**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1038

IN THE MATTER OF
THE SUCCESSION OF HELEN MARIE FORET

Judgment Rendered: December 22, 1010.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 88430

The Honorable William A. Morvant, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Gaidry, J concurs

**CARTER, C. J.**

Betty Foret Mohr appeals a judgment granting summary judgment and dismissing her petition to annul the testament of Helen Marie Foret and to remove the succession representative.

## FACTS AND PROCEDURAL HISTORY

Helen Marie Foret died on July 22, 2008, at the age of 91, having never married and having no biological or adopted children. She left an olographic testament dated February 21, 2008, in which she revoked all prior testaments, left a certain sum to Donna Zink (the widow of her late nephew), and bequeathed the remainder of her estate to Adrienne Comeaux (the niece of her deceased best friend). The testament appointed Jeanne Comeaux (Ms. Foret's godchild, Adrienne's sister and also an attorney) as independent executrix of the estate. Upon Jeanne's petition, the trial court signed an order probating the February 2008 testament and appointing Jeanne as independent executrix of Ms. Foret's estate.

Thereafter, Ms. Foret's niece, Betty Foret Mohr, filed a petition to annul the 2008 testament on the basis of lack of testamentary capacity and undue influence, and sought to have Jeanne removed as succession representative. Ms. Mohr amended her petition to request probate of an olographic testament executed by Ms. Foret in June 2002, which left Ms. Foret's entire estate to Ms. Mohr. This appeal is taken from the trial court's judgment granting summary in favor of Jeanne Comeaux, Adrienne Comeaux, and Donna Zink (collectively, "the Comeauxs"), and dismissing Ms. Mohr's claims.

## DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Bozarth v. State, LSU Medical Center/Chabert Medical Center**, 09-1393 (La. App. 1 Cir. 2/12/10), 35 So.3d 316, 323. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966B; **Id.**

The burden of proof on a motion for summary judgment is on the moving party. If the moving party will not bear the burden of proof at trial on the matter that is before the court, the moving party's burden is to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden shifts to the adverse party to prove that there are genuine issues of material fact by providing factual evidence sufficient to establish the ability to satisfy the evidentiary burden of proof at trial. LSA-C.C.P. art. 966C(2).

A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. **Bozarth**, 35 So.3d at 324. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Id.**; **Saizan v.**

**Pointe Coupee Parish School Bd.**, 10-0757 (La. App. 1 Cir. 10/29/10), ___ So.3d ___, ___.

*Lack of Testamentary Capacity*

Ms. Mohr contends that Ms. Foret lacked testamentary capacity at the time she executed the February 2008 testament and that the trial court erred in finding no genuine issue of material fact regarding this issue.

A valid donation *mortis causa* through a last will and testament requires that the testator have testamentary capacity at the time the testament is executed. LSA-C.C. art. 1471, 1570. To have testamentary capacity, the testator must be able to generally comprehend the nature and consequences of the disposition being made. LSA-C.C. art. 1477. Testamentary capacity is presumed. **Succession of Lyons**, 452 So.2d 1161, 1164 (La. 1984); **In re Succession of Theriot**, 08-1233 (La. App. 1 Cir. 12/23/08), 4 So.3d 878, 882. A party alleging lack of testamentary capacity must overcome the presumption of capacity by clear and convincing evidence by demonstrating that the lack of testamentary capacity is highly probable, or much more probable than not. **Succession of Fisher**, 06-2493 (La. App. 1 Cir. 9/19/07), 970 So.2d 1048, 1054.

In reviewing the voluminous body of evidence under consideration on the motion for summary judgment, we are mindful of comment (f) to LSA-C.C. art. 1477, which states:

> Cases involving challenges to capacity are fact-intensive. The courts will look both to objective and subjective indicia. Illness, old age, delusions, sedation, etc. may not establish lack of capacity but may be important evidentiary factors. If illness has impaired the donor's mind and rendered him unable to understand, then that evidentiary fact will establish that he does not have donative capacity. Outrageous behavior by an individual may or may not be indicative of lack of ability to understand. Some outrageous behavior may be nothing more

> than a personality quirk, while other outrageous behavior may manifest serious mental disturbance. Each case is unique. Heavy sedation should be a strong factor to consider, since the sedative effects of the drug may impair the ability of the person to comprehend the nature and consequences of his act.
>
> The courts will look to the medical evidence that is available, such as the medical records and the testimony of treating doctors, and to other expert testimony, and to the testimony of lay witnesses. Clearly, no quick litmus-paper test exists to apply to the evaluation of mental capacity in all cases.

