

No. 50,111-CA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

SUCCESSION OF

JOSEPH ROBERT COOK

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Originally Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 18427

Honorable Michael O. Craig, Judge

* * * * *

COOK, YANCEY, KING & GALLOWAY
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Appellant

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Appellees

* * * * *

Before BROWN, CARAWAY, MOORE,
PITMAN, and CALLOWAY (*Ad Hoc*), JJ.

CARAWAY, J., dissents for the reasons assigned in his dissent to the
original opinion rendered December 16, 2015.
BROWN, C.J., dissents for the reasons assigned by J. Caraway.

CALLOWAY, J., *Ad Hoc*, On Rehearing,

During the last year of his life, Joseph Robert Cook (“Joseph”) executed a will leaving the entirety of his estate to his daughter, Elizabeth Dianne Cook (“Dianne”), and in the alternative, his housekeeper. His sons, Robert Cook (“Robert”) and David Cook (“David”), filed suit to invalidate the will on the grounds of undue influence by Dianne. Finding clear and convincing evidence of undue influence by Dianne over her father, the trial court invalidated the will. Dianne now appeals. Because we find no manifest error in the trial court’s findings of fact and because we find the evidence of undue influence to be clear and convincing, we affirm.

FACTS

In 1998, Joseph and his wife, Dorothy Lovett Cook (“Dorothy”), executed reciprocal wills leaving all their property to the other and then to their three children in equal portions. Dorothy died in 2005. On July 17, 2012, Joseph, a few days away from turning 90, executed a new will in which he bequeathed all his property to Dianne, and in the alternative, to Mary Margaret Thurman (“Thurman”), his housekeeper.

The execution of the new will followed months of increasing discord between Dianne and her brothers and of Dianne’s increasing involvement in Joseph’s daily life. At the center of the Cook family discord was Rodidaco, Inc. (“Rodidaco”), a family corporation formed in the 1970s by Joseph, a certified public accountant, and Dorothy, with their three children as the sole and equal shareholders. Upon incorporating Rodidaco, Joseph kept the stock certificates, which were endorsed in blank.

Rodidaco owns a large tract of land on U.S. Highway 80 on which is located Robert's law office, the Cook Law Firm, and Farm Park, Inc. ("Farm Park"), a trailer park and Rodidaco subsidiary developed by Joseph. Since Dorothy's death, Joseph has lived in a trailer at Farm Park. Dianne, who also lives at Farm Park next to Joseph, collects rental income from some of the trailers at Farm Park. David operates a restaurant and a granite yard on property owned by Rodidaco. None of the three siblings pay rent for their use of the Rodidaco property. In addition to the income generated by Farm Park, Rodidaco received income from mineral royalties, a pipeline servitude, and leases of radio and/or cell towers located on the property. Both Dianne and David testified that Joseph, although not a shareholder, lived out of Rodidaco, using its funds as needed for his expenses.

Dianne had moved back to Louisiana from California in 1995. From 1996 until 2008, she worked as the office manager for Robert's law firm. Dianne left Robert's employ when he did not increase her \$135,000 salary, which she admitted was more than some of the attorneys at the firm were making. Dianne testified that Robert had promised that she would make more as they grew the business together, and she did not believe he was keeping that promise. Robert believed Dianne's demands equated to establishing a prohibited partnership between a lawyer and nonlawyer. A short time after she left his firm, Robert gave her \$200,000. Referring to the payment as a severance, Robert testified that he was worried about Dianne not being able to pay her bills. Dianne said he paid it because of his promise to take care of her. Both agreed that, for tax purposes, they

considered the payment a buyout of Dianne's interest in a related advertising business. Robert testified that his relationship with Dianne "went south" after she left his employ.

Dianne then worked for David for a few months. According to David, she left his employ after she tried to fire his wife's brother, who managed his Crawfish Palace restaurant. Dianne denied this.

In November 2009, Dianne had a car accident. Shortly after, she sold her house and moved to Farm Park next to her father and began taking care of him. The record indicates that she was, by this time, Joseph's daily companion and that she had taken charge of the bookkeeping and records associated with Rodidaco.

In late 2009, during litigation involving David's granite business, Dianne testified that she was the sole owner of Rodidaco. This prompted David and Robert to ask Joseph for their Rodidaco stock certificates. After first calling Dianne, Joseph gave them the certificates. Explaining her testimony in the granite litigation, Dianne stated that Joseph had, over the years, allowed her and her brothers to claim losses to Rodidaco on their individual tax returns, with any refunds placed back into corporation. When David and Robert no longer wanted to participate in that arrangement, she took all the losses and filed tax returns showing herself as 100% owner of Rodidaco.

Around October 2011, Robert and David asked to see Rodidaco's financial records. According to Dianne, the request followed an argument with Robert during a family dinner outing. Joseph objected when Robert

informed him that he had given someone permission to hunt on Rodidaco land. Dianne testified that when she asked Robert to honor Joseph's wishes, Robert "exploded," called her a "dominatrix," and said that he and David did not know what was going on with Rodidaco and Farm Park. She told Robert to be at Joseph's trailer the next day with David to see the records. Dianne claims that she allowed her brothers to see all that she had; the brothers allege that the records she provided were incomplete.

