763 So.2d 482

Bruce HENDERSHAW, David Heudershaw, and Dereck Hendershaw, Appellants,
v.
The ESTATE OF David C. HENDERSHAW, Deceased, Appellee.

No. 4D99-1458.

District Court of Appeal of Florida, Fourth District.

July 5, 2000.

Rehearing Denied August 9, 2000.

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[763 So.2d 483]

Richard A. Kupfer of Richard A. Kupfer, P.A., West Palm Beach, for appellants.

Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., Palm Beach Gardens, and Michael Jeffries of Neill, Griffin, Jeffries, Fowler, Tierney & Neill, Fort Pierce, for Appellee-Doris M. Hendershaw.

SHAHOOD, J.

This is a will contest in which the decedent's three sons ("appellants") sought to invalidate their father's will which disinherits them and leaves his entire $1.6 million estate to his third wife ("appellee"). Following a hearing at which the appellants attempted to establish that the decedent lacked testamentary capacity due to a declining mental state, the trial court entered an order admitting the will to probate, and making the following findings:

> The opponents of the will have made a strong showing questioning the capacity of the decedent to make a will on the day the will in this case was signed. If the evidence of incapacity were strong enough to shift the burden of proof to the proponents of the will, the Court would find that the proponents had not met that burden because they have been unable to establish by greater weight of the evidence that on the day the will was executed, the decedent was lucid enough to demonstrate a general understanding of the extent of his estate. However, the opponents are unable to cite to the Court any caselaw that supports the position that the burdeu of proof should shift or that the presumption of capacity vanishes. Because it appears the presumption of capacity is not a burstiug bubble presumption, the Court feels compelled to uphold the will.

We affirm the result reached in this case, not because the presumption of capacity is not a bursting bubble presumption, but because the appellants did uot meet their burden of proving lack of testamentary capacity. *See generally Dade County School Bd. v. Radio Station WQBA,* 731 So.2d 638 (Fla.1999)(even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling).

The burden of invalidating a will because of lack of testamentary capacity is a heavy one and must be sustained by a preponderance of the evidence. *Estate of Bailey,* 122 So.2d 243, 245 (Fla. 2d DCA 1960); *see also In re Donnelly's Estate,* 137 Fla. 459, 188 So. 108 (1938)(It is well established that a last will and testament shall be held valid whenever possible). Testamentary capacity is

determined only by the testator's mental capacity at the time he executed his will. *Estate of Bailey,* 122 So.2d at 245. "`[S]ound mind' means the ability of the testator `to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed.'" *Id.* (citations omitted). The probate court's findings in a will contest shall not be overturned where there is substantial competent evidence to support those findings, unless the probate judge has misapprehended the evidence as a whole. *Id.* at 247; *see also Estate of Parson,* 416 So.2d 513 (Fla. 4th DCA 1982)(The findings of the trial court are to be presumed correct and are to be given the same weight as a jury verdict).

In their briefs on appeal, the parties argue whether the presumption of testamentary capacity is a vanishing or "bursting-bubble" presumption. We do not

[763 So.2d 484]

reach that issue because, based on the court's findings that appellants did not initially meet their heavy burden of proving that the decedent lacked testamentary capacity on the day the will was executed, any discussion of whether the presumption is rebuttable is irrelevant.

Although there was some testimony that on some day in 1986 the decedent would not have been competent to make a will, there was no testimony that in December 1987, when the will was actually executed, the decedent lacked such a capacity. In fact, while there was no evidence to show that the decedent was not lucid, there was some evidence to show that he was lucid on that day. Based on the evidence, the trial court correctly found that while appellants made a "strong showing questioning the capacity of the decedent," they did not establish lack of testamentary capacity by a preponderance of the evidence. We, therefore affirm the trial court's order admitting the will to probate.

AFFIRMED.

DELL and FARMER, JJ., concur.

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66 So.2d 465
40 A.L.R.2d 1399
In re WILMOTT'S ESTATE.
Supreme Court of Florida, Division A.
June 5, 1953.
Rehearing Denied July 3, 1953.

Header ends here. Alex Akerman, Jr., Orlando, and J. B. Hodges, Lake City, for appellant.

Fishback, Williams & Smith, Orlando, for appellee.

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SEBRING, Justice.

Frederick W. Wilmott died on November 30, 1949. Among his papers and effects were a will dated October 28, 1948, a codicil dated October 29, 1948, a second codicil dated April 27, 1949, a will dated June 24, 1949, and an instrument dated June 29, 1949, which purported to be a republication of the will executed on October 28, 1948.

After his death a petition was filed in the County Judge's Court of Orange County by certain of the devisees under the wills praying for the probate of the republication instrument dated June 29, 1949. William Wilmott, an adopted son of the decedent, filed objections to the probate of this instrument, and all other testamentary instruments found at the death of the decedent, on the ground that at the time of their execution the decedent lacked testamentary capacity.

The county judge, on November 6, 1951, entered an order denying the petition for the probate of the republication instrument dated June 29, 1949, and granting leave to the petitioners to file a petition for the probate of the will dated October 28, 1948, and the codicil dated October 29, 1948. The basis of this ruling was the finding of the county judge that the decedent had not possessed testamentary capacity from April 27, 1949, to June 29, 1949, inclusive.

The practical effect of this ruling was to render invalid the instrument dated June 29, 1949, which on its face reinstated the will of October 28, 1948, and also to render invalid the will dated June 24, 1949, and the second codicil to the will executed in October 1948.

After the entry of this order the petitioners filed their petition praying that the 1948 will and codicil be admitted to probate and letters testamentary be issued thereon. William Wilmott, the adopted son, filed an answer contesting this proceeding on the ground that at the time the proffered instruments were executed the decedent was mentally incapable of makiug a will, and furthermore that the instruments were executed as the result of the undue influence of the petitioners.

On December 20, 1951, the county judge entered an order allowing the probate of the 1948 will and the codicil. The basis of this order was the finding by the county judge that the testator possessed testamentary capacity at the time he executed the instruments, and that no undue influence had been exercised by anyone in bringing about their execution.

At a later date, the county judge entered an order denying the application of the adopted son for the allowance of costs and an attorney's fee to his attorney in connection with the contest of the purported republication dated June 29, 1949.

An appeal was taken to the Circuit Court of Orange County from all of these orders.

At final hearing, the circuit court ruled that the order of the county judge denying the probate of the republication instrument dated June 29, 1949, and admitting the 1948 will and codicil to probate, should be affirmed;

that the order with reference to the application for the allowance of attorney's fees and costs should be affirmed insofar as it disallowed an attorney's fee to the protestant, and that the order should be reversed as to the disallowance of costs.

The whole matter is now before this Court on an appeal taken from the order entered by the Circuit Court of Orauge County.

The first question with which we shall deal arises from the adjudication in the decree that the decedent was legally capable of making the will and codicil executed in October 1948. The appellant maintains that inasmuch as the finding of the county judge was that the decedent was incapable of making a will during the period extending from April 27, 1949, to June 29, 1949, the finding should have been that the decedent was likewise incompetent in October of 1948, there being no showing that his condition had changed materially from October 1948 until April of 1949, and there being a substantial showing that the probable incompetency was as early as October of 1946.

While it is true that the decedent was not in good health during 1948 and

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that his condition worsened to such an extent that on April 27, 1949, he was, as found by the county judge, 'so sick in body and mind that he did not possess the testamentary capacity required by law to execute' a will, it does not necessarily follow from this that he was not competent to execute a will on October 28, 1948, the day he executed the instrument that was later admitted to probate. Whether he was or was not lacking in testamentary capacity upon that day was a pure question of fact to be determined by the county judge.

The rule governing appeals in respect to such determinations is that the circuit court, on consideration of the evidence, should not reverse an order of the county judge sitting in probate unless it is made to appear that the county judge wholly misapprehended the legal effect of the evidence as an entirety, or made a finding when there was no legal substantial evidence to support it. In re Thompson's Estate, 145 Fla. 42, 199 So. 352.

In the case at bar there was substantial evidence to support the finding of the county judge. Upon a review of the order entered by the county judge the circuit court found that while during his long illness 'large quantities of narcotics were administered to [the decedent] and upon many occasions he was under the influence of same so that he was incompetent to make a will, [nevertheless] when he was out from the effect of the drug he was rational and capable of transacting business. There is no showing that at the time of executing the October 28th will or the October 29th codicil he was under the influence of narcotic or otherwise, but on the contrary [there are] facts showing that his mind was clear; that he understood about his property and the disposition he was making of same. The order must be affirmed.'

We agree with the conclusion reached by the circuit court in its order. The making of a will does not depend upon a sound body but upon a sound mind. By 'sound mind' is meant the ability of the testator 'to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed.' Newman v. Smith, 77 Fla. 633, 82 So. 236, 241; Hamilton v. Morgan, 93 Fla. 311, 112 So. 80; Marston v. Churchill, 137 Fla. 154, 187 So. 762; Miller v. Flowers, 158 Fla. 51, 27 So.2d 667; Neal v. Harrington, 159 Fla. 381, 31 So.2d 391. A sick person may make a valid will in his last illness or even when in a dying condition. 'And, unless the surrounding circumstances are such as to show that not

only was the testator afflicted with an impairment of his senses, such as would ordinarily be occasioned by diseases * * * but is, by reason of the effect of disease on his mind, also unable to comprehend and understand the nature of the undertaking in which he is engaged when he attempts to make his will, it cannot be said as a matter of law that testamentary capacity is shown to be so lacking as to render a will made during one's affliction and last illness invalid for want of sufficient testamentary capacity. If the testamentary requisites are found, the will may be valid, although executed by one of great age, whose mind is enfeebled, whose body is debilitated, whose memory is failing or whose judgment is vacillating, especially where the will appears to have been fairly made, is not an unnatural one, and apparently was made under conditions not inconsistent with the inference that it emanated from a free mind.' Smith v. Clements, 114 Fla. 614, 154 So. 520.

The appellant attaches great significance to the evidence which establishes the fact that during the course of his illness narcotics were administered to the decedent and that on the day of the execution of the will an inordinate quantity was delivered to his home. We have given due consideration to this in the light of the whole evidence and are not shaken in our conclusion that the circuit court ruled correctly in affirming that portion of the county judge's order dealing with the question of testamentary capacity. For the law is plain that the fact that one is a user of narcotics does not necessarily deprive him of testamentary capacity. Fernstrom v. Taylor,

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107 Fla. 490, 145 So. 208. He may be an addict and yet have the capacity which the law requires for making a will, if, in spite of the use of narcotics, he has sufficient mind and memory to understand the nature and extent of his property, the proper objects of his bounty and the nature of his testamentary act. Indeed, it is possible that a testator may have testamentary capacity even though it is proven that he was somewhat under the influence of drugs at the time he executes a will. The same is true where the ravages of disease combine with the effects of drugs. In such situations, as in all others, the qnestion to be determined is solely that of the mental capacity of the testator at the time he executes the instrument. Page on Wills, 2nd ed., Vol. 1, section 159.

A second question raised by the appellant is as to the finding of the county judge that no undue influence was exercised in procuring the execntion of the will that was admitted to probate. We conclude, upon a consideration of the whole evidence, that the circuit court did not err when it affirmed the county judge on this issue. A third question raised by the appellant is in respect to the ruling of the county judge that the appellant was not entitled to an attorney's fee to be paid out of the assets of the estate for services rendered by his attorneys in the republication proceedings.

In support of his contention that the county judge erred in disallowing an attorney's fee, the appellant takes the following position: In the 1948 will only the two petitioners, sisters of decedent, were named as residuary legatees, while under the terms of the 1949 will not only the petitioners but also one Lillie Mae Sharpe, an adopted daughter of the decedent, would have been entitled to share in the residuum. In the 1948 will one Bessie Sweat was devised two certain lots of real property that were owned by the decedent, while under the terms of the second codicil to the 1948 will, which was dated April 27, 1949, one of these lots was devised to one Edith Dillingham. Due to his efforts in the proceeding instituted to probate the republication instrument dated June 29, 1949, this instrument, as well as the will executed on June 24, 1949, and the second codicil to the 1948 will, dated April 27, 1949, were denied probate because of the lack of

testamentary capacity of the decedent to execute the instruments. By reason of his efforts in this behalf, the appellant benefited the estate by preventing an illegal distribution of the assets under these invalid instruments, thereby assuring to Bessie Sweat two lots of real property instead of one, and also increasing the shares of the petitioners, who were residuary legatees under the 1948 will, from one-third of the residuum of the estate to one-half.

In opposition to this contention the appellees assert that in all the testamentary instruments that were before the county judge for adjudication, the provision made for the appellant was precisely the same, namely, a specific bequest for the sum of one-dollar. The contest made by the appellant in respect to these instruments was not induced by any desire on his part to benefit the estate and the lawful heneficiaries thereof, but was solely for the purpose of destroying all instruments executed by the decedent so as to create a condition of intestacy by virtue of which the appellant would profit handsomely under the statute of descent and distribution.

The appellees assert, further, that the appellant 'is not correct in assuming that he has benefited the estate by increasing the share of proponents from 1/3 to 1/2, because neither contestant or proponents ever took the position that the will of June 24, 1949, was a valid last will and testament * * * and that if said will had been declared by the court of his own motion to be the last will and testament of Frederick W. Wilmott such decision would have been made by the court based on the testimony and not at the urging of either proponent or contestant. * * *'

Finally, the appellees assert that if there had been no contest, 'the republication of the October 28, 1948, will with the codicil of October 29, 1948, and the codicil of April 27, 1949, would have been the effective last will and testament. The attack on the republication by the contestant resulted in canceling only the codicil of April 27, 1949,' which did nothing more

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than change the ownership of one lot of land valued at $1,400 from Bessie Sweat to Edith Dillingham. Under these circumstances--so the appellees assert--the appellant should not be entitled to an attorney's fee out of the estate, because the cost thereof will have to be borne 'by the residuary legatees from whom William Wilmott, by his contesting of the will, sought [unsuccessfully] to take everything.'

The issue is whether upon the facts shown by the record the services of counsel for appellant in this litigation have been of benefit to the estate so as to entitle him to an attorney's fee out of the estate under the terms of section 734.01(2), Florida Statutes 1951, F.S.A., which provides:

'Any attorney who has rendered services to an estate or the personal representative may apply to the court by petition for an order making an allowance for attorney's fees, and, after notice to persons adversely affected, the court shall make such order with respect thereto as shall be proper.'

