Affirmed and Memorandum Opinion filed February 25, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00820-CV

IN RE ESTATE OF MELVIN PATRICK PARRIMORE, DECEASED

On Appeal from the Probate Court No. 3
Harris County, Texas
Trial Court Cause No. 405228

M E M O R A N D U M O P I N I O N

This is an appeal from an amended final judgment denying a will contest. Appellants Melvin Patrick Parrimore, II and Bradley Reed Parrimore are the sons of the decedent, Melvin Patrick Parrimore. Appellee Patrice Parrimore was Melvin's wife at the time of his death, and she offered the disputed will for probate. The trial court held a bench trial and admitted the will to probate. Appellants challenge that decision in multiple issues.

In their first two issues, appellants argue that the trial court abused its discretion when it refused to allow them to amend their pleadings to add a suit to

quiet title on the first day of trial on the will contest. We overrule these issues because the trial court has discretion to manage its own docket and did not abuse that discretion when it refused to allow appellants to add a new cause of action not directly relevant to the will contest.

Appellants' third issue concerns comments made by the trial judge. According to appellants, these comments indicate that the trial judge misapplied the law governing testamentary capacity and therefore failed to consider evidence related to Melvin's state of mind both before and after the execution of the will. We overrule this issue because appellants failed to preserve the alleged error by objecting when the trial court made the comments. Further, even if this issue had been preserved, it would not require reversal because appellate courts cannot look to comments made by a trial judge during a bench trial to determine the basis for the trial court's ruling.

In their fourth and fifth issues, appellants contend that the evidence is legally and factually insufficient to establish that Melvin possessed: (1) testamentary intent when the will was executed; and (2) testamentary capacity on the date the will was executed. In their sixth issue, appellants assert that the evidence is conclusive that Melvin executed the will as a result of undue influence or that the trial court's determination that the will was not executed as a result of undue influence is against the great weight and preponderance of the evidence. We overrule each of these issues because the record contains legally and factually sufficient evidence supporting the trial court's judgment. We therefore affirm the trial court's amended final judgment.

BACKGROUND

Melvin and Patrice were married on November 18, 2006. This was Melvin's second marriage. Melvin previously had been married to Betty Parrimore.

Appellants are Melvin and Betty's children. Patrice was aware that at the time she married Melvin, he was suffering from congestive heart failure and had a defibrillator. Despite his illness, Melvin worked long hours as an energy manager for Klein Independent School District.

On November 15, 2009, Patrice noticed that Melvin's speech was slurred and that the left side of his face had drooped. Patrice took Melvin to the emergency room, where he received prompt treatment for a stroke. Melvin responded well to the treatment and was released from the hospital on November 18, 2009. Patrice testified that Melvin's condition continued to improve once he returned home from the hospital.

Melvin and Patrice had begun working on a will for Melvin in 2008. While working on the will, Melvin indicated who his sons were and talked about not leaving anything to his heirs. Melvin and Patrice then used a computer program to draft the will. The will-making program asked questions, Melvin answered the questions, and the program then produced the completed will, which could be printed. According to Patrice, the will was completed, but not signed, long before Melvin had the stroke. Article I of Melvin's will provides:

> I am married to Patrice Miller Parrimore and all references in this Will to "my spouse" are references to Patrice Miller Parrimore.
>
> The names of my children are Bradley Reed Parrimore and Melvin Parrimore II. All references in this Will to "my children" are references to the above-named children.
>
> The failure of this Will to provide for any distribution to my child(ren): Bradley Parrimore and Melvin Parrimore II, is intentional.

On November 29, 2009, eleven days after Melvin was released from the hospital, Patrice and Melvin organized a party at their home for the signing of Melvin's will. Family and friends were invited to the party. Melvin played pool

and circulated about the home visiting with the guests during the party.

Debbie Knox, a long-time friend of Patrice and a notary public, and Jerome Jackson, a family friend of both Patrice and Melvin, were among the party guests. Knox testified at trial that she had the chance both to observe Melvin during the party and to talk with him directly. Knox, who was aware Melvin had experienced a stroke, testified that Melvin appeared to be of sound mind that day and knew that one of the reasons for the party was to have his will signed. Melvin eventually told Knox that they "needed to do the will." Knox confirmed that Melvin wanted to sign the will. Knox then asked Melvin if he was giving Patrice permission to sign the will for him, and he told her that he was. Patrice then signed the will on behalf of Melvin. Three witnesses—Tommy Walker, Jerome Jackson, and Sharon Simmons—then signed the will in Melvin's presence.

Once he was released from the hospital following his stroke, Melvin began physical, occupational, and speech therapy at various institutions to address issues caused by the stroke. Melvin's issues included "primary impairments in speech/language functioning consistent with resolving aphasia." As noted above, Patrice testified that Melvin's condition continued to improve. Melvin began driving again and he went back to work part-time in May 2010. Melvin resumed working full-time in July 2010. Melvin died on September 3, 2010.

