[Cite as *In re Estate of Worstell*, 2002-Ohio-5385.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: THE ESTATE OF RALPH M. WORSTELL
Plaintiff-Appellee : C.A. CASE NO. 19133

vs. : T.C. CASE NO. 332228

HAROLD TODD, INC. & AS EXEC OF ESTATE OF RALPH WORSTELL, ET AL.
Defendants-Appellants : (Civil Appeal from Probate Court)

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O P I N I O N

Rendered on the 4th day of October, 2002.

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GRADY, J.

{¶1} This is an appeal from a judgment of the Probate Court in favor of a plaintiff in an action contesting a will. The judgment was entered on the verdict of a jury. On appeal, Defendants argue that the judgment was against the manifest weight of the evidence. After reviewing the entire record, we

agree, and accordingly will reverse the Probate Court's judgment and remand for a new trial.

{¶2} On March 9, 1995, Ralph Worstell executed a written will. It directed his executor, after the payment of his debts and funeral expenses, to convey Ralph's car and a life interest in his house to his friend, Bonnie Phillips, and the remainder interest in his house and the residue of his estate to his nephew and only surviving relative, Gary Martin Worstell.

{¶3} In late 1999, at ninety-one years of age, Ralph was diagnosed with cancer and began treatment at a local hospital. Eventually, Ralph's physical condition worsened and caused him to be transferred to a nursing home.

{¶4} On March 16, 2000, Ralph executed a new last will and testament, which revoked his 1995 will. This will directed his executor after paying all debts and funeral expenses, to convey a life interest in his house and his car to Bonnie Phillips, the remainder interest in his house and $100,000 to Gary Martin Worstell, $12,000 to a friend, Harold Todd, and the residue of his estate to the American Cancer Society. This will was prepared by Attorney B. Eugene Gilbert. Ralph Worstell contacted Gilbert after several unreturned phone calls were made to the attorney who had prepared Ralph Worstell's three previous wills.

{¶5} Ralph Worstell died on May 4, 2000. At his death, Ralph owned a house valued at approximately $90,000, two farms valued at approximately $245,600 and $199,400, respectively, an automobile, and bank accounts containing approximately $185,000.

Under the terms of his March 16, 2000 will, Gary Worstell would receive assets in the approximate amount of $190,000 and the American Cancer Society would receive assets of the approximate value of $345,000. Under Ralph Worstell's 1995 will, those assets were bequeathed to Gary Worstell.

{¶6} Ralph Worstell's 2000 Will was admitted to probate on May 17, 2000. Gary Worstell, his nephew, contested the will. A trial was held and the jury rendered its verdict, by a vote of six jurors, in favor of Gary Worstell, finding that the 2000 Will is not the last will and testament of Ralph Worstell.

{¶7} The American Cancer Society filed a timely notice of appeal. Two assignments of error are presented:

FIRST ASSIGNMENT OF ERROR

{¶8} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR A JUDGMENT NOT WITHSTANDING THE VERDICT BASED ON PLAINTIFF-APPELLEE'S FAILURE TO SATISFY HIS BURDEN OF PROOF."

{¶9} Civ.R. 7(B)(1) provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing." A trial is a hearing on the merits which concludes with the return of a verdict on the claims for relief involved or, if prior to the submission of those claims to the trier of fact, with an order or judgment of the trial court directing a judgment on the claim for one of the parties. The rule further provides that "[a] motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order

sought."

{¶10} Civ.R. 50(B) provides that a motion for judgment notwithstanding the verdict "may be made not later than fourteen days after entry of judgment" on the verdict. The motion may precede the judgment. *Rumley v. Cerco, Inc.* (Sept. 20, 2001), Franklin App. No. 00AP-1228. The motion must, nevertheless, be one made in writing, per Civ.R. 7(B)(1) because, a verdict having been returned on which the judgment was entered, the motion is not one "made during a hearing or trial."

{¶11} The motion that Defendants made was oral and preceded the judgment, and was made immediately after the verdict was returned and accepted by the court. The motion was stated in perfunctory terms: "Like to move for a judgment notwithstanding the verdict, Your Honor." The court replied: "All right. Overruled. That's it." (T. 451-452).