In connection with our consideration of section 734.01(2), it should be noticed that section 732.14(3) provides a different standard for allowance of fees to counsel for personal representatives who are proponents of a will, then does section 734.01(2). The decisions under this section, which apply the test of prima facie justification or good faith, are therefore not controlling in the present situation. Compare Watts v. Newport, 151 Fla. 209, 9 So.2d 417, and In re Graham Estate, 156 Fla. 421, 23 So.2d 485.

The facts of the case under consideration present a question somewhat different from any so far ruled upon in Florida, and the authorities in other states are in conflict on the point. See anno. 10 A.L.R. 805, 69 A.L.R.

possible obstacle in the path of the 1948 will whenever the latter was offered probate as an original instrument; and finally, the second codicil to the 1948 will, dated April 27, 1949, which changed the terms of the 1948 will in at least one particular. It is merely a coincidence that under the terms of the prior will and codicil finally established, after intervening instruments had been set aside, the distribution of the assets of the estate will be similar in most particulars to what the distribution would have been under the invalid republication instrument, and that appellant will receive no greater share than that which he would have received had he remained silent.

The services of counsel in preventing distribution under invalid instruments must be held to confer a benefit upon the estate, and under the terms of section 734.01(2), Florida Statutes 1951, F.S.A., attorneys' fees should be allowed. Upon the same principles, reasonable costs are also allowable under section 732.14(1). Compare Lewis v. Gaillard, supra.

From the couclusions reached it follows that the judgment appealed from must be affirmed in part and reversed in part, with directions that the circuit court enter an order commanding the connty judge to fix and allow reasonable attorneys' fees to counsel for the contestant in accordance with this opinion, and that costs be allowed in accordance with law.

It is so ordered.

ROBERTS, C. J., and TERRELL and MATHEWS, JJ., concur.

72 So.2d 34
Supreme Court of Florida, Special Division A.

HOUSE OF LYONS, Inc. et al.
v.
MARCUS.

April 13, 1954.

Suit to foreclose a chattel mortgage on corporation's property, wherein mortgagee alleged that Comptroller had caused levy to be made upon mortgaged chattels under warrant for delinquent sales taxes. The Circuit Court, Dade County, Marsball C. Wiseheart, J., denied Comptroller's motion to dismiss and entered a final decree for mortgagee, and Comptroller appealed. The Supreme Court, Sebring, J., held that where signers of chattel mortgage encumbering corporation's chattels designated themselves as officers, and notary who took acknowledgment identified named persons as those who signed instrument, and certificate of acknowledgement stated that such persons acknowledged that they executed instrument for the purposes therein named, certificate met statutory requirement that instrument be acknowledged by party executing same.

Decree affirmed.

West Headnotes (5)

[1] **Mortgages**
Record of Defective Instruments or Instruments Not Entitled to Record
266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k166 Notice of Mortgage Affecting Priority
266k171 Record of Mortgage as Notice
266k171(4) Record of Defective Instruments or Instruments Not Entitled to Record
A transcription of a mortgage upon the record, without proper proof of the execution of the instrument, is a mere nullity.

Cases that cite this headnote

[2] **Acknowledgment**
Errors and Defects in Certificate
12 Acknowledgment
12II Taking and Certificate
12k40 Errors and Defects in Certificate
12k41 In General
The whole of the instrument acknowledged may be resorted to for support of the acknowledgment. F.S.A. §§ 695.03, 698.02.

1 Cases that cite this headnote

[3] **Acknowledgment**
Errors and Defects in Certificate
12 Acknowledgment
12II Taking and Certificate
12k40 Errors and Defects in Certificate
12k41 In General
It is the established policy of the law to uphold certificates of acknowledgment, and, wherever substance is found, obvious clerical errors and all technical omissions will be disregarded, and inartificialness in execution will not be permitted to defeat them, if, looking at them as a whole, either alone or in connection with the instrument, they reasonably and fairly indicate a compliance with the law. F.S.A. §§ 695.03, 698.02.

5 Cases that cite this headnote

[4] **Acknowledgment**
Errors and Defects in Certificate
12 Acknowledgment
12II Taking and Certificate
12k40 Errors and Defects in Certificate
12k41 In General
Clerical errors will not be permitted to defeat acknowledgments when they, considered either alone or in connection with the instrument acknowledged, and viewed in the light of the controlling statute, fairly show a substantial compliance with the statute. F.S.A. §§ 695.03, 698.02.

3 Cases that cite this headnote

[5] **Acknowledgment**
Persons Who May Make Acknowledgment
12 Acknowledgment
12II Taking and Certificate

12k11 Persons Who May Make Acknowledgment
Where signers of chattel mortgage encumbering corporation's chattels designated themselves as officers, and notary who took acknowledgment identified named persons as those who signed instrument, and certificate of acknowledgment stated that named persons acknowledged that they executed instrument for the purpose therein named, certificate met statutory requirement that instrument be acknowledged by party executing same. F.S.A. §§ 695.03, 698.02.

1 Cases that cite this headnote

Attorneys and Law Firms

*35 Richard W. Ervin, Atty. Gen., John C. Reed, Sp. Asst. Atty. Gen., and W. R. Culbreath, Asst. Atty. Gen., for appellants.

Gilbert A. Frank, Miami Beach, for appellee.

Opinion

SEBRING, Justice.

Alexander J. Marcus, the owner and holder of a chattel mortgage executed by House of Lyons, Inc., a corporation, filed a suit to foreclose the mortgage, alleging in his complaint that the instrument had heen duly recorded in the public records of Dade County, and that subsequent to the date of recordation the Comptroller of the State of Florida had filed a warrant for delinquent sales taxes against the mortgagor corporation, House of Lyons, Inc., and had caused the Sheriff of Dade County to levy upon the personal property covered by the mortgage.

By a motion to dismiss, the Comptroller raised the question of whether or not the chattel mortgage in question had been properly acknowledged so as to entitle it to recordation and thereby give it priority over the tax lien filed at a later date. The trial court denied the motion to dismiss and entered a final decree in favor of the plaintiff.

The only question on the appeal is whether the lien of the mortgage is superior to the tax lien by reason of its prior recordation.

Section 698.02, Florida Statutes 1951, F.S.A., provides in substance, that in order for a chattel mortgage to be entitled to record 'its execution must be acknowledged or proved in the manner provided for mortgages of real property.' The controlling statute in respect to the acknowledgment of mortgages of real property prescribes, so far as material to this case, that 'the execution thereof must be acknowledged by the party executing the same * * *.' Section 695.03, Florida Statutes 1951, F.S.A.

In the case at bar the chattel mortgage was executed on a blank-form for mortgage in the following form:
'House of Lyons, Inc.

'By: /s/ Carrie Lyons,

President (L.S.)

'/s/ Seymour M. Levin,

Secretary (L.S.)'

And the material portion of the notary's certificate of acknowledgment recites 'Personally appeared before me Carrie Lyons & Seymour Levin to me well known as the person described in and who executed the foregoing instrument and acknowledged that they executed the same for the purpose therein expressed * * *.'

[1] It is the settled rule that 'A transcription of a mortgage upon the record, without proper proof of the execution of the instrument, is a mere nullity'. McKeown v. Collins, 38 Fla. 276, 21 So. 103. See also Edwards v. Thom, 25 Fla. 222, 5 So. 707; Keech v. Enriquez, 28 Fla. 597, 10 So. 91; Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201. Consequently, the only problem in the instant case is that of determining whether the acknowledgment by the corporate mortgagor can be considered 'proper proof of the execution of the instrument,' or whether it must be held to be fatally defective.

[2] [3] [4] We find no case directly on point in this jurisdiction. The decisions of the subject in other jurisdictions have been predicated, in many instances, upon specific statutory provisions prescribing the form of certificate to be used, particularly as to corporate acknowledgments. Under such statutory provisions, the courts have made it clear that before an instrument will be entitled to record there must be a substantial compliance with the statutory requirements as

to disclosure of official title, authority to act, and the like, in the certificate of acknowledgment. Annotation 29 A.L.R. at p. 989, and 25 A.L.R.2d p. 1154. However, by the rule in effect in Florida, the whole of the instrument acknowledged may be resorted to for support of the acknowledgment. As pointed out in *36 Summer v. Mitchell, 29 Fla. 179, 10 So. 562, 14 L.R.A. 815, 'It is the established policy of the law to uphold certificates of acknowledgment * * * and, wherever substance is found, obvious clerical errors and all technical omissions will be disregarded. Inartificialness in their execution will not be permitted to defeat them, if looking at them as a whole, either alone or in connection with the [instrument], we find that they reasonably and fairly indicate a compliance with the law. Clerical errors will not be permitted to defeat acknowledgments when they, considered either alone or in connection with the instrument acknowledged, and viewed in the light of the statute controlling them, fairly show a substantial compliance with the statute.' Rule approved in Cleland v. Long, 34 Fla. 353, 16 So. 272; Jackson v. Haisley, 35 Fla. 587, 17 So. 631; Platt v. Rowand, 54 Fla. 237, 45 So. 32; Investment Co. v. Trueman, 63 Fla. 184, 57 So. 663; Robinson v. Bruner, 94 Fla. 797, 114 So. 556; Peninsular Naval Stores Co. v. Mathers, 96 Fla. 620, 119 So. 333; Harris v. Zeuch, 103 Fla. 183, 137 So. 135.

[5] Under this principle, it appears to us that the certificate on the mortgage involved in this case meets the simple requirement of section 695.03, Florida Statutes 1951, F.S.A., that the instrument be 'acknowledged by the party executing the same'-in this case, House of Lyons, Inc. The notary who took the acknowledgment identified the named individuals as the persons 'described in and who executed the foregoing instrument.' In the instrument the named individuals are described as president and secretary, respectively, of the corporate mortgagor. In the acknowledgment the named individuals further acknowledged that they executed the instrument 'for the purpose therein expressed,' and the purpose expressed in the mortgage is that certain specifically described personal assets of the corporate mortgagor shall be bound as security for the payment of an acknowledged debt of the corporate mortgagor, the instrument being executed for the corporate mortgagor, House of Lyons, Inc., 'By' the officers specified.

An Ohio court, in disposing of a case involving a very similar acknowledgment, had this to say: 'It is claimed that such an acknowledgment is defective and fails to comply with the statute. It seems to us that the acknowledgment should be read and construed in conjunction with the contents of the entire instrument. The instrument discloses that it is the lease of the corporation signed by the officers of the corporation leasing property of the corporation to the defendant. How can it be said that these officers acknowledged the instrument in any other capacity than as officers of the corporation? No one would contend that these officers * * * could be personally held under this instrument. Under no circumstances could it be claimed that they or any one connected with the transaction intended any individual obligation. There is abundant and respectable authority to uphold the sufficiency of this acknowledgment in the authorities cites by counsel for plaintiff. 29 A.L.R., Annotated, p. 996 et seq.' Anthony Carlin Co. v. Burrows Bros. Co., 54 Ohio App. 202, 6 N.E.2d 761, 763. Accord Tenney v. East Warren Lumber Co., 43 N.H. 343.

Similarly, in Muller v. Boone, 63 Tex. 91, it was held that an acknowledgment by an individual that he executed a deed 'for the purposes * * * therein contained' was equivalent to an acknowledgment that the execution was the act of the corporation, where the deed purported on its face to be the act of the corporation. See also cases cited in 29 A.L.R. at p. 996 for the proposition that 'by the weight of authority, a certificate will be upheld, even though it recites that the one who executed the instrument for the corporation acknowledged it to be 'his' act and deed, instead of that of the corporation, where it is clear from a consideration of the certificate with the instrument that it was the intent to acknowledge for the corporation.'

From the conclusions reached it follows that the decree appealed from should be affirmed.

It is so ordered.

ROBERTS, C. J., TERRELL, J., and ROGERS, Associate Justice, concur.

All Citations

72 So.2d 34

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206 N.C.App. 67
Court of Appeals of North Carolina.

In the Matter of the WILL
OF Lewis Manly DURHAM.

No. COA09–274. | Aug. 3, 2010.

Synopsis

Background: After executors presented will for admission to probate, grandson filed petition seeking to have letters testamentary issued to executors revoked, and executors filed motion for sanctions. Grandson later filed a caveat to purported will alleging it was invalid, and the parties stipulated that the revocation petition should be dismissed as moot. Grandson thereafter filed motion for sanctions against executors due to their failure to withdraw their sanctions motion. The Superior Court, Chatham County, Donald W. Stephens, J., granted executors' motion for sanctions and denied grandson's motion, and the Court, Carl R. Fox, J., entered summary judgment for executors. Grandson appealed.

Holdings: The Court of Appeals, Ervin, J., held that:

[1] appeal from sanctions order was untimely;

[2] Court would treat appeal as petition for certiorari review;

[3] Rule 11 applied to trial court proceeding;

[4] petition to revoke testamentary letters was not well grounded in law;

[5] failure of notary's affidavit to address whether testator was personally known or produced "satisfactory evidence" of identity did not create a genuine issue of material fact as to whether will was validly executed; and

[6] will was not the product of undue influence.

Affirmed.

West Headnotes (35)

[1] **Costs**
Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

1 Cases that cite this headnote

[2] **Costs**
Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
In analyzing whether the filing meets the factual certification requirement of Rule 11, the court must make the following determinations: (1) whether the party undertook a reasonable inquiry into the facts and (2) whether the party, after reviewing the results of his inquiry, reasonably believed that his position was well-grounded in fact. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

2 Cases that cite this headnote

[3] **Costs**
Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
Whether a document complies with the legal sufficiency prong of Rule 11 is determined as of the time it was signed. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[4] **Costs**
⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

To satisfy the legal sufficiency requirement of Rule 11, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. Rules Civ.Proc., Rule 11(a), West's N.C.G.S.A. § 1A–1.