Patrice filed an Application to Probate Will and for Issuance of Letters Testamentary. Appellants filed their will contest soon thereafter. Appellants alleged that Melvin did not possess testamentary intent or capacity when the will was executed. They also alleged that Patrice exerted undue influence on Melvin.

The trial court conducted a bench trial to resolve these issues. In addition to Knox, Jerome Jackson, one of the witnesses to the will execution, testified during

the trial. Jackson was aware that Melvin had suffered a stroke prior to the will-signing party. Jackson testified that Melvin was able to communicate that day, they talked about the will, Melvin appeared to be of sound mind, and Melvin asked him to be a witness to the execution of his will. Jackson initially testified that Melvin signed the will, not Patrice. When Jackson was asked to clarify his testimony, he explained that he saw Melvin talking to Patrice and that he could not remember if Patrice signed the will on Melvin's behalf. Later, Jackson testified that while he was in the same room as Melvin during the will signing, he did not see Melvin sign the will.

Karen Young, Melvin's sister, also testified during the trial. Young testified that she had seen Melvin ask Patrice to sign documents for him and she did not find it unusual for Melvin to have asked Patrice to sign the will on his behalf. While Young was not present at the will-signing party, she saw Melvin the day before and also after the will was signed, and she testified that she believed Melvin was of sound mind. Melvin also discussed his stroke with Young. Young testified that Melvin told her the stroke caused him to have a speech issue. Young denied that Melvin told her he had a brain injury or memory problems as a result of the stroke.

Young also testified about Melvin's relationship with his sons. According to Young, Melvin had visitation rights with his sons and although they did spend some weekends with him during the summers of 2008 and 2009, they did not spend the full amount of time they were allotted with their father. Finally, Young testified that she believed Melvin loved his two sons.

Once Patrice rested her case, the trial court found that Patrice had met the statutory requirements and had proven up the will. The trial court then turned to appellants' allegations of lack of testamentary intent, testamentary capacity, and

undue influence. At this point, the following exchange occurred:

THE COURT: Once again, you do recall that it's - - once again, you're going to need, since the will was admitted, direct evidence - - on direct evidence, you're going to need to refute by direct evidence.

[APPELLANTS]: Well, Your Honor, I raise - - on the issue of - - and I'm sorry, Your Honor, I'm only going to be able to raise the issue of undue influence.

THE COURT: I didn't say that. I just said since we have had testimony dealing with the will execution, you are going to, if you wish to counteract it, you're going to need to bring contrary direct evidence.

[APPELLANTS]: I'll just put on my case. Thank you, Your Honor.

THE COURT: Sure. All right.

Appellants called Patrice as their first witness. Patrice confirmed that Melvin had a stroke on November 15, 2009. Patrice also confirmed that Melvin's hospital medical records report that Melvin was having comprehension issues that day. Appellants then offered medical records into evidence and the following exchange occurred:

THE COURT: What do medical records have to do - -

Okay. Let's try this again. You may have a very expansive view of undue influence, but medical records do not prove undue influence. I've never seen that happen.

[APPELLANTS]: What I was trying to do is show his condition - -

THE COURT: Condition when?

[APPELLANTS]: - - before, during and after the execution of the will.

THE COURT: Why don't you forget the before and after, and do the execution of the will since we have testimony that he was sufficiently capacitated.

Undue influence is very difficult to prove, and it's impossible to prove in my experience with medical

records.

But if you feel that that's all you have to go on, go ahead.

[APPELLANTS]: That's one of the things I believe should be one of the issues.

THE COURT: Sure. Okay.

The trial court then admitted the medical records into evidence.

Appellants had Patrice read excerpts from the records. Among other things, those excerpts disclosed that on November 16, 2009, Melvin had "difficulty with naming, expression, perception and comprehension." The records also noted that these issues had improved from the day before. The records also indicated that Melvin was referred to a rehabilitation facility (TIRR) for speech therapy as a result of his stroke. After Patrice had been questioned about additional medical record excerpts that had been offered and admitted into evidence, the following exchange occurred:

THE COURT: Okay. Let's try this. My understanding, we've established the fact that the man had a stroke, okay. Can we deal with the only thing that matters which is not what the plan of recovery was and whether he went to TIRR or not, but what happened on the date the will was executed?

[APPELLANTS]: Well, I believe the severity of the stroke will lead up to the date of the execution of the will. However, I think that that should be established as well. The severity of the stroke, I believe - -

THE COURT: Do you have any medical testimony?

[APPELLANTS]: The medical records.

THE COURT: In other words, you don't have medical testimony?

[APPELLANTS]: I have medical records.

THE COURT: You didn't get an M.D. to review it and give you an opinion, you're just going through medical records?

[APPELLANTS]: That's correct.
THE COURT: All right. Go ahead.

Khalsani Fullerton was appellants' next witness. Fullerton testified that he had been Melvin's friend since the 1980s. Fullerton explained that Melvin loved his children and they were his pride and joy. Fullerton admitted during cross-examination, however, that the last time he saw Melvin was in 2008.