After the above episode concerning the corporate records, Dianne retained an attorney, Ken Mascagni ("Mascagni") of Cook Yancy, King and Galloway ("CYKG"), to represent her in dealing with Robert and David. Dianne testified that she felt like she'd be "bullied" otherwise. Mascagni wrote to Robert and David on December 10, 2011, informing them that, in light of their questioning the Rodidaco records and suggesting that Dianne had "shorted" them or the corporation, Dianne now "wants to terminate any mutual interest in the corporation and in any property." The brothers retained their own attorney. Both sides demanded records from the other.

Dianne made a proposal for dividing the property between the three siblings and allowing Joseph to retain income from the cell towers and royalties and to have a usufruct over his trailer. Robert testified that the three siblings met, without their attorneys, to discuss the agreement. However, their negotiations were unsuccessful.

In March 2012, Dianne closed on a house in Gulf Shores, Alabama, and had an elevator installed to accommodate Joseph. By May, Dianne and

Joseph were spending four to five days at a time about every couple of weeks in Gulf Shores.

At the beginning of June 2012, Robert found a letter placed on his desk about a proposal to buy one of the towers on Rodidaco property. Joseph had written across the top of the letter, "I want my money up front." David went to Joseph to discuss the sale. But Dianne, who was present with Joseph, intervened and made it clear that the decision to sell had been made. This event precipitated the brothers scheduling the shareholder meeting on June 19, 2012, during which they exercised their majority shareholders' rights and removed Dianne as secretary of Rodidaco and their 89-year-old father as its president. Robert explained that Joseph was in declining health and that he had abdicated all his functions regarding Rodidaco to Dianne, who also had Joseph's power of attorney. He also explained that they had not discussed with Joseph his removal as president of Rodidaco ahead of the shareholders' meeting because the removal would not affect Joseph's livelihood, and they saw no reason to "rile him up."

Dianne, who had attended the shareholders' meeting by telephone and recorded it, immediately went to Joseph with the recording and told him "you wouldn't believe this if I told you so here I recorded it and you need to listen to this." She testified that, after playing the recording, he asked her to play it again and that she played it for him three times. She agreed with Joseph when he concluded that Robert and David had stolen from him. She testified that Joseph said he wanted his property back and asked her what he could do. She advised getting an attorney and suggested that he could

“surely” get back the money he had put into the corporation. Dianne contacted Mascagni for a referral and went with Joseph to CYKG’s offices to meet with another CYKG attorney.

On June 22, 2012, CYKG sent a demand letter to Rodidaco claiming that it owed Joseph \$408,492.13, plus interest, as reflected on the books of the corporation “for loans made over a number of years to that corporation.” Then, on July 3, 2012, a suit styled “Petition on Money Loaned” was filed on behalf of Joseph against Rodidaco while Joseph and Dianne were again in Gulf Shores. Dianne testified that they returned to Louisiana on July 15, 2012, and that she again accompanied Joseph to CYKG on July 17, 2012, to sign the verification for the suit against Rodidaco, to file a petition to probate Dorothy’s will leaving all her property to Joseph, and to execute a new will which had been prepared by a third CYKG attorney, Stephen Yancey (“Yancey”). This new will purported to leave all Joseph’s property, including the claim against Rodidaco, to Dianne or, alternatively, to Thurman. Dianne was present in the room when Joseph signed the new will and the verification for the suit against Rodidaco. Dianne admitted that she talked with Joseph about the lawsuit against Rodidaco and his new will, but she denied having “extensive” discussions. Regarding Joseph’s decision to change his will, Dianne explained that because of what Robert and David had done to him, Joseph believed she would not “see a dime out of the corporation” and wanted to leave whatever he had left to her.

Robert and David maintained that nothing was stolen from their father because he was not a shareholder and that he became enraged against

them by Dianne repeatedly playing the recording of the meeting. Robert testified that he and his daughter, Michelle, tried to visit Joseph a couple of weeks after the shareholders' meeting. Joseph met them at his doorstep and ordered them off his property. Robert had never seen him that mad. He sent his father a note for his birthday to reestablish communication, but nothing came of it. Regarding their prior relationship, Robert claimed that they were very close and that he saw his father every day until Dianne moved next door to him. Their relationship then became strained, and Robert visited twice a week or less. Robert stated that it was "very unlikely" that he could have visited with his father without Dianne being there.

Unlike Robert's experience after the shareholders' meeting and the filing of the suit, David testified that he was allowed at Joseph's house with no problems. David recalled meeting with him to get his Social Security number to set up a new account with automatic drafts for his electric bill. Joseph gave him the information without any animosities. David also testified that he and his children visited Joseph in December 2012. They were having a good visit, and Joseph was reminiscing about old war stories. However, his demeanor changed when Dianne arrived. Joseph started saying that he wanted his money back, so David and his family kissed him goodbye and left. This was the last time David saw him conscious. Both David and Robert testified that Joseph had good relationships with his grandchildren and that there would have been no reason to disinherit them.

Regarding Joseph's condition during the last years of his life, Robert and David claimed that he stayed in bed much of the time due to arthritis and did crossword puzzles. He had hearing problems but did not always wear his hearing aids. Robert testified that Joseph was forgetful at times and talked mostly about old war stories and things in the past. David testified similarly. As proof of Joseph's alleged confusion, they related an incident where he claimed he saw some soap or detergent floating and another incident where he ordered a 25-pound box of poison.