Ms. Foret was a lifelong Baton Rouge resident who moved to the Williamsburg Senior Living Community in 2002, where she lived in an apartment in the community's independent living wing. Ms. Foret's closest friend, Gertrude Comeaux, moved to Williamsburg around the same time, but soon became ill and passed away. After Gertrude's death, Ms. Foret maintained a close relationship with Gertrude's nieces, Jeanne (who was also Ms. Foret's godchild), Adrienne, and Cammie Comeaux. Ms. Foret's niece, Ms. Mohr, also lived in Baton Rouge and maintained a relationship with Ms. Foret.

In the last years of her life, Ms. Foret experienced some health problems and in 2007 was treated by a geriatrician, Dr. Mohammad Saeed-Baig. In January 2008, Ms. Foret suffered an episode in which she was found in her apartment unable to summon assistance. Dr. Saeed admitted her to the hospital for testing and evaluation to rule out several causes for her recent confusion, including "the possibility of acute stroke, infection, [or] worsening dementia[.]" Upon discharge, Dr. Saeed noted that Ms. Foret had "intermittent confusion" in the hospital, including being unable to remember taking monitors off her body and attempting to leave her bed. In his report, he documented that Ms. Foret had "underlying memory loss and

intermittent confusion." He further recommended that she either have sitters to assist her in her apartment or consider moving to a nursing home.

After her discharge from the hospital, Ms. Foret returned to her apartment at Williamsburg and employed sitters, as arranged by Ms. Mohr. That same month, Ms. Foret and Ms. Mohr had a falling out, allegedly because Ms. Foret believed Ms. Mohr was attempting to force her into a nursing home, which Ms. Foret adamantly opposed. Ms. Mohr did not see or speak to Ms. Foret again after January 14, 2008.

On the date Ms. Foret executed the February 2008 testament, Adrienne took Ms. Foret to her regular beauty appointment, then drove Ms. Foret to a luncheon for her social group. After seeing that Ms. Foret was seated at the restaurant with at least one of her friends, Adrienne left. Jeanne picked up Ms. Foret after the luncheon, and attested that Ms. Foret paid her bill and as she was leaving, stopped to speak to an old friend. Jeanne then drove Ms. Foret to her Williamsburg apartment.

Jeanne attested that Ms. Foret had decided earlier in the month to create a new will because Ms. Foret was angry with Ms. Mohr for attempting to move her to a nursing home. Jeanne explains that she followed Ms. Foret's request and retrieved the 2002 will from her law firm's safe,[1] and also brought Ms. Foret paper on which to write a new will. After the luncheon, Jeanne accompanied Ms. Foret to her apartment and discussed with Ms. Foret her intentions regarding the new will. Ms. Foret then drafted the testament at issue and destroyed the 2002 testament.

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[1] Jeanne Comeaux is a partner in the Baton Rouge office of a Louisiana law firm, where she concentrates in areas of commercial and business litigation. She disputes Ms. Mohr's allegation that she was Ms. Foret's attorney.

Thereafter, Ms. Foret continued to live in her Williamsburg apartment with the assistance of sitters. Ms. Foret suffered a massive stroke on July 20, 2008, and died on July 22, 2008.

The parties herein have presented conflicting evidence regarding Ms. Foret's mental state at the time she executed the 2008 will. The Comeauxs have presented their own affidavits and depositions, as well as those of friends of Ms. Foret, who attest that Ms. Foret seemed fine, and Ms. Foret's sitters, who found Ms. Foret to be alert and cognizant. In contrast, Ms. Mohr has presented medical records showing that Ms. Foret had noted periods of confusion, two forensic psychiatric reports that question Ms. Foret's capacity, as well as the affidavits of two friends who had lunch with Ms. Foret hours before she executed the 2008 will. Ms. Alma McGrew described Ms. Foret at the luncheon as seeming "mentally somewhere else" or in a "trance." Ms. McGrew stated that "[Ms. Foret] seemed like a child and would do whatever she was told." Ms. McGrew also questioned whether Ms. Foret recognized her, though they had been members of the same social group for some time. Ms. Josephine Hughes similarly described Ms. Foret at the luncheon as being uncommunicative, added that Ms. Foret was unable to read her menu or order for herself, and also noted that Ms. Foret did not seem to know who Ms. Hughes was.[2]

In determining whether an issue is genuine and one of material fact, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. **Fernandez v. Hebert**, 06-1588 (La. App. 1 Cir. 5/4/07), 961 So.2d 404, 408, writ denied, 07-1123 (La. 9/21/07),

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[2] As noted, the body of evidence herein is voluminous and is only briefly summarized in this opinion.

