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In re Tiffany Living Trust 2001, 124 Nev. Adv. Op. No. 8 (March 6, 2008)¹

ESTATE PLANNING – UNDUE INFLUENCE, NEVAD RULES OF PROFESSIONAL CONDUCT, CONSTRUCTIVE TRUSTS

Summary

Consolidated appeals from district court orders in a trust proceeding that found no undue influence in naming the attorney as the primary beneficiary of an estate and found Nevada's Rules of Professional Conduct do not give rise to a private right of action, and which dismissed the civil action for constructive trust.

Disposition/Outcome

Affirmed. The Nevada Supreme Court first held that an attorney, whose law firm partner prepares an estate plan for a client, who names the attorney as a beneficiary, must overcome the presumption of undue influence by demonstrating clear and convincing evidence. Here, the Court held clear and convincing evidence demonstrates that the client in this case was not unduly influenced in naming the attorney as the primary beneficiary of her estate. Second, the Court held violations of Nevada's profession conduct rules do not give rise to a private right of action. Finally, the Court determined the district court did not err in dismissing the civil action for constructive trust that was instituted after the trust proceedings had taken place.

Factual and Procedural History

These consolidated appeals concern the estate of Jane Tiffany who, to avoid probate, established a living trust within which she could place all of her assets. Before arranging the living trust, Jane quitclaimed her house to appellant Josephine Ricks and to herself as joint tenants with right of survivorship.

Kenneth A. Woloson prepared the estate plan. Woloson was a law firm partner of Jane's friend, and respondent, attorney Phillip J. Dabney. During its preparation, Josephine agreed to Jane's request to quitclaim her interest in the house to the trust based on the alleged understanding that Josephine would receive the house upon Jane's death.

In executing her living trust, Jane listed Dabney as the beneficiary of her house. After Jane's death, Josephine's husband, appellant William Ricks, attempted to overturn Jane's designation of Dabney as a beneficiary of the estate by arguing that it was a product of undue influence, as Dabney's law partner had prepared the estate plan. However, the district determined Dabney successfully rebutted the presumption of undue influence.

Subsequently, Josephine instituted an action for relief in her favor, in the form of a constructive trust that consisted of Jane's house. Dabney moved to consolidate this action with the trust proceeding, already on appeal, and to dismiss it. The district court granted Dabney's motions to consolidate Josephine's action with the trust proceeding. The court also dismissed Josephine's action based on her failure to file a creditor's claim during the trust proceeding. Additionally, the court determined Josephine had "had her day in court" because she had

¹ By Candace Oranges.

previously filed a notice of lis pendens during the trust proceeding. These consolidated appeals followed.

Discussion

In this consolidated appeal, the Court considered (1) whether Dabney successfully rebutted the presumption of undue influence arising from his law firm partner's preparation of Jane's living trust, which named Dabney as the beneficiary of Jane's house; (2) whether a violation of SCR 158 provided a private right of action to set aside Jane's living trust; and (3) whether the district court erred in dismissing Josephine's constructive trust action.

Undue Influence

The Court determines that the attorney, Woloson, prepared the living trust according to Jane's instructions and desires, which were not a product of Dabney's undue influence. A presumption of undue influence arises when (1) a fiduciary relationship exists; and (2) the fiduciary benefits from the transaction in question.² A presumption of undue influence arose because a fiduciary relationship existed between Dabney and Jane, as Dabney's law firm partner prepared Jane's living trust. Furthermore, Dabney, as the fiduciary, benefitted from the relationship because he was the beneficiary of Jane's house.³

With respect to fiduciary relationships, from which an attorney obtains a business advantage from a client, the Court noted an attorney must rebut a presumption of impropriety by a showing of clear and satisfactory evidence.⁴ "Clear and satisfactory" is equivalent to "clear and convincing" evidence.⁵ Therefore, irrespective of terminology, this heightened standard must eliminate any serious doubt about the correctness of the conclusions drawn from the evidence.⁶ The Court finds this standard consistent with Nevada's case law, which requires an attorney when dealing with a client for his benefit, to demonstrate "by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching."⁷ The district court properly found Dabney had rebutted the presumption of undue influence with clear and convincing evidence. Accordingly, the Court concludes the evidence supports the district court's finding of no undue influence.