2 Cases that cite this headnote

[5] **Costs**
⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

The improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

1 Cases that cite this headnote

[6] **Costs**
⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

An "improper purpose," for Rule 11 purposes, is any purpose other than one to vindicate rights or to put claims of right to a proper test. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[7] **Costs**
⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

Even if a paper is well grounded in fact and in law, it may still violate Rule 11 if it is served or filed for an improper purpose. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

1 Cases that cite this headnote

[8] **Costs**
⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

The determination of whether a filing was made for an improper purpose for Rule 11 purposes must be reviewed under an objective standard, with the relevant inquiry being whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[9] **Costs**
⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

A violation of any one of the factual sufficiency, legal sufficiency, and improper purpose requirements of Rule 11 mandates the imposition of sanctions. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

2 Cases that cite this headnote

[10] **Appeal and Error**
⇐ Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review

30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general

The trial court's decision to impose or not to impose mandatory sanctions under Rule 11(a) is reviewable de novo as a legal issue. Rules Civ.Proc., Rule 11(a), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[11] **Appeal and Error**
⇐ Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general

In the de novo review of Rule 11 sanctions, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence; if the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions. Rules Civ.Proc., Rule 11(a), West's N.C.G.S.A. § 1A–1.

3 Cases that cite this headnote

[12] **Appeal and Error**
⇐ Insufficiency of verdict or findings

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(8) Insufficiency of verdict or findings

A court's failure to enter findings of fact and conclusions of law on Rule 11 sanctions issues is error which generally requires remand in order for the trial court to resolve any disputed factual issues. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[13] **Appeal and Error**
⇐ Competent or credible evidence

Appeal and Error
⇐ Findings supported by evidence

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(4) Competent or credible evidence
30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1011 On Conflicting Evidence
30k1011.1 In General
30k1011.1(4) Findings supported by evidence

The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[14] **Appeal and Error**
⇐ Costs and Allowances

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) In general

In reviewing the appropriateness of the particular Rule 11 sanction imposed, an abuse of discretion standard is proper because the rule's provision that the court "shall impose" sanctions for motions abuses concentrates the court's discretion on the selection of an appropriate sanction rather than on the decision to impose sanctions. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[15] **Appeal and Error**
⇦ Effect of Failure to Serve Process or to Give Notice

30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k430 Effect of Failure to Serve Process or to Give Notice
30k430(1) In general

Rule 11 sanctions order, which was the last decision made in proceeding for removal of estate's executors, was entered in a separate proceeding from grandson's subsequent caveat action, such that sanctions order could not be challenged as part of an appeal from the summary judgment order in the caveat action, and thus grandson's notice of appeal from sanctions order, filed more than 30 days after trial court entered sanctions order, was untimely warranting dismissal of appeal. West's N.C.G.S.A. §§ 28A–9–1, 31–32; Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1; Rules App.Proc., Rule 3(c)(1).

1 Cases that cite this headnote

[16] **Appeal and Error**
⇦ Jurisdiction of appellate court

30 Appeal and Error
30X Record
30X(A) Matters to Be Shown
30k503 Jurisdiction of appellate court

The record on appeal should contain a showing of the jurisdiction of the appellate court.

Cases that cite this headnote

[17] **Certiorari**
⇦ Sufficiency of allegations in general

73 Certiorari
73II Proceedings and Determination
73k42 Petition or Other Application
73k42(3) Sufficiency of allegations in general

Court of Appeals would exercise its discretion and treat grandson's untimely appeal from sanctions order, entered as part of proceeding for removal of estate's executors, as a petition for writ of certiorari and review the challenge on the merits, where grandson proceeded, albeit mistakenly, in good faith by waiting until trial court entered a final order in grandson's subsequent caveat proceeding before noting his appeal from the sanctions order, and delay actually prevented court from having to consider multiple appeals arising from the same basic set of facts. West's N.C.G.S.A. §§ 28A–9–1, 31–32; Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1; Rules App.Proc., Rules 3(c)(1), 21(a)(1).

1 Cases that cite this headnote

[18] **Costs**
⇦ Nature and Grounds of Right

Executors and Administrators
⇦ Application and proceedings thereon

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
162 Executors and Administrators
162II Appointment, Qualification, and Tenure
162k32 Revocation of Letters
162k32(2) Application and proceedings thereon

Rules of Civil Procedure, including Rule 11, applied in grandson's action to revoke letters testamentary issued to estate's executors. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1; West's N.C.G.S.A. §§ 1–393, 28A–9–1.

Cases that cite this headnote

[19] **Courts**
⇦ Construction and application of particular rules

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(3) Construction and application of particular rules

The North Carolina Rules of Civil Procedure govern the procedure in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute; the phrase "all actions and proceedings of a civil nature" is inclusive of, but not exclusive to, civil actions, and the phrase is broad and encompasses

different types of legal actions, not solely those initiated with a complaint. Rules Civ.Proc., Rule 1, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[20] **Costs**
⇐ Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
An estate proceeding is a proceeding of a civil nature in which a Superior Court Judge has the authority to impose Rule 11 sanctions. West's N.C.G.S.A. §§ 1–393, 28A–9–1; Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[21] **Costs**
⇐ Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
Trial court could hear and decide issue of Rule 11 sanctions against grandson based on his petition to revoke letters testamentary issued to estate's executors, although issues raised by the revocation petition had already been resolved by the filing of a dismissal of the petition, given the suspension of the administration of the estate, which was a process necessarily overseen by the Clerk of Superior Court, the necessity for continued supervision over contested estate-related issues by some component of the General Court of Justice due to grandson's filing of caveat, and the fact that the Superior Court had jurisdiction, in the aftermath of the filing of the caveat, over the whole matter in controversy.

1 Cases that cite this headnote

[22] **Costs**
⇐ Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
The filing of a dismissal does not deprive the trial court of jurisdiction to consider a sanctions motion.

Cases that cite this headnote

[23] **Costs**
⇐ Nature and Grounds of Right
102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general
Grandson's petition to revoke testamentary letters issued to estate's executors was not well grounded in law, and thus grandson was subject to Rule 11 sanctions; there was no statutory basis for finding that either executor was disqualified from serving as an executor, grandson's contention that will was not the genuine last will of grandfather did not indicate that letters were obtained by false representation or mistake, unsupported speculation that executors engaged in embezzlement or mismanagement of grandfather's assets prior to her death and the issuance of the letters did not constitute default or misconduct in the execution of office, executors did not labor under any private interest that might tend to hinder or be adverse to a fair and proper administration, and grandson lacked standing to file the petition, as will had been admitted to probate by the time he filed the petition and he was not entitled to share in the estate under that will. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1; West's N.C.G.S.A. §§ 28A–4–2, 28A–9–1(a).

Cases that cite this headnote

[24] **Wills**
⇐ Objections to probate, answers to petitions therefor, and caveats
409 Wills
409V Probate or Contest of Will
409V(L) Petitions, Objections, and Pleading

409k277 Objections to probate, answers to petitions therefor, and caveats

The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form.

Cases that cite this headnote

[25] **Executors and Administrators**

⇐ Revocation of Letters

Wills

⇐ Objections to probate, answers to petitions therefor, and caveats

162 Executors and Administrators
162II Appointment, Qualification, and Tenure
162k32 Revocation of Letters
162k32(.5) In general
409 Wills
409V Probate or Contest of Will
409V(L) Petitions, Objections, and Pleading
409k277 Objections to probate, answers to petitions therefor, and caveats

A caveat, and not a revocation petition, is the proper method for challenging the validity of a disputed will once it has been admitted to probate.

Cases that cite this headnote

[26] **Costs**

⇐ Nature and Grounds of Right

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 In general

Good faith reliance on an attorney's advice precludes sanctions against the party under the legal sufficiency prong of Rule 11. Rules Civ.Proc., Rule 11, West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[27] **Wills**

⇐ Objections to probate, answers to petitions therefor, and caveats

409 Wills
409V Probate or Contest of Will
409V(L) Petitions, Objections, and Pleading
409k277 Objections to probate, answers to petitions therefor, and caveats

A caveat is an attack upon the validity of the instrument purporting to be a will; the will and not the property devised is the res involved in the litigation.

1 Cases that cite this headnote

[28] **Judgment**

⇐ Evidence and Affidavits in Particular Cases

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(1) In general

Failure of notary's affidavit to address whether testator was personally known to the notary or produced "satisfactory evidence" of his identity did not create a genuine issue of material fact for summary judgment purposes as to whether self-proved will was validly executed; will's acknowledgement and oath were in substantial compliance with statutory forms, and issues of personal knowledge or "satisfactory evidence" were simply not addressed in the affidavit. West's N.C.G.S.A. § 10B–3, 31–11.6(a); Rules Civ.Proc., Rule 56(c), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[29] **Wills**

⇐ Execution, existence, and genuineness

409 Wills
409V Probate or Contest of Will
409V(M) Evidence
409k287 Presumptions and Burden of Proof
409k289 Execution, existence, and genuineness

In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with the proper formalities required by law.

1 Cases that cite this headnote

[30] **Wills**
⇦ Nature and degree in general
409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k154 Undue Influence
409k155.1 Nature and degree in general
The four general elements of undue influence in the execution of a will are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence.

Cases that cite this headnote

[31] **Wills**
⇦ Fraud and undue influence in general
409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k162 Evidence
409k166 Weight and Sufficiency
409k166(1) Fraud and undue influence in general
Undue influence in the execution of a will is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.

Cases that cite this headnote

[32] **Wills**
⇦ Nature and degree in general
409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k154 Undue Influence
409k155.1 Nature and degree in general
Seven factors are traditionally considered in evaluating whether undue influence occurred in the execution of a will, including: (1) old age and physical and mental weakness, (2) that the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision, (3) that others have little or no opportunity to see him, (4) that the will is different from and revokes a prior will, (5) that it is made in favor of one with whom there are no ties of blood, (6) that it disinherits the natural objects of his bounty, and (7) that the beneficiary has procured its execution.

Cases that cite this headnote

[33] **Wills**
⇦ Nature and degree in general
409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k154 Undue Influence
409k155.1 Nature and degree in general
A caveator need not demonstrate the existence of every factor in order to prove undue influence; instead, there is a need to apply and weigh each factor in light of the differing factual setting of each case.

Cases that cite this headnote

[34] **Wills**
⇦ Undue influence
409 Wills
409V Probate or Contest of Will
409V(N) Hearing or Trial
409k315 Submission of Issues to Jury
409k316.3 Undue influence
If a reasonable mind could infer from evidence that the purported last will and testament is not the product of the testator's free and unconstrained act, but is rather the result of overpowering influence sufficient to overcome the testator's free will and agency, then the will contest case must be submitted to the jury for its consideration; such a determination requires the court to engage in a heavily fact-specific inquiry.

Cases that cite this headnote

[35] **Wills**
⇦ Consistency of disposition with inclinations and expressed intentions
Wills
⇦ Physical and mental condition of testator
409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k162 Evidence

409k166 Weight and Sufficiency
409k166(6) Consistency of disposition with inclinations and expressed intentions
409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k162 Evidence
409k166 Weight and Sufficiency
409k166(8) Physical and mental condition of testator
Will was not the product of undue influence, although testator suffered from difficulties associated with extreme old age and will revoked prior will which named grandson as a beneficiary; there was no evidence suggesting that his will was actually overborne, many people not aligned with will's executors saw and communicated with testator during the hours surrounding the execution of the will and heard testator expressly state that he wished to disinherit grandson due to dissatisfaction with his conduct, alleged isolation of grandson by estate's executors occurred after the execution of the will and pursuant to testator's express wishes, and beneficiaries under the will were the natural objects of testator's bounty.

Cases that cite this headnote

**116 Appeal by petitioner and caveator from order entered 10 March 2008 by Judge Donald W. Stephens in Chatham County Superior Court and judgment entered 6 November 2008 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 16 September 2009.

Attorneys and Law Firms

Stark Law Group, PLLC, Chapel Hill, by Thomas H. Stark and Seth A. Neyhart, for Petitioner/Caveator–Appellant.

Levine & Stewart, Chapel Hill, by James E. Tanner, III, for Respondent/Propounders–Appellees.

Opinion

ERVIN, Judge.

*68 Petitioner and Caveator Gary Dixon [1] appeals from an order imposing sanctions pursuant to N.C. Gen.Stat. § 1A–1, Rule 11 stemming from the filing of a Verified Complaint for Revocation of Letters Testamentary following the appointment of Ida Pharr and Frank Durham as executors [2] of the estate of Lewis M. Durham. In addition, Caveator appeals the trial court's order granting summary judgment in favor of Executors concerning the validity of Decedent's will. After *69 careful consideration of the record in light of the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

On 27 July 1983, Decedent and his wife, Ona Mae Durham, executed mutual and reciprocal wills which provided that, upon the death of either spouse, his or her estate would pass to the surviving spouse. Both wills also provided that, in the event that either spouse died before the other spouse's will became effective, 50% of "any cash on hand," "any cash on deposit," and "any amounts due under any promissory note receivable" would pass to Aldersgate Methodist Church and all remaining real and personal property would pass to Caveator, who was Decedent's adopted grandson.

Caveator claimed that, after Mrs. Durham was diagnosed with cancer, he assisted the couple with dressing, transportation and financial management issues on a daily basis. On 17 February 2006, Mrs. Durham died. According to Caveator, Decedent became very depressed, expressed suicidal thoughts, and became highly susceptible to third party influences following his wife's death. Executors concede that Caveator had a longstanding relationship with the couple and that the same had not been true of them.

On 18 February 2006, Griffin Funeral Home contacted Clarice Jones, sister of Executors and Decedent's niece, to inform her that Caveator had missed several appointments that day regarding Mrs. Durham's funeral arrangements. In response, Ms. Jones telephoned Decedent to apprise him of the situation. During the call, she heard him call out "Help me!" On the following morning, Executors went to investigate the situation, only to discover that Caveator had locked himself in Mrs. Durham's bedroom. Upon entering the residence, Executors found Decedent sitting in his own dried urine. Decedent told Executors that he had not eaten in two days, that he had given Caveator $10,000 to pay for Mrs.

Durham's funeral, and that Caveator had failed to make the necessary payment.

After leaving Decedent's residence on 19 February 2006, Propounders initially took Decedent to the hospital. At the hospital, Decedent was described as being oriented and alert despite being in a weak and dehydrated condition. A hospital social worker **117 recommended that Decedent contact an attorney to work out certain power of attorney issues.

