Rel: February 26, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190203

Lawrence Stephen Taylor

v.

Charles R. Hanks

Appeal from Mobile Probate Court
(18-2279)

PER CURIAM.

Lawrence Stephen Taylor appeals from a summary judgment entered in favor of Charles R. Hanks in Taylor's will contest. Taylor

challenged the will of his father, Billy Lee Hite, alleging, among other things, that Hite had lacked testamentary capacity when he made the will, which did not mention Taylor. Because we conclude that a genuine issue of material fact exists regarding whether Hite had testamentary capacity, we reverse and remand.

The evidence, viewed in the light most favorable to Taylor, the summary-judgment nonmovant, see Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So. 2d 359 (Ala. 1993), reveals the following facts. Taylor's mother and Hite dated in the 1950s, but they never married. Taylor was born in 1959. At some point, Hite married another woman, and they had a son who predeceased Hite. In the early 1990s, Taylor's mother told him that Hite was his father. In 1996, Hite acknowledged that Taylor was his son. However, Taylor testified that he did not communicate with Hite between 1998 and his death in 2018.

On August 25, 2018, Hite suffered a stroke and was admitted to a hospital, from which he was later discharged. On September 14, 2018, Hite suffered another stroke. On that date, Hite was again admitted to the hospital, where he stayed for 12 days. As will be discussed in more

detail below, Hite was prescribed many medications during his hospital stay, including narcotic pain medications.

On September 18, 2018, four days after his second stroke, Hite met with an attorney in Hite's hospital room to discuss the preparation of his will. At that time, Hite told his attorney that he had no children. Two days later, the attorney returned to Hite's hospital room with a will for Hite to execute. Hite, whose dominant hand had been weakened by the stroke, signed the will by marking his name with an "X." The will named Hanks, Hite's neighbor and friend, as the executor of Hite's estate. The will made various bequests and left nearly half the estate to Hanks. Taylor was not mentioned in the will. Instead, Hite stated in the will: "I have no children." Hite died about a month later, on October 18, 2018, at the age of 88.

Hanks filed a petition to probate Hite's will in the Mobile Probate Court. Taylor subsequently contested the will in the probate court, alleging, in pertinent part, that Hite had lacked the capacity to make the will. In the alternative, Taylor filed a claim seeking to be treated as a pretermitted child under § 43-8-91(b), Ala. Code 1975, alleging that Hite

had omitted Taylor from the will because Hite believed Taylor was dead. Hanks moved for a summary judgment on the will-contest claim, submitting, among other things, testimony from Hite's attorney and Hanks indicating that Hite had testamentary capacity at the time he executed his will. Hanks responded to the summary-judgment motion, arguing, among other things, that the misstatement in the will that Hite had no children and Hite's medical records created a factual issue regarding Hite's testamentary capacity. The probate court subsequently entered a summary judgment in favor of Hanks on the will-contest claim, and Taylor appealed to this Court. However, Taylor's alternative claim seeking to be treated as a pretermitted child remained pending in the probate court. Therefore, this Court issued an order to the probate court, noting that the appeal appeared to be taken from a nonfinal, nonappealable order and asking the probate court to address that issue. The probate court subsequently certified the summary judgment as final, and thus appealable, under Rule 54(b), Ala. R. Civ. P. See Committee Comments on 1973 Adoption of Rule 54.

> "In reviewing the disposition of a motion for summary judgment, 'we utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact,' Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988), and whether the movant was 'entitled to a judgment as a matter of law.' Wright v. Wright, 654 So. 2d 542 (Ala. 1995); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' Wright, 654 So. 2d at 543 (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So. 2d 359 (Ala. 1993); Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990)."

Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997). Further, in a summary-judgment case, a court "'"will accord the nonmoving party all reasonable favorable inferences from the evidence."'" Ex parte Blunt, 303 So. 3d 125, 131 (Ala. 2019) (quoting Ex parte Turner, 840 So. 2d 132, 135 (Ala. 2002), quoting in turn Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000)).