Medical records in evidence show that, as would be expected of a man in his late 80s, Joseph suffered from a number of ailments during the last five years of his life. His ailments included such things as osteoarthritis, hypertension, high cholesterol, coronary artery disease, shortness of breath, urinary incontinence, dehydration, and low potassium. He was treated with medication for anxiety and depression stemming from the death of his wife. In May 2010, his internist, Dr. Rajan Khanna ("Dr. Khanna"), suspected he had suffered mini-strokes or "TIA's" after Dianne reported that Joseph had awakened with slurred speech, marked generalized weakness, and some confusion. In February 2011, Dianne reported to Dr. Khanna that Joseph was having problems with recent memory loss. He had forgotten food in the oven and how to get to a store. Dr. Khanna believed Joseph was developing Alzheimer's dementia, a late life condition involving short term memory problems. He suggested a medication, but Joseph was not willing to comply. Dr. Khanna's records and testimony indicate that Joseph was a stubborn patient who did not always comply with

medical recommendations and that Dianne was always present with Joseph at his appointments and part of the discussions.

While in Gulf Shores with Dianne for Thanksgiving 2012, Joseph began complaining of chest pain. He was eventually diagnosed with an enlarged thyroid that was pushing on his esophagus and impairing his ability to swallow. Neither Robert nor David were informed of Joseph's deteriorating health. Faced with either starving to death from being unable to eat, getting nutrients from a feeding tube or catheter, or undergoing a risky surgery, Joseph opted for surgery. The surgeon, Dr. Glen Lee Watkins ("Dr. Watkins"), felt that Joseph understood his situation and made his own decision. However, Dr. Watkins noted that Joseph was in a debilitated state and that Dianne signed the consent forms.

The surgery took place on January 17, 2013. Dianne claimed that she asked Joseph to call his sons but that he refused. She chose to respect his wishes until the day after surgery when she was told that Joseph's heart was giving out and that he would not make it. She then called Robert, who was in Fort Meyers, Florida. Robert contacted David, who went to the hospital and put a phone beside Joseph so that Robert could say goodbye.

Joseph passed away on January 18, 2013. Dianne filed a petition to probate his will on January 23, 2012 and was confirmed as executrix on January 26, 2013. She substituted herself as party plaintiff in the suit against Rodidaco on February 8, 2013.

On August 30, 2013, Robert and David filed a petition seeking to annul the probated will on the grounds of undue influence by Dianne over

their father, who they alleged suffered from diminished mental and physical capacities. They alleged that Dianne's actions "created a divisive atmosphere" in an effort to serve her "own vindictive and financial/litigious interests" and that she substituted their father's true testamentary wishes with her own by surreptitiously convincing him to execute a new will drafted by her attorneys.

A two-day trial took place on January 10, 2014, and April 30, 2014. In addition to the testimony mentioned above, the parties presented dueling experts on the issues of undue influence and Joseph's mental capabilities at the time of the execution of the will. Dianne also presented testimony from Yancey, the attorney who prepared the will, and several friends and acquaintances.

Yancey had no doubt in his mind that Joseph knew what he was doing in executing the new will. However, he admitted that Dianne had brought Joseph to his office and that she was "there frequently" with Joseph. The friends who testified generally claimed that Joseph was doing well when they last saw him. Mark Sims, whose wife was close friends with Dianne and who met Joseph in 2004, testified that they invested in properties with Dianne and vacationed in Gulf Shores with her and Joseph. He claimed that Joseph talked to him about his anger and disappointment in his sons during the "months" leading up to the changing of his will. Stephanie Sims testified that she never initiated any conversation with Joseph about his relationship with his sons, but she did recall him saying that they had stolen his business. She was not sure whether Dianne was

present for that conversation. She also testified that she was with Dianne at the hospital before Joseph died and that Dianne asked him to call his sons, but he refused. Mike Weber testified that he and his wife went out to dinner with Joseph and Dianne during the middle of July 2012 and that Joseph was “very on top.” They all denied seeing anything to suggest that Dianne was making decisions for her father. Thurman, Joseph’s housekeeper and alternate legatee, testified that she saw him about four hours each week and that there was “nothing the matter” with his mind. She testified that it broke his heart when Robert and David took Rodidaco from him, and she believed that Joseph would have gone along with their plans if only Robert had asked him to make changes.

After considering the testimony and evidence, the trial court entered a judgment on September 2, 2014, annulling the will on the grounds of Dianne’s undue influence. In a written opinion, the trial court found that Joseph had capacity to execute the testament, but that the level of influence Dianne had over Joseph was such that it destroyed his free agency and caused her volition to be substituted for his. The trial court explained:

The testimony presented shows that Dianne and Decedent spent significant time alone together, where Dianne is the only witness as to the contents of those conversations. There is no doubt that Dianne cared for her father, however her influence in this matter appears to go beyond “mere advice, or persuasion, or kindness and assistance.” Decedent had recently lost his wife and was suffering from declining health and was dependent on Dianne for his basic needs, including the administration of his financial/business affairs. Although Dianne contends she did not influence Decedent in his decision to change his testament, looking at the facts and circumstantial evidence presented it is of [sic] the opinion of the Court that Dianne would not stay neutral in this situation.