{¶12} The form in which the motion was made lacked any explanation for its grounds. A written motion and memorandum in support could have provided that. As the motion was not made in accordance with Civ.R. 7(B)(1), in writing, we cannot find that the trial court abused its discretion when it denied the motion as it did. The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶13} "THE JURY'S VERDICT INVALIDATING MR. WORSTELL'S 2000 WILL SHOULD BE REVERSED AS IT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶14} Appellants argue that the jury's verdict is contrary to

the manifest weight of the evidence and should be reversed because there is inadequate evidence in the record to show that Ralph Worstell lacked testamentary capacity when he executed the 2000 Will. In reviewing a claim that the verdict is against the manifest weight of the evidence, an appellate court must review the entire record to determine whether the judgment is supported by some competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261.

{¶15} It is undisputed that the will which Ralph executed on March 16, 2000, and which was admitted to probate on May 17, 2000, was signed by him and is otherwise proper in form. Plaintiff, Gary Worstell, attacked the will on two grounds. He alleged that it was the product of undue influence, a claim he eventually abandoned. He also alleged that Ralph M. Worstell was not competent to make that will. The jury found in favor of Gary Worstell on that claim, six in favor and two abstaining.

{¶16} R.C. 2107.02 provides that "[a] person of the age of eighteen years, or over, sound mind and memory, and not under restraint may make a will." A person is presumed to be of sound mind. *Kennedy v. Walcutt* (1928), 118 Ohio St. 442. In order to successfully challenge the validity of a will admitted to probate, the initial burden is on the contesting party to prove the will invalid. *Kirschbaum v. Dillon* (1991), 58 Ohio St.3d 58.

{¶17} A testator has capacity to make a will when he has sufficient mind and memory (1) to understand the nature of the business in which he is engaged, (2) to comprehend generally the

nature and extent of his property, (3) to hold in his mind the names and identities of those who had natural claims upon his bounty, and (4) to be able to appreciate his relation to members of his family. *Niemes v. Niemes* (1917), 97 Ohio St. 145. A person who lacks testamentary capacity is not competent to make a will. Neither is that person competent to revoke a prior will made when the person was competent, because the same degree of mental capacity necessary to make a will is required to revoke one. See 79 American Jurisprudence 2d, Wills, Section 500.

{¶18} Gary Worstell presented three witnesses in contesting the 2000 will; himself, Robert Bentley, who rented one of Ralph M. Worstell's properties, and Dr. Albert N. Bayer, a psychiatrist specializing in geriatric diagnosis and treatment.

{¶19} Gary Worstell testified that he has lived in Georgia since 1965. He admitted he did not often see his uncle, Ralph Worstell, after he moved from Ohio. Since 1990, Gary visited his uncle only three times; twice in 1991 and on the day before Ralph died in 2000. (T. 55). Gary testified that he typically talked to Ralph by telephone two to three times a month. (T. 56).

{¶20} Although his contact with his uncle was minimal, Gary testified that his uncle seemed confused on several occasions. While Gary did not mention this during his deposition, at trial he testified that in the months following January 2000, Ralph would interrupt their conversations and "jump into the way past about something that happened several years ago." (T. 64-65).

{¶21} While Gary never expressly stated it, his testimony supports an inference that Ralph was not of sound mind in the

months before and after the 2000 Will was executed. However, contrary to Gary's testimony about his uncle's diminishing mental capacity, much of his testimony shows that Ralph was lucid and that he understood what was going on around him.

{¶22} Gary testified that during a conversation in January of 2000, two months before Ralph executed the 2000 will, he discussed Ralph's estate with him. Specifically, Gary testified that they discussed "where [Ralph] kept his papers, where he kept his will, . . . who lived in the houses, what banks his money was in. Everything. He basically listed what he had and what he wanted to do. He told me he wanted to give the money to Harold. Told me what he left Bonnie. Told me he left me the executor and the rest of it." (T. 62). Gary testified that during this conversation Ralph described specific farming equipment he owned and told him where that equipment was located. (T. 86). According to Gary, Ralph sounded and acted normal during the conversation. (T. 63). This conversation shows that Ralph had a solid understanding of his property.