Taylor argues that the record on appeal contains substantial evidence demonstrating that Hite lacked the capacity to make his will. Thus, Taylor argues that a genuine issue of material fact exists regarding whether Hite had testamentary capacity and, therefore, that the probate court erred in entering a summary judgment on Taylor's will-contest claim. Conversely, Hanks argues that the record does not contain substantial evidence demonstrating that Hite lacked testamentary capacity.

To make a valid will, a testator must have testamentary capacity. Fletcher v. DeLoach, 360 So. 2d 316, 318 (Ala. 1978). That is, a testator must possess

> " 'mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty [(, i.e., to whom she is bequeathing the property)], and the disposition which she wished to make -- to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other....' "

Id. (quoting Knox v. Knox, 95 Ala. 495, 503, 11 So. 125, 128 (1892)). " 'Simply stated, if the testator knows his estate and to whom he wishes to give his property and understands that he is executing a will, he has

testamentary capacity.' " Ex parte Helms, 873 So. 2d 1139, 1147 (Ala. 2003) (quoting Smith v. Vice, 641 So. 2d 785, 786 (Ala. 1994)).

There is a presumption that every person has the capacity to make a will, and a contestant has the burden to prove the lack of testamentary capacity. Pirtle v. Tucker, 960 So. 2d 620, 633 (Ala. 2006). Determining whether a testator had testamentary capacity requires a "broad evidentiary inquiry." Allen v. Sconyers, 669 So. 2d 113, 117 (Ala. 1995). Evidence relevant to that inquiry includes evidence of " 'the mental and physical condition of the testat[or], either before or immediately after execution of the will' " and evidence of the testator's " ' "conversations, deportment, acts, and appearance." ' " Allen, 669 So. 2d at 118 (quoting Fletcher, 360 So. 2d at 318).

Taylor argues that he presented substantial evidence indicating that Hite lacked testamentary capacity when he made his will. Taylor primarily relies on Hite's statement made in the will itself that he had no children. In fact, Taylor is Hite's son, Hite acknowledged Taylor as his son in 1996, and there is no evidence indicating that, before preparing his will, Hite ever repudiated that acknowledgment. Taylor argues that

Hite's incorrect statement in his will that he had no children is substantial evidence creating a genuine issue of material fact regarding Hite's testamentary capacity. In making that argument, Taylor relies on Horton v. Rasberry, 852 So. 2d 155 (Ala. Civ. App. 2002).

In Horton, contestants challenged a testator's will, arguing that the testator lacked testamentary capacity when she made her will. The contestants argued that the testator did not know the objects of her bounty, and the contestants supported their argument solely by noting that the testator had incorrectly stated in her will that she had five children when she actually had six children. The trial court entered a summary judgment against the contestants, but the Court of Civil Appeals reversed the judgment. The court in Horton explained:

> "The question presented is whether the record contains 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgement [could] reasonably infer' (West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)) that at the time she executed her will, [the testator] did not have 'mind and memory sufficient to recall ... the objects of her bounty.' Fletcher [v. DeLoach], 360 So. 2d [316,] 318 [(Ala. 1978)]. [The personal representative of the testator's estate] contends that the contestants, in fact, introduced no evidence indicating that [the testator] was

> unaware of the objects of her bounty. We disagree. In this case, the terms of the will itself provide such evidence.
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> " '....'
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> "...[T]he instrument itself may express the delusion that prevents the testator from having testamentary capacity. ... [The testator's] erroneous declaration as to the number of children she had and who they are goes directly to the issue whether [she] knew the objects of her bounty at the time she executed the will. Accordingly, we conclude that the summary judgment in this case was inappropriate.
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> "We emphasize that this is not a case in which a testator merely elects to leave nothing to a child. In Smith v. Vice, 641 So. 2d 785 (Ala. 1994), for example, the Supreme Court concluded that, in light of the testatrix's perception of her daughter's actions in swearing out a warrant for the testatrix's arrest, the fact that the will left nothing to the daughter did not indicate a lack of testamentary capacity. We note, however, that in Smith, unlike the present case, there is no indication that the testatrix actually affirmatively misstated in her will the number of children she had, or who they were. In other words, there was no evidence, as there is in this case, indicating that the testatrix was not even aware of one of the objects of her bounty. See also Kramer v. Weinert, 81 Ala. 414, 417, 1 So. 26, 27 (1887) ('The failure of memory, unless it be entire, or extend to the immediate family and property of the deceased testator, or [be such] that [the testator] is unable to recall and retain the constituents of the business sufficiently long for its completion, is not of itself a legal standard of testamentary capacity.' (Emphasis added.))."