In its written reasons, the trial court noted as important the facts that the volatile relationship between Dianne and her brothers “reached a breaking point” when they removed her as secretary of Rodidaco, that the sons had a great relationship with their father until the last six months of his life, and that Dianne spent a significant amount of time alone with Joseph. Evidence of Dianne acting to influence Joseph to change his will included Dianne’s recording of the shareholders’ meeting, her playing it multiple times for Joseph, and her agreeing with Joseph that his sons were stealing his money. The trial court found that Dianne reinforced Joseph’s “false beliefs.” Dianne’s actions in probating her mother’s testament without informing her brothers and her involvement in the filing of the suit against Rodidaco two weeks before she brought Joseph to CYKG to rewrite his testament to make her the sole beneficiary also influenced the trial court’s decision. Finally, the trial court found that Dianne gave some inconsistent testimony regarding important conversations she had with Joseph.

Dianne filed a motion for a new trial, asserting that the trial court failed to give serious enough consideration to her evidence, including the witnesses who testified that Joseph was furious with his sons. Denying the motion, the trial court stated that it did consider all the evidence, believed that Joseph was furious at his sons, but found that Dianne “was pretty much the source of that anger and that fury[.]” Thereafter, Dianne filed this devolutive appeal.

DISCUSSION

Standard of Review

On appeal, Dianne urges this court to examine the record by a standard of review other than manifest error, which she asserts does not allow the reviewing court to assess whether the clear and convincing burden of proof was satisfied. She asserts that, although the clear and convincing standard requires a higher burden of proof than the preponderance of the evidence standard applicable in most civil cases, both types of cases are reviewed under the manifest error standard, which merely requires the reviewing court to determine whether there is no reasonable factual basis for the trial court's findings or whether the findings are clearly wrong. Dianne proposes the adoption of a standard by which the reviewing court would determine whether the existence of disputed fact was "highly probable" or "much more probable than its nonexistence" based on the evidence. She asserts that this standard "would enable this Court to uphold the strong public policy against postmortem amendment of testaments[.]"

The burden of proof for claims of under influence is set forth in La.

C. C. art. 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.

The clear and convincing standard applies in this matter where Dianne, the alleged wrongdoer, is the testator's daughter.

The clear and convincing standard is an intermediate burden of proof that requires more than a “preponderance of the evidence” but less than proof “beyond a reasonable doubt.” Rather, the evidence must show the existence of the disputed fact to be highly probable, meaning much more probable than its nonexistence. *Succession of Lyons*, 452 So. 2d 1161, 1165 (La. 1984). The clear and convincing standard applies in cases “where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds.” *Id.*, citing *McCormick on Evidence*, Section 340(b), p. 798 (2nd ed. 1972). Cases involving testamentary capacity, termination of parental rights, attorney disciplinary matters, filiation proceedings instituted after the death of the alleged father, and workers’ compensation proceedings involving proof of permanent total disability are examples of the types of matters requiring clear and convincing proof.¹ Each of these involve strong public policy considerations that necessitate a heightened burden of proof.

In cases requiring proof by clear and convincing evidence, our courts review the factual findings for manifest error. For example, in *Hines v. Williams*, 567 So. 2d 1139 (La. 1990), *writ denied*, 571 So. 2d 653 (La. 1990), a filiation action, the supreme court applied the manifest error standard to the trial court’s findings and then determined whether the facts

¹See *Lyons, supra*, requiring clear and convincing evidence to overcome the presumption of testamentary capacity; La. Ch. C. art. 1035(A), requiring proof of the grounds for termination of parental rights by clear and convincing evidence; La. S. Ct. R. 19 §18(C) and *In re King*, 601 So. 2d 657 (La. 1992), requiring clear and convincing proof of attorney misconduct; La. C. C. art. 197, requiring clear and convincing evidence of paternity in actions instituted after the death of the alleged father; and La. R.S. 23:1221(2) regarding proof of permanent total disability by a workers’ compensation claimant.

proved paternity by clear and convincing evidence. In attorney disciplinary matters, the manifest error standard applies to the factual findings of the Hearing Committee in reviewing the record to determine whether the alleged misconduct was proven by clear and convincing evidence. *In re Caulfield*, 96-1401 (La. 11/25/96), 683 So. 2d 714. The factual findings of the workers' compensation judge are reviewed for manifest error in determining whether a claimant proved permanent total disability by clear and convincing evidence. *Morgan v. Glazers Wholesale Drug Co.*, 46,692 (La. App. 2d Cir. 11/2/11), 79 So. 3d 417. While the grounds for termination of parental rights must be proven by clear and convincing evidence, the factual findings in such cases are reviewed for manifest error. *State ex rel. D.L.R.*, 2008-1541 (La. 12/12/08), 998 So. 2d 681. In reinstating a judgment of termination that had been reversed by the court of appeal, the supreme court found that the appellate court had substituted its judgment for that of the district court without first finding manifest error. *Id.* In *In re Succession of Doucet*, 42,963 (La. App. 2d Cir. 2/6/08), 975 So. 2d 738, a case concerning whether or not the decedent revoked his will, this court reviewed the findings of fact for manifest error in determining that the evidence did not provide clear and convincing proof that someone other than the testator destroyed his will.