{¶23} In late February or early March of 2000, Ralph and Gary discussed the possibility of Ralph selling his farms because Ralph was worried about paying his mounting medical expenses. (T. 66). Although Gary talked Ralph into holding off on the idea, the conversation shows Ralph was sufficiently competent to understand and be concerned about his financial affairs.

{¶24} Though the record is not entirely clear, in January 2000, March 2000, or both, Ralph informed Gary that he was changing his Will to bequeath Harold Todd $12,000. Gary also

testified that during a conversation in March, Ralph informed Gary that he would not be able to serve as executor of Ralph's will because he lived out of state. These conversations show that Ralph understood and intended to make a new will, or at least to amend his prior will.

{¶25} In the period between January 2000 until Ralph's death, Ralph twice loaned Gary money. The first of those loans was for $700. The amount of the second loan is unclear, but it appears to be less than $700. (T. 91). Ralph's ability to perform a loan transaction demonstrates that he was lucid at the times those transactions were made. It also shows that Ralph must have appreciated Gary's relationship to him.

{¶26} Other than through two or three phone calls a month, Gary Worstell had a limited ability to observe Ralph's mental state. Gary Worstell was not present when Ralph executed his will and cannot testify as to Ralph's mental state at the time. At the very least, Gary Worstell's testimony fails to show that Ralph Worstell did not satisfy any of the four *Niemes* factors.

{¶27} Similarly, Robert Bentley's testimony sheds little light on Ralph Worstell's capacity to execute his 2000 Will. Bentley, who was Ralph's tenant, testified that he visited Ralph twice before died. Bentley visited Ralph one month before Ralph died. Bentley testified that Ralph recognized him and they had a brief conversation. (T. 106). Bentley also visited Ralph about a week before Ralph died. (T. 105). Bentley testified that when he walked into Ralph's room, Ralph recognized him, put his arm up and said "Robert," and then passed out. (T. 107, 109). Bentley's

testimony only establishes that both a month before his death and a week before his death, Ralph was able to recognize Bentley. Both were after the 2000 will had been executed.

{¶28} Gary Worstell's case relied almost entirely on the opinion testimony of Dr. Albert N. Bayer. Dr. Bayer had no personal interaction with Ralph Worstell; his opinion was based solely on his review of the medical documents from the nursing home, hospital, and the hematologist who had cared for Ralph Worstell. (T. 120). Dr. Bayer also testified that he never read the depositions of any of the individuals who had cared for Ralph because he did not obtain them, though he did send a letter to the contestant's attorneys requesting that they provide him this information. Dr. Bayer also testified that he spoke to no one who had cared for Ralph at the hospital or at the nursing home about the notes they made in Ralph's medical records or their perceptions of Ralph's condition. (T. 158-161).

{¶29} From his examination of the records he was provided, Dr. Bayer was able to testify that, in addition to the incurable cancer from which he suffered, Ralph was suffering from other serious illnesses during the last several months of his life, during which time he executed the contested will. Principal among these were dementia, related to his advanced age, as well as heart and pulmonary disorders. The combined effects of those and other illnesses and the medications administered to treat them produced a substantial impairment of Ralph's mental faculties, in Dr. Bayer's opinion. His ultimate opinions were stated as follows:

{¶30} "Q. [B]ased on your review of the records and based upon your medical training, experience and based upon your understanding of the various medical conditions suffered by Ralph Worstell as well as the behaviors exuded by Ralph Worstell, do you have a conclusion to Ralph Worstell's mental condition as of March 16, 2000?

{¶31} "A. Yes. I would certainly say that he was experiencing a delirium at that time and that his ability to process information was substantially impaired.

{¶32} "Q. Do you have an opinion with respect to whether he was capable of knowing the nature and extent of his property?

{¶33} "A. I would say that it - that [it] certainly would be compromised, that it would not be intact.

{¶34} "Q. And with his ability to understand his relationship with family members?

{¶35} "A. I would say that it would not be intact, that [it] would be compromised to a substantial degree.

{¶36} "Q. And with respect to his ability to understand the business in which he was in, what would your opinion be with respect to that?

{¶37} "A. Again, I would say it would be compromised.

{¶38} "Q. Okay. And Dr. Bayer, also do you have an opinion with respect to whether Ralph Worstell had the capacity to execute a will on that date?