Melvin Parrimore, II testified next. He testified that he was Melvin's older son and believed that he had a good relationship with his father. He went on to testify that he went with his father to Galveston and Corpus Christi one summer, his father acknowledged his graduation from high school, and his father provided him with a debit card while he was in college.

Appellants then called Knox back to the witness stand, and she confirmed that Melvin gave Patrice permission to sign the will on his behalf. Knox also confirmed that she was a long-time friend of Patrice. On cross-examination, Knox testified that, on November 29, 2009, she did not see anyone: (1) physically make Melvin do anything; (2) force Melvin to do anything; or (3) trick Melvin into doing anything.

At the conclusion of the evidence, the trial court found in favor of Patrice and signed a judgment accordingly. This appeal followed.

ANALYSIS

I. Legally and factually sufficient evidence supports the trial court's judgment admitting Melvin's will to probate.

In their fourth, fifth, and sixth issues, appellants challenge the legal and factual sufficiency of the evidence supporting the trial court's judgment. We address these issues first because, if successful, they would provide appellants with the greatest relief.

A. Standard of review and applicable law

In conducting a legal-sufficiency review, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that supports it. *Univ. Gen. Hosp., L.P. v. Prexus Health Consultants, LLC*, 403 S.W.3d 547, 550 (Tex. App.–Houston [14th Dist.] 2013, no pet.). The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the decision under review. *Id.* at 551. We must credit favorable evidence if a reasonable trier of fact could, and disregard contrary evidence unless a reasonable trier of fact could not. *Id.* The trier of fact is the sole judge of the witnesses' credibility and the weight to afford their testimony. *Id.*

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which he did not have the burden of proof, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding. *Id.* at 550. A party attacking the legal sufficiency of an adverse finding on an issue on which he had the burden of proof must demonstrate that the evidence conclusively establishes all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

In reviewing the factual sufficiency of the evidence, we must examine the entire record, considering both the evidence in favor of, and contrary to, the challenged findings. *See Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The amount of evidence necessary to affirm is far less than the amount necessary to reverse a judgment. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 616 (Tex. App.–Houston [14th Dist.] 2001, pet. denied). This Court is not a factfinder. *Ellis*, 971 S.W.2d at 407. Instead, the trier of fact, in this case the trial court, is the sole judge of the credibility of the witnesses and the weight to afford their

testimony. *Pascouet*, 61 S.W.3d at 615–16. Therefore, we may not pass upon the witnesses' credibility or substitute our judgment for that of the trial court, even if the evidence would also support a different result. *Id.* If we determine the evidence is factually insufficient, we must detail the evidence relevant to the issue and state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict; we need not do so when affirming. *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (per curiam).

When a party challenges the factual sufficiency of the evidence supporting a finding for which he did not have the burden of proof, we may set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Ellis*, 971 S.W.2d at 407; *Nip v. Checkpoint Sys., Inc.*, 154 S.W.3d 767, 769 (Tex. App.–Houston [14th Dist.] 2004, no pet.). When a party attacks the factual sufficiency of an adverse finding on which he bore the burden of proof, he must establish that the finding is against the great weight and preponderance of the evidence. *Dow Chemical Co.*, 46 S.W.3d at 242.

In this case, the trial court did not issue separate findings of fact and conclusions of law, but it did include the following findings in the final judgment:[1]

> A contest to the admission of the will was filed by opponents Melvin Parrimore II, and Bradley R. Parrimore. The Court finds that the will was not signed as a result of any undue influence, that Testator was of sound mind and had the legal capacity to execute a will. The Court finds that the will was executed with the formalities required by Section 59 of the Texas Probate Code.

[1] Although appellants filed a request for findings of fact and conclusions of law pursuant to Rule 296, because they did not file a "Notice of Past Due Findings of Fact and Conclusions of Law" as required by Rule 297, they waived any complaint that may have had regarding the trial court's failure to file findings of fact and conclusions of law. *See* Tex. R. Civ. P. 297; *Las Vegas Pecan & Cattle Co., Inc. v. Zavala Cnty.*, 682 S.W.2d 254, 255–56 (Tex. 1984). Additionally, oral statements made by a trial judge in open court cannot substitute for findings of fact. *Intec. Sys., Inc. v. Lowrey*, 230 S.W.3d 913, 918 (Tex. App.—Dallas 2007, no pet.).

Under Rule 299a, a trial court should not include findings of fact in its judgment. *See* Tex. R. Civ. P. 299a ("Findings of fact shall not be recited in a judgment."). Nevertheless, because the record does not contain additional findings of fact or conclusions of law, the findings in the judgment have probative value and will be treated as valid findings. *See In re C.A.B.*, 289 S.W.3d 874, 881 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *In re Estate of Jones*, 197 S.W.3d 894, 900 n.4 (Tex. App.—Beaumont 2006, pet. denied). Any omitted findings that are supported by the evidence may be supplied by a presumption that it supports the judgment. *Black v. Dallas Cnty. Welfare Unit*, 835 S.W.2d 626, 630 n.10 (Tex. 1992). When, as here, there is a complete reporter's record of the trial, the trial court's findings will not be disturbed on appeal if there is any evidence of probative force to support them. *Barrientos v. Nava*, 94 S.W.3d 270, 288 (Tex. App.—Houston [14th Dist.] 2002, no pet.). If the evidence supports the trial court's findings, we must uphold the trial court's judgment on any theory of law applicable to the case. *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984).