Our jurisprudence has been consistent in reviewing findings of fact under the manifest error standard and then determining whether, absent manifest error, the facts satisfy the clear and convincing burden of proof. This standard ensures that the reviewing court properly assesses the

evidence to determine that it meets the intermediate burden of proof, while deferring to the trial court's better capacity to evaluate witnesses and preserving the allocation of trial and appellate functions between the respective courts. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). We find no merit to Dianne's argument for application of a heightened standard of review heretofore unrecognized by the courts of our state.

Finding of Undue Influence

_____ Relating to the merits of the case, Dianne argues that the trial court erred in finding that her brothers proved by clear and convincing evidence that she exercised such a degree of influence over her father that his free agency or volition was destroyed and hers substituted for his. Specifically, she argues that the trial court's factual conclusions are incorrect and "defy the uncontradicted testimony and evidence in the record." She asserts that the trial court "completely ignored the uncontradicted and unimpeached testimony of a number of disinterested witnesses" and either ignored or improperly weighed the actions of her brothers in removing Joseph as president of Rodidaco and Joseph's resultant anger. Lastly, Dianne argues that the trial court reversed the burden of proof by essentially requiring that she "prove that she remained neutral and that she purposefully encouraged reconciliation between her father and her brothers" in order to disprove the allegation of under influence.

La. C. C. art. 1479 provides:

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.

This court has recognized that undue influence is a subjective standard that is difficult to both define and prove. *In re Succession of Cooper*, 36,490 (La. App. 2d Cir. 10/23/02), 830 So. 2d 1087. Because “objective aspects of undue influence are generally veiled in secrecy, ... the proof of undue influence is either largely or entirely circumstantial.” La. C. C. art. 1479, Revision Comment (b). Undue influence includes physical coercion or duress, but the comments state that “more subtle influences, such as creating resentment toward a natural object of a testator’s bounty by false statements, may constitute” undue influence. *Id.* The comments caution that “[m]ere advise, 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.” *Id.* See also *In re Succession of Lounsberry*, 2001-1664, p. 4 (La. App. 3d Cir. 5/8/02), 824 So. 2d 409, 412.

We find no merit to Dianne’s argument that the trial court improperly reversed the burden of proof by requiring her to prove that she remained neutral and encouraged reconciliation between her father and brothers. Regarding Dianne’s assertion that she did not influence Joseph to change his testament, the trial court opined that she “would not stay neutral in this situation.” The trial court did not require Dianne to prove her neutrality. It simply found that, rather than remaining neutral in the situation between her brothers and father, Dianne acted to influence Joseph to change his testament. This finding is not manifestly erroneous and is supported by clear and convincing evidence in the record.

Contrary to Dianne's argument, we do not find that the trial court ignored the testimony of any witnesses. The trial court's opinion and reasons given when it denied Dianne's motion for a new trial show that it considered all the evidence. The trial court found, as indicated by the testimony of some of the disinterested witnesses, that Joseph was furious with his sons after they removed him from Rodidaco, but it also found that his anger was fueled by Dianne. These findings are not manifestly erroneous. Moreover, we find the testimony of the friends and acquaintances offered by Dianne to be of limited relevance on the ultimate issue of undue influence. As stated in the Revision Comments to La. C. C. art. 1479, the objective evidence of undue influence is often veiled in secrecy. The record shows that Dianne, whose relationship with her brothers had "gone south," spent much time alone with Joseph, and this time alone afforded her the opportunity to influence him against Robert and David.

The record shows that the disinterested witnesses either spent little time with Joseph or spent time with him in the company of Dianne. Cary Camp testified that he saw Joseph about four times a year and had last had a 30-minute casual conversation with him in August 2012. Thurman testified that she saw Joseph four hours a week when she did his housekeeping on Thursdays. Weber and his wife had dined with Joseph and Dianne on the evening of July 17, 2012, after Joseph had executed the new will. Mark and Stephanie Sims were both friends of Dianne before they befriended Joseph and began spending time with the two of them in Gulf Shores. All generally

indicated that there was nothing wrong with Joseph's mental faculties; however, testamentary capacity was not at issue. We note that Mark Sims, whose testimony was most favorable to Dianne's side, testified that Joseph was very upset and angry with his sons and talked about changing his will for "months." His testimony indicated that this would have been even before the shareholder meeting on June 19, 2012, but nothing in the record supports Mr. Sims' claim that Joseph planned to change his will before his removal as president of Rodidaco.

The testimony of Dr. Khanna, Joseph's longtime physician, was that Dianne regularly attended visits with him and related Joseph's history and symptoms. Dr. Khanna was not asked his opinion on undue influence and stated that he had no knowledge of their relationship outside his office. Dr. Watkins likewise indicated that Dianne was present when he saw Joseph and that she provided his medical history. Dr. Watkins believed that Joseph understood his medical options at the end of his life and made his own decision. However, the decision to proceed with a risky surgery when faced with nothing but dire options is not indicative of whether Dianne exercised undue influence over Joseph regarding the changing of his will months before his death. The testimony of both physicians highlights Dianne's intimate involvement in Joseph's healthcare and daily life.