*70 On 20 February 2006, Executors took Decedent to his attorney's office. Due to the press of other business, Decedent's attorney referred him to the firm of Levine & Stewart for preparation of a power of attorney and a will. According to the drafting attorney, who met with Decedent out of Executors' presence, Decedent "stated quite adamantly that he wanted to draw up a new Will in order to take his [Caveator] out of his Will." After consulting with the drafting attorney, Decedent executed a new will on 20 February 2006 which revoked all of his prior wills, designated Executors to administer his estate, and bequeathed his estate in equal shares to his eight living nieces and nephews, including Executors.

After Executors took Decedent to the funeral home on 19 February 2006, he never lived in his home again. Instead, he resided in Cambridge Hills in Pittsboro. Caveator was not allowed to see Decedent after 19 February 2006. On 21 September 2007, Decedent died.

On 28 September 2007, Executors successfully presented the 20 February 2006 Will for admission to probate to the Clerk of Superior Court of Chatham County. On 1 October 2007, Caveator filed a petition seeking to have the letters testamentary that had been issued to Executors revoked. On 11 October 2007, Executors filed an Answer to Show Cause and Motion for Sanctions pursuant to N.C. Gen.Stat. § 1A–1, Rule 11. On 18 October 2007, Caveator filed a Response in Opposition to Motion.

On 13 November 2007, Caveator filed a Caveat to Purported Will Dated February 20, 2006 in which he alleged that the 20 February 2006 will was invalid because Decedent lacked sufficient testamentary capacity to execute a valid will on 20 February 2006 and because the 20 February 2006 will resulted from undue influence on the part of Executors. A few minutes prior to the filing of the Caveat, the parties filed a Memorandum of Judgment/Order in which they stipulated that, given the filing of the Caveat, the revocation petition should be dismissed as moot. On 16 November 2007, the Clerk entered an order suspending the administration of Decedent's estate and issued a citation directing all interested parties to appear at the 14 January 2008 session of the Chatham County Superior Court. On 27 February 2008, Caveator filed a Motion for Rule 11 Sanctions seeking sanctions against counsel for Executors due to their failure to withdraw their original sanctions motion.

On 10 March 2008, Judge Stephens entered an Order for Sanctions Pursuant to Rule 11 granting Executors' motion for sanctions *71 against Caveator and denying Caveator's motion for sanctions against Executors' counsel. On 19 September 2008, Executors filed a summary judgment motion directed to the Caveat. On 13 October 2008, Caveator filed a response to Executors' summary judgment motion. On 6 November 2008, Judge Fox entered an order granting Executors' summary judgment motion. On 8 December 2008, Caveator noted an appeal to this Court from both the 10 March 2008 order imposing sanctions and the 6 November 2008 order granting Executors' summary judgment motion.

II. Legal Analysis

A. Sanctions Order

1. Standard of Review

[1] [2] [3] [4] [5] [6] [7] [8] [9] [10] [11] [12] [13] [14] N.C. Gen.Stat. § 1A–1, Rule 11 provides, in pertinent part, that:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry that it is well grounded in fact and is warranted by existing law ...; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Dodd v. Steele,* 114 N.C.App. 632, 635, 442 S.E.2d 363, 365,

disc. review denied, 337 N.C. 691, 448 S.E.2d 521 (1994) (citing *Bryson v. Sullivan,* 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992)). ****118** "In analyzing whether the [filing] meets the factual certification requirement, the court must make the following determinations: (1) whether the [party] undertook a reasonable inquiry into the facts and (2) whether the [party], after reviewing the results of his inquiry, reasonably believed that his position was well-grounded in fact." *McClerin v. R–M Industries, Inc.,* 118 N.C.App. 640, 644, 456 S.E.2d 352, 355 (1995) (citing *Higgins v. Patton,* 102 N.C.App. 301, 306, 401 S.E.2d 854, 857 (1991), *overruled on other grounds, Bryson,* 330 N.C. 644, 412 S.E.2d 327). "The text of [N.C. Gen.Stat. § 1A–1, Rule 11] requires that whether the document complies with the legal sufficiency prong of the Rule is determined as of the time it was signed." *Bryson,* 330 N.C. at 657, 412 S.E.2d at 334. "To satisfy the legal sufficiency requirement, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." ***72** *Dodd,* 114 N.C.App. at 635, 442 S.E.2d at 365 (citing N.C. Gen.Stat. § 1A–1, Rule 11(a), and *Bryson,* 330 N.C. at 656, 412 S.E.2d at 332). Finally, "[t]he improper purpose prong of [N.C. Gen.Stat. § 1A–1,] Rule 11 is separate and distinct from the factual and legal sufficiency requirements." *Bryson,* 330 N.C. at 663, 412 S.E.2d at 337. "An improper purpose is 'any purpose other than one to vindicate rights ... or to put claims of right to a proper test.' " *Mack v. Moore,* 107 N.C.App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting G.P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) (Supp.1992)). "Thus, even if a paper is well grounded in fact and in law, it may still violate [N.C. Gen.Stat. § 1A–1,] Rule 11 if it is served or filed for an improper purpose." *Brooks v. Giesey,* 334 N.C. 303, 315, 432 S.E.2d 339, 345–46 (1993) (citing *Bryson,* 330 N.C. at 663, 412 S.E.2d at 337). The determination of whether a filing was made for an improper purpose "must be reviewed under an objective standard," *Id.* (citing *Turner v. Duke University,* 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989), *disc. review denied,* 329 N.C. 505, 407 S.E.2d 552 (1991)), with "the relevant inquiry [being] whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Mack,* 107 N.C.App. at 93, 418 S.E.2d at 689 (citing Joseph, *Sanctions* § 13(A) (1989)). "A violation of any one of these requirements mandates the imposition of sanctions under" N.C. Gen.Stat. § 1A–1, Rule 11. *Dodd,* 114 N.C.App. at 635, 442 S.E.2d at 365.

> The trial court's decision to impose or not to impose mandatory sanctions under [N.C. Gen.Stat.] § 1A–1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C. [Gen.Stat.] § 1A–1, Rule 11(a).

Turner, 325 N.C. at 165, 381 S.E.2d at 714 (1989); *see also Static Control Components, Inc. v. Vogler,* 152 N.C.App. 599, 603, 568 S.E.2d 305, 308 (2002); *Polygenex International, Inc. v. Polyzen, Inc.,* 133 N.C.App. 245, 249, 515 S.E.2d 457, 460 (1999). "A court's failure to enter findings of fact and conclusions of law on [sanctions] issue[s] is error which generally requires remand in order for the trial court to resolve any disputed factual issues." ***73** *McClerin,* 118 N.C.App. at 644, 456 S.E.2d at 355. "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings." *Static Control Components,* 152 N.C.App. at 603, 568 S.E.2d at 308 (citing *Institution Food House v. Circus Hall of Cream,* 107 N.C.App. 552, 556, 421 S.E.2d 370, 372 (1992)). "[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper because '[t]he rule's provision that the court 'shall impose' sanctions for motions abuses ... concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.' " *Turner,* 325 N.C. at 165, 381 S.E.2d at 714 ****119** (quoting *Westmoreland v. CBS, Inc.,* 770 F.2d 1168, 1174 (D.C.Cir.1985) and citing *Daniels v. Montgomery Mut. Ins. Co.,* 320 N.C. 669, 360 S.E.2d 772 (1987)).

2. Timeliness of Caveator's Appeal

[15] Before considering Caveator's challenge to the sanctions order, we must first address the timeliness of his appeal. In essence, Executors argue that the sanctions

order was entered in response to the filing of the removal petition; that a removal proceeding conducted pursuant to N.C. Gen.Stat. § 28A–9–1 is a separate proceeding from a caveat proceeding conducted pursuant to N.C. Gen.Stat. § 31–32 *et seq.;* that the sanctions order was the final order entered in the removal proceeding; and that Caveator's failure to note an appeal to this Court within the time period set out in N.C.R.App. P. 3(c)(1) deprived this Court of jurisdiction to hear Caveator's appeal from the sanctions order. We agree.

The trial court entered the sanctions order on 10 March 2008. Caveator noted an appeal to this Court from the sanctions order on 8 December 2008. Apparently, Caveator believed that he was not entitled to appeal the sanctions order until the caveat proceeding had concluded. However, as Executors note, the sanctions order was the last decision made in the removal proceeding and constituted a final order which Caveator was required to appeal within the 30–day period specified in N.C.R.App. P. 3. *Long v. Joyner,* 155 N.C.App. 129, 134, 574 S.E.2d 171, 175 (2002), *disc. review denied,* 356 N.C. 673, 577 S.E.2d 624 (2003) (stating that, while "defendant's appeal from the sanction order would [ordinarily] be dismissed as interlocutory," "the underlying legal issues in this case have been resolved by the parties in a settlement agreement," leaving the sanction order "appealed in this case ... the only unresolved issue in the case and therefore appealable"). As a result, the sanctions order was entered in a separate *74 proceeding from the caveat case and could not be challenged as part of an appeal from the trial court's summary judgment order in the caveat proceeding.

[16] According to N.C.R.App. P. 3(c), notice of appeal in a civil action or special proceeding must be filed "within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure" or "within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period." Since 8 December 2008 is much more than 30 days after 10 March 2008 and since the record contains no indication that Caveator filed any sort of motion that would have tolled the running of the 30–day period specified in N.C.R.App. P. 3(c), the only way in which Caveator's notice of appeal could have been timely would have been if there had been a substantial delay in the service of the sanctions order. The record is completely silent, however, as to when, if ever, the sanctions order was served upon Caveator, which precludes us from determining that Caveator noted his appeal from the sanctions order in a timely manner. According to well-established North Carolina law, the record on appeal should "contain a showing of the jurisdiction of the appellate court." *Love v. Moore,* 305 N.C. 575, 582, ftn. 1, 291 S.E.2d 141, 147, ftn. 1 (1982). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.,* 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Given the complete absence of any showing in the record on appeal that Caveator appealed the sanctions order in a timely manner, we have no alternative except to dismiss Caveator's appeal from the sanctions order as untimely.

[17] We do, however, have the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of certiorari pursuant to N.C. R.App. P. 21(a)(1), to grant the petition, and to then review Caveator's challenge to the sanctions order on the merits. *See Anderson v. Hollifield,* 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (holding "that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner"). Although we have concluded **120 that Caveator failed to note a timely appeal from the sanctions order, there is no question but that he proceeded, albeit mistakenly, in good faith in waiting until the trial court entered a final order in the caveat proceeding before noting his appeal from the *75 sanctions order. In view of our preference for deciding appeals on the merits, *Dogwood Development,* 362 N.C. at 198–99, 657 S.E.2d at 365, and the fact that Caveator's delay actually prevented us from having to consider multiple appeals arising from the same basic set of facts, we conclude that we should exercise our discretion and grant certiorari pursuant to N.C.R.App. P. 21(a) in order to reach the merits of Caveator's challenge to the sanctions order.

3. Applicability of Rules of Civil Procedure

[18] Caveator's initial challenge to the sanctions order rests on a contention that the Rules of Civil Procedure do not apply to estate matters pending before the Clerk, so that the trial court erred by sanctioning him pursuant to N.C. Gen.Stat. § 1A–1, Rule 11. According to Caveator, this Court held in *In re Estate of Newton,* 173 N.C.App. 530, 537–38, 619 S.E.2d 571, 575, *disc. review denied,* 360 N.C. 176, 625 S.E.2d 786 (2005), that:

> While respondent would have us conclude that any estate matter is subject to the Rules of Civil Procedure by virtue of its nature and similarity to a special proceeding, we note that, as detailed above, trustee removal proceedings are held "in an estate matter and *not in a special proceeding or in a civil action.*" N.C. Gen.Stat. § 36A–26.1 (emphasis added). Although Chapter 36A does not expressly or "otherwise" prescribe "differing [rules of] procedure," we are not persuaded that, in addition to the duties already placed upon them, clerks of court must also make decisions regarding discovery and other issues of law arising during estate matters. Instead, we conclude that the clerks of our superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. Thus, where a clerk of superior court is presented with a petition to remove a trustee, the clerk examines the affidavits and evidence of the parties and determines only whether the trustee is qualified or fit to faithfully discharge his or her duties. The process due to the parties during such a determination, having not been expressly prescribed by statute, is only that which is reasonable when applying general principles of law. *See Edwards v. Cobb,* 95 N.C. 5, 12 (1886) ("The statute conferring power on the Clerk to remove executors and administrators, does not prescribe in terms how the facts in such matters shall be ascertained, but it plainly implies that he shall act promptly and summarily. Applying general principles of law, ***76** the method of procedure we have above indicated, or one substantially like it, is the proper one.")

After noting that a proceeding to remove an executor or administrator of an estate "was not a civil action, but a proceeding concerning an estate matter, which was exclusively within the purview of the Clerk's jurisdiction, and over which the Superior Court retained appellate, not original, jurisdiction," *In re Parrish,* 143 N.C.App. 244, 251, 547 S.E.2d 74, 78, *disc. review denied,* 354 N.C. 69, 553 S.E.2d 201 (2001); that Executors' sanctions motion had been filed while the revocation petition was still pending before the Clerk; and that the issues raised by the revocation petition had been resolved by a Memorandum of Judgment that had been entered with the consent of the parties, Caveator argues that, since this matter had never been appealed to the Superior Court, the trial court never obtained jurisdiction to act on the sanctions motion. We disagree.

[19] **[20]** The North Carolina Rules of Civil Procedure "govern the procedure ... in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen.Stat. § 1A–1, Rule 1. The "phrase 'all actions and proceedings of a civil nature' [is] inclusive of, but not exclusive to, civil actions; the phrase is broad and encompasses different types of legal actions, not solely those initiated with a complaint." *In re Estate of Rand,* 183 N.C.App. 661, 663, 645 S.E.2d 174, 175, *disc. rev. denied,* 361 N.C. 568, 650 S.E.2d 601 (2007). According ****121** to N.C. Gen.Stat. § 1–393, "[t]he Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided." *See also Virginia Electric and Power Co. v. Tillett,* 316 N.C. 73, 76, 340 S.E.2d 62, 65, *cert. denied,* 317 N.C. 715, 347 S.E.2d 457 (1986) (stating that, "[e]ven where an action is a special proceeding, the Rules of Civil Procedure are made applicable by N.C. [Gen.Stat.] § 1–393 ..."). A proceeding for the revocation of previously-issued letters testamentary initiated pursuant to N.C. Gen.Stat. § 28A–9–1 "constitutes a special proceeding." *In re Estate of Sturman,* 93 N.C.App. 473, 475, 378 S.E.2d 204, 205 (1989) (citing *Phil Mechanic Construction Co. v. Haywood,* 72 N.C.App. 318, 321, 325 S.E.2d 1, 2 (1985)). As a result, "an estate proceeding is a 'proceeding of a civil nature' " in which a Superior Court Judge has the authority to impose sanctions pursuant to N.C. Gen.Stat. § 1A–1, Rule 11. *In re Estate of Rand,* 183 N.C.App. at 661, 645 S.E.2d at 175.