B. The evidence is legally and factually sufficient to support the trial court's finding that Melvin possessed testamentary intent.

Appellants contend in their fourth issue that the evidence is legally and factually insufficient to support the trial court's implied finding that Melvin's will was properly executed because Melvin lacked testamentary intent. Patrice, as the proponent of the will, had the burden to prove the November 29, 2009 document was executed with testamentary intent. *In re Estate of Steed*, 152 S.W3d 797, 806 (Tex. App.—Texarkana 2004, pet. denied); *see In re Estate of Ayala*, No. 14-14-00324-CV, 2015 WL 4930638, at *3 (Tex. App.—Houston [14th Dist.] Aug. 18, 2015, pet. denied) (mem. op.) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983)).

A document is not a will unless it is executed with testamentary intent. *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955); *Cason v. Taylor*, 51 S.W.3d 397, 405 (Tex. App.—Waco 2001, no pet.). The intent required is to make a revocable disposition of property to take effect after the testator's death. *Cason*, 51 S.W.3d at 405. Intent is determined from the language of the document itself, and extrinsic evidence may be admitted to explain the meaning of the language chosen by the maker. *Id.* It is essential that the maker intended to express his testamentary wishes in the particular instrument offered for probate. *In re Estate of Steed*, 152 S.W3d at 812.

The instrument offered for probate is entitled "Last Will and Testament of Melvin Patrick Parrimore," and the first paragraph provides: "I, Melvin Patrick Parrimore, of Humble, Texas, revoke my former Wills and Codicils and declare this to be my Last Will and Testament." Melvin then directed that his debts, funeral expenses, and any expenses related to a final illness be paid out of his estate. Melvin also provided for the distribution of the property in his estate and he selected an executor to handle the disposition of his estate. We conclude that the language of the instrument offered for probate supports the trial court's implied finding that Melvin possessed testamentary intent when he authorized Patrice to sign the will for him. *See In re Estate of Ayala*, 2015 WL 4930638, at *3 (concluding testator possessed testamentary intent based on language of the instrument); *Cason*, 51 S.W.3d at 406 (same).

Appellants also argue that the evidence is legally and factually insufficient to support the trial court's implied finding of testamentary intent because the evidence showed Melvin did not know the contents of his will. Appellants cite *Collins v. Smith*, 53 S.W.3d 832, 837 (Tex. App.—Houston [1st Dist.] 2001, no pet.), in support of this contention. In *Collins*, the court of appeals initially

observed that a testator is presumed to know the contents of a testamentary instrument signed by him if he (1) is of sound mind, (2) is able to read and write, (3) has the capacity to acquire knowledge of the contents of a document by exercising his faculties, and (4) executes the instrument and has it witnessed as required by statute. *Id.* The court went on to state that an exception to this general rule exists when unexplained circumstances cast suspicion on whether the testator knew the contents of the will. *Id.*

Appellants list a litany of circumstances they claim are suspicious or unexplained and therefore cast doubt on Melvin's knowledge of the contents of his will. These include (1) Melvin's stroke and subsequent speech and communication issues and rehabilitation; (2) Jerome Jackson's testimony that appellants allege establish that Jackson was not paying attention during the will signing; (3) Melvin initially returned to work part-time and his supervisor was asked to remind Melvin of his responsibilities; (4) the testimony of the witnesses and the notary regarding the actual execution of the will, which appellants assert was contradictory; and (5) Melvin disinherited his sons, appellants, even though they allege he remained in a loving relationship with them.

Even if the cited circumstances cast suspicion on the issue of whether Melvin knew the contents of his will, we conclude that Patrice presented evidence that, if believed by the trier of fact, removed any suspicion. This evidence includes Patrice's testimony that she and Melvin began working on his will in 2008, and they discussed his sons and Melvin's desire to not leave anything to his heirs. There was also testimony that Melvin had seen his sons infrequently in 2008 and 2009. We conclude that Melvin's decision to leave none of his estate to his sons does not negate the evidence that Melvin possessed testamentary intent. *See Dickson v. Swain*, No. 14-05-00062-CV, 2006 WL 2729640 at *6 (Tex. App.—

