IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON ENRIQUE AROSEMENA AND JUDITH STEVENS,
Appellants,
vs.
BRYAN LOWE; BRYAN LOWE, P.C., A NEVADA PROFESSIONAL CORPORATION; AND BRYAN LOWE, AS TRUSTEE OF THE JULIE AROSEMENA TRUST,
Respondents.

No. 39524

FILED

JAN 30 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended district court order granting respondents' motion for summary judgment in an action for breach of fiduciary duty in the administration of a trust.

Julie Arosemena retained respondent attorney Bryan Lowe to prepare multiple testamentary documents, including a revocable trust for herself and a will for her then-husband, appellant Ramon Arosemena. Under the original terms of the trust, Julie was the grantor and trustee, Ramon was the first successor trustee, and Lowe was the second successor trustee.

Julie amended her trust three times. The first amendment, drafted by Lowe, named Lowe as the only successor trustee and added general pecuniary distributions of $100,000.00 each to Ramon and Julie's neighbor, appellant Judith Stevens. After Julie and Ramon divorced, Julie amended the trust again. The second amendment, drafted by Lowe, named Julie and Lowe as co-trustees.

After purchasing a house, Julie informed Lowe that she wanted him to have her residence upon her death. When Julie asked Lowe to amend the trust to that effect, he informed her that he could not

and would not make such an amendment. Subsequently, she retained separate, independent counsel: (1) to transfer title to the residence into the name of the trust; and (2) to draft the third amendment, giving Lowe her residence and most of the household furnishings upon her death.

After Julie died, Lowe distributed the trust assets according to its terms. As a result, he received Julie's residence and furnishings as a specific gift. Because the trust had insufficient assets to fund the general pecuniary gifts, including the $100,000.00 gifts to Ramon and Stevens, Lowe proportionately reduced the gifts. Ramon and Stevens filed suit against Lowe alleging, among other claims, breach of fiduciary duty. After both sides moved for summary judgment, the district court granted Lowe's motion for summary judgment.

We review orders granting summary judgment de novo.[1] Summary judgment is appropriate when the record, viewed in a light most favorable to the non-prevailing party, demonstrates that no genuine issue of material fact remains in dispute and that the prevailing party is entitled to judgment as a matter of law.[2]

Because the parties stipulated below that no genuine issues of material fact exist, the contentions on appeal involve questions of law. "Questions of law are reviewed de novo."[3]

Appellants first argue that an attorney who drafts a revocable trust for a client and serves as co-trustee to the trust exercises undue

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[1]Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994).

[2]Id.

[3]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

influence over the client and engages in self-dealing when he accepts a substantial gift from the trust set forth in a trust amendment drafted by a separate, independent attorney. In response, Lowe argues that appellants lack standing to raise the self-dealing issue.

When an attorney represents a trustee, the attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law.[4] Because Lowe owed a duty of care and fiduciary duties to appellants, who were beneficiaries under the trust at all relevant times, we conclude that appellants have sufficient standing to raise the self-dealing issue.

A testamentary instrument is invalid if procured by the undue influence of another.[5] A presumption of undue influence arises, shifting the burden of proof, when a person challenging a testamentary instrument shows that:

> (1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.[6]

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[4]Charleson v. Hardesty, 108 Nev. 878, 882-83, 839 P.2d 1303, 1306-07 (1992).

[5]Rice v. Clark, 47 P.3d 300, 304 (Cal. 2002); see generally Close v. Flanary, 75 Nev. 255, 257-58, 339 P.2d 379, 380 (1959).

[6]Rice, 47 P.3d at 304; see also Estate of Auen, 35 Cal. Rptr. 2d 557, 562-63 (Ct. App. 1994) superseded by statute as stated in Rice, 47 P.3d 300 (where a testator's attorney is alleged to have exerted undue influence, any benefit other than compensation for legal services may be considered undue).

Generally, the mere existence of an attorney-client relationship between a testator and beneficiary does not by itself raise a presumption that a testamentary gift was procured by undue influence.[7]

In this case, the confidential nature of the attorney-client relationship satisfies the first prong regarding undue influence. However, no genuine issue of material fact exists concerning whether Lowe actively participated in procuring the third amendment's preparation or execution. Because Lowe was unwilling to draft the third amendment, Julie retained separate, independent counsel to draft the third amendment. Separate independent counsel testified in his deposition that Julie wanted to give Lowe the house.

Regarding self-dealing, no genuine issue of material fact exists indicating that Lowe: (1) induced Julie to withdraw fund or to give him the home, (2) suggested that she do so, or (3) had any knowledge that she purchased the residence with the intent to eventually give it to him.

We conclude that, where a client exercises her independent judgment in giving her attorney a substantial gift via trust amendment, the attorney who drafted the trust does not exercise undue influence over the client or engage in self-dealing when he accepts the substantial gift set forth in a trust amendment drafted by a separate, independent attorney.

Next, appellants contend that Lowe was under a separate duty to notify Ramon Arosemena of any amendments to his former wife's trust because Lowe also drafted his will. In this, they argue that an attorney-client relationship extends to areas beyond interpreting a will

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[7]P.G. Guthrie, Annotation, Wills: Undue Influence in Gift to Testator's Attorney, 19 A.L.R.3d 575 (1968) (noting that there are some cases holding to the contrary).

when an attorney, who is retained to draft and supervise the execution of a will, identifies himself as the client's attorney in the will and retains a continuing role to deal with questions that may arise concerning the construction of the will. We disagree.

The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained.[8] Just as a physician's duty to a patient is determined by the particular medical undertaking for which he is engaged, an attorney's duty to a client is likewise determined by the nature of the services he agreed to perform.[9] An attorney who is retained to draft a will and supervise its execution, and who has no further contractual relationship with the testator regarding the will, has no continuing duty to the testator regarding the will after it has been executed.[10]

While an attorney owes his client a fiduciary duty toward all matters for which the attorney is retained, we conclude that this duty does not encompass providing the client with information concerning another

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[8]Johnson v. Jones, 652 P.2d 650, 652 (Idaho 1982); see generally Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977) ("In a legal malpractice action it is not sufficient merely to prove an attorney-client relationship existed with respect to some matters. It is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based.").

[9]Hargett v. Holland, 447 S.E.2d 784, 788 (N.C. 1994).

[10]Id. (concluding that, after an attorney who was retained to draft and supervise the execution of a will performed his professional obligations, his professional duty to testator was at an end); see also Stangland v. Brock, 747 P.2d 464, 469 (Wash. 1987) (determining that an attorney retained to draft and supervise the execution of a will has no continuing obligation to monitor the testator's management of his property to ensure that the scheme originally established in the will is maintained).

individual's legal documents that may affect the client. Therefore, regardless of Lowe's ongoing duty to deal with questions that may arise concerning the construction of Ramon's will, we conclude that Lowe and Ramon's attorney-client relationship did not require Lowe to inform Ramon of any amendment to Julie's trust.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[12]

Shearing, C.J.

Agosti, J.

Rose, J.

Becker, J.

Maupin, J.

Gibbons, J.

Blake, D.J.

cc: Hon. Sally L. Loehrer, District Judge
Carl B. Meyer
Ryan, Marks, Johnson & Todd
Clark County Clerk

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[11]Having considered appellants' other arguments regarding the district court judge's assumption of facts based on her personal experience and the conflict of interest, we conclude they are without merit.

[12]The Honorable Archie Blake, Judge of the Third Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron E. Leavitt, Justice. Nev. Const. art. 6, § 4.