrold Pope being his “friend.”

After reviewing the evidence, we conclude that the contestants failed to present sufficient evidence to prove a claim of fraud or undue influence. “In our society, it is a fundamental right of every individual to be able to dispose of his property, in accordance with the law, as he deems desirable.”¹⁴ In this instance the evidence produced was simply insufficient to support a reasonable inference of fraud or undue influence, or to

¹⁴ *Kata v. Second Natl Bank* (1971), 26 Ohio St.2d 210, 216, 271 N.E.2d 292.

OHIO FIRST DISTRICT COURT OF APPEALS

rebut the presumption of validity that arose from the will being admitted to probate. To hold otherwise would work a disservice on Hayes's compliance with the formalities of R.C. 2107.03: "[A] will must comply with [the formalities of R.C. 2107.03.] That section requires that, in order to be valid and effective, a will must comply with certain definite formalities. The reason for such formalities is to prevent the diversion of a decedent's estate from those who would take it under the statutes of descent and distribution except in instances where the decedent has clearly and deliberately expressed an intention to so divert it."¹⁵

Here the evidence presented by the contestants was insufficient to reasonably defeat the intent of Hayes as expressed in his last will and testament. And because neither fraud nor undue influence could be inferred from the facts and evidence, the entry of summary judgment by the probate court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 5, 2007
per order of the Court _____
Presiding Judge

¹⁵ See *Sherman v. Johnson* (1953), 159 Ohio St. 209, 222, 112 N.E.2d 326.