Horton, 852 So. 2d at 158.

Like in Horton, in this case Hite affirmatively misstated in his will that he had no children. As Horton indicates, that misstatement suggests that Hite might not have fully known the objects of his bounty when he made his will. However, unlike in Horton, in which there was no indication that the testator was estranged from any of her children, here there is evidence indicating that Hite and Taylor were estranged. Hite acknowledged that Taylor was his son in 1996, when Taylor was in his mid 30s, but Taylor testified that he did not communicate with Hite from 1998 until his death in 2018. Given those particular facts, it is possible that Hite's lengthy lack of a relationship with Taylor led Hite to state in his will that he simply had no children. However, given all the unique facts of this case -- including the relevant medical evidence -- that is not the only conclusion that could be drawn.

As Taylor notes, Hite suffered two strokes resulting in his hospitalization shortly before making his will. On the day of the second stroke, September 14, 2018, Hite was admitted to the hospital, complaining of weakness and difficulty speaking. However, Hite's medical records indicate that he also was suffering from abdominal pain associated

with a gastrointestinal bleed, and "acute pain" was listed as one of Hite's "active problem[s]." Numerous medications were ordered for Hite, including two narcotic pain medications, Norco (hydrocodone-acetaminophen) and morphine. Medical records from September 14 indicate that the Norco was prescribed to be taken orally every four hours as needed for pain and that the morphine was prescribed to be administered every four hours intravenously as needed for severe pain.

Taylor argues that Hite was under the influence of the narcotic pain medications when he made his will in the hospital and that this is relevant in determining whether he lacked testamentary capacity. Hanks contends that there is no evidence indicating that Hite was actually taking the narcotic pain medications when he met with his attorney on September 18 to discuss making the will or on September 20 when Hite executed the will. However, considering the entirety of the medical records, a fact-finder could reasonably conclude that Hite took narcotic pain medication during that period. Early in the morning of September 17, three days after Hite had entered the hospital, his status changed. An examining doctor concluded that Hite "had a high probability of imminent

or life-threatening deterioration" relating to his gastrointestinal bleed, and Hite was transferred to the intensive-care unit. At the time, Hite also complained of substernal chest pain, which the medical records indicate may have been attributable to "acute blood loss anemia." Under Hite's "progress notes" entered at 10:51 p.m. on September 17, several medications are listed, including Norco and morphine. That entry indicates that the Norco was to be taken orally every four hours and that the morphine was to administered intravenously every four hours; however, unlike two earlier entries in the medical records regarding those two narcotic pain medications, there was no notation indicating that they were to be taken "as needed."

The following day, September 18, Hite met with his attorney to begin preparing his will, and Hite executed his will on September 20. Although the medical records are unclear on this point, they do offer some evidence indicating that Hite was taking narcotic pain medications during his hospital stay, during which he was experiencing pain and which followed two recent strokes. The use of narcotic pain medications might have influenced Hite's mental state. We emphasize that the medical

evidence must be viewed in the context of Hite's affirmative misstatement to his attorney and in his will that he did not have any children. Considering all the unique evidence in this case, viewing that evidence in the light most favorable to Taylor as the nonmovant, and resolving all reasonable doubts against Hanks as the movant, as we must, Hobson, supra, we conclude that there is a genuine issue of material fact regarding whether Hite had testamentary capacity. Accordingly, we reverse the summary judgment entered in favor of Hanks on Taylor's will-contest claim.