Although Caveator's challenge to the trial court's jurisdiction is understandable given certain language that appears in our prior decisions ***77** , we conclude that the position advocated by Executors and adopted by the trial court is, on balance, the more persuasive one. We reach this conclusion for several reasons.

First, while *Estate of Newton,* upon which Caveator places principal reliance, clearly states that "trustee removal proceedings are held 'in an estate matter and *not in a special proceeding or in a civil action* ' " to which the Rules of Civil Procedure apply and refuses, for that reason, to overturn the Clerk's decision despite the absence of "discovery as well as twenty days to prepare a responsive pleading following the denial of his motions to dismiss," 173 N.C.App. at 537–38, 619 S.E.2d at 575, we do not find *Estate of Newton* controlling for several reasons. First, *Estate of Newton* deals with trustee removal proceedings, while at least one other relevant decision involves a proceeding initiated for the purpose of removing an executor or administrator. As a result, we believe that other decisions are more directly on point than *Estate of Newton* despite the fact that *Estate of Newton* certainly

references the removal of executors and administrators. Secondly, *Estate of Newton* does not hold that all components of the Rules of Civil Procedure are irrelevant to trustee removal proceedings; instead, *Estate of Newton* simply held that traditional discovery procedures and the twenty-day period within which a party is allowed to file a responsive pleading following the denial of a dismissal motion were not required in trustee removal proceedings. In other words, *Estate of Newton* does not address the extent to which a remedy for filings that lack an adequate basis in law or fact or which have been filed for an improper purpose should be provided. Thirdly, the statutory provision upon which *Estate of Newton* relies, N.C. Gen.Stat. § 36A–26.1, was repealed effective 1 January 2006. 2005 N.C. Sess. L. c. 192. s. 1. The current statutory provision governing the procedures to be employed in trust-related proceedings contains language that closely tracks that of N.C. Gen.Stat. § 1A–1, Rule 11(a), indicating that relief for the filing of meritless trustee removal petitions is now available. Accepting Caveator's argument, on the other hand, would effectively countenance the filing of frivolous petitions seeking the removal of administrators or executors without any remedy being available for the injured fiduciary, which is not consistent with what we believe to have been the General Assembly's intent. As a result, we do not believe that *Estate of Newton* compels the conclusion that N.C. Gen.Stat. § 1A–1, Rule 11 does not apply in the removal petition context.

*78 Instead of focusing on *Estate of Newton*, we believe that *Estate of Sturman* and *Estate of Rand* are more relevant to the present discussion. As we have already noted, *Estate of Sturman* states that a revocation proceeding is a special proceeding. 93 N.C.App. at 476, 378 S.E.2d at 206. Given that N.C. Gen.Stat. § 1–393 provides that the Rules of Civil Procedure, including N.C. Gen.Stat. § 1A–1, Rule 11, apply in special proceedings, *Estate of Sturman* establishes that relief under N.C. Gen.Stat. § 1A–1, Rule 11, is available in revocation proceedings. Furthermore, without making any mention of *Estate of Sturman* and while citing the very **122 language from *Estate of Newton* upon which Caveator relies, *Estate of Rand* noted "the lack of any authority to suggest the Rules [of Civil Procedure] do not apply to estate proceedings." 183 N.C.App. at 664, 645 S.E.2d at 176. Thus, the weight of authority establishes that relief under N.C. Gen.Stat. § 1A–1, Rule 11, is available in revocation proceedings conducted pursuant to N.C. Gen.Stat. § 28A–9–1.

[21] [22] Finally, Caveator argues that the trial court erred by hearing and deciding the sanctions issue despite the fact the issues raised by the revocation petition had already been resolved and the fact that the Superior Court typically acts in an appellate capacity in estate-related matters. However, according to well-established North Carolina law, the filing of a dismissal does not deprive the trial court of jurisdiction to consider a sanctions motion. *Bryson,* 330 N.C. at 653, 412 S.E.2d at 331 (stating that "[d]ismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated") (citing *In re Peoples,* 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978), *cert. denied,* 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979)). Moreover, by the time that the trial court heard the sanctions motion, Caveator had filed a caveat challenging the 20 February 2006 will. Pursuant to N.C. Gen.Stat. § 31–36, upon the filing of a caveat, the "clerk of superior court shall forthwith issue an order that shall apply during the pendency of the caveat to any personal representative, having the estate in charge," suspending the administration of the estate except for the "preserv[ation of] the property of the estate," the "pursu[it] and prosecut[ion of] claims that the estate may have against others," the "fil[ing of] all appropriate tax returns," and the payment of "taxes; funeral expenses of the decedent; debts that are a lien upon the property of the decedent; claims against the estate that are timely filed; professional fees related to administration of the estate, including fees for tax return preparation, appraisal fees, and attorney's fees for estate administration." *See also* *79 *In re Will of Tatum,* 233 N.C. 723, 729, 65 S.E.2d 351, 355 (1951) (stating that, "[u]nder the provisions of [N.C. Gen.Stat. §] 31–36, the executor is charged with the preservation of the estate pending final determination of the issue raised by the caveat, unless and until he be removed") (citing *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E.2d 562 (1940); *Elledge v. Hawkins,* 208 N.C. 757, 182 S.E. 468 (1935); and *In re Will of Palmer,* 117 N.C. 133, 23 S.E. 104 (1895)). Furthermore, when the pleadings "raised an issue of *devisavit vel non* and necessitated transfer of the cause to the civil issue docket for trial by jury," "jurisdiction to determine the whole matter in controversy, as well as the issue of *devisavit vel non,* passed to the Superior Court in term." *In re Will of Wood,* 240 N.C. 134, 136, 81 S.E.2d 127, 128 (1954); *see also In re Will of Charles,* 263 N.C. 411, 416, 139 S.E.2d 588, 591 (1965) (stating that, "[w]hen a caveat is filed[,] the Superior Court acquires jurisdiction of the whole matter in controversy"). Based upon these legal principles, we conclude that, given the suspension of the administration of the estate, which is a process necessarily

overseen by the Clerk of Superior Court; the necessity for continued supervision over contested estate-related issues by some component of the General Court of Justice; and the fact that the Superior Court has jurisdiction, in the aftermath of the filing of a caveat, over "the whole matter in controversy," *Will of Wood,* 240 N.C. at 136, 81 S.E.2d at 128, the Superior Court was the division of the General Court of Justice with jurisdiction to hear and decide the sanctions motion following the filing of the caveat, so that the trial court did not err by hearing and deciding the sanctions motion.

4. Appropriateness of Sanctions Order

[23] The trial court made the following findings of fact in the sanctions order:

1. [Caveator] affirmed by Verified Complaint that [Executors] obtained letters testamentary by falsely representing a purported will to be the genuine last will and testament of [Decedent].

2. Under the terms of this February 20, 2006 Will, the eight living nieces and nephews of [Decedent], including the ****123** Co–Executors, inherit equal shares of the estate.

3. Under the provisions of a previous July 27, 1983 Will, [Caveator] was to inherit 50% of the estate, with the other 50% going to Aldersgate Methodist Church.

***80** 4. If the Will submitted by Ms. Pharr and Mr. Durham is genuine, [Caveator] and the Church are disinherited. By letter to this Court, the Church has disclaimed any interest in these proceedings.

5. On its face, the 2006 Will appears to be a valid attested written will. It was prepared by the offices of Levine & Stewart, notarized by Patricia F. Clapper, a Notary Public, Certified Paralegal, and staff member of Levine & Stewart. The Will was witnessed by attorney John T. Stewart, and by Catherine L. McLean, who was at that time employed as a receptionist at Levine & Stewart, and is currently a law student attending Wake Forest Law School.

8. [Caveator] affirmed that each of the signatures of [Decedent], appearing on: (1) Resignation of Executor 06 E 296;[3] (2) Inventory for Decedent's Estate 06 E 296; (3) Final Account 06 E 296, and (4) Statement of Receipt of Funds 06 E 296, are not the signatures of [Decedent]. Patricia F. Clapper notarized each of these signatures, just like the signature on the Will. Neither [Caveator] nor any representative of [Caveator] has ever contacted Ms. Clapper with respect to the alleged falsification of her Notary Seal.

9. [Caveator] affirmed that each of the signatures of [Decedent] appearing on the Oath of Executor in 06 E 296 and a General Warranty Deed are not the signatures of [Decedent]. Karen W. Wolfe, a Chatham County Notary Public, notarized these signatures. Neither [Caveator] nor any representative of [Caveator] has ever contacted Ms. Wolfe regarding the alleged falsification of her Notary Seal.

10. [Caveator] affirmed that the Co–Executors, Ida Pharr and Frank Durham, were both disqualified under N.C. Gen.Stat. § 28A–4–2. Neither person was or is so disqualified.

11. [Caveator] affirmed that the Co–Executors violated a fiduciary duty through default or misconduct in the execution of their office, but in fact indicates no such default or misconduct with respect to any actions taken in the execution of their office as Executors. The Complaint instead makes numerous allegations concerning activities prior to the death ***81** of [Decedent], including the forgery of all the notarized documents listed hereinabove.

12. [Caveator] affirmed that the Co–Executors have a private interest that would be adverse to fair administration of the [Decedent's] Estate, in that a fair administration would require an accounting of their actions as fiduciaries prior to the death of [Decedent]. Unless the 2006 Will is invalidated, [Caveator] is not a beneficiary of the [Decedent's] Estate entitled to such an accounting. Counsel for the Estate has offered to provide such an accounting upon request to any beneficiary of the 2006 Will.

Based upon these findings of fact, the trial court concluded as a matter of law that:

2. Under the application of N.C. Gen.Stat. § 1A–1, Rule 11, by signing a pleading or other paper, a party certifies that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact, warranted by existing law, and not interposed for any

improper purpose. A violation [of] any of these three requirements justifies the Court in awarding sanctions.

3. [Caveator's] affirmations concerning the Will and other notarized documents are not well grounded in fact **124 based upon knowledge, information or belief that was formed as the result of any reasonable inquiry. Neither [Caveator] nor any representative made any inquiry whatsoever that would provide an adequate factual basis to contend the Will and notarized documents were forgeries requiring the falsification of independent witness signatures or Notary Seals, much less the kind of investigation that would support the contention that all of these documents were executed by some sort of imposter.

4. [Caveator's] Complaint was not warranted by existing law; not one of the grounds to revoke letters testamentary was present under 28A–9–1(a).

5. Given the self-serving nature of [Caveator's] attempt to challenge his disinheritance, combined with the fact that his affirmations in the Complaint were not well grounded in fact or warranted by existing law, and were asserted without inquiry, reasonable or otherwise, the Court strongly infers and *82 hereby concludes that the Complaint was asserted for an improper purpose.

6. [Caveator] has violated each of the prongs of Rule 11, and is subject to sanction by this Court.

7. The Court concludes that it is fair and reasonable to require [Caveator] to reimburse the costs in attorneys fees incurred by virtue of his violation of Rule 11, in the amount submitted by Affidavit of Counsel for the Estate.

Since Caveator has not challenged any of the trial court's findings of fact, they are binding on us for purposes of appeal. *Static Control Components,* 152 N.C.App. at 603, 568 S.E.2d at 308 (stating that "findings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal") (citing *Inspirational Network, Inc. v. Combs,* 131 N.C.App. 231, 235, 506 S.E.2d 754, 758 (1998)). As a result, our review of the sanctions order is limited to determining whether the trial court's findings of fact support its conclusions of law and whether its conclusions of law rest on a correct understanding of the applicable statutory provisions.

N.C. Gen.Stat. § 28A–9–1 (a) provides that "[l]etters testamentary, letters of administration, or letters of collection may be revoked after hearing on any of the following grounds:

1. The person to whom they were issued was originally disqualified under the provisions of [N.C. Gen.Stat. §] 28A–4–2 or has become disqualified since the issuance of letters.

2. The issuance of letters was obtained by false representation or mistake.

3. The person to whom they were issued has violated a fiduciary duty through default or misconduct in the execution of his office, other than acts specified in [N.C. Gen.Stat. §] 28A–9–2.

4. The person to whom they were issued has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration. The relationship upon which the appointment was predicated shall not, in and of itself, constitute such an interest.

According to N.C. Gen.Stat. § 28A–9–1(b), the issue of whether letters testamentary should be revoked may be raised by a "verified complaint" filed by "any person interested in the estate."

*83 The qualifications required for obtaining or retaining letters testamentary are set out in N.C. Gen.Stat. § 28A–4–2, which provides that:

No person is qualified to serve as a personal representative who:

(1) Is under 18 years of age;

(2) Has been adjudged incompetent in a formal proceeding and remains under such disability;

(3) Is a convicted felon, under the laws of either the United States or of any state or territory of the United States, or of the District of Columbia and whose citizenship has not been restored;

(4) Is a nonresident of this State who has not appointed a resident agent to accept service of process in all actions or **125 proceedings with respect to the estate, and caused such appointment to be filed with the court; or

who is a resident of this State who has, subsequent to appointment as a personal representative, moved from this State without appointing such process agent;

(5) Is a corporation not authorized to act as a personal representative in this State;

(6) Repealed by Session Laws 1999–133, s. 1, effective January 1, 2000.

(7) Has lost his rights as provided by Chapter 31A;

(8) Is illiterate;

(9) Is a person whom the clerk of superior court finds otherwise unsuitable; or

(10) Is a person who has renounced either expressly or by implication as provided in [N.C. Gen.Stat. §] 28A–5–1 and 28A–5–2.

