

DA 20-0352

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 40N

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IN THE MATTER OF THE ESTATE OF:

GARY ALLEN COOPER,

Deceased.

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APPEAL FROM: District Court of the Thirteenth Judicial District,  
In and For the County of Yellowstone, Cause No. DP 18-0128  
Honorable Michael G. Moses, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jack E. Sands, Attorney at Law, Billings, Montana

For Appellee:

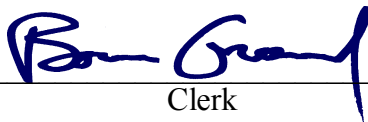
Jeffrey E. Janca, David J. Dietrich, Dietrich & Associates, P.C., Billings,  
Montana

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Submitted on Briefs: December 16, 2020

Decided: February 16, 2021

Filed:

  
Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellees, James D. Cooper and Patricia L. Cooper (James and Patricia), brother and sister of decedent Gary Allen Cooper (Gary), filed their Petition for Formal Probate of Copy of Will, Determination of Testacy and Heirs, and Appointment of Personal Representatives on May 2, 2018. James and Patricia sought to probate Gary's will, dated March 2, 2017. Appellant, Amanda Cooper (Amanda), Gary's daughter, filed her Response and Counter-Petition for Formal Probate of Will and Appointment of Personal Representative on June 20, 2018. Amanda sought to have probated a subsequent will, dated November 15, 2017. The Court held two days of hearings on June 12 and November 7, 2018. On December 12, 2018, the District Court entered its Findings of Fact, Conclusions of Law, and Order and thereafter appointed attorney Ben T. Sather (Sather) as the Independent Personal Representative for Gary's estate. James and Patricia filed a Creditor's Claim on September 25, 2019, related to a pay on death (POD) account where they were originally named as beneficiaries. On June 19, 2020, the District Court entered its final Order granting James and Patricia's Creditor's Claim and admitting the March 2, 2017 will to probate. Amanda appeals from this Order. We affirm in part and remand in part.

¶3 Gary died February 13, 2018, at the age of 70. At the time of his death, Gary had been involuntarily committed to Montana State Hospital since December 29, 2017. Gary was a widower, retired, and terminally ill with advanced myeloma, skeletal metastasis, and dementia. Because of his severely compromised medical condition and terminal diagnosis, Gary developed an addiction to opioids and his mental and physical conditions began to deteriorate rapidly through the summer and fall of 2017. Between August and November 2017, Gary was hospitalized at least three times due to his addiction and declining health. Because of his aggressive behavior, threats, and substance abuse, Gary was terminated from three hospice programs and two oncologists.

¶4 James and Patricia began helping Gary in 2014 after his diagnosis of multiple myeloma. In January 2017, Gary opened a POD account with First Interstate Bank in the amount of \$100,000, designating James and Patricia as the POD beneficiaries. Gary told his other brother, Russell K. Cooper (Russell), that he wanted James and Patricia to receive the POD account because of their help in caring for him. In Gary's March 2, 2017 will, Amanda inherited Gary's real property and any residuary. James, Patricia, and Russell did not benefit from this will.

¶5 In October 2017, Carl and Barbara Howard (Howards), Gary's neighbors, began to care for Gary. By this time, Gary's physical and mental health had become severely compromised. The Howards moved into Gary's house and provided food and medical care to Gary until December 8, 2017. In November, Gary, with the assistance of the Howards, moved his accounts from First Interstate Bank to Rimrock Credit Union and changed his beneficiaries. At that time, the POD account totaled \$100,371.75. The

District Court found the evidence was unclear who the specific beneficiaries of the accounts were after moving them; however, the evidence was clear that all the accounts would go to Amanda. Gary, also with the assistance of the Howards, changed his will on November 15, 2017, leaving his entire estate to the Howards and appointing them as his personal representatives. Gary also changed his Power of Attorney to Carl during the course of the Howards' stay at his home. During these proceedings, Carl subsequently filed a renunciation in favor of Amanda—both as a beneficiary and as a personal representative. The Howards testified that they promised to ensure Amanda would receive all of Gary's estate, even though the November 15, 2017 will bequeathed to the Howards. The District Court, reasonably so, found this perplexing. Amanda had been estranged from her father since her mother's suicide in 2009. She visited her father in March or April 2017 when she came to Billings to visit. After the visit, she had a few phone calls with her father.