Taylor also argues that the summary judgment erroneously awarded costs to Hanks under § 43-8-196, Ala. Code 1975. That Code section provides, in part, that "[t]he costs of any [will] contest under the provisions of this article[, i.e., Article 7 of the Probate Code,] must be paid by the party contesting if he fails." However, the summary judgment did not actually award costs; rather, the summary judgment stated that, pursuant to § 43-8-196, costs "will be taxed" against Taylor and that the probate court "retains jurisdiction" to consider a later award of those costs. Similarly, the probate court's subsequent order certifying the

summary judgment as a final judgment under Rule 54(b) also stated that costs would be taxed later. The record does not contain an order entered by the probate court actually awarding costs under § 43-8-196. Thus, there is no order awarding costs for us to review. However, insofar as the summary judgment stated that costs would be assessed against Taylor under § 43-8-196, that statement is legally unsupported at this time given that we are reversing the summary judgment and that § 43-8-196 provides that a will contestant is liable for the costs of the contest only if the contest "fails."

Based on the foregoing, we reverse the summary judgment and remand the case for further proceedings.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs in the result.

MITCHELL, Justice (concurring in the result).

I agree with the majority that there is a genuine issue of material fact about whether Billy Lee Hite possessed testamentary capacity at the time he executed his will. But I don't believe we should consider the evidence that Hite was prescribed hydrocodone-acetaminophen and morphine in the period leading up to his execution of that will because there is no accompanying evidence in the record indicating how, if at all, those medications affected his capacity.

Maxwell v. Dawkins, 974 So. 2d 282 (Ala. 2006), is instructive. In Maxwell, there was evidence that a testator regularly took multiple medications. Despite that evidence, this Court held that there was no genuine issue of material fact about the testator's capacity because, among other things, there was no accompanying evidence that those medications "affected [the testator's] mental acuity in any way."[1] Id. at 287.

[1]It was alleged in Maxwell that the testator regularly took medications including Xanax, Percocet, morphine, and Oxycontin. 974 So. 2d at 286-87.

The record in this case is similarly devoid of evidence indicating how Hite was affected by the medications he had been prescribed. While the record contains warning labels for both hydrocodone-acetaminophen and morphine indicating that those medications "may impair" the mental and physical abilities of individuals who take them, there is no evidence that Hite was in fact affected in that manner. And it is improper to "indulge in speculation" as to the mere possibility that he might have been. Ex parte Travis, 414 So. 2d 956, 961 (Ala. 1982); see also Schaaf v. Astrue, 602 F.3d 869, 876 (7th Cir. 2010) (explaining that it would "be speculation to assume that [the appellant] automatically suffers from [common] side effects" of the prescription medication he had been taking).

There is a presumption under our law that every person has the capacity to make a will, see Pirtle v. Tucker, 960 So. 2d 620, 633 (Ala. 2006) -- and I do not believe this presumption can be overcome by evidence that the testator was taking medication unless there is also evidence showing specifically how that medication negatively affected the testator. To allow otherwise impermissibly vaults speculation to the level of substantial evidence.

Nevertheless, I am persuaded by the rationale of Horton v. Rasberry, 852 So. 2d 155 (Ala. Civ. App. 2002), and believe it provides a sufficient basis by itself to reverse the summary judgment entered in favor of Charles R. Hanks. In Horton, the Court of Civil Appeals held that a testator's erroneous declaration of the number of children she had was sufficient to establish a genuine issue of material fact about her testamentary capacity. 852 So. 2d at 158. Here, the record contains evidence that Hite knew and acknowledged that Lawrence Stephen Taylor was his son, yet affirmatively stated both to his attorney and in his will that he "ha[d] no children." Applying Horton to these facts, Taylor has presented substantial evidence necessary to overcome summary judgment. I therefore concur in the result reached by the majority opinion.