Houston [14th Dist.] Sept. 26, 2006, no pet.) (mem. op.) ("It is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testatrix because they do not believe she made a wise or fair distribution of her property."). Several witnesses, including Jerome Jackson, testified that they had talked to Melvin the day of the will signing. These witnesses testified that Melvin appeared to be of sound mind, he was aware of the purpose for the gathering at his home, and he had discussed his will with them. We conclude that the trial court, as the trier of fact, reasonably could have found that any suspicion clouding the execution of Melvin's will was dispelled by this evidence. *See In re Estate of Hemsley*, 460 S.W.3d 629, 635 (Tex. App.—El Paso 2015, pet. denied) ("In every circumstance in which a reasonable trier of fact could resolve conflicting evidence either way, the reviewing court must presume it did so in favor of the prevailing party, and disregard the conflicting evidence in its sufficiency review."); *In re E.H.*, 450 S.W.3d 166, 177 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (stating that trial court, as the trier of fact, may resolve inconsistencies in testimony of any witness); *Collins*, 53 S.W.3d at 838 (concluding that will proponent's evidence had removed any suspicion surrounding execution of will). We overrule appellants' fourth issue.[2]

[2] To the extent appellants' fourth issue can be construed as a challenge to the sufficiency of the evidence because Patrice signed the instrument on Melvin's behalf, we conclude that argument fails. At the time the will was signed, Section 59 of the Probate Code allowed a testator to direct another person to sign the instrument on his behalf. Acts 1955, 54th Leg., R.S., ch. 55, § 1, sec. 59, 1955 Tex. Gen. Laws 88, 107, *amended by* Act of May 18, 1961, 57th Leg., R.S., ch. 412, § 1, 1961 Tex. Gen. Laws 936, *amended by* Act of May 22, 2969, 61st Leg., R.S., ch. 641, § 5, 1969 Tex. Gen. Laws 1922, 1923, *amended by* Act of May 5, 1971, 62d Leg., R.S., ch. 173, § 5, 1971 Tex. Gen. Laws 967, 974, *amended by* Act of May 24, 1991, 72d Leg., R.S., ch. 895, § 7, 1991 Tex. Gen. Laws 3062, 3064, *repealed by* Act of May 26, 2009, effective January 1, 2014, 81st Leg., R.S., ch. 680, § 10, 2009 Tex. Gen. Laws 1512, 1731, *amended by* Act of May 29, 2011, 82d Leg., R.S., ch. 1338, § 1.12, 2011 Tex. Sess. Law Serv. 3884, 3887 (current version at Tex. Est. Code Ann. § 251.051 (West 2014)) (subsequent citations to the Probate Code). The evidence introduced at trial is legally and factually sufficient to establish that Melvin directed Patrice to sign the will on his behalf.

C. The evidence is legally and factually sufficient to support the trial court's finding that Melvin possessed testamentary capacity when his will was executed.

In their fifth issue, appellants assert that the evidence is legally and factually insufficient to support the trial court's finding that Melvin possessed testamentary capacity at the time his will was executed. A testator has testamentary capacity when he has sufficient mental ability to understand that he is making a will, and the general nature and extent of his property. *Bracewell v. Bracewell*, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.). He also must know the natural objects of his bounty, the claims upon them, and have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to form a reasonable judgment about them. *Id.*

In a will contest, the pivotal issue is whether the testator had testamentary capacity on the day the will was executed. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968). Patrice, as the proponent of the will, had the burden to prove testamentary capacity. *Croucher*, 660 S.W.2d at 57. Evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed provided the evidence demonstrates that a condition affecting his testamentary capacity was persistent and was likely present at the time the will was executed. *Id*. "Incapacity to make a will . . . is a subtle thing, and must be established to a great extent, at least so far as lay witnesses are concerned, by circumstantial evidence." *In re Boultinghouse's Estate*, 267 S.W.2d 614, 619 (Tex. Civ. App.—El Paso 1954, writ dism'd). To successfully challenge a testator's mental capacity with circumstantial evidence from time periods other than the day on which the will was executed, a will contestant must establish (1) that the evidence offered indicates a lack of testamentary capacity; and (2) that the evidence is probative of the testator's capacity or lack thereof on the day the will was executed. *Croucher*,

660 S.W.2d at 57.

Appellants begin their sufficiency challenge by pointing out the evidence in the record, primarily medical records, related to Melvin's stroke and subsequent rehabilitation.[3] Appellants emphasize the undisputed evidence that Melvin suffered a stroke and that the records report he was experiencing problems with naming, expression, perception, and comprehension when he arrived at the emergency room. Appellants also point out that Melvin was referred for speech therapy after he left the hospital. Appellant's also assert, without providing citations to the record, that TIRR determined in December 2009 that Melvin was experiencing a deficit in comprehension, an inability to communicate his thoughts through conversation, depression, and continued memory loss. Finally, appellants point out that Melvin's will was executed eleven days after he was released from the hospital following his stroke. Appellants' argument, in short, is that Melvin's stroke caused a brain injury that affected his mental status that continued up to the day his will was executed and that he did not possess testamentary capacity as a result.

Even if we assume the evidence appellants emphasize is probative of Melvin's capacity on the day the will was executed, there is other evidence in the record that Melvin did possess testamentary capacity on that day. This includes direct evidence from multiple witnesses of Melvin's general mental condition on the day his will was executed. Each of these witnesses was aware of Melvin's stroke, testified that Melvin appeared to be of sound mind that day, and testified that he knew he was executing his will. The same medical records emphasized by appellants also note that Melvin, after his stroke, showed continual improvement in

[3] Appellants did not present the testimony of a medical doctor to explain the content of Melvin's medical records.

his condition.