¶6 James and Patricia filed their Creditor's Claim on September 25, 2019 stating Gary's estate was indebted to James and Patricia in the amount of \$100,371.75 plus interest from the date on which the POD account at First Interstate Bank was terminated and liquidated. James and Patricia stated that the Howards had exerted undue influence on Gary and that their actions resulted in the termination of the POD account that had established James and Patricia as the named beneficiaries. Sather filed a Petition for Allowance of Creditors' Claim on March 13, 2020.

¶7 James and Patricia petitioned the District Court to probate the March 2, 2017 will and to grant their Creditor's Claim, requesting they receive the monies in the POD

account. Amanda petitioned the court to probate the November 15, 2017 will and maintained that James and Patricia's removal as the POD beneficiaries was valid. Amanda requested the court deny the Creditor's Claim. On June 19, 2020, the District Court entered its Order granting James and Patricia's claim in the amount of \$100,371.75 plus the legal rate of interest and admitting the March 2, 2017 will to probate. The District Court concluded that Gary's physical and mental health during October, November, and December 2017, was so severely compromised that he could not have withstood any undue influence. On June 29, 2020, the District Court entered an order requiring the personal representative pay James and Patricia's claim, together with interest in the amount of \$28,559.71, by July 1, 2020.

¶8 Amanda argues the following on appeal: (1) she was entitled to have her claims against the estate tried before a jury; (2) the District Court improperly admitted to probate the March 2, 2017 will; (3) she was not allowed to present witnesses in support of Gary's competency; (4) Sather was appointed over her objections without a will having been first admitted to probate; and (5) damages were calculated incorrectly. We address each of Amanda's arguments.

¶9 This Court reviews a district court's findings of fact to determine whether the findings are clearly erroneous. *State v. Perry*, 283 Mont. 34, 36, 938 P.2d 1325, 1327 (1997). In determining whether the findings are clearly erroneous, this Court reviews whether the findings are supported by substantial evidence. *Ace Leasing, Inc. v. Boustead*, 2002 MT 213, ¶ 16, 311 Mont. 285, 55 P.3d 371. If the findings are supported by substantial evidence, then we determine if the district court misapprehended the effect

of the evidence. *Ace Leasing, Inc.*, ¶ 16. We review conclusions of law for correctness. *Covenant Invs., Inc. v. First Sec. Bank*, 2014 MT 14, ¶ 9, 373 Mont. 353, 317 P.3d 197. Substantial evidence is evidence that a reasonable mind could accept as adequate to support a conclusion. *D.R. Four Beat All., LLC v. Sierra Prod. Co.*, 2009 MT 319, ¶ 23, 352 Mont. 435, 218 P.3d 827. A district court's evidentiary rulings are reviewed for an abuse of discretion. *Stokes v. Ford Motor Co.*, 2013 MT 29, ¶ 11, 368 Mont. 365, 300 P.3d 648. A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice. *Bardsley v. Pluger*, 2015 MT 301, ¶ 10, 381 Mont. 284, 358 P.3d 907.

¶10 Rule 38(d) of the Montana Rules of Civil Procedure clearly states that “[a] party waives a jury trial unless its demand is properly served and filed.” Amanda failed to follow this rule because she never filed a valid demand for jury trial with the District Court nor did she serve a demand on opposing counsel or the parties. To properly preserve a demand for jury trial, the demand must be filed with the court and served on the parties. Amanda did neither. The requirements of the Rule are clear and straightforward. By failing to file a demand with the District Court, Amanda waived her right to a trial by jury, arguments to the contrary notwithstanding.

¶11 Section 28-2-407, MCA, provides:

Undue influence consists of: (1) the use by one in whom a confidence is reposed by another person or who holds a real or apparent authority over the other person of the confidence or authority for the purpose of obtaining an unfair advantage over the other person; (2) taking an unfair advantage of

another person's weakness of mind; or (3) taking a grossly oppressive and unfair advantage of another person's necessities or distress.

To determine whether there has been undue influence, a court may consider: (1) any confidential relationship between the person alleged to be exercising undue influence and the donor; (2) the physical and mental condition of the donor as it may affect his or her ability to withstand influence; (3) the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind susceptible to influence; and (4) the demands and importunities as they may affect the donor, taking into account time, place, and surrounding circumstances. *In re Estate of Bradshaw*, 2001 MT 92, ¶ 13, 305 Mont. 178, 24 P.3d 211.

