

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0340**

In the Matter of the Trust Created by Eileen Carlson Kasell,
dated September 10, 2013, as amended.

**Filed November 13, 2018
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-TR-CV-15-186

Donald W. Carlson, Otsego, Minnesota (pro se appellant)

William R. Asp, Best & Flanagan LLP, Minneapolis, Minnesota (for respondent
Associated Trust Company)

Steven R. Little, SRL Law, PLLC, Minneapolis, Minnesota (for respondent Eileen Kasell).

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this trust dispute, pro se appellant challenges the district court's order removing
him as a beneficiary of the trust. We affirm.

FACTS

Respondent Eileen Carlson Kasell is the trustor and primary beneficiary of the Eileen Carlson Kasell Revocable Trust Agreement. Article One, Paragraph 1.1 of the Trust reserves to Kasell the right to “amend, in whole or in part, or to revoke the dispositive provisions [of the Trust] by a writing delivered to [the] Trustees.” Associated Trust Company, N.A. (Associated Trust), serves as the current trustee of the Trust. Kasell has two adult sons, appellant Donald William Carlson and G.C., who were, until recently, the named contingent beneficiaries of the trust at Kasell’s death.

On January 6, 2016, Carlson, Kasell, Associated Trust, and G.C. entered into a settlement agreement which provided that Kasell waived her right to freely amend the Trust and that a court order would be required for future amendments. On August 11, 2017, Kasell signed the Third Amendment and Complete Restatement of the Eileen Carlson Kasell Revocable Trust Agreement (Third Amendment). That amendment removed Carlson as a contingent beneficiary of the Trust, leaving G.C. as the sole beneficiary.

On August 31, 2017, Kasell appeared before the district court for matters relating to the Trust but not pertaining to the Third Amendment and not encompassed by this appeal. At that hearing, the district court asked Kasell to testify about the amendment. Kasell testified that she had amended her trust approximately two weeks earlier, of her own free will, and with the intent to remove Carlson as a beneficiary. Kasell testified that she was of sound mind at the time of the hearing, but when asked whether she was of sound mind when she signed the amendment, the discussion went off topic and she did not answer the

question. On September 13, 2017, Kasell petitioned the district court to authorize the Third Amendment.

On September 26 and October 16, 2017, Carlson filed objections to the Third Amendment. He claimed that Kasell's amendment was based on "misinformation" provided by G.C., that Kasell's attorney was "selected by" G.C. and was acting "more in the interests of G.C. and [G.C.'s wife] than the interests of [Kasell]," and that he (Carlson) was suffering from a medical disability and required a continuance of the contested hearing. The district court denied Carlson's request for a continuance.

On October 26, 2017, the district court held a hearing on the petition for the Third Amendment. At that hearing, Carlson argued that Kasell was not "competent" to make this amendment, citing to Kasell's "multiple brain surgeries, [the] drains planted in her brain," and various unspecified "psychiatric or medical opinions that [Kasell] was not competent." Carlson also argued that Kasell mistakenly believed that he had taken money from her, that "her legal representation [had] been effectively hijacked," and that she mistakenly believed that he had been "found guilty" of some sort of wrongdoing by "some Hennepin County official authority," a reference to an unrelated proceeding involving Hennepin County Adult Protective Services. Carlson admitted that he did not have "medical or psychiatric evidence" that Kasell was incompetent, but argued that his lack of evidence was because he had "been denied access to her to get her in front of the doctor." Carlson offered five exhibits, and the district court sustained relevance objections to all but one, a petition for appointment of a guardian and conservator that Carlson filed on behalf of Kasell. Kasell did not present any testimony or evidence at this hearing.

The district court issued an order granting the petition to amend the Trust, implicitly rejecting Carlson’s challenge to Kasell’s capacity. The court found that Kasell was “not under guardianship or conservatorship,” and “desire[d] to amend the Trust.” After noting that Kasell properly followed the procedures required to amend the Trust, the district court concluded that the “Third Amendment to the Trust should be allowed.” Carlson appeals.

D E C I S I O N

We begin with a review of the principles that govern this appeal. Although some accommodations may be made for pro se litigants, they are generally held to the same standards as attorneys. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). The appellate court does not retry the case, weigh the evidence, or assess witness credibility on appeal. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). “It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.” *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977).

“[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it.” *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted). Mere assertions of error without supporting legal authority or argument are waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). “[I]ssues not adequately briefed are waived.” *Brooks v. State*, 897 N.W.2d 811, 819 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017).

An assertion of fact in a brief must be supported with citation to the record. Minn. R. Civ. App. P. 128.02, subd. 1(c).

Additionally, merely showing error by a district court is insufficient to obtain relief on appeal; to obtain relief, an appellant must also show that any error was prejudicial. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (stating that “[a]lthough error may exist, unless the error is prejudicial, no grounds exist for reversal”). In short, on appeal, it is not the appellate court’s obligation to demonstrate that the district court’s decision is correct; it is the appellant’s obligation to show, based on the record that was before the district court when it made its decision, that the district court’s decision is incorrect and that, as a result, appellant was prejudiced.

With those principles in mind, we turn to Carlson’s challenges to the district court’s order allowing the Third Amendment to Kasell’s trust. He asserts that Kasell was “not competent” to make this decision and that she was unduly influenced by G.C. Carlson also raises the issue of his own medical incapacity, which we interpret as an assertion that the district court erred by refusing to grant his request for a continuance. Carlson does not support his assertions of error with legal argument; nor does he cite legal authority or provide legal analysis. We therefore limit our review to an inspection of the record for obvious prejudicial error. *See Modern Recycling, Inc.*, 558 N.W.2d at 772.

Minn. Stat. § 501C.0601 (2016) provides that “[t]he capacity required to create, amend, or revoke a revocable trust . . . is the same as that required to make a will.” The standard for evaluating capacity and undue influence in relation to a trust is the same

standard used in relation to execution of a will. *See Norwest Bank Minn. N., N.A. v. Beckler*, 663 N.W.2d 571, 579 (Minn. App. 2003) (“[T]he standard used in evaluating the capacity of [the trustor] to execute these powers of appointment is that used in determining testamentary capacity for the execution of a will.”); *Arneson v. Arneson*, 372 N.W.2d 20, 21-22 (Minn. App. 1985) (considering issues of lack of testamentary capacity and undue influence in the context of a trust instrument), *review denied* (Minn. Oct. 11, 1985).

The standard for contested will proceedings is set forth in Minn. Stat. § 524.3-407 (2016):

Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.

“The contestants of a will have the burden of proving lack of testamentary capacity and undue influence.” *In re Estate of Olsen*, 357 N.W.2d 407, 411 (Minn. App. 1984), *review denied* (Minn. Feb. 27, 1985). A person has the necessary testamentary capacity to execute a will or trust if she “understands the nature, situation, and extent of [her] property and the claims of others on [her] bounty or [her] remembrance,” and she is “able to hold these things in [her] mind long enough to form a rational judgment concerning them.” *In re Estate of Congdon*, 309 N.W.2d 261, 266 (Minn. 1981) (quotation omitted). Evidence of undue influence includes

the opportunity to exercise it, active participation in the preparation of the will by the party exercising it, a confidential

relationship between the person making the will and the party exercising the influence, disinheritance of those whom the decedent probably would have remembered in [her] will, singularity of the provisions of the will, and the exercise of influence or persuasion to induce [her] to make the will in question.

Olsen, 357 N.W.2d at 411 (citing *In re Estate of Wilson*, 27 N.W.2d 429, 432 (Minn. 1947)).

A district court's determination of whether a person lacks testamentary capacity or was subjected to undue influence is a question of fact that this court will not set aside unless clearly erroneous. See *In re Estate of Larson*, 394 N.W.2d 617, 620 (Minn. App. 1986) ("The [district] court's findings on undue influence are not to be set aside unless clearly erroneous."), *review denied* (Minn. Dec. 12, 1986); *In re Estate of Rasmussen*, 69 N.W.2d 630, 634 (Minn. 1955) (noting that in cases of testamentary capacity the district court's fact finding in cases of testamentary capacity is binding unless clearly erroneous). A district court's factual findings are clearly erroneous "only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). Because the finder of fact is in the best position to determine witness credibility, we defer to the district court's witness credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

As to the district court's implicit determinations that Kasell was neither incapacitated nor subjected to undue influence, we do not discern obvious prejudicial error. Although Carlson objected to the Third Amendment on the ground that Kasell was not

“mentally competent,” he did not provide any evidence, other than his own opinion, to support that assertion. At the August 31, 2017 hearing, Kasell testified that she executed the Third Amendment of her own free will with the intent to “discard [Carlson] from [her] trust.” She also testified that she was “of sound mind” at the time of the hearing. Although Kasell’s attorney asked her whether she had been of sound mind when she signed the amendment, the discussion became sidetracked and she never actually answered the question. Nonetheless, the district court appears to have found Kasell’s testimony more credible than Carlson’s unsupported assertions. *See Vang v. A-1 Maint. Serv.*, 376 N.W.2d 479, 482 (Minn. App. 1985) (stating that an actual determination regarding credibility is necessarily implicit in a fact-finder’s decision when there is conflicting evidence). This court defers to that credibility determination. *See Vangsness*, 607 N.W.2d at 472.

Carlson’s assertion of undue influence is similarly unavailing. In district court, Carlson’s evidentiary support for this assertion was limited to his own opinion. But Kasell testified that she amended the Trust of her own free will and did not once mention or refer to G.C., the person allegedly exerting undue influence. Carlson attempted to introduce an 11th Circuit Court of Appeals decision regarding a fraud judgment against G.C., but the district court sustained Kasell’s relevance objection. On this record, we cannot say that the district court clearly erred by implicitly finding that Kasell was not subjected to undue influence.

As to the issue of Carlson’s medical disability and any suggestion that the district court erred by denying his request for a continuance, Carlson does not explain how he was prejudiced. He merely states that he was “medically incapacitated” and that his attendance

at two hearings was affected. However, the two hearings to which Carlson refers—one that he was “medically unable to attend” and another that he attended “by telephone conference call from his hospital bed”—pertained to a separate matter not encompassed by this appeal. Carlson attended the October 26, 2017 hearing on Kasell’s petition to amend the trust. Again, we do not discern obvious prejudicial error stemming from the district court’s refusal to grant a continuance.

Although the district court’s findings supporting its order authorizing the Third Amendment are minimal, the record supports the district court’s implicit determinations that Kasell did not lack capacity and was not subjected to undue influence. Because we discern no obvious prejudicial error, we affirm.

Affirmed.