When presented with conflicting evidence, the trial court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *In re Estate of Hemsley*, 460 S.W.3d at 635. The trial court may believe one witness, disbelieve others, and resolve any inconsistencies in the evidence. *In re E.H.*, 450 S.W.3d at 177; *see Dickson*, 2006 WL 2729640 at *5 ("A jury is not bound by the testimony of any one witness and may accept all, part, or none of the testimony of the witnesses and may accept part of [the] testimony of one witness and part of another or members of the jury may draw their own deductions from all the evidence in the case."). The trial court's resolution of any conflicts and inconsistencies in the evidence against appellants does not render the evidence insufficient. *See Barnhart v. Morales*, 459 S.W.3d 733, 747 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (addressing factual sufficiency of the evidence). We hold the evidence is legally and factually sufficient to support the trial court's finding that Melvin possessed testamentary capacity on the day his will was executed. *See In re Estate of Hemsley*, 460 S.W.3d at 637 (concluding direct evidence of testator's general mental condition on the day he executed his will was legally and factually sufficient evidence that he possessed testamentary capacity). We overrule appellants' fifth issue.

D. The evidence is legally and factually sufficient to support the trial court's finding that Melvin did not execute his will as a result of undue influence.

In their sixth issue, appellants contend that the evidence is legally and factually insufficient to support the trial court's finding that Melvin did not execute the will as a result of undue influence. A will may be set aside based on undue influence if the contestant proves: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind

of the testator at the time of the execution of the testament; and (3) the execution of the testament which the maker thereof would not have executed but for such influence. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963); *In re Estate of Ayala*, 2015 WL 4930638, at *5. The burden of proving undue influence is upon the party contesting execution—here, appellants. *Id.* The contestants must introduce some evidence that meets each of the elements of undue influence. *Id.*

Factors that typically are considered in gauging undue influence include: (1) the circumstances surrounding the execution of the instrument; (2) the relationship between the testator and the beneficiary and any others who might be expected recipients of the testator's bounty; (3) the motive, character, and conduct of the persons benefitted by the instrument; (4) the participation by the beneficiary in the preparation or execution of the instrument; (5) the words and acts of the parties; (6) the interest in and opportunity for the exercise of undue influence; (7) the physical and mental condition of the testator at the time of the will's execution, including the extent to which he was dependent upon and subject to the control of the beneficiary; and (8) the improvidence of the transaction by reason of unjust, unreasonable, or unnatural disposition of the property. *See In re Estate of Ayala*, 2015 WL 4930638, at *5 (citing *Guthrie v. Suiter*, 934 S.W.2d 820, 831 (Tex. App.—Houston [1st Dist.] 1996, no writ)). Undue influence may be established by circumstantial evidence, but such evidence must be probative of the issue and not merely create a surmise or suspicion that such influence existed at the time the document was executed. *Id.* Undue influence cannot be inferred by opportunity alone because "[t]here must be some evidence to show that the influence was not only present, but [that it was] in fact exerted with respect to the [execution of the document] itself." *Cotten v. Cotten*, 169 S.W.3d 824, 827 (Tex. App.—Dallas 2005, pet. denied).

In making their sufficiency challenge, appellants point to the trial court's comments (some of which are quoted in the background section above) regarding the evidence necessary to show undue influence. As explained above, however, we consider the entire record in reviewing whether the evidence is sufficient to support the trial court's finding of no undue influence. We address appellants' argument that the trial court's comments were erroneous in Part III below.

Appellants also argue that the trial court's refusal to allow them to amend their will contest to add a suit to quiet title prevented them from introducing evidence relevant to their claim of undue influence. We conclude appellants have not preserved this issue for appellate review because they have not pointed to any place in the appellate record where they offered such evidence, the trial court excluded it, and appellants made an offer of proof. *See* Tex. R. Evid. 103(a)(2); *Comiskey v. FH Partners, LLC*, 373 S.W.3d 620, 629–30 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("To preserve error in the exclusion of evidence, a party must (1) attempt during the evidentiary portion of the trial to introduce the evidence; (2) if an objection is lodged, specify the purpose for which the evidence is offered and give the trial court reasons why the evidence is admissible; (3) obtain a ruling from the court; and (4) if the court rules the evidence inadmissible, make a record of the evidence the party desires admitted.").

In addition, appellants rely again on the medical records related to Melvin's stroke and subsequent treatment; evidence related to the preparation of Melvin's will; the relationship between Patrice, Melvin, and the various trial witnesses and will-signing party guests; and the undisputed fact that Melvin bequeathed his entire estate to Patrice and left nothing to his sons. Appellants contend that Patrice's status as the only beneficiary under Melvin's will shows that she had a motive to exert an undue influence on Melvin. Appellants also assert that Patrice had the

opportunity to exercise undue influence on Melvin's disposition of his estate because she participated in the preparation of his will. Finally, they argue that the will provided for an unnatural disposition of Melvin's estate because it completely excluded his children.