964 So.2d 333. Resolution of this matter depends on credibility determinations and the weighing of evidence, which are within the province of the factfinder and are appropriate for a trial on the merits, but are inappropriate for deciding a motion for summary judgment. At trial, the factfinder is charged with assessing the credibility of the witnesses and is free to accept or reject, in whole or in part, the testimony of any witness. **Succession of Fisher**, 970 So.2d at 1055 n.5. This is particularly important herein, where the parties have attempted to discount the testimony of witnesses, essentially by rehabilitation through subsequent testimony. Moreover, any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits.[3] **Property Ins. Ass'n of Louisiana v. Theriot**, 09-1152 (La. 3/16/10), 31 So.3d 1012, 1014, quoting **Suire v. Lafayette City-Parish Consolidated Gov't**, 04-1459 (La. 4/12/05), 907 So.2d 37, 48.

After *de novo* review, we find that summary judgment was improperly granted on the issue of testamentary capacity.

*Undue Influence*

In addition to challenging the 2008 testament for lack of testamentary capacity, Ms. Mohr contends that the 2008 testament is invalid as it is the result of the defendants' undue influence over Ms. Foret, who suffered diminished capacity.

Louisiana Civil Code article 1479 sets forth that "[a] donation . . . *mortis causa* shall be declared null upon proof that it is the product of

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[3] We further note that trial of the matter will allow the trial court to fulfill its gatekeeping role of evaluating the presented expert testimony in light of the **Daubert** standards of admissibility. See **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); **Succession of Werner v. Zarate**, 07-0829 (La. App. 1 Cir. 12/21/07), 979 So.2d 506, 509.

influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor. Comment (b) to article 1479 explains that the article presumes testamentary capacity and further that:

> [T]he objective aspects of undue influence are generally veiled in secrecy, and the proof of undue influence is either largely or entirely circumstantial. ...[E]veryone is more or less swayed by associations with other persons, so this Article attempts to describe the kind of influence that would cause the invalidity of a gift or disposition. Physical coercion and duress clearly fall within the proscription of the previous Article. The more subtle influences, such as creating resentment toward a natural object of a testator's bounty by false statements, may constitute the kind of influence that is reprobated by this Article, but will still call for evaluation by the trier of fact. Since the ways of influencing another person are infinite, the definition given in this Article is used in an attempt to place a limit on the kind of influence that is deemed offensive. Mere advice, or persuasion, or kindness and assistance, should not constitute influence that would destroy the free agency of a donor and substitute someone else's volition for his own.

The party alleging nullity based on undue influence bears the burden of proving such, as set forth in Civil Code article 1483:

> A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if, at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

Ms. Mohr's undue influence attack primarily focuses on Jeanne Comeaux, who was present at the time Ms. Foret executed the 2008 testament, and who, Ms. Mohr contends, "had a plan or design to influence Ms. Foret to execute the new will favoring Jeanne Comeaux's sister." Ms. Mohr alleges that Jeanne was Ms. Foret's attorney, and therefore a relationship of confidence existed between them, making her burden of

proof on the issue of undue influence a preponderance of the evidence. The Comeauxs dispute this allegation, with Jeanne maintaining that she never acted as Ms. Foret's attorney, and only drafted certain powers of attorney at no charge.

As with the testamentary capacity challenge, resolution of the undue influence challenge will turn on credibility determinations and the weighing of evidence. Considering this and our decision regarding the testamentary capacity issue, we find summary judgment inappropriate on this issue. In fact, summary judgment is seldom appropriate for determinations based on subjective facts or motive, intent, good faith, knowledge, or malice; indeed, it may only be granted on subjective intent issues when no issue of material fact exists concerning the pertinent intent. **Succession of Fisher**, 970 So.2d at 1054.

## CONCLUSION

For the foregoing reasons, the judgment of the trial court granting summary judgment and dismissing Ms. Mohr's claims is reversed. Costs of this appeal are assessed to Jeanne C. Comeaux, Adrienne Comeaux, and Donna Zink.

**REVERSED.**