

STATE OF VERMONT
ORANGE COUNTY

In re: Estate of Orville Tucker

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Orange Superior Court
Docket No. 248-12-05 Oecv

FILED
APR 16 2009
ORANGE SUPERIOR COURT

DECISION
Pending Motions in Limine

A ruling of the Probate Court declining to admit decedent's 2004 will for probate was appealed to this court. The case is now ready for a de novo trial before a jury on whether Orville Tucker lacked testamentary capacity at the time he made his 2004 will, and whether the will was the product of undue influence on the part of his daughter, Valerie Hausmann. The parties to the case are Appellant Valerie Hausmann and Appellee Stephen Tucker, both children of the decedent, Orville Tucker. Another child, Theodore (Ted) Tucker, stands to benefit if the 2004 will is admitted. He is not a party to this case by ruling of July 25, 2008.

There are three pending motions to exclude evidence at trial, involving four issues as set forth below. The court will issue a separate decision on Appellant's Motion for a Preliminary Ruling on Burden of Proof.

MPR #13: Appellant's Motion to Exclude "Tyler Report"

Valerie Hausmann seeks to exclude a report prepared by Karen Tyler, an employee of the Vermont Adult Protection Division.¹ Ms. Hausmann contends that the report is hearsay, and that it is not admissible under any of the relevant hearsay exceptions. Appellee Stephen Tucker seeks to admit the report as a public record under V.R.E. 803(8) or as a business record under V.R.E. 803(6).

The hearsay exceptions for public records and business records are meant to apply to documents whose reliability is "guaranteed by the regularity and lack of future concern with which the records are made, the actual reliance placed upon them in human affairs, and the duty of the recorder to make an accurate record." V.R.E. 803, Reporter's Notes. In other words, documents that are otherwise hearsay may nevertheless be admitted into evidence as public records or business records if they represent the "routine reflections of the day to day operations" of a business or agency, and have been relied upon for some purpose other than the subject of the specific litigation in which they have been offered. *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943); see also V.R.E. 803, Reporter's Notes (examples of public records are grand lists, tax collection records, and town-meeting minutes).

¹ The parties have represented that Ms. Tyler will be called as a witness during the jury trial. The motion is not to preclude her from testifying, but to exclude her written report from evidence.

In this case, the investigative report was prepared specifically for the purpose of determining whether or not Stephen Tucker abused his father, which is closely related to a contested issue in this litigation. The report was not used by a state agency for any other purpose. Accordingly, it does not demonstrate the qualities of reliability that justify admission of ordinary business records or public records. It is simply hearsay: Ms. Tyler's out-of-court statement on issues pertaining to the litigation. The motion to exclude the investigative report is accordingly *granted*.

MPR #13: Appellant's Motion to Exclude Final RFA Order

Ms. Hausmann seeks to exclude a final relief-from-abuse finding and order issued in 2006 that includes a judicial finding that she had placed her brother Stephen in fear of imminent bodily harm.

The incident occurred more than one year after Orville's death, and is not relevant to the question of whether Orville lacked testamentary capacity at the time he made his 2004 will or whether the will was the product of undue influence. The allegations tend to show that Valerie and Stephen had a contentious relationship in 2006, but they do not tend to show family relationships at any time relevant to the making of Orville's will. V.R.E. 401. For this reason, the motion to exclude the final RFA order is *granted*.

MPR #15: Appellee's Motion to Exclude Evidence of "Taplin Hill" land

Stephen Tucker moves to preclude evidence of a real-estate transaction more than 20 years ago involving a parcel of land known as "Taplin Hill." Stephen seeks to exclude any evidence pertaining to the transaction as irrelevant, misleading, and a waste of time.

Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401. In this case, the proffered evidence is highly tangential and collateral to the issues in dispute, which are whether Orville lacked testamentary capacity at the time he made his will, and whether the 2004 will was the product of undue influence. The transaction was so remote in time that even if Orville were aware of it, it does not tend to show the presence or absence of undue influence in 2004. V.R.E. 401. Moreover, any probative value would be substantially outweighed by the potential for confusion of the issues and waste of time. V.R.E. 403.

Furthermore, to the extent that Ms. Hausmann contends that Orville saw a "connection" between the Taplin Hill transaction and his own transfer of the family farm to Stephen, the inference to be drawn is that Orville thought it was more likely that Stephen "tricked" him because he had also "tricked" Victory in Jesus more than twenty years ago. This amounts to evidence that Stephen had a propensity to take advantage of others in real estate transactions, and that he acted in conformity therewith during the 2003 transfer of the family farm; such propensity evidence is inadmissible under V.R.E. 404(b).

For these reasons, Stephen's motion to exclude evidence pertaining to the "Taplin Hill" transaction is *granted*.

MPR #16: Appellee's Motion to Exclude Evidence of Affair

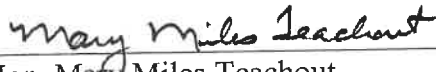
Stephen moves to exclude evidence of an alleged affair. Valerie does not oppose the motion; it is *granted*.

ORDER

For the foregoing reasons:

- (1) Appellant Valerie Hausmann's Motion to Exclude "Tyler Report" and Final RFA Order (MPR #13) is *granted*;
- (2) Appellee Stephen Tucker's Motion to Exclude Evidence Regarding Taplin Hill Land (MPR #15) is *granted*; and
- (3) Appellee Stephen Tucker's Motion to Exclude Evidence of Affair (MPR #16) is *granted*.

Dated at Chelsea, Vermont this 16th day of April, 2009.



Hon. Mary Miles Teachout
Superior Court Judge