STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of EDITH FRANCES ZSIGO, Deceased.

DENNIS ZSIGO and MARIAN ZSIGO,

Appellants,

v

ROBERT ZSIGO,

Appellee.

UNPUBLISHED
May 5, 2000

No. 210541
Genesee Probate Court
LC No. 97-154175-SE

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Appellants Dennis Zsigo and Marrian Zsigo appeal as of right from an order adjudging and allowing a May 9, 1997, document as the Last Will and Testament of decedent, Edith Frances Zsigo, following a bench trial. Under the will, Edith devised fifty-five acres of a family farm, valued at approximately $144,000, to two adult grandchildren, Jason Zsigo and Julie Zsigo Hart, who are the children of her son, David Zsigo. The remainder of the estate was divided equally amongst Edith's six surviving children. Appellants, who are two of Edith's children, contend that Edith lacked the mental capacity to execute a will on May 9, 1997, which was one week before her death, and that Edith was also subject to undue influence. We affirm.

Appellants first argue that the trial court, in finding that Edith had the testamentary capacity to execute a will, erred by disregarding medical evidence to the contrary and by giving undue weight to lay opinion testimony. Appellants contend that the trial court effectively created an "irrebuttable presumption" of Edith's mental competency to effect a will.

MCL 700.121; MSA 27.5121 provides that "[a] person 18 years of age or older who is of sound mind may make a will." To have testamentary capacity, an individual must have the mental capacity to understand the business in which he or she is engaged, know the extent and value of his or her property and the natural objects of his or her bounty, and keep such facts in mind long enough to dictate a will without prompting from others. *In re Thayer's Estate,* 309 Mich 473; 15 NW2d 712

(1944); see also *In re Grow's Estate,* 299 Mich 133; 299 NW 836 (1941); *In re Walker's Estate,* 270 Mich 33; 258 NW 206 (1935); *Vollbrecht's Estate v Pace,* 26 Mich App 430; 182 NW2d 609 (1970). An individual suffering from physical ills and some degree of mental disease may still execute a valid will, unless provisions of the will are affected by such conditions. *In re Thayer's Estate, supra*. Testamentary capacity must be judged by manifestations in conduct or language. *Fraser v Jennison*, 42 Mich 206; 3 NW 882 (1879). Testamentary capacity is judged at the time of the execution of the will, and not before or after, unless the condition of the testator before or after the execution of the will is competently related to the time of execution. *In re Powers' Estate,* 375 Mich 150; 134 NW2d 148 (1965); *In re Getchell's Estate,* 295 Mich 681; 295 NW 360 (1940); *In re Rowling's Estate,* 291 Mich 218; 289 NW 136 (1939). Mental competency to execute a will is presumed and the burden of showing mental incompetency is upon those who contest the will, establishing that incompetency existed at the time the will was drawn. MCL 600.2152; MSA 27A.2152; *In re Skoog's Estate*, 373 Mich 27; 127 NW2d 888 (1964); *In re Powers' Estate, supra*; *In re Thayer's Estate, supra* at 473; *In re Grow's Estate, supra* at 133; *Vollbrecht's Estate, supra* at 430; *In Re Arnson's Estate,* 2 Mich App 478; 140 NW2d 546 (1966). While a will proponent cannot rest on the presumption of a testator's mental capacity to make a will when there is competent proof to the contrary, the contestant has the burden of proof at all times to show that the testator lacked the mental capacity to make a will. *In re Thayer's Estate, supra* at 473; *In re Thiede's Estate,* 301 Mich 658; 4 NW2d 47 (1942).

A review of the trial court's decision reveals that the court considered all relevant testimony on the issue of Edith's competency, including the testimony of Dr. Stoker and nurse Buszek. While the trial court did not dispute the testimony of the medical experts that Edith's "mental capacity was greatly limited," it nonetheless concluded that Edith "understood what she was doing and what she was executing" and that "she had sufficient mental capacity . . . to make that will."

Appellants seemingly contend that the opinions of the medical experts were entitled to more weight than those of the lay witnesses, particularly because the medical experts were "disinterested" witnesses, whereas the lay witnesses did not have "any rational factual basis to hold to the opinions they held." Appellants argue that the trial court erred by failing to draw a distinction between the two classes of testimony, according more weight to the expert medical testimony on the question of Edith's competency. We disagree.

Opinion testimony of medical experts regarding testamentary capacity is not accorded superior status with respect to lay testimony under Michigan law. In *In re Estate of Moxon*, 234 Mich 170, 173-174; 207 NW 924 (1926), our Supreme Court held that any witness, lay or expert, who has knowledge about whether a testator had the necessary mental capacity to execute a will is permitted to testify. Similarly, in *In re Searchill Estate,* 9 Mich App 614, 622; 157 NW2d 788 (1968), this Court held that a lay witness may give testimony on the question of the competency of a testator where a foundation is laid and an opportunity is given for cross-examination.