Both sides presented expert testimony. Dr. Harminder Mallik, a forensic psychiatrist offered as an expert on behalf of David and Robert, concluded from his review of depositions and medical records, telephone interviews with Robert, David, and Dr. Khanna, and listening to the

testimony of the parties that Joseph was subjected to undue influence by Dianne. Dr. Mallik focused on seven factors which he believed indicated undue influence. In short, these included: (1) the unnatural provision of the new will leaving everything to Dianne, or the housekeeper, to the exclusion of even Joseph's grandchildren; (2) the new will being inconsistent with Joseph's intent as expressed in his original will; (3) Dianne's increasing involvement in Joseph's care and life; (4) Joseph's declining health, including reports of memory problems noted in Dr. Khanna's records; (5) Dianne's involvement in procuring the new will; (6) the fact that Dianne was named the sole beneficiary under the will, reaping undue profit; and (7) the confidential relationship between Dianne and her father evidenced by his daily dependence on her and her having his power of attorney and access to his bank account.

After interviewing disinterested witnesses and reviewing depositions, medical records, Dr. Mallik's report, and the parties' testimony, Dr. Richard Williams, an expert in general psychiatry, concluded on behalf of Dianne that there was no undue influence. In support of his opinion, Dr. Williams discussed the absence of evidence that Joseph had dementia, that Dianne isolated him from others, or that he was dependent upon her in a "pathological way." Notably, Dr. Williams likened the dependency indicative of undue influence to Stockholm Syndrome. We believe this goes beyond the type of influence contemplated by La. C. C. art. 1479.

At the heart of this matter is the testimony of the parties, which establishes the facts and circumstances that clearly and convincingly prove

undue influence. The record shows that Joseph loved his children, established Rodidaco for their benefit, and maintained good relationships with both his sons until the shareholder meeting of June 19, 2012. Dianne's relationships with Robert and David had soured before then due to employment disputes and management of Rodidaco. After leaving both Robert's and David's employ and moving next door to Joseph, Dianne became increasingly involved in Rodidaco and her father's daily life. As Dianne became more involved in her father's life, her brothers became less involved.

Dianne testified that she always encouraged them to see more of their father, but they indicated that Dianne was always present. Michelle, Robert's daughter, testified about a dispute that arose during Christmas 2011 at her house when David confronted Dianne about signing something. According to Michelle, Dianne grabbed Joseph, who was not involved in the dispute, and left. Michelle explained that she'd had to call Dianne to have her grandfather come to her house for Christmas because "they didn't go anywhere apart. It was always them two." Additionally, Dianne's purchase of the house in Gulf Shores allowed her to spend more time alone with Joseph away from the rest of the family and with her friends.

The record clearly shows Joseph's increasing isolation from his family and dependency on Dianne in the months prior to his execution of the new will and during the time when Dianne and her brothers were seeking to terminate their mutual interests in Rodidaco. After her brothers demanded to see the corporate records, Dianne retained an attorney to

negotiate terminating their mutual interest in the corporation. The record does not indicate whether this was done with or without Joseph's knowledge. Ultimately, negotiations between the siblings failed. When Robert and David tried to question the decision to sell one of the towers on the Rodidaco property, they were shut out by Dianne and realized that their 89-year-old father had abdicated all his Rodidaco functions to Dianne. They then proceeded with the shareholder meeting to remove Dianne as secretary and Joseph as president.

Considering the increasingly poor relationship between Dianne and her brothers and her increasingly close relationship to Joseph as his primary companion and caregiver, the trial court was not manifestly erroneous in finding that Dianne's actions after the shareholder meeting were taken for the purpose of creating resentment by Joseph toward his sons and inflaming his anger at his removal as president of Rodidaco for her own benefit. Telling him "you wouldn't believe this if I told you," Dianne immediately went to Joseph with the recording of the shareholder's meeting and played it for him multiple times. She agreed with his sentiment that his sons had stolen something from him, even though he was not a shareholder in the corporation. By these actions, Dianne cast her brothers' actions in the most negative light and reinforced Joseph's feelings of anger and betrayal, all to her benefit.

Evidence of Dianne's undue influence over Joseph also includes her procurement of legal counsel for him from the same firm that represented her in trying to negotiate a division of Rodidaco property with her brothers.

Interestingly, the evidence concerning the siblings' unsuccessful negotiation of a property division does not appear to include any mention of a \$400,000-plus debt owed by Rodidaco to Joseph. Dianne accompanied Joseph to meet with the attorneys who prepared the suit against Rodidaco, the petition to probate Dorothy's testament with a detailed descriptive list that included the alleged debt owed by Rodidaco, and Joseph's new will. After returning from another visit to Gulf shores, she accompanied Joseph on July 17, 2012, when he signed the verification for the suit and executed his new will leaving everything to her.

All these facts and circumstances lead to the highly probable, or clear and convincing, conclusion that Dianne exercised undue influence over Joseph regarding his execution of the will naming her as the sole beneficiary and Thurman as the alternate beneficiary. From our close and thorough review of this matter, we detect no manifest error in the trial court's findings of fact, and we find that Robert and David have proved by clear and convincing evidence that Joseph's will was the product of Dianne's influence that so impaired his volition and substituted her own volition for his.