The trial court specifically found that neither Ms. Pharr nor Frank Durham was disqualified from serving as a co-executor of Decedent's estate under N.C. Gen.Stat. § 28A–4–2. The only statutory basis for disqualification upon which Caveator relies in challenging the trial court's determination is N.C. Gen.Stat. § 28A–4–2(9), with this contention based on [Frank] Durham's criminal record and "the circumstances ***84** of the case." However, N.C. Gen.Stat. § 28A–4–2(3) specifically addresses the ability of a convicted felon to serve as a personal representative and allows such a person to do so as long as his or her rights have been restored. The record contains no indication that Frank Durham's rights have not been restored. Furthermore, Caveator made no reference to "the circumstances of the case" in his original revocation petitions as a basis for seeking the revocation pursuant to N.C. Gen.Stat. § 28A–9–1(a)(1). *State v. Sharpe*, 344 N.C. 190, 195, 473 S.E.2d 3, 6 (1996) (stating that "[i]t is well settled in this jurisdiction that [a party] cannot argue for the first time on appeal [a] new ground for admission that he did not present to the trial court"). As a result, the trial court correctly concluded that Caveator's petition set forth no lawful basis for revocation pursuant to N.C. Gen.Stat. § 28A–9–1 (a)(1).

[24] **[25]** Secondly, the record contains no indication that the letters testamentary issued to Executors were "obtained by false representation or mistake." N.C. Gen.Stat. § 28A–9–1(a)(2). In seeking to obtain revocation based upon this statutory provision, Caveator argued in the revocation petition that Executors obtained the issuance of the disputed letters testamentary "by the false representation that the [20 February 2006 will] was the genuine last will and testament of Decedent" and that Executors "falsely stated the known value of the estate, in that they were personally aware of assets exceeding the amount she listed." "The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form." *In re Will of Spinks*, 7 N.C.App. 417, 423, 173 S.E.2d 1, 5 (1970). As a result, a caveat, and not a revocation petition, is the proper method for challenging the validity of a disputed will once it has been admitted to probate. In addition, there is no evidence that the increase in the value of the assets in Decedent's estate shown in the filings made by Executors constitutes proof of fraudulent concealment of assets. Furthermore, even if Executors falsely and materially understated the value of the assets in the estate in these filings, there is no basis for believing that any such false and material understatement contributed to the Clerk's decision to issue letters testamentary to Executors. As a result, the revocation petition provides no basis in law for the revocation of the letters testamentary issued to Executors pursuant to N.C. Gen.Stat. § 28A–9–1(a)(2).

Thirdly, the record does not establish any basis for a conclusion that Executors "violated a fiduciary duty through default or misconduct ***85** in the execution of [their] office, other than acts specified in [N.C. Gen.Stat. §] 28A–9–2." Although the revocation petition alleges that this ground for revocation exists to the extent that "such assets are no longer property of the estate as a result of [Executors'] embezzlements or mismanagement, ****126** or insofar as [Executors] have been attempting to abscond with the assets without listing them with the Court," we understand this allegation to refer to events that Caveator believes to have occurred prior to the issuance of the letters testamentary that Caveator seeks to have revoked. Aside from the fact that Caveator has offered no evidence beyond mere speculation that such acts of "embezzlement or mismanagement" occurred, the acts that Caveator hypothesizes do not constitute "default or misconduct in the execution of [Executors'] office." N.C. Gen.Stat. § 28A–9–1(a)(3). As we have already noted, the mere fact that the value of the assets listed on a later filing was substantially higher than the value of the assets listed on the initial application does not, without more, show any breach of fiduciary duty. As a result, the revocation petition does not adequately allege grounds for revocation pursuant to N.C. Gen.Stat. § 28A–9–1(a)(3).

Fourth, the record does not establish that Executors labored under any sort of "private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration...." N.C. Gen.Stat. § 28A–9–1(a)(4). According to Caveator, grounds for revocation pursuant to N.C. Gen.Stat. § 28A–9–1(a)(4) exist because "any fair and proper administration of the estate would require legal action to force [Executors] to account for their acts in their fiduciary capacity to [Decedent] and [Decedent's] estate." The entire basis for Caveator's contention is his unsupported belief that Executors engaged in acts of misconduct with respect to Decedent's property prior to Decedent's death. In the absence of any ability to prove the existence of such acts of misconduct, Caveator cannot establish the necessary "private interest" required to support a request for removal pursuant to N.C. Gen.Stat. § 28A–9–1(a)(4). Thus, this aspect of the removal petition lacks an adequate basis in law as well.

An even more fundamental problem with the filing of the revocation petition is that Caveator lacked standing to file it. A revocation petition may be filed by a "person interested in the estate." N.C. Gen.Stat. § 28A–9–1(b). At the time the revocation petition was filed, the 20 February 2006 will had been admitted to probate. Caveator was not entitled to share in Decedent's estate under the 20 February 2006 will. ***86** As a result, Caveator had no standing to seek to have Executors removed as the co-executors of Decedent's estate at the time that he filed the revocation petition. Thus, although this issue is not specifically mentioned in the trial court's conclusions of law, the revocation petition lacked any basis in law for this reason as well.

[26] Caveator argues that, to the extent that his "counsel may have erred in his analysis of N.C. Gen.Stat. § 28A–9–1(a), such error is the responsibility of [Caveator' s] counsel and not Caveator, who relied on the advice and analysis in good faith." Although "good faith reliance on an attorney's advice preclude[s] sanctions against the party under the legal sufficiency prong" of N.C. Gen.Stat. § 1A–1, Rule 11, *Brooks v. Giesey,* 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993) (citing *Bryson,* 330 N.C. at 662, 412 S.E.2d at 336), the trial court did not find, as it did in *Bryson,* that Caveator acted in good faith in reliance on advice provided by his attorney. Although Caveator's argument might have merit in the event that the record reflected that it had been presented to the trial court, *Taylor v. Collins,* 128 N.C.App. 46, 53, 493 S.E.2d 475, 480 (1997) (holding that an award of sanctions against a litigant were inappropriate where the litigant's counsel "frankly admit[ted] that at all times, [the plaintiff] relied on his advice as to the legal and factual sufficiencies of the action"), we are unable to find any indication that Caveator advanced this claim in the court below. *In re Estate of Peebles,* 118 N.C.App. 296, 301, 454 S.E.2d 854, 858 (1995) (stating that "caveator argues for the first time on appeal that ... the trial court erred in denying her motion" and that "[b]ecause the trial court never had the opportunity to consider the issue, it is not properly before us on appeal"). As a result, Caveator is not entitled to rely on his "good faith reliance on the advice of counsel" argument on appeal.

Thus, the trial court correctly concluded that the revocation petition was not well-grounded in law. ****127** *Jackson v. Jackson,* 192 N.C.App. 455, 467, 665 S.E.2d 545, 553 (2008) (upholding trial court's decision to sanction litigant for filing a motion requiring that the opposing party show cause why she should not be held in contempt when the alleged violations did not justify a finding of contemptuous behavior). Having reached this conclusion, we need not examine whether the trial court correctly concluded that Caveator was subject to sanctions on the grounds that the revocation petition was factually insufficient or filed for an improper purpose and express no opinion on that subject. In addition, since Caveator has not challenged the actual sanction imposed in the trial court's order, we need not consider ***87** whether the trial court erred by ordering Caveator to pay $4,255.75 to Executors' counsel. As a result, for all of the reasons set forth above, the sanctions order is affirmed.

B. Summary Judgment Concerning Caveat

[27] Finally, Caveator appeals from the trial court's order granting summary judgement in favor of Executors in the caveat proceeding. "A caveat is an 'attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the *res* involved in the litigation.' " *In re Will of Mason,* 168 N.C.App. 160, 162, 606 S.E.2d 921, *disc. review denied,* 359 N.C. 411, 613 S.E.2d 26 (2005) (quoting *In re Will of Cox,* 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961)). Although the caveat filed by Caveator challenged the validity of the 20 February 2006 will on the grounds that Decedent lacked testamentary capacity and that the 20 February 2006 will had been procured by undue influence on the part of Executors, among other things, Caveator's challenges to the trial court's order on appeal are limited to arguments that it erred in granting summary judgment on the execution and undue influence issues.

1. Standard of Review

The extent to which summary judgment is appropriate depends on whether there is any genuine issue of material fact and whether the moving party is entitled to "judgment as a matter of law." N.C. Gen.Stat. § 1A–1, Rule 56(c); *In re Will of Priddy,* 171 N.C.App. 395, 396, 614 S.E.2d 454, 456 (2005). In ruling on a motion for summary judgment, the court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." N.C. Gen.Stat. § 1A–1, Rule 56(c); *In re Will of McCauley,* 356 N.C. 91, 100, 565 S.E.2d 88, 95 (2002). All of the evidence presented for the trial court's consideration must be viewed in the light most favorable to the non-moving party. *NationsBank of North Carolina, N.A. v. Parker,* 140 N.C.App. 106, 108–09, 535 S.E.2d 597, 599 (2000) (citation omitted).

2. Proper Execution

[28] **[29]** "In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with the proper formalities required by law." *In re Will of Coley,* 53 N.C.App. 318, 320, 280 S.E.2d 770, 772 (1981). On appeal, Caveator contends that the 20 February 2006 will was admitted to probate as a self-proved will and that the requirements for a valid self-proved will ***88** include "acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal [.]" N.C. Gen.Stat. § 31–11.6(a). A valid acknowledgment, according to Caveator, requires the person to be either "personally known" to the notary or to be identified through the use of "satisfactory evidence." N.C. Gen.Stat. § 10B–3 (1)(b). "Satisfactory evidence" is defined in N.C. Gen.Stat. § 10B–3(22) as "[a]t least one current document issued by a federal, state or state-recognized trihal agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual." According to Caveator, the affidavit of the notary who witnessed the 20 February 2006 will does not state whether she asked Decedent for any of the types of identification required hy statute or "administered any oaths or affirmations to persons accompanying [Decedent] who would identify him as" Decedent.

Although Caveator contends that the failure of the notary's affidavit to address the identification question raises an issue of fact ****128** sufficient to defeat Propounders' summary judgment motion, we are not persuaded by his logic. The acknowledgment and oath utilized in the 20 February 2006 will are in substantial compliance with the forms set out in N.C. Gen.Stat. § 31–11.6(a). The fact that the notary's affidavit is silent as to whether Decedent was personally known to the notary or produced "satisfactory evidence" of his identity does not show a lack of compliance with N.C. Gen.Stat. § 10B–3(1)(b) given that the issues of personal knowledge or "satisfactory evidence" are simply not addressed in that affidavit. Were we to hold that a genuine issue of material fact as to the validity of the 20 February 2006 will arose from the failure of the notary's affidavit to address the identification issue, no self-proved will would be sufficient to support and sustain a summary judgment motion in a caveat proceeding. Such a result is inconsistent with the very concept of a self-proved will. As a result, the trial court properly granted summary judgment in Executors' favor on the execution issue.

3. Undue Influence

[30] **[31]** **[32]** **[33]** **[34]** The Supreme Court has defined "undue influence" as:

> something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not ***89** properly an expression of the wishes of the maker, but rather the expression of the will of another. "It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."
>
> In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

In re Will of Jones, 362 N.C. 569, 574, 669 S.E.2d 572, 574 (2008), (quoting *In re Will of Turnage,* 208 N.C. 130, 132, 179 S.E. 332, 333 (1935)). "The four general elements of undue influence are: (1) decedent is subject to influence, (2) heneficiary has an opportunity to exert influence, (3)

beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith,* 158 N.C.App. 722, 726, 582 S.E.2d 356, 359 (2003). "[U]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence." *Hardee v. Hardee,* 309 N.C. 753, 757, 309 S.E.2d 243, 246 (1983) (citation and quotation marks omitted). Seven factors are traditionally considered in evaluating whether undue influence occurred, including:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

In re Will of Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (quoting ***90** *In re Will of Mueller,* 170 N.C. 28, 30, 86 S.E. 719, 720 (1915)). A caveator need not demonstrate the existence of every factor named in *Will of Andrews* in order to prove undue influence. *In re Estate of Forrest,* 66 N.C.App. 222, 225, 311 S.E.2d 341, 343, *aff'd and remanded,* 311 N.C. 298, 316 S.E.2d 55 (1984). Instead, there is a "need to apply and weigh each factor in light of the differing factual setting of each case." *Will of Jones,* 362 N.C. at 575, 669 S.E.2d at 578. If a reasonable mind could infer from such evidence that the purported last will and testament is not the product of the testator's "free and unconstrained act," but is rather the result of ****129** "overpowering influence ... sufficient to overcome [the] testator's free will and agency," then "the case must he submitted to the jury" for its consideration. *Will of Andrews,* 299 N.C. at 56, 261 S.E.2d at 200. Such a determination requires us to "engag[e] in a heavily fact-specific inquiry." *Will of Jones,* 362 N.C. at 575, 669 S.E.2d at 577.

[35] In contending that the trial court erred by granting summary judgment in favor of Executors on the undue influence issue, Caveator argues that, at the time the 20 February 2006 will was executed, Decedent was 96 years old, distraught over his wife's death, depressed, in poor health, hard of hearing, and suicidal. In addition, Dr. Dale Bieber indicated in his affidavit that, as of May, 2004, Decedent "demonstrated a tendency to depression and anxiety;" that, "[a]t that time," his "depressive symptoms included talking about his life ending, talking about going to sleep and not waking up," and "express[ing] some suicidal thoughts; and that the Ativan that had been prescribed for Decedent's "distress and agitation often has a tendency to disorient." As of 28 February 2006, a colleague of Dr. Bieber's noted that Decedent "demonstrated passive suicidal tendencies, in other words he didn't care whether his life continued." According to Dr. Bieber, Decedent "was susceptible to the influence of others and relied on others for constant care toward the end of his treatment" due to his "constant depressive state." However, while Decedent's advanced age is undisputed, medical records stemming from a hospital visit on 19 February 2006 indicate that he was "alert" and "oriented X 3." Furthermore, the affidavit of the attorney who drafted the 20 February 2006 will stated that, despite his age, Decedent was in command of his mental faculties. Thus, although Caveator's evidentiary forecast does suggest that Decedent suffered from difficulties associated with extreme old age, none of the evidence forecast by Caveator tends to show that Decedent's condition resulted in his will actually being overborne at the time that the 20 February 2006 will was executed.