¶12 Here, the District Court concluded there was not a confidential relationship between Gary and the Howards; that the disposition of Gary's estate in the November 15, 2017 will was unnatural and demonstrated an unbalanced mind easily susceptible to influence; and that, while there was no evidence of demands made by the Howards on Gary, they were nonetheless in the right place and right time and, in fact, did become the sole beneficiaries of Gary's estate. Finally, there was ample evidence in the form of independent testimony and medical records which demonstrated that Gary was in no condition physically or mentally to withstand any kind of undue influence from the Howards. The court concluded that the November 15, 2017 will and all other transactions made involving Gary's estate between "late October 2017 through December 2017 were all the result of undue influence during a time when Gary Cooper's health was seriously impaired and easily influenced." The District Court reviewed

Sather's Verified Status Report, the Montana State Hospital Discharge Summary; the November 15, 2017 will, the numerous medical reports demonstrating Gary was both physically and mentally severely compromised, calls to law enforcement for help, incident reports prepared by First Interstate Bank, the Howards' conduct and perplexing testimony, and the testimony of independent witnesses. We conclude there was substantial evidence supporting the District Court's finding that Gary did not have the capacity to alter his will or to make other transactions between late October 2017 through December 2017. Further, there was no mistake or misapprehension of the evidence which would render the findings of the District Court or its conclusions clearly erroneous.

¶13 Amanda argues that she was denied the opportunity to present witnesses who would demonstrate Gary had the capacity to execute the November 15, 2017 will. Particularly, Amanda wished to present Joan Hagen's testimony, an officer at Rimrock Credit Union, to demonstrate that Gary, who was brought to the bank by the Howards, was competent to change his accounts and will. Amanda made an offer of proof to this effect, although Ms. Hagen was not an expert or qualified to make assessments of undue influence. Amanda and the Howards testified to their views that Gary was competent. The District Court is afforded discretion in its evidentiary rulings and may make rulings based on its reasonable determination that the evidence is unnecessary, repetitive, duplicitous or lead to confusion. We conclude that given the reliance of the District Court on the Montana State Hospital Discharge Summary and other substantial evidence supporting the District Court's conclusions, that it did not abuse its discretion in limiting the testimony Amanda was allowed to present.



¶14 Amanda argues that a will must first be declared valid before appointment of an independent personal representative. However, in *In re Estate of Edwards*, 2017 MT 93, ¶ 25, 387 Mont. 274, 393 P.3d 639, this Court held that it is proper to appoint a neutral personal representative prior to determining which of two competing wills should be admitted to probate. Additionally, here, the District Court held:

The nomination was made known to all interested parties. Counsel for Amanda Cooper, Mr. Jack Sands, objected to the nomination on the basis that Mr. Sather is not a named party in the decedent's will. This objection was made known to the Court via email on June 19, 2019. Per the Court's December 12, 2018 Findings of Fact, Conclusions of Law and Order, this objection is unacceptable and is overruled.

We agree. Moreover, the District Court had the authority to appoint an independent personal representative and, absent an appropriately preserved objection on the record, we will not entertain any further consideration of this issue.

¶15 Lastly, Amanda argues that the District Court incorrectly awarded interest on the POD account. We first observe that beneficiaries of a POD account are not considered creditors of an estate. Nonetheless, the District Court and the parties treated James and Patricia's interest in the POD account as if it were a creditor's claim. James and Patricia filed a Creditor's Claim and Sather filed a Verified Petition for Allowance of Creditors' Claim. The District Court approved the Creditor's Claim, as presented, together with "the legal rate of interest." Under the circumstances here, we will not disturb the District Court and parties' characterization of the claim. Respecting the amount of interest, § 72-3-805(5), MCA, provides that "an allowed claim bears interest at the legal rate for the period commencing 60 days after the time for original presentation of the

claim has expired . . . .” Section 25-9-205, MCA, provides that the “legal rate” is the “rate equal to the rate for bank prime loans . . . , plus 3%.” Here, the District Court imposed a rate of 10%, which was not correct and did not comply with these statutory provisions. We therefore remand these proceedings for the sole purpose of determining the interest rate on the claim in accordance with §§ 72-3-805(5) and 25-9-205, MCA.

¶16 The District Court’s order probating Gary’s March 2, 2017 will and requiring payment of James and Patricia’s claim is affirmed. These proceedings are remanded for the District Court to determine interest in accordance with §§ 72-3-805(5) and 25-9-205, MCA.

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA  
/S/ INGRID GUSTAFSON  
/S/ BETH BAKER  
/S/ JIM RICE