CONCLUSION

For the reasons explained, we affirm the trial court's judgment annulling the testament of Joseph Robert Cook. Costs of appeal are assessed against Dianne Elizabeth Cook.

AFFIRMED.

CARAWAY, J., dissenting.

I respectfully dissent and would reverse the annulment of the testator's will.

Appellant ("Dianne") first argues at great lengths that the clear and convincing standard under La. C.C. art. 1483 for the burden of proof was not properly applied by the trial court in this case and that Louisiana's application of the manifest error standard of appellate review will likely compound the error further. Dianne asserts that blind adherence to the manifest error standard, requiring only a "reasonable fact basis" for judgment, makes the clear and convincing burden meaningless on appeal.

I believe both standards have application in the following manner for this circumstantial evidence case. Since proof of intent and the volition of the testator, outside of the testament itself, rests exclusively on circumstantial evidence,² there may be competing, yet undisputed, bodies of reasonable evidence which imply the motive or state of mind of the testator.³ Here, while the Appellees, Robert and David Cook (hereinafter sometimes referred to as "the brothers"), may have sufficiently proven a body of circumstantial facts suggesting Dianne's undue influence over their

²When intent is disputed in a civil or criminal action, proof of intent or state of mind is rarely established as a fact by direct evidence, but may be inferred from the facts regarding the individual's actions or other circumstances. *S.G. v. City of Monroe*, 37,103 (La. App. 2d Cir. 4/11/03), 843 So.2d 657; *Schmidt v. Blue Cross and Blue Shield of Louisiana, Inc.*, 33,910 (La. App. 2d Cir. 9/27/00), 769 So.2d 179, writ denied, 00-3011 (La. 12/15/00), 777 So.2d 1234; *Ledet v. Burgess*, 93-600 (La. App. 5th Cir. 2/9/94), 632 So.2d 1185. See also, *State v. Sosa*, 05-0213 (La. 1/19/06), 921 So.2d 94; *State v. Graham*, 420 So.2d 1126, 1127 (La. 1982) and Justice Lemmon's concurrence in *Succession of Talbot*, 530 So.2d 1132 (La. 1988).

³In the analogous criminal law statute for the even higher burden of proof for a crime, La. R.S. 15:438 recognizes different circumstantial bodies of evidence that raise competing inferences for multiple hypotheses for a vital fact, as follows: "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

father, Joseph, simply applying the manifest error standard of review to that evidence alone is not the end of the inquiry. Dianne's defense produced an opposing body of circumstantial evidence from which her father's intentions and volition for his will may also be inferred. This evidence raises a competing inference; a competing hypothesis for their father's intent. That body of evidence should likewise be reviewed to determine if it rests on undisputed facts and gives rise to reasonable inferences of a different motive for Joseph's act. To the extent that the evidence of the brothers' actions in June 2012, demonstrate circumstantially another reasonable hypothesis for the father's state of mind for his July will, the clear and convincing standard for their burden of proof may not be met.

It should also not go unnoticed that backing up Dianne's proof for the testator's intent is the solemn act for the testament itself that occurred in proper form in this case.⁴ The attorney who prepared the will and acted as notary testified that Joseph discussed with him his desires for the will's preparation and, of course, acknowledged the testament as his will at its execution. Additionally, there is the implied recognition in Article 1483 that one child or spouse in a close caregiver relationship with the testator is never deemed to have exerted an undue influence because of that relationship in the absence of clear and convincing proof to the contrary.

⁴There is a presumption in favor of the validity of testaments in general, under Louisiana law. *In re Succession of Holbrook*, 13-1181 (La. 1/28/14), 144 So.3d 845. A will is strongly presumed to have intended the effects of its stated intentions when it complies with the legal formalities imposed by the law. *Succession of Reeves*, 97-20 (La. App. 3d Cir. 10/29/97), 704 So.2d 252.

See, In re Succession of Culotta, 04-1298 (La. App. 5th Cir. 3/1/05), 900 So.2d 137, writ denied, 05-0817 (La. 5/13/05), 902 So.2d 1024.⁵

As a threshold matter, the trial court ruled without discussion of the facts that Joseph did not lack capacity to execute the will. On Joseph's final visit with his family physician on January 8, 2013, the doctor noted Joseph's "good judgment and insights." Nevertheless, at age 91, Joseph exhibited some memory problems and had an Alzheimer's dementia diagnosis by mental testing in 2011. With this ruling by the trial court of contractual capacity, *albeit* with some mental issues, the two opposing views for Joseph's mental state in July 2012 would appear to me to be equally affected by Joseph's condition. Just as he could be more susceptible to an undue influence of the daughter, he could also overreact to the actions by the brothers in ousting his control over the family corporation, Rodidaco.