Violation of SCR 158

The Court rejected William's argument that the district court should have set aside Jane's living trust because Dabney and Woloson violated SCR 158. Before the legislature repealed SCR 158(3), the rule provided "a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client,

² See *Peardon v. Peardon*, 65 Nev. 717, 767, 201 P.2d 309, 333 (1948) (holding that the doctrine of undue influence "reaches every case, and grants relief 'where influence is acquire and abused, or where confidence is reposed and betrayed' . . . but is applied when necessary to conveyances, executory and executed contracts, and wills").

³ See Nev. R. Prof. Conduct 1.8 (formerly SCR 158(3), 160(1)).

⁴ In re *Singer*, 109 Nev. 1117, 1120-21, 865 P.2d 315, 317 (1993).

⁵ See, e.g., *Cora v. Strock*, 441 N.W.2d 392, 395 (Iowa Ct. App. 1989).

⁶ See *M.L.J. v. Johnson*, 121 S.W.3d 378, 380 (Tenn. Ct. App. 2003).

⁷ *Williams v. Waldman*, 108 Nev. 466, 472, 836 P.2d 614, 618 (1992) (citing *Davidson v. Streeter*, 68 Nev. 427, 440, 234 P.2d 793, 799 (1951); *Moore v. Rochester W. M. Co.*, 42 Nev. 164, 176, 174 P. 1017, 1021 (1918)).

including a testamentary gift, except where the client is related to the donee.” Additionally, SCR 160(1) provided “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 157, 158(3), 159 or 160.”⁸

The Court holds that despite any apparent violations of SCR 158 and 160 when Woloson prepared Jane’s living trust benefiting Dabney, William does not possess a private right of action to set aside Jane’s living trust.⁹ The Court relies on its previous determination in *Mainor*, where it held an attorney’s violation of the rules of professional conduct does not give rise to a private right of action for civil damages, rather the violation relates to the standard of care an attorney owes its client.¹⁰ Accordingly, the district court did not abuse its discretion in denying William a private right of action despite the apparent violations of SCR 158 and 160. A violation of the Nevada Rule of Professional Conduct does not create a private right of action.¹¹

Dismissal of Josephine’s civil action

The Court finds correct the district court’s determination that Josephine’s claim was time-barred because she failed to file a creditor’s claim during the trust proceeding. The Court finds Josephine to be a creditor because she attempted to recover property she believed held in Jane’s living trust, and, thus, sought payment of her claim. Therefore, the district court did not err in determining that Josephine was time-barred from bringing her claim under NRS 164.025(3).

Accordingly, the district court did not err in dismissing Josephine’s civil action because she failed to bring her constructive trust or fraud claim in the earlier trust proceeding. The Court reasons that she should have filed a petition for constructive under NRS 164.033(a)(1) when the court was considering whether Dabney was entitled to the house, because her rights to the house were adjudicated in the trust proceeding, along with William’s rights.

Conclusion

In affirming the orders of the district court, the Nevada Supreme Court holds that Dabney successfully rebutted the presumption of undue influence by showing clear and convincing evidence that he did not unduly influence Jane into naming him as a beneficiary of her estate. The Court also holds that despite apparent violations of the Nevada Rules of Professional Conduct, per se violations do not afford William a private right of action to set aside Jane’s living trust. Lastly, the Court concludes the district court appropriately dismissed Josephine’s civil action.

⁸ Former SCR 160 is now Nevada Rule of Professional Conduct 1.10. Because the former version applied at all times pertinent to this matter, the Court uses the former version in this opinion.

⁹ See *Mainor v. Nault*, 120 Nev. 750, 768-69, 101 P.3d 308, 320-21 (2004).

¹⁰ *Id.*

¹¹ *Id.*