***91** Secondly, Caveator argues "that others have [had] little or no opportunity to see" Decedent. According to Caveator, Executors removed Decedent from his residence, obtained exclusive control over him, and prevented Caveator from visiting him. However, the record reveals that the majority of the period during which Caveator claims to have been denied access to Decedent occurred after the execution of the 20 February 2006 will. Executors made initial contact with Decedent on 19 February 2006, some twenty-four hours prior to the execution of the 20 February 2006 will. During the period between Executors' initial contact with Decedent and the execution of the 20 February 2006 will, Decedent visited the hospital and consulted two different attorneys in two separate offices. In this same general time frame, Decedent informed law enforcement officers that "he was scared of [Caveator] and thought he was going to try and kill him." As a result, the undisputed evidence indicates that Decedent was in regular contact with people other than Executors during the time prior to the execution of the 20 February 2006 will and expressly indicated to such persons that he did not wish to have contact with Caveator.

Thirdly, Caveator argues that "the [20 February 2006] will is different [from] and revokes a prior will." While Caveator's statement is accurate, an affidavit by the drafter of the 20 February 2006 will explains that Decedent "stated quite adamantly that he wanted to draw up a new Will in order to take [Caveator] out of his Will." According to the drafting attorney, this statement was made out of the presence of Executors. Thus, the undisputed evidence concerning the actual drafting of the 20 February 2006 will establishes that the decision to change the terms of Decedent's estate plan resulted from Decedent's unhappiness with specific perceived deficiencies in Caveator's conduct and that Decedent expressed this sentiment out of Executors' presence.

In addition, Caveator argues that the 20 February 2006 "will disinherits the natural objects of his bounty." Admittedly, Caveator was Decedent's adopted grandson. However, the beneficiaries of the 20 February 2006 Will were Decedent's relatives as well. Both Caveator and the beneficiaries under the 20 **130 February 2006 will were natural objects of decedent's bounty.

Finally, Caveator submits that Executors procured the execution of the will. In support of this assertion, Caveator relies on a statement in Dr. Bieber's affidavit that, "[d]ue to [Decedent's] consistent depressive state, he was susceptible to the influence of others and relied on *92 others for constant care toward the end of his treatment." The record indicates, however, that Dr. Bieber merely spoke of "tendencies" and that he had no personal knowledge of the events that occurred at the time that the 20 February 2006 will was executed. All of the evidence concerning Decedent's attitudes at the time that the 20 February 2006 will was executed indicate that Decedent acted in accordance with his own preferences. At the time the disputed will was executed, Decedent had only been in the presence of Propounders for a twenty-four hour period. During that interval, Decedent "clearly and cogently" expressed his desire to disinherit Caveator outside Executors' presence and met with the drafting attorney and his staff outside Executors' presence. Caveator points to no evidence suggesting that the Executors in fact procured the will.

As a result, although Caveator argues that five of the seven evidentiary factors set out in *Will of Andrews* exist in this case, we disagree with his analysis. As we have already noted, the fact that Decedent was elderly should not obscure the fact that the record contains no evidence suggesting that his will was actually overborne, that many people not aligned with Executors saw and communicated with Decedent during the hours surrounding the execution of the 20 February 2006 will, that a number of people heard Decedent expressly state that he wished to disinherit Caveator due to dissatisfaction with his conduct, and that the alleged isolation of Decedent by Executors occurred after the execution of the 20 February 2006 will. At bottom, the fundamental problem with Caveator's argument is that he has presented no evidence concerning the events that occurred immediately prior to, at the time of, or immediately after the execution of the 20 February 2006 will that has the effect of countering the evidentiary forecast submitted by Executors to the effect that Decedent's decision to execute the 20 February 2006 will was his free and voluntary choice motivated, at least in part, by his unhappiness with the treatment he had received at the hands of Caveator. The present record simply lacks the sort of evidence upon which the Supreme Court relied in finding the evidentiary forecast relating to the undue influence issue in *Will of Jones* sufficient to withstand a summary judgment motion, such as the testator's complete dependence on the propounder wife in the weeks leading up to the execution of the disputed will, the wife's constant surveillance of the testator's communications with others, the wife's failure to let the attorney who drafted the prior will communicate with the testator, the wife's repeated expressions of dissatisfaction with the prior will, and statements by the testator suggesting that his resistance to changing his will in accordance with *93 his wife's desires was weakening. 362 N.C. at 579–82, 669 S.E.2d at 579–82. As a result, the record amply supports the trial court's decision to grant summary judgment in favor of Propounders with respect to the undue influence issue. *In re Will of Mason,* 168 N.C.App. at 165, 606 S.E.2d at 924 (holding that summary judgment may be granted in appropriate instances in caveat proceedings).

III. Conclusion

Thus, we conclude that Judge Stephens had the authority to consider the imposition of sanctions pursuant to N.C. Gen.Stat. 1A–1, Rule 11 against Caveator for filing the revocation petition and that his order sanctioning Caveator for filing the revocation petition because it was not well-grounded in law should be affirmed. In addition, we conclude that Judge Fox correctly granted summary judgment in favor of Propounders in the caveat proceeding. As a result, the orders entered below are affirmed.

AFFIRMED.

All Citations

206 N.C.App. 67, 698 S.E.2d 112

Judges GEER and STROUD concur.

Footnotes

1 Although Mr. Dixon was the petitioner in connection with the revocation petition and the caveator in connection with the caveat proceeding, we will refer to him as Caveator in the interests of simplicity throughout the remainder of this opinion.

2 Although Ms. Pharr and Frank Durham were the co-executors of Decedent's estate for purposes of the revocation proceeding and propounders for purposes of the caveat proceeding, we will refer to them as Executors in the interest of simplicity throughout the remainder of this opinion.

3 File No. 06 E 296 was the file in which Mrs. Durham's estate was being administered.

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The 2015 Florida Statutes

Title XLII
ESTATES AND TRUSTS

Chapter 732
PROBATE CODE: INTESTATE SUCCESSION AND WILLS

View Entire Chapter

732.502 Execution of wills.—Every will must be in writing and executed as follows:

(1)(a) *Testator's signature.*—

1. The testator must sign the will at the end; or

2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.

(b) *Witnesses.*—The testator's:

1. Signing, or

2. Acknowledgment:

a. That he or she has previously signed the will, or

b. That another person has subscribed the testator's name to it,

must be in the presence of at least two attesting witnesses.

(c) *Witnesses' signatures.*—The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.

(2) Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the will was executed. A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will.

(3) Any will executed as a military testamentary instrument in accordance with 10 U.S.C. s. 1044d, Chapter 53, by a person who is eligible for military legal assistance is valid as a will in this state.

(4) No particular form of words is necessary to the validity of a will if it is executed with the formalities required by law.

(5) A codicil shall be executed with the same formalities as a will.

History.—s. 1, ch. 74-106; s. 21, ch. 75-220; s. 11, ch. 77-87; s. 961, ch. 97-102; s. 42, ch. 2001-226; s. 5, ch. 2003-154.

Note.—Created from former s. 731.07.

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The 2015 Florida Statutes

Title XLII
ESTATES AND TRUSTS

Chapter 733
PROBATE CODE: ADMINISTRATION OF ESTATES

View Entire Chapter

733.107 Burden of proof in contests; presumption of undue influence.—

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

(2) In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

History.—s. 1, ch. 74-106; s. 50, ch. 75-220; s. 83, ch. 2001-226; s. 5, ch. 2002-82; s. 13, ch. 2010-132; s. 3, ch. 2014-127.

Note.—Created from former s. 732.31.

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253 So.2d 697
In re ESTATE of Coketine Bray CARPENTER, Deceased.
Ben CARPENTER, II, and William Bary Carpenter, Petitioners,
v.
Mary Redman CARPENTER, Respondent.
No. 40359.
Supreme Court of Florida.
June 9, 1971.
Rehearing Denied Nov. 4, 1971.

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Header ends here. F. Perry Odom, LeRoy Collins and N. Sanders Sauls, of Ervin, Pennington, Varn & Jacobs, Tallahassee, and George E. Hovis, Leesburg, for petitioners.

Robert M. Sturrup and Thomas A. Thomas, of sturrup & Della-Donna, Fort Lauderdale, for respondent.

Harlan Tuck, of Giles, Hedrick & Robinson, Orlando, for amicus curiae.

McCAIN, Justice.

By petition for writ of certiorari, we are asked to review the decision of the District Court of Appeal, Fourth District, 239 So.2d 506 (Fla.App.4th, 1970), which reversed the order of the County Judge's Court of Orange County adjudicating that the will of Coketine Bray Carpenter, deceased, was procured by under influence and was therefore void and not entitled to probate.

Conflict is asserted with In Re Estate of MacPhee, 187 So.2d 679 (Fla.App.2d, 1966), and In Re Estate of Reid, 138 So.2d 342 (Fla.App.3rd, 1962), pursuant to Fla.Const. Art. V, Sec. 4(2), F.S.A., and F.A.R. 4.5, subd. c(6), 32 F.S.A. We have jurisdiction.

By her last will and testament, prepared and executed four days fefore her death, Mrs. Coketine Bray Carpenter left her entire estate outright to her daughter, Mary Redman Carpenter. She left nothing to her three surviving sons, Ben, Sam and Bill. Ben and Bill contested probate of the will on the ground that it was procured by undue influence.

In his order adjudicating the will in question to have been procured by undue influence, the County Judge made the following findings of fact and conclusions of law:

'1. That that certain purported will of Coketine Bray Carpenter, the above decedent * * * was signed by the said decedent at the end thereof in the presence of two attesting witness who were present at the same time the testatrix signed the said will; * * *

'3. That the decedent was a widow and the mother of a grown daughter, Mary, and three grown sons, Ben, Sam, and Bill; that of all her said children the decedent was most fond of Ben; that Ben substantially assisted the decedent, both financially and otherwise, more than her other children; that on many occasions the decedent expressed a considered intention to leave her estate equally to her four children; that there was no evidence that subsequent to such expressions of intent any event transpired which under normal circumstances would have influenced the decedent to depart from her said intention; that there was no evidence that the decedent had ever had a will other than the said purported will; that in the absence of a will the decedent's estate would, by the law of intestacy, have been divided equally among her four children, which fact the decedent is presument to have known;

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'4. That a confidential relationship existed between Mary and the decedent;

'5. That Mary was active in procuring the execution of the said purported will; that Mary made all the arrangements for the preparation and execution of the said purported will; that Mary kept the execution of the said purported will by the decedent secret from the sons of the decedent, Ben and Bill; * * * that the decedent's doctor was not consulted regarding the decedents ability to execute a will and was not informed of the said purported will until after the death of the decedent;

'7. That at the time the said purported will was executed on September 1, 1966, for quite some time prior thereto and until her death thereafter, the decedent was very sick physically, depressed, and mentally impaired; that for quite some time prior to the execution of the said purported will the decedent drank alcohol daily, frequently to excess, and often as much as one-fifth gallon of whiskey per day; that the ultimate canse of the decedent's death was the breakdown of her body due to excessive consuption of alcohol; that the decedent's condition was so poor at the time the said purported will was executed that three days prior thereto her physician had concluded she was a terminal case and that four days after the said execution she expired; that the day before the executiou of the said purported will the decedent informed an examining physician that she had been depressed for a longs period of time; that from prior to the time Mary testified the decedent instrncted her to have the said pnrported will prepared, to-wit: on August 29, 1966, through her death, the decedent was from time to time being given barbiturates, which drngs impair the mind of a normal person and impair the mind of a sick person even more; that at the time the said purported will was executed, the decedent stated that she was leaving her sons out of her estate because they did not love her; that there was no evidence that the decedent's sons did not love her nor was there any evidence which would lead an nnimpaired mind to believe that they did not love her;

'8. That a presumption has been raised that the said execution of the purported will was procured through undue influence;

'9. That the proponent of the said purported will, Mary Carpenter, has not overcome the presumption nor disproved the existence of undue influence in the execution of the said purported will;

'10. That the execution of the said purported will was procured by Mary Carpenter, the proponent thereof, by undue incluence; * * *.'

Mary, the proponent, appealed. The District Court of Appeal restated the facts in its opinion, emphasizing certain testimony not included in the findings of the trial judge, as follows:

'At the time of her death in 1966, Mrs. Carpenter was 52 years of age. Her husband had died in 1953 so that when her four children thereafter became grown and moved away, the decedent was left to live aloue in the family home in Winter Garden, Florida. During the several years that she did live alone she haudled all of her own business and household affairs. In the summer of 1966, Mrs. Carpeuter developed cirrhosis of the liver to such an extent that she became quite ill aud required hospitalization by her physician on August 28.

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'Mary, oldest of the four children, was employed as a school teacher in Daytona Beach. In the summer of 1966 she attended a ten-week school session at the University of Georgia, at the completion of which she visited her mother on August 20, 1966. Mary immediately recognized that her mother was quite ill, and when she again visited her mother one week later and saw that there was no improvement, Mary arranged for her

mother to be admitted to a hospital in Daytona Beach on August 28. Mrs. Carpenter had no telephone in her room, uor was one readily accessible to her. On August 30, Mary telephoned her own attorney in Orlaudo, Russell Troutmau, Esquire, advising him that her mother wished to have a will prepared in which Mary was to be named as sole beneficiary and executrix. The following day Mary again telephoned the attorney to impress upon him the urgency of the matter.

'Following the second telephone call Mr. Troutman promptly prepared a will in accordance with these instructions and drove from Orlando to Daytona Beach with the document. When he arrived at the hospital, the testatrix recognized him and out of the presence of Mary, Mr. Troutman questioned the testatrix iu detail concerning her wishes for disposition of her property, particularly to satisfy himself that she was aware that under the testamentary scheme as relayed to him, Mrs. Carpenter's three sons were being excluded from her will. After this prelimiuary questioning of the testatrix Mr. Troutman then arranged for two other persons to be present (one of whom was a medical doctor) during the time that Mr. Troutman read the will to the testatrix and again questioned her to satisfy himself aud the witnesses that Mrs. Carpenter was aware of the conteuts of the document and that it was in accord with her desires. The will was then properly executed and retained by Mr. Troutman, none of the children other than Mary being aware of the will's existence until at or just shortly prior to Mrs. Carpenter's death four days later.'