In making this challenge, appellants largely ask this Court to draw inferences contrary to the trial court's findings. Under our standard of review, however, we must make inferences that support the trial court's findings. *Univ. Gen. Hosp., L.P.*, 403 S.W.3d at 550. Moreover, the burden was on appellants to demonstrate undue influence. *See Rothermel*, 369 S.W.2d at 922. Appellants' arguments and evidence do not conclusively or overwhelmingly show that Patrice in fact exercised undue influence. Although Patrice was present for the will signing and indeed signed the will on Melvin's behalf, these facts in and of themselves are not evidence of undue influence. *See* Tex. Prob. Code Ann. § 59 (repealed 2009, effective January 1, 2014); *In re Estate of Ayala*, 2015 WL 4930638, at *5 (observing that undue influence cannot be established by opportunity alone).

In addition, Knox testified that she asked Melvin if he was giving Patrice permission to sign on his behalf and he stated that he was. Knox also testified that she did not see Melvin being (1) pressured to sign the will, (2) forced to sign the will, or (3) tricked into signing the will. Jackson testified that he talked to Melvin during the party and Melvin told him that he wanted to sign the will. Conversely, appellants failed to present evidence that would, under the appropriate standard of review, compel or greatly weigh in favor of a finding that the execution of the will was the result of Melvin's will being overborne or subverted by Patrice or any other person. The trial court found that Melvin had testamentary capacity, and the evidence supporting that finding is discussed in Part I.C. above. We also discussed

Melvin's decision to exclude his sons from his will in Part I.B. We conclude that Melvin's decision to exclude his sons is insufficient to compel or greatly weigh in favor of a finding that Melvin executed his will as a result of undue influence. *See Dickson*, 2006 WL 2729640 at *6. We conclude appellants have done no more than raise suspicion that Patrice exercised undue influence on Melvin. This is insufficient to overturn the trial court's finding because appellants must "show that the influence was not only present, but [that it was] in fact exerted with respect to the [execution of the document] itself." *Cotten*, 169 S.W.3d at 827; *see also In re Estate of Ayala*, 2015 WL 4930638, at *5.

We hold the evidence is legally sufficient because appellants did not conclusively establish the successful exercise of undue influence. *See Dow Chem. Co.*, 46 S.W.3d at 241. Similarly, we hold the evidence is factually sufficient because appellants have not shown that the trial court's failure to find undue influence is against the great weight and preponderance of the evidence. *Id.* at 242. We overrule appellants' sixth issue.

II. The trial court did not abuse its discretion when it denied appellants' request to add a cause of action to quiet title to their will contest.

Appellants' first and second issues concern their efforts to add a cause of action to their petition. The scheduling order set the pleading amendment deadline in December 2012. Almost a full year later, appellants filed a written motion for leave to amend their pleadings to add a cause of action against Patrice to quiet title to Melvin's "separate property declaring the Quit Claim Deed conveyance to [Patrice] as void." The trial court conducted an oral hearing on the motion. The trial court asked appellants if they were "seeking leave to add an extra matter to a will contest." Appellants agreed that they were. The trial court then stated: "[w]e don't do that. Now, what you do is you file a separate cause, and you know, do

whatever you're going to do and it will be a separate matter entirely. That's just the way it is." The trial court went on: "[i]f she wants to bring an action with respect to the title of the property, she's well within her rights, but it has nothing to do with the will contest, so we're not going to try two unrelated matters at the same time." The trial court concluded the hearing by saying: "[i]t's a will contest. The will is either admitted or the will is not admitted. And whatever happens happens. That has nothing to do with title to the property. That's a separate matter." The trial court subsequently signed a written order denying appellants leave to amend their pleadings.

On the first day of the will-contest trial, appellants again sought leave to amend their pleadings to add a quiet title claim to the trial. Patrice objected and the trial court denied appellants' request.

Appellants argue that the trial court abused its discretion when it denied their requests because the trial court, a statutory probate court, was required to exercise jurisdiction over the quiet-title claim because it was a matter incident to Melvin's estate. We need not address whether a suit to quiet title is a matter incident to an estate because, even if it is, we conclude that appellants have not shown the trial court abused its discretion.

A. Standard of review and applicable law

A trial court has broad discretion to manage its docket, and we will not interfere with a trial court's exercise of its discretion absent a showing of clear abuse. *Bagwell v. Ridge at Alta Vista Investments I, LLC*, 440 S.W.3d 287, 292 (Tex. App.—Dallas 2014, pet. denied). More specifically, a trial court's refusal to allow an amendment to pleadings will not be disturbed on appeal unless the complaining party demonstrates a clear abuse of discretion. *NCS Mgmt. Corp. v. Sterling Collision Ctrs., Inc.*, 108 S.W.3d 534, 536 (Tex. App.—Houston [14th

Dist.] 2003, pet. denied). An abuse of discretion occurs when the trial court acts in an unreasonable and arbitrary manner, or when it acts without reference to any guiding rules or principles. *See First State Bank of Mesquite v. Bellinger & Dewolf, LLP*, 342 S.W.3d 142, 145 (Tex. App.—El Paso 2011, no pet.).