{¶39} "A. I would say conclusively that he did not have the capacity to execute a will on that date.

{¶40} "Q. Okay. Why is that?

{¶41} "A. Based on medical conditions that he had and the evidence of his behaviors and the references to different types of impaired cognitive functioning he had a delirium that would substantially impair his ability to understand and execute such a document.

{¶42} "Q. Was Ralph Worstell of sound mind when he executed this will?

{¶43} "A. No. (T. 151-152).

{¶44} This testimony addressed each of the requirements articulated in *Niemes*, showing that Ralph Worstell failed to satisfy the competency standard required to execute a valid will. However, on re-cross, Dr. Bayer recanted this position when he conceded that it "was established in the record" that Ralph Worstell knew he owned two farms, was able to conduct business, and that he knew he was changing his will. (T. 210). More specifically, Dr. Bayer testified that the record showed that Ralph knew who he was; that "it appeared to be true" that Ralph Worstell recognized and understood the people who visited him; that he could not conclusively testify that Ralph Worstell did not understand the nature and extent of his property when he executed the 2000 Will; and that when Ralph Worstell met with his attorney to make the 2000 Will, "[Ralph Worstell] certainly indicated that he understood he was involved in some sort of important meeting." (T. 210-211).

{¶45} Dr. Bayer conceded that the record he reviewed showed

that Ralph Worstell satisfied the functional components of the *Niemes* test. Nevertheless, Dr. Bayer still opined that Ralph Worstell lacked the requisite testamentary capacity to make a will. Dr. Bayer testified that from December 1999, to his death in May of 2000, Ralph Worstell could not have competently made any substantial decision-making regarding legal matters or medical matters. (T.198).

{¶46} While evidence of a testator's mental and physical condition within a reasonable time before and after the making of the will is admissible, to throw light on his mental condition at the time of the execution of the will in question, it is the mental condition of the testator at the time of making a will that determines his testamentary capacity. *Kennedy v. Walcutt, supra,* paragraph 2 of the syllabus. Except by general inference, Dr. Bayer's opinions do not support that specific proposition. Additionally, it is important to note that the *Niemes* test for competency and the doctor's medical diagnosis of competency are not identical concepts. "Testamentary capacity is a rational understanding of the kind and value of the property involved, the manner in which the property is intended to be disposed of, and the ability, without suggestion, to make a testamentary disposition of the property." 31 Ohio Jurisprudence 3d, Decedents' Estates, Section 243. We agree with the Appellant that Dr. Bayer's opinion, founded on Ralph's medical condition, was not necessarily consistent with the legal definition of capacity in *Niemes*, and it may have misled the jury to disregard the applicable legal standard.

{¶47} "Physical disability is not an impediment if it does not destroy the traditional elements of testamentary capacity – the ability of the person to understand the nature of the business in which engaged, to comprehend generally the nature and extent of property owned, to hold in mind the names and the identity of those who have natural claims on the person's bounty, and to be able to appreciate family relationships. So, a person may have testamentary capacity even though of advanced years, suffering from disease. All that is necessary is that at the time of the execution of the will the testator had sufficient mental capacity to understand what was being done, or, in general, possessed the elements of testamentary capacity. . . .

{¶48} "However, weakness of intellect, sufficient to negate testamentary capacity, may be traceable to old age, disease, and bodily infirmities, and the pain or effect of a disease may be such that one cannot be held to have a sound and disposing mind and memory." 31 Ohio Jurisprudence 3d, Decedents' Estates, Section 249 (illustration omitted).

{¶49} Dr. Bayer inferred that Ralph was incompetent by reason of the physical disabilities he identified from Ralph's records, as well as certain inappropriate behaviors in which he was reported to have engaged. However, those behaviors were explained by other witnesses, and were not so inappropriate under the circumstances shown as to connote a lack of mental acuity.

{¶50} In that regard, emphasis was put on the fact that, while he was in the nursing home, Ralph voided his bladder and bowels into bowls or cans that were at his bed. But, it was

explained that his illnesses had left him incontinent, and his conduct was to avoid soiling himself, and he stopped after being told to. This does not portray irrational or irresponsible behavior.