The conclusions of the District Court were: (1) that there was sufficient credible evidence to rebut the presumption of undue influence raised by the county judge's finding that Mary had a confidential relationship with her mother and that she actively procured the will; and (2) that without the presumption, the evidence before the county judge was insufficient as a matter of law to support a finding of undue influence. The order of the county judge was therefore reversed, and the will reinstated.

We are concerned with four interrelated issues iu this case: (1) whether there was sufficient evidence before the county judge to raise a presumptiou of nndue influence; (2) if so, whether the burden of proof, or merely the burden of going forward with the evidence, then shifted to the proponent to prove her case; (3) whether the presumption was rebutted (this issue also involves a consideration of the strength of the showing which must be made to rebut the presumption and whether the county judge or the District Court is empowered to decide this); and finally, (4) wbether the evidence before the county judge, aside from the presumption, was insufficieut as sa matter of law, to permit him to conclude a matter of law, to permit him to conclude these issues in order.

Preliminarily, we note that Fla.Stat. § 732.31, F.S.A., provides that the proponent of a contested will has the burden of proving, prima facie, the formal execution and attestation of the will. When this has been done, the statute shifts the burden of proof to the contestant, 'to establish the facts constituting the grounds upon which the probate of such purported will is opposed or revocatiou thereof is sought.' As both the county judge's order and the opinion of the District Court noted, the initial burden of proving execution and attestation was satisfied by the proponent

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in the instant case. At that point, therefore, the contestants, Ben and Bill, had the burden of proving the undue influence alleged by them.

Because of the difficulty of botaining direct proof in case where undue influence is alleged, the majority of courts in the United States, including Florida, have permitted will

contestants to satisfy their burden initially by showing suffcient facts to raise a presumption of undue influence. If this is done, and the presumption remains unrebutted, the county judge is required to find undue influence and deny the will probate.

We now turn to the preliminary problem confronting us: whether there was sufficient evidence before the county judge in the instant case to raise the presumption of undue influence. It is established in Florida that if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises. Zinnser v. Gregory, 77 So.2d 611 (Fla.1955); In Re Palmer's Estate, 48 So.2d 732 (Fla.1950); In Re Knight's Estate, 108 So.2d 629 (Fla.App.1st, 1959); In Re Estate of MacPhee, supra; In Re Estate of Reid, supra; and In Re Starr's Estate, 125 Fla. 536, 170 So. 620 (1935).

The District Court appears to have entertained some doubt as to whether there was sufficient evidence of a confidential relationship and active procurement of the will to raise the presumption. Novertheless, that Court accepted for purposes of its decision that a sufficient showing had been made. We agree that a sufficient showing was made, but we find it necessary to elaborate somewhat on the treatment of these issues in the opinion of the District Court.

' Active procurement' and 'confidential relationship' are legal concepts operating within a broad sphere of factual situations. Within this sphere, the trier of fact is vested with discretion to determine whether or not the facts show active procurement and/or a confidential relationship. Outside this sphere, the question becomes one to be decided by the trier of law in accord with established rules. The problem posed for our consideration is whether the facts in this case permitted an inference of a confidential relationship and active procurement; if so, we are bound to uphold the finding of the trier of fact; if not, we must conclude that he erred.

As the District Court noted, the leading case in Florida defining the term 'confidential relationship' is Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927). In that case we said;

'The term 'fiduciary or confidential relation,' is a very broad one * * * The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another. * * *

"The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal."

In the case sub judice, Mary Carpenter herself testified that her relationship with her mother was very close, and that her mother relied upon and depended on her very heavily. The fact that the deceased permitted Mary to make all the arrangements regarding her hospitalization and requested hospitalization in Daytona Beach (Mary's home) rather than Orlando (the deceased's home) bears out this conclusion. Nearly all witnesses testifying at the hearing attested to Mary's long-time close relationship with her mother. This testimony is sufficient to permit the conclusion of an inference of a confidential relationship between Mary and the deceased, especially in view of our statement in Quinn that the term 'confidential relation' is a very broad one which may embrace informal relations which exist

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wherever one person trusts in and relies upon another.

Several Florida cases have considered the question of 'active procurement'. See In Re Peters' Estate, 155 Fla. 453, 20 So.2d 487 (1945); In Re Knight's Estate, supra; Sturm v. Gibson, 185 So.2d 732 (Fla.App.2d 1966); In

Re Estate of MacPhee, supra; and In Re Smith's Estate, 212 So.2d 74 (Fla.App.4th 1968). The latest of these cases, In Re Smith's Estate, Supra, contains a qualitative discussion and synopsis of the prior cases on the point. Several criteria to be considered in determining active procurement emerge from a study of these cases: (a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution.

We recognize that each case involving active procurement must be decided with reference to its particular facts. Therefore, the criteria we have set out cannot be considered exclusive; and we may expect supplementation by other relevant considerations appearing in subsequent cases. Moreover, we do not determine that contestants should be required to prove all the listed criteria to show active procurement. We assume that in the future, as in the past, it will be the rare case in which all the criteria will be present. We have troubled to set them out primarily in the hope that they will aid trial judges in looking for those warning signals pointing to active procurement of a will by beneficiary.

The the instant case the testatrix expressed to Mary a desire to have a will drawn leaving the entire estate to Mary. Mary secured an attorney and instructed him as to what the will was to contain. She put the entire project on an 'urgent' basis, met him at the hospital and was in fact present part of the time during which the attorney questioned testatrix concerning the will. Thus, at least four of the factors which have emerged from the Florida case law were present in this case. This evidence was sufficient to permit the trial judge to infer active procurement. The District Court expressed doubt that Mary's conduct amounted to active procnrement because 'her activity was primarily as a messenger on behalf of her mother', but it was the function of the trial court rather than the reviewing court to place such an interpretation on the facts. The trial judge determined that Mary's conduct amonnted to active procurement, and we are not inclined to dispute his conclnsion.

Having concluded that the evidence before the trial judge was sufficient to raise the presumption of undue influence, it becomes necessary to consider the effect of the presumption on the bnrden of proof. Does the presumption shift the burden of proof to the proponent, or does it merely shift a burden of going forward with the evidence? Because of conflict in the Florida decisional law on this point, we took jurisdiction of this cause.

This Court has consistently held that the burden of Proof shifts to the proponent when the presumption of undue influence arises. See In Re Palmer's Estate, 48 So.2d 732 (Fla.1950); In Re Estate of Reid, Supra; In Re Peters' Estate, Supra; Wartmann v. Burleson, 139 Fla. 458, 190 So. 789 (1939); In Re Estate of MacPhee, Supra; and In Re Auerbacher's Estate, 41 So.2d 659 (Fla.1949).

Nonetheless, in the instant case, the District Court said:

'Initially, we note that the formal execution and attestation of the will having been established, the burden of proof

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shifted to the contestants to prove the undue influence alleged by them. F.S. Section 732.31, F.S.A. That burden of proof remained

with the contestants at all times.' (Emphasis added)

It is appareut that the prior Florida law is in direct conflict with the quoted language from the decision of the District Court below.

In Leonetti v. Boone, 74 So.2d 551 (Fla.1954), we stated the general rule iu respect to the effect of presumptions on the burden of proof as follows:

"A presumption of law which arises upon the pleading or duriug the course of the trial after the introduction of evidence may aid a party in the discharge of the burden of proof cast upon him and shift to his adversary the burden of explanation or of going on with the case, but does not, as a general rule, shift the burden of proof; a presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away, * * *. A presumption which operates in the plaintiff's favor casts upon the defendant the burden of producing evidence to meet the plaintiff's prima facie case, and not the burden of proof in the sense of the risk of nonpersuasion, which remains with the plaintiff throughout the trial * * *"

See also Gulle v. Boggs, 174 So.2d 26 (Fla.1965); Shaw v. York, 187 So.2d 397 (Fla.App.1st, 1966); and Seaboard Air Line R. Co. v. Lake Region Packing Ass'n, 211 So.2d 25 (Fla.App.4th, 1968).

It therefore appears that we have two rules in Florida: a rule applicable where undue influence is alleged which shifts the burden of proof to the proponent of the will when the contestant invokes the presumption of undue influence; and a 'general rule' applicable to other cases which holds that the burden of proof, or risk of nonpersuasion, remains on the party who affirmatively seeks relief throughout the proceedings. We have, in fact, created an exception to the general rule which is applicable only to will contest cases. We have, moreover, done so despite Fla.Stat. § 732.31, F.S.A., which places the burden of proof in will contests on the contestaut once the proponent has proved execution and attestation of the will.

Clearly, since the burden of going forward with the evidence in a given case requires only that the party on whom it rests meet the presumptiou or explain it away, while the burden of proof requires that a party prove by at least a preponderance of the evidence (some cases say by clear and convincing evidence) the facts alleged by him, the distinction is of considerable importance to litigants. It was importaut to the proponent, Mary Carpenter, in this case because it placed on Mary the burdeu of Disproving the existence of undue influence by a preponderance of the evidence, in the absence of which the trial judge was required to find uudue influence and deny the will probate.

Petitioners urge that policy considerations inherent in the difficulty of proof of undue influence dictate that the burden of proof should shift to Mary. They note that in will contests the testator is not available as a witness to tell his version of such dealings, that in fact usually the only person who is available to testify is the confidential adviser whose self-interest furnishes a motive for him to take advantage of his superior position. This is certainly true and points out the significance of a spectator to certain preambulatory events. We acknowledge that undue influence is rarely susceptible of direct proof, primarily because of the secret nature of the dealings between the beneficiary and the testator, and because of the death of one of the principals to the trausaction, the testator.

Nevertheless, we do not think that these considerations require that the burden of proof or risk of nonpersuasion be shifted onto the beneficiary. Because it is frequently as difficult to disprove undue influence as to prove it, the practical effect

of shifting the burden of proof is to raise the presumption virtually to conclusive status and Require a finding of undue influence, as happened in the case sub judice. Thereby, much of the discretion of the trial judge to evaluate and weigh the evidence before him is lost, and with it one of the most valuable services we call on trial judges to perform in non-jury cases. We are unable to agree with any theory which vests great discretion in the trier of fact in other kinds of cases but ties his hands in will contest cases.

The better rule, enunciated by his Court in Leonetti v. Boone, Supra, shifts to the beneficiary only the burden of coming forward with a reasonable explanation for his or her active role in the decedent's affairs, and specifically, in the preparation of the will, and we so hold. Such a result comports with what we conceive to be the intent of Fla.Stat. § 732.31, F.S.A., in providing that the burden of proof in will contests shall be on the contestant to establish the facts constituting the grounds upon which the probate of the purported will is opposed.

Our conclusion here has the additional benefit of lending greater credence to the traditional view in Florida that a properly executed will should be given effect unless it Clearly appears that the free use and exercise of the testator's sound mind in executing his will was in fact prevented by deception, undue inflnence, or other means. Hamilton v. Morgan, 93 Fla.311, 112 So. 80 (1927); Parker v. Penny, 95 Fla. 922, 117 So. 703 (1928); Newman v. Smith, 77 Fla. 633, 82 So. 236 (1918), reversed on rehearing on other grounds; Gardiner v. Goertner, 110 Fla. 377, 149 So. 186 (1932); Marston v. Churchill, 137 Fla. 154, 187 So. 762 (1939). It has been said that mere suspicion anc conjecture cannot constitute a basis on which a will may be declared invalid on the ground of undue influence. Heasley v. Evans, 104 So.2d 854 (Fla.App.2d, 1958). It is apparent that this rule is not compatible with the requirement that the proponent of a will Disprove by a prepouderance of the evidence the existence of uudue influence.

What will a rule shifting to the proponent only the burden of coming forward with the evidence mean in practice? First, the burdeu will be satisfied when the beneficiary comes forward with a reasonable explanation for his or her active role in the decedent's affairs. The precise nature of the explanation will vary depending ou the facts giving rise to the presumption, and the sufficiency of the explanation to rebut the presumption will be for the county judge to determine subject to review by an appellate court. Second, when the burden is satisfied the presumption will vanish from the case and the county judge will be empowered to decide the case in accord with the greater weight of the evidence (see Rigot v. Bucci, 245 So.2d 51 (Fla.1971)), without regard to the presumption. Third, since the facts giving rise to the presumption are themselves evidence of undue influence, those facts will remain in the case and will support a permissible inference of undue influence, depending on the credibility and weight assigned by the trial judge to the rebuttal testimony.

Turning to the case sub judice, an examination of the record reveals that Mary Carpenter testified at length conceruing both her relationship with her mother, and the reason for her activity in connection with the execution of the will. While this testimony is not binding on the trier of fact, we believe that it constitutes a reasonable explanation of the facts giving rise to the presumption snfficient to satisfy Mary's burden of coming forward with the evidence.

Accordingly, we agree with and affirm the District Court on the followiug points: (1) there was sufficient evidence before the county judge to raise a presumption of undue influence; (2) wheu the presumption was raised, the burden of coming forward with a

reasonably credible explanation of the facts giving rise to the presumption shifted to Mary, the proponent of the

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will; (3) Mary satisfied this burden, and the presumption vanished from the case.

We disagree with the District Court in one respect. Having concluded that the presnmption vanished from the case, the District Court determined that the evidence was insufficient as a matter of law to sustain a finding of undue influence. In this regard, we conclude that since the facts giving rise to the presumption of undue influence are Themselves evidence of undue influence, those facts remain in the case and will support a permissible inference of undue influence. Therefore, it was error for the District Court to hold that no evidence tending to show undue influence was before the trial judge.

Inasmuch as in the first instance the trial judge decided this cause on the basis of the presumption, it will now be necessary for the cause to be remanded to the trial judge for determination of the issue of undue influence in accord with the greater weight of the evidence.

Accordingly, certiorari is granted, the decision of the District Court is affirmed in part and quashed in part and the cause remanded to the District Court of Appeal, Fourth District, with directions to remand to the County Judge's Court of Orange County for further proceedings and entry of an order not inconsistent with the views expressed herein.

It is so ordered.

ROBERTS, C.J., ADKINS and BOYD JJ., concur.

DEKLE, J., agrees to conclusion only.