In *In re Estate of Lewandowski*, 236 Mich 136; 210 NW 314 (1926), the Court held that opinion testimony of professional witnesses was competent as to what extent the testatrix's mind was affected by the disease with which she was afflicted, her mental condition shortly before her will was

executed, and the possibility of her regaining consciousness within that time. However, in *Bradford v Vinton*, 59 Mich 139, 154; 26 NW 401 (1886), the Court stated:

> The opinion of a physician as to mental competency, aside from the question of insanity, is entitled to no greater consideration than that of a layman, having equal facilities for observation. . . . The weight which should have been given to the testimony was for the jury, and whether the testimony of the physician upon the question of mental capacity or competency should be given greater or less weight than that of laymen upon the same question was exclusively for them to decide.

Appellants also argue that the trial court erred in finding that Edith was competent because the two subscribing witnesses were "passive observers" who could only make assumptions that Edith knew what she was doing and were not "reasonable" witnesses. In particular, appellants contend that there was "witness bias" because these witnesses did not ask Edith "open ended questions such as how she wants the farm to pass upon her death," or ask the nurse to stay longer to inquire whether Edith was "oriented to person, place, time," or ask Edith the names of her children, or question her whether the various times that her hand slipped off the paper indicated that she did not want to sign the will.

There is no requirement in Michigan law that subscribing witnesses question a testator to determine competence. Rather, as stated in *In re Beiter's Estate,* 361 Mich 661, 665; 106 NW2d 166 (1960), "[w]hat is required is no more than understanding and communication. . . [f]luency is not the test."

The testimony of Edith's sons, David, Robert and Michael, and that of Mr. Shenk, a subscribing witness, supports the trial court's finding that Edith comprehended the nature of making a will and comprehended that the farm would go to her two grandchildren. When questioned by her attorney whether she wanted a will, whether she wished the farm property to be left to her two grandchildren upon her death, and whether she understood the will, Edith responded by shaking her head up and down and answering "yes." Although Edith faltered in attempting to sign the will about five or six times when her hand slipped due to weakness, Edith eventually succeeded in affixing her signature to the document after her daughter-in-law held the document back up. When then asked by her attorney if she meant "Edith" to be her signature, she responded "yes." Finally, when her attorney asked her if she had any further questions or wanted to discuss any matter with him, Edith responded "not with you." According to another subscribing witness, Mrs. Hardy, Edith she just kind of grinned," and was "kinda [sic] like chuckling a little bit." According to appellee, Edith responded with "not with you" because she did not care much for lawyers. As the trial court noted, Edith's remark "indicates that her mind was working" Applying, as we must, the "highly deferential" clear error standard of review, MCR 2.613(C); *People v Thenghkam*, 240 Mich App ___; ___ NW2d ___ (No. 207303, issued 2/29/2000), we cannot say that the trial court clearly erred in finding that Edith possessed sufficient understanding and communication as to convey that she knew what property she possessed, that she was making a testamentary disposition, and that she was leaving the farm to her two grandchildren, Jason and Julie.[1]

Finally, appellants claim that the trial court erred in refusing to declare the will invalid because of undue influence. We disagree. In *In re Peterson Estate*, 193 Mich App 257, 259-260; 483 NW2d 624 (1992), this Court observed:

> "To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." [Quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).]

Contrary to appellants' claim that Edith took no affirmative role in procuring the will, the evidence indicated that Edith discussed the will with appellee on April 26, 1997, after being admitted to the hospital, and directed him to "use my attorney" in Durand. With the exception of the farm property, Edith's estate was otherwise divided equally amongst her six children. As for the farm, there was evidence that Edith wanted the farm to be "handed down to another generation," but decided against transferring it to her son David (who had worked on the farm since 1970) because of capital gains tax questions and because of his relationship with his live-in girl friend, whom Edith did not want to have any rights in the farm property. As a result, she decided to leave the farm to her two grandchildren, Jason and Julie, who are David's children. Jason testified that Edith discussed the disposition of the farm property with him on many occasions, and wanted to put the farm solely in his name. However, Jason asked Edith to include his sister Julie because he had a close relationship with her and did not want her to be left out.

In light of the foregoing record, we conclude that the trial court did not err in finding that the will was not invalid because of undue influence. Moreover, as appellee notes, there is no evidence of undue influence arising from the existence of a fiduciary relationship.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra

[1] Because the testimony was amply sufficient to create a genuine issue of material fact as to Edith's testamentary capacity, we likewise conclude that the trial court did not err in denying appellants' motion for summary disposition under MCR 2.116(C)(10).