{¶51} Evidence shows that Ralph understood the nature of the business in which he was engaged, namely executing a will. There are several entries in his medical records relating Ralph's stated desire to make a new will, and also in the testimony of both those who cared for him in the nursing home and in the testimony of his friends who frequently visited him. (T.187-188). Hospital records show that on one specific occasion, the day before Ralph was scheduled to meet with Attorney Gilbert about his new will, Ralph told a nurse: "I'll be having a meeting in my room tomorrow at 9:00 a.m. I would like to have my breakfast to be served early so that my room will be clean for the meeting." (T. 187). In fact, the hospital records of March 16, 2000, the day Ralph signed his will, show that at 9:00 a.m., the time of the scheduled meeting, that Ralph was alert, that his appetite was good and that he was "pleasant and cooperative with caregivers." (T. 189).

{¶52} Gary Worstell testified that Ralph had mentioned to him during a conversation in January of 2000 that Ralph was planning to change his will. (T. 87-89). Harold Todd testified that Ralph told Todd that he had tried several times to contact the lawyer who drafted his previous wills, but without success. (T. 380). When Ralph's calls went unanswered, Ralph asked Todd to find him another lawyer. Todd searched the phonebook for an attorney and

called Attorney Gilbert. Gilbert informed Todd that Ralph needed to contact Gilbert himself. (T. 380). Ralph then did that, not once but twice; first to set up the preliminary meeting, and again to follow up and set up a time to execute the will two or three weeks later. (T. 355). Even Gary Worstell's expert witness, Dr. Bayer, admitted that Ralph knew he was changing his will. (T. 210). Finally, Deborah Hopper, a disinterested witness, testified that she witnessed Ralph voluntarily sign the will, and she testified that he appeared well aware of his actions. Attorney Gilbert testified likewise.

{¶53} It is also obvious that Ralph was able to comprehend generally the nature and extent of his property. Attorney Gilbert, who drafted Ralph's 2000 Will at his instruction, and Gary Worstell, both testified that Attorney Gilbert was unaware of the terms of Ralph's previous will, and that Attorney Gilbert never spoke to the previous attorney who had drafted the 1995 Will until after the 2000 Will was executed. (T. 89-90, 358). Nevertheless, the 1995 Will and the 2000 Will contain nearly identical provisions wherein Ralph leaves a life estate interest in his house and his 1990 Cadillac to Bonnie Phillips. Gary Worstell is also benefitted in both, though to a lesser extent in the 2000 will. The consistency of these provisions show: that Ralph understood and was able to communicate what property he had and where he wanted his property to go as clearly in the 2000 Will as in the 1995 Will.

{¶54} Attorney Gilbert testified that when they met to discuss drafting Ralph's will, Ralph told him that he owned two

farms in New Lebanon, a house in New Lebanon, and a 1990 Cadillac. (T. 367). He testified that Ralph even gave him directions to the farms, and later asked Gilbert to have them appraised in case he had to sell them. Gary Worstell testified that he had several conversations with Ralph concerning Ralph's property. In one conversation, in late January, Gary testified that Ralph told him where different pieces of farming equipment could be found on the farms, and was so detailed in his description that he informed Gary of specific parts that were missing from one of the plows. (T. 86). Finally, even Gary Worstell's expert witness, Dr. Bayer, conceded that he could not conclusively state that Ralph did not know the extent and value of his possessions. (T. 211).

{¶55} Harold Todd and his wife, Charlene Todd, and her mother, Bonnie Phillips, testified concerning their long friendship with Ralph and the assistance they provided during his last illness. They helped him manage his business affairs, always at his direction, which included collecting his rents, having his taxes prepared, and assisting him in writing checks. In all these enterprises, according to the witnesses, Ralph was fully cognizant of his affairs and capable of making appropriate judgments about them.

{¶56} It is also clear that Ralph held in his mind the names and identities of those who had natural claims upon his bounty, and that he appreciated his relation with members of his family. Attorney Gilbert testified that Ralph said that he had no immediate family and that his only real family was his nephew,

Gary Worstell, who lived in Atlanta. (T. 367). The 2000 will bequeaths Gary Worstell $100,000 in cash and a remainder interest in Ralph's home, which is valued at approximately $90,000. Ralph specifically named Gary in the will and referred to him as his "nephew". This clearly shows that Ralph was well aware of those who had natural claims on his bounty. Ralph's devise of approximately $190,000 worth of cash and property to Gary shows that Ralph appreciated this relationship, even while electing to leave the bulk of his estate to the American Cancer Society. Harold Todd, who had survived cancer, said that Ralph mentioned the American Cancer Society to him and said: "Look what they're doing for people like us." (T. 393).

{¶57} The principal difference between Ralph's 1995 will and the will he executed in March of 2000 is in his bequest of the rest, residue, and remainder of his estate to the American Cancer Society instead of to Gary Worstell. Ralph was first diagnosed with cancer in 1999. Dr. Bayer's testimony shows that Ralph was sorely tried by the illness and its treatment. He may very well, and apparently did, wish to benefit an agency whose work could help others similarly afflicted. Ralph nevertheless made ample provision in the 2000 will for his only remaining family member, Gary Worstell, with whom he was not especially close, and whom Ralph had no reason to expect would continue family ownership of Ralph's two farms should Ralph bequeath them to him.

{¶58} As we noted above, judgments supported by some competent, credible evidence will not be reversed because it is against the manifest weight of the evidence. *C.E. Morris Co. v.*

Foley Constr. Co, supra. Further, in *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, the Supreme Court stated:

{¶59} "While we agree with the proposition that in some instances an appellate court is duty-bound to exercise the limited prerogative of reversing a judgment as being against the manifest weight of the evidence in a proper case, it is also important that in doing so a court of appeals be guided by a presumption that the findings of the trier-of-fact were indeed correct." *Id.*, at 74-80.

{¶60} Even when a judgment of a trial court is sustained by sufficient evidence, an appellate court "may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. "The test is whether that evidence is capable of inducing belief in its truth, and whether those truths preponderate in favor of the verdict according to the applicable burden of proof." *State v. Moshos*, (Oct. 10, 1997), Greene App. No. 96CA140. In making that determination, this court "will not arbitrarily substitute its judgment for that of the trier of fact on the issue of witness credibility . . . unless it is patently apparent that the factfinder lost its way." *Id.*

{¶61} After carefully reviewing all the evidence presented, we find that it does not preponderate in favor of the jury's verdict that Ralph Worstell was not competent to make the will he executed on March 16, 2000, and that in finding that he was incompetent the jury patently lost its way. Other than the testimony of Dr. Bayer, all the evidence demonstrates that when

he executed the will Ralph Worstell understood what he was doing, what property he owned, the identity of his natural heirs, and that he appreciated his relationship to them. *Niemes*.

{¶62} Whether a testator was competent to make a will is not subject to direct proof; competence must be proved inferentially from other evidence. The foundational evidence on which Dr. Bayer relied for his opinions consisted of entries made by other persons in nursing home records and his conclusions about the possible effects that Ralph Worstell's illnesses and medications may have had on him. In making these critical judgments, Dr. Bayer lacked the benefit of any personal observations of Ralph Worstell, which is significant to the conclusions he drew. All the observations of the other witnesses whose testimony preponderated in favor of competence concerned matters within their direct and personal knowledge, and is deserving of greater weight when inferences from it must be drawn to reach the requested verdict.

{¶63} In appellate review of the weight of the evidence, great deference is due to the factfinder's decision as to which testimony to credit, since the factfinder has seen and heard the witnesses testify. In this case, there are no issues of credibility. After *State v. Thompkins, supra*, less deference is due to a factfinder's decision as to how much logical force to assign an inference suggested by that evidence, or how persuasive it is, because appellate judges are at least equally qualified, by reason and experience, to venture opinions concerning logical force of competing inferences. *State v. Lawson* (August 22,

1997), Montgomery App. No. 16288.

{¶64} In the case before us, our weight of the evidence determination involves weighing inferences, not determining which witness was more credible, and we may give less deference to the factfinder when inferences are weighed. For all of the above reasons, we find that the verdict and judgment for Gary Worstell is not supported by competent and credible evidence that preponderates in favor of the necessary finding Ralph Worstell lacked testamentary capacity at the time he executed his will on March 13, 2000.

{¶65} Appellant's second assignment of error is sustained. The judgment of the trial court will be reversed and the case will be remanded for a new trial.

WOLFF, P.J. and FAIN, J., concur.

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