Under Texas Rule of Civil Procedure 63, a party may file amended pleadings without leave of court up to seven days before trial, but the trial court may alter this deadline through a scheduling order issued under Rule 166. *Id.* After the deadline, amended pleadings "shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party." Tex. R. Civ. P. 63. A trial court has no discretion to refuse such an amendment unless: (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment. *Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990); *see Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 64 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (addressing trial amendment).

The assertion of a new cause of action may be prejudicial to the opposing party, but it is not automatically prejudicial as a matter of law. *Tanglewood Homes Ass'n, Inc*., 436 S.W.3d at 64. Instead, we evaluate the amendment in the context of the entire case to determine prejudice. *Id.* An amendment is prejudicial on its face if: (1) it asserts a new substantive matter that reshapes the nature of the trial itself; (2) the opposing party could not have anticipated it in light of the development of the case up to the time the amendment was requested; and (3) the opposing party's presentation of its case would be detrimentally affected by the amendment. *Tanglewood Homes Ass'n, Inc.*, 436 S.W.3d at 64–65. When a

pleading amendment that introduces a new substantive matter has been refused by the trial court under Rule 63, the burden is on the complaining party to show an abuse of discretion rather than on the opposing party to show surprise. *NCS Mgmt. Corp.*, 108 S.W.3d at 536.

B. The trial court was within its discretion to conclude that appellant's amendment was prejudicial.

Appellants' only argument that the trial court abused its discretion is that the court was required under the Probate Code to exercise jurisdiction over the quiet title cause of action because, in appellants' view, it was a matter related to or incident to the probate of Melvin's estate. In making their argument, appellants do not address the three factors set out above for determining when an amendment is prejudicial.

We disagree with appellants that the trial court refused to allow the amendment to appellants' pleadings based on a mistaken belief that it lacked jurisdiction. The trial court instead refused the amendment based on Rule 63 and the court's inherent authority to control its own docket. *See Porras v. Jefferson*, 409 S.W.3d 804, 807 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Dow Chem. Co.*, 46 S.W.3d at 240 (stating that trial court has inherent power to control disposition of cases "with economy of time and effort for itself, for counsel, and for litigants")); *Ho v. Univ. of Texas at Arlington*, 984 S.W.2d 672, 693–94 (Tex. App.—Amarillo 1998, pet. denied) (holding that trial court has inherent authority to control its own docket).

We hold that in exercising this authority, the trial court was within its discretion to deny the amendment on the ground that the quiet-title cause of action—raised for the first time long after the pleading amendment deadline and over the objection of the opposing party—asserted a new substantive claim that

would reshape the nature of the trial and prejudice Patrice's presentation of her case.[4] *See NCS Mgmt. Corp.*, 108 S.W.3d at 537 (holding no abuse of discretion to deny request to amend pleadings to add new causes of action when original claim was on verge of final judgment). We therefore overrule appellants' first and second issues.

III. Appellants failed to preserve for appellate review their third issue complaining about comments made by the trial court during the trial.

In their third issue, appellants complain about comments made by the trial judge during the trial, some of which are quoted in the background section above. In appellants' view, the comments establish that the trial judge misapplied the law governing testamentary capacity and thus failed to consider evidence relating to Melvin's state of mind both before and after the execution of the will. We conclude this issue is not preserved for our review.

Appellants were required to preserve their complaints about the trial judge's comments by objecting when the allegedly improper comments were made during the bench trial. Tex. R. App. P. 33.1(a); *Tucker v. Thomas*, 405 S.W.3d 694, 713–14 (Tex. App.—Houston [14th Dist.] 2011) (en banc), *rev'd on other grounds*, 419 S.W.3d 292 (Tex. 2013); *see Dow Chem. Co.*, 46 S.W.3d at 241 (holding preservation necessary in a jury trial). Because appellants did not object when the

[4] Will contests and actions to quiet title involve fundamentally different types of claims. The pivotal issue in a will contest based on an allegation of lack of testamentary capacity is whether the testator had testamentary capacity on the day the will was executed. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968). To set aside a will based on an allegation of undue influence, a contestant must prove (1) the existence and exertion of an influence, (2) that subverted or overpowered the mind of the testator at the time of the execution of the will, (3) so that the testator executed a will the testator would not have executed but for such influence. *In re Estate of Reno*, 443 S.W.3d 143, 150 (Tex. App.—Texarkana 2009, no pet.). The term "suit to quiet title," on the other hand, has been used broadly in reference to legal disputes regarding (1) title to, and possession of, real property—a trespass-to-try-title action, and (2) validity of "clouds" that indirectly have an adverse effect on an undisputed owner's title to real property. *Parker v. Hunegnaw*, 364 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

trial court made the challenged comments, they failed to preserve this issue for appellate review.

CONCLUSION

Having overruled appellants' issues on appeal, we affirm the trial court's amended final judgment.

/s/ J. Brett Busby
Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby.