# STATE OF MICHIGAN

# COURT OF APPEALS

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In re Estate of MICHAEL WOLOSHEN, Deceased.

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DENNIS WOLOSHEN, Personal Representative of the Estate of MICHAEL WOLOSHEN, Deceased,

Petitioner-Appellee,

v

JEFF WOLOSHEN, DAVID WOLOSHEN, LESTER WOLOSHEN, and TINA KASSARJIAN,

Respondents-Appellants,

and

KINGSTON COMMUNITY SCHOOLS,

Appellee.

UNPUBLISHED
November 15, 2002

No. 234327
St. Clair Probate Court
LC No. 99-099482-SE

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Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Respondents appeal as of right the probate court's order admitting decedent's will to probate. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent, who was eighty-one years old and terminally ill, dictated a will to his attorney. He bequeathed his farm and tools to petitioner, his son, cash gifts to two couples, and stock investments and the receivables on a land contract to Kingston High School, his alma mater. Decedent expressly excluded respondents, his other children, from the will.

Petitioner sought to have decedent's will admitted to probate. Respondents filed objections and claimed that decedent lacked testamentary capacity at the time he executed the will. At trial Dr. Brooks, who is an infectious disease and internal medicine specialist, testified that while decedent appeared to understand his condition was terminal, he did not seem to be

interested in his circumstances. Dr. Brooks opined that the level of toxins in decedent's body and the fact that decedent was in moderate pain could have negatively affected decedent's capacity to think rationally, and asserted that it was not likely that decedent would have been able to recognize the natural objects of his bounty or the nature and extent of his property.

Respondent Jeff Woloshen testified that he and decedent had a stormy relationship, and that decedent had no relationship with respondents David Woloshen, Lester Woloshen, or Tina Kassarijian. Diane Delecta, decedent's attorney, testified that when she prepared decedent's will, decedent named his children, knew the nature and extent of his assets, specified how he wanted his property distributed, and explicitly stated that he did not want to leave anything to respondents.

Shirley Eckert, decedent's neighbor and friend for several years, testified that she was present when decedent made his will. She stated that decedent was aware of his condition, and was able to converse in a rational manner. Eckert noted that several years earlier, decedent had remarked that he might leave money to the Kingston school system. Dr. Cox, who is an oncologist, testified that decedent was able to converse in a rational manner. He indicated that decedent's acceptance of the fact that his illness was terminal was not unusual.

The probate court found that respondents had failed to overcome the presumption that decedent had testamentary capacity at the time he executed his will. The evidence established that decedent was ill, but that he was able to identify his children and his assets, and to formulate a plan for the distribution of those assets. The evidence showed that decedent's decision to exclude respondents from the will was based on strained family relations, and not on a lack of testamentary capacity. The court ordered that decedent's will would be admitted to probate.

In a proceeding for the probate of a will, it is presumed the testator had the mental capacity to make a will. MCL 600.2152. To have testamentary capacity, an individual must be able to recall the natural objects of his bounty, to comprehend the nature and extent of his property, to understand that he was providing for the disposition of his property after his death, and to understand the disposition of the property. SJI2d 170.41; *In re Vollbrecht Estate*, 26 Mich App 430, 434; 182 NW2d 609 (1970), quoting *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953). The party contesting a will has the burden of proving by a preponderance of the evidence that the decedent lacked testamentary capacity. *In re Hallitt's Estate*, 324 Mich 654, 658; 37 NW2d 662 (1949). We review the probate court's findings of fact for clear error. *In re Wojan Estate*, 126 Mich App 50, 52; 337 NW2d 308 (1983).

Respondents argue the probate court clearly erred in finding that decedent had testamentary capacity at the time he executed his will. We disagree and affirm the probate court's decision. Dr. Brooks based his opinion that decedent did not understand his circumstances and did not have testamentary capacity largely on the fact that decedent did not react in an overtly emotional manner to the fact that he was dying of cancer. However, no objective evidence supported Dr. Brooks' opinion that toxins had invaded decedent's brain and negatively affected his capacity to think rationally.

Dr. Cox, who testified that decedent was alert and was able to converse in a rational manner, indicated that many persons, especially those of an advanced age, reacted to such news in a calm manner that demonstrated acceptance. He indicated that such calmness did not mean

that a person lacked understanding of the circumstances. Shirley Eckert testified that decedent understood and accepted the fact his condition was terminal, and that he was able to converse in a rational manner.

Diane Delecta, who had extensive experience in probate matters, testified that when decedent dictated his will, he was able to name his children, to state the nature and extent of his assets to know he was providing for the disposition of his property after his death, and to specify how he wanted his property distributed. Delecta indicated that decedent clearly stated that he did not want to include respondents in the will. The evidence presented by witnesses Cox, Eckert, and Delecta supported the probate court's finding that at the time he executed the will decedent knew his children, knew the nature and extent of his assets, and knew how he wanted his property to be distributed. The probate court correctly found that respondents did not overcome the presumption that decedent had testamentary capacity at the time he executed his will. *Volbrecht Estate*, *supra*; *Hallitt's Estate, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter