NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0722

IN THE MATTER OF THE SUCCESSION OF
LOUISE LAURA ALEXANDER

Judgment rendered November 9, 2015.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 15976
Honorable Ralph Tureau, Judge

* * * * * *

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BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

PETTIGREW, J.

Appellant challenges the trial court's determination that decedent's February 28, 2011 will and the donations made therein were valid. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Louise Laura Alexander died on May 27, 2011. Prior to her death, Ms. Alexander executed a Last Will and Testament on February 28, 2011, before attorney W. Benjamin Valentine and two witnesses, Lynn Hall and Theresa Paul. In her will, Ms. Alexander named her nephew, Gary Brannon Alexander, as her sole legatee, and her niece, Gay B. Sullivan, as executrix of her estate. Following Ms. Alexander's death, Gary filed a Petition for Probate of Statutory Testament and Petition for Possession. In response thereto, Gay filed a petition to annul the will naming Gary as the sole defendant. She argued that Ms. Alexander lacked capacity at the time the will was executed and, further, that the will was executed as a result of undue influence, fraud, and duress.

Gay subsequently filed a supplemental and amending petition seeking to annul the will and for return of property belonging to Ms. Alexander's estate. In said petition, Gay named Lynn Hall, Charles and Jayne Cassard, and Rebecca Aiken as additional defendants (sometimes collectively referred to as "the defendants"). In addition to seeking the nullity of Ms. Alexander's will, she sought the following relief: 1) the nullity of a donation *inter vivos* of immovable property from Ms. Alexander to the Cassards; 2) the return of a purported $20,000.00 gift to Lynn Hall, with interest; and 3) the return of any and all monies received from the Lincoln Benefit Life Company ("Lincoln") annuity paid to Lynn Hall, the Cassards, and Rebecca Aiken, with interest.[1]

The matter proceeded to a four-day bench trial. Various witnesses for the parties gave conflicting testimony at trial regarding Ms. Alexander's capacity, or lack thereof, and

[1] In a second supplemental and amending petition, Gay added Lincoln and the remaining beneficiaries of the annuity (Alfred and Regina Roper, Shirley Fridge, Pat and Rose Mary Richardson, Rev. Michael Galea, and Catholic Charities of the Diocese of Baton Rouge, Inc.) as defendants. She subsequently filed motions to dismiss Lincoln and the remaining beneficiaries of the annuity from these proceedings, leaving only Gary, Lynn Hall, the Cassards, and Rebecca Aiken as defendants below.

whether she was subject to any undue influence at the time she made the will or the various donations at issue. After hearing the testimony and considering the evidence in the record, the trial court gave extensive oral reasons for judgment wherein it determined that the February 28, 2011 will was valid. The trial court found that although Ms. Alexander had some medical problems including dementia, Gay had failed to carry her burden of proving by clear and convincing evidence that Ms. Alexander was incapable of making the donations or executing the will. The trial court further found that Ms. Alexander was not under any undue influence at the time that she executed the challenged donations. Judgment was signed accordingly on December 29, 2014, ordering, in pertinent part, as follows:

> **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that based upon the factual findings of this Honorable Court and the applicable law, Louise Alexander possessed testamentary capacity to make a donation mortis causa on February 28, 2011 and that the Last Will and Testament dated February 28, 2011 is found to be valid.
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> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that based upon the factual findings of this Honorable Court and the applicable law, Louise Alexander possessed donative capacity to make a donation inter vivos on November 23, 2010 and that the donations in the amounts of TWENTY THOUSAND AND XX/100 ($20,000.00) DOLLARS to Lynn Hall on November 23, 2010 and TWO THOUSAND AND XX/100 ($2,000.00) DOLLARS to Lynn Hall on November 8, 2010 are found to be valid.
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> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that based upon the factual findings of this Honorable Court and the applicable law, Louise Alexander possessed donative capacity to make donation inter vivos on March 4, 2011 and that the Act of Donation of immovable property to Charles J. Cassard, Jr. and Jayne Cassard is found to be valid.
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> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that based upon on [sic] the factual findings of this Honorable Court and the applicable law, there is no finding of fraud, duress or undue influence upon the Decedent on the part of the Defendants regarding the creation of the Last Will and Testament dated February 28, 2011, the donations in the amounts of TWENTY THOUSAND AND XX/100 ($20,000.00) DOLLARS and TWO THOUSAND AND XX/100 ($2,000.00) DOLLARS to Lynn Hall, the Act of Donation of immovable property to Charles J. Cassard, Jr. and Jayne Cassard or any monetary donations to Rebecca Aikens.
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that each party is to bear his/her own costs in this matter.

From this judgment, Gay appeals, arguing the trial court erred (1) in finding that Ms. Alexander had the necessary donative capacity when she made a November 2010

donation *inter vivos* to Lynn Hall; (2) in finding that Ms. Alexander had the necessary donative capacity to make a donation *inter vivos* of the majority of her immovable property to Charles Cassard; (3) in finding that Ms. Alexander had capacity to execute the February 28, 2011 will; and (4) in finding that the February 28, 2011 will was not invalid because Ms. Alexander's vision had degenerated to the point that she could no longer read when she executed the will.

APPLICABLE LAW

Notarial Testament

According to La. Civ. Code art. 1576, a notarial testament is one that is executed in accordance with the formalities of La. Civ. Code arts. 1577 through 1580.1. Article 1577 provides:

> The notarial testament shall be prepared in writing and dated and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then:
>
> (1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page.
>
> (2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this __ day of ____, __."

A testator physically impaired to the extent that she cannot read may execute a notarial will in accordance with La. Civ. Code art. 1579. The written testament must be read aloud in the presence of the testator, the notary, and two competent witnesses. The testator must then signify that she heard the reading and that the instrument is her will. An attestation clause setting forth this reading and declaration must be executed. **Succession of Boisseau**, 33,861, p. 3 (La. App. 2 Cir. 9/27/00), 768 So.2d 743, 746, writ denied, 2000-2993 (La. 12/15/00), 777 So.2d 1233.

The testator's ability to read is an element of testamentary capacity. **Succession of Lawler**, 42,940, p. 4 (La. App. 2 Cir. 3/26/08), 980 So.2d 214, 216, writ denied, 2008-1117 (La. 9/19/08), 992 So.2d 939. Whether a testator has the

ability to read is a question of fact. Absent manifest error, the trial court's finding will not be overturned on appeal. See **Succession of Barranco**, 94-1726, p. 5 (La. App. 1 Cir. 6/23/95), 657 So.2d 708, 711, writ denied, 95-1902 (La. 11/3/95), 662 So.2d 11.

Testamentary Capacity

"Capacity to donate *inter vivos* must exist at the time the donor makes the donation. Capacity to donate *mortis causa* must exist at the time the testator executes the testament." La. Civ. Code art. 1471. "To have capacity to make a donation *inter vivos* or *mortis causa,* a person must be able to comprehend generally the nature and consequences of the disposition that he is making." La. Civ. Code art. 1477. There is a presumption in favor of testamentary capacity. **Succession of Lyons**, 452 So.2d 1161, 1164 (La. 1984). A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor executed the testament or made the donation *inter vivos.* La. Civ. Code art. 1482(A). To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence. **Succession of Crawford**, 2004-0977, p. 8 (La. App. 1 Cir. 9/23/05), 923 So.2d 642, 647, writ denied, 2005-2407 (La. 4/17/06), 926 So.2d 511.

The issue of capacity is factual in nature, and the trial court's finding that the testator possessed or lacked capacity will not be disturbed on appeal in the absence of manifest error. **In re Succession of Brantley**, 99-2422, p. 5 (La. App. 1 Cir. 11/3/00), 789 So.2d 1, 4, writ denied, 2001-0295 (La. 3/30/01), 788 So.2d 1192. Comment (f) to La. Civ. Code art. 1477, provides:

> 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.

Where factual findings are based on determinations regarding the credibility of witnesses, the findings of the trial court are entitled to great deference. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671.

Undue Influence

Louisiana Civil Code Article 1479 provides that a donation *inter vivos* or *mortis causa* shall be declared null "upon proof that it is the product of 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.*" (Emphasis added.) The burden of proof for one challenging a donation based on "undue influence" is found in La. Civ. Code art. 1483 (emphasis added):

> 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.

As with testamentary capacity, the trial court's finding of, or failure to find, undue influence is fact intensive, and such a finding cannot be disturbed on appeal in the absence of manifest error. **In re Succession of Gilbert**, 37,047, p. 4 (La. App. 2 Cir. 6/5/03), 850 So.2d 733, 735-736, writ denied, 2003-1887 (La. 11/7/03), 857 So.2d 493. Reversal is warranted only if the appellate court finds that no reasonable factual basis for the trial court's finding exists in the record, and that the finding is clearly wrong. **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987).

When seeking to annul a donation on the basis of undue influence, it is not sufficient to merely show that the donee exercised some degree of influence over a donor; instead, the challenger must show that the donee's influence was so substantial that the donee substituted his or her volition for that of the donor. See **Succession of**

Anderson, 26,947, pp. 2-4 (La. App. 2 Cir. 5/10/95), 656 So.2d 42, 44-45, writ denied, 95-1789 (La. 10/27/95), 662 So.2d 3. To annul a testamentary disposition on the basis of undue influence, the influence must be operative at the time the testament is executed. **Gilbert**, 37,047 at 5, 850 So.2d at 736. When the evidence shows that the execution of a testament was well within the discretion of the testator, the trial court should find that the testator's volition has not been substituted by the volition of any donee. *Id.*

DISCUSSION

On appeal, Gay contends that based on the totality of the circumstances herein, the evidence indicates that Ms. Alexander lacked the requisite donative capacity to effect the November 2010 donations of more than $20,000.00 in cash to Lynn Hall, the February 2011 will, and the March 2011 donation of her immovable property to Charles Cassard. She points to the opinion of Dr. Robert Blanche, which she argues is adequately supported by the evidence in the record, that Ms. Alexander did not have the requisite executive function to have a lucid interval in 2009 and 2010. She further posits that Ms. Alexander "had objective and documented brain damage that began to manifest in her hallucinations and confabulations in early 2010." Finally, Gay argues that there are independent grounds to nullify the February 28, 2011 will executed by Ms. Alexander, namely, the lack of an attestation clause as required by La. Civ. Code art. 1579. She asserts there was clear and convincing evidence in the record that established Ms. Alexander's eyesight had degenerated to the point that she could no longer read. Thus, she maintains, the will should have been read aloud to Ms. Alexander and acknowledged by her as an expression of her intent.

In response, Gary asserts that the trial court heard each witness and observed their demeanors and motives over the four-day trial, reviewing medical records, tapes, and photographs submitted into evidence and listening to the testimony of experts. Lynn Hall maintains that the trial court analyzed days of testimony, made factual determinations, and judged the credibility of the witnesses. The Cassards note that the defendants were each in regular contact with Ms. Alexander in the final months of her

life and were in the best position to testify regarding her capacity at the time of the donations at issue, whereas Gay had not seen Ms. Alexander since May 2010. Moreover, the Cassards argue that Ms. Alexander's medical records contained conflicting information regarding her condition and cognitive abilities and that no treating physicians were present at trial to testify regarding Ms. Alexander's health and abilities during the last few months of her life.

With regard to Ms. Alexander's alleged visual impairment, Gary argues that Dr. Blanche's testimony regarding Ms. Alexander's visual impairment should be discounted as the medical document he relied on in making his conclusion regarding her vision was not dated. Thus, Gary argues, there is no way of knowing if this one reference to "some visual impairment" was before or after the will was executed, nor are there any details given as to what the actual impairment was. Rather, Gary points to medical records dated January 27, 2011, where Ms. Alexander is described as "behavior pattern appropriate for age, gender and circumstance. Normal appearance, normal thought process. No acute findings regarding emotional status." He notes there is no mention in this January 2011 record of any visual impairment.

Under the manifest error standard of review, a trial court's reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review, even though the court of appeal is convinced that had it been the trier-of-fact, it would have weighed the evidence differently. **In re Succession of Wagner**, 2008-0212, pp. 18-19 (La. App. 1 Cir. 8/8/08), 993 So.2d 709, 722. As the trier-of-fact, a trial court is charged with assessing the credibility of witnesses and, in so doing, is free to accept or reject, in whole or in part, the testimony of any witness. **Pelican Point Operations, L.L.C. v. Carroll Childers Company**, 2000-2770, pp. 7-8 (La. App. 1 Cir. 2/15/02), 807 So.2d 1171, 1176, writ denied, 2002-0782 (La. 5/10/02), 816 So.2d 293. When factual findings are based upon determinations regarding the credibility of witnesses, the manifest error standard demands that great deference be accorded to the trier-of-fact's findings. **Hitchen v. Southland Steel**, 2005-1708, p. 5 (La. App. 1 Cir. 6/9/06), 938 So.2d 123, 126.

With regard to testamentary capacity, the trial court acknowledged that Ms. Alexander had some medical problems, including dementia. The trial court recounted the testimony of various witnesses who spoke to Ms. Alexander's capability. After hearing four days of testimony and considering the documentary evidence in the record, the trial court concluded that Gay had failed to meet her burden of proving by clear and convincing evidence that Ms. Alexander lacked the testamentary capacity to make the donations or execute the will or that she was subjected to any undue influence at the time. The trial court found that Ms. Alexander "was not a weak minded person." The trial court added, "[t]he testimony before the court [was] that she was very strong willed, [and] knew exactly what she wanted." Of particular interest, the trial court noted that Ms. Alexander had told other people what she wanted to do with her property and the reasons why. The trial court acknowledged the testimony of the attorneys who had worked with Ms. Alexander, noting that both Ben Valentine and Donnie Floyd had spent time with her going over the documents and that they both believed she was capable and knew what she was doing.

We have thoroughly reviewed the record before us and find no error in the trial court's judgment. Gay failed to satisfy her burden of proving by clear and convincing evidence that Ms. Alexander lacked testamentary capacity or that she was subjected to any undue influence. The trial court's reasonable evaluations of credibility and reasonable inferences of fact must be afforded great deference. The arguments made by Gay on appeal are without merit.

CONCLUSION

For the above and foregoing reasons, we affirm the December 29, 2014 judgment of the trial court in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B. All costs of this appeal are assessed against appellant, Gay B. Sullivan.

AFFIRMED.