The trial court ruled that Rodidaco was the center of the family tensions. Surprisingly, however, the brothers, as the plaintiffs and the controlling shareholders in the company, did not detail or dispute the father's role as president of the company since its inception in the late 1970s. More importantly, despite another important act of Joseph in July of 2012 – his \$408,000 lawsuit against Rodidaco – the brothers did not

⁵The appellate court in *Culotta* reversed the trial court judgment invalidating a will on the grounds of undue influence finding that the sister failed to prove her brother's undue influence by clear and convincing evidence. The elderly testator suffered from dementia "at times, when he was agitated." When he expressed a desire to stop living with his daughter, the testator's son and his wife came to live with him in his home. While there, the father utilized the services of the son's attorney to change a previous will to make the son his sole heir. After considering the evidence presented by both sides, including medical and legal testimony, the court reversed the trial court after determining that the execution of the testament was well within the discretion of the testator who vehemently opposed living with his daughter and clearly expressed his desire that his daughter and grandchildren receive nothing.

challenge this debt with their corporation's records, or the lack thereof. The brothers' position at trial was that they had never known of a \$408,000 debt while at the same time acknowledging their father's control in the creation and management of the corporation for many years. The petition for Joseph's suit alleged that payments from the company to Joseph on the debt had been periodically made through the years. There was testimony by David that Joseph received payments and was "living out of the corporation." Before Joseph's ouster as president in June 2012, Joseph had asserted a claim to money owed to him by the company in connection with the disputed tower sale.

With the accounting records for the company in the brothers' control, was there a debt or not? If there was a debt, then Joseph was informed of two things in June 2012: (1) He was no longer the president of Rodidaco by his sons' unannounced actions, and (2) his \$408,000 asset in the form of the corporate debt might not be repaid with his loss of control of the company. On the other hand, if Dianne had concocted a fiction of a \$408,000 debt in her father's mind that is not supported by the company's accounting records, then that manufactured \$408,000 falsity is further evidence of her undue influence over Joseph. The brothers did not try to dispute their father's claim to the debt by accounting evidence within their control. They only admitted that since the company had been in their father's control for years, they had never known about such debt. Part of Dianne's defense regarding her father's state of mind for his will was that her father directed attorneys to file a suit on a \$408,000 debt. The brothers did not try to show

through a review of all corporate records that the suit was frivolous. As plaintiffs in this action, with the burden of proof, the brothers' evidence did not challenge the circumstantial evidence that Joseph was very disturbed about his claim for \$408,000.

In addition to this undisputed evidence of the father's \$408,000 claim, the brothers admitted that their father exhibited great anger at Robert and Robert's daughter, Michelle, in late June or early July, only days after the brothers' ouster of Joseph as president of Rodidaco on June 19. The purpose of Robert's visit was to try and explain to Joseph why the brothers had removed him as president. Michelle described her grandfather as "screaming" and threatening "to attack us." Robert explained that Joseph "was furious because he believed we had stolen something from him."

This tragic encounter, a few days before Joseph's execution of his will, can hardly be asserted as the product of Dianne's undue influence. From the testimony of Robert, Michelle and Dianne, Dianne was not even present. The incident clearly pertained to Joseph's knowledge of the brothers' actions against his interest in Rodidaco. The strong inference from this fit of anger over the brothers' actions with Rodidaco is that the brothers' actions served as the motivation for their exclusion by Joseph in his July 17 will.

Under the manifest error measure of these facts, the brothers do not dispute that Joseph's outburst of anger, just days before executing his will, was related to his removal as the president of Rodidaco on June 19, 2012. A reasonable inference by this defense evidence, thus, overhangs the

brothers' case. Proof of Joseph's state of mind for his will may be inferred from his anger over the brothers' actions with Rodidaco. Significantly, the trial court's reasons for judgment did not specifically mention the brothers' action in removing Joseph as president, his angry encounter with Robert and Michelle, or Joseph's \$408,000 suit and explain how Dianne's undue influence somehow completely produced Joseph's exhibited anger shown in those matters.

On the other hand, when the evidence is viewed most favorably to the brothers' case, there is a strong showing of Dianne's control over her father from 2010 when she moved to live next to Joseph. This, coupled with her clearly strained relationship with her brothers, produces the competing inference that Dianne was exerting undue influence on Joseph's decisions. Nevertheless, drawing the line between Dianne, as primary caregiver and circumstantial manipulator of Joseph's decisions, and Joseph's independent anger toward his sons, is not a task for the fact finder's determination by direct evidence. Reasonable inferences for one's state of mind must be weighed, and sometimes the weight of each clouds the conclusion to be gleaned from the other. It is significant to me that with all the family tension and hard feelings exhibited between the siblings leading up to the June 19, 2012 ouster of Joseph as president, Joseph had never chosen to change his will; or from the brothers' perspective, Dianne had never motivated her father to change the will. Likewise, before his ouster, the independent outburst of anger Joseph rendered toward his son in the

presence of his granddaughter and outside of Dianne's presence had never previously occurred.

In conclusion, proof of state of mind is rarely established by direct evidence. That is certainly true with a testator allegedly under an undue influence despite his solemn act. When I search this record for the circumstantial evidence bearing on Joseph's state of mind, there is evidence that tends to prove an undue influence by Dianne. Yet, if another hypothesis for the testator's intent rests on other reasonable circumstantial evidence, I cannot say that the brothers' claim of undue influence by Dianne has been proven to be highly probable and therefore clear and convincing. I think that evidence surrounding the brothers' own actions in removing their father as president of the company is a strong body of undisputed circumstantial evidence for his motive in removing his sons from his will. The brothers' hypothesis for their father's manipulated motive for his will does not exclude the reasonable hypothesis of Joseph's independent anger against them.