COURT OF APPEALS DECISION DATED AND FILED

February 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1258

Cir. Ct. No. 01-PR-6

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE ESTATE OF JOHN ELMER KRON, DECEASED:

ROBERT KRCMA,

APPELLANT,

V.

CONNIE KINSMAN,

RESPONDENT.

APPEAL from an order of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert Krcma appeals an order rejecting his challenge to John Kron's will. Krcma contends that Kron lacked testamentary capacity and the will was the product of Connie Kinsman's undue influence. He

argues that the trial court's findings of fact are clearly erroneous and that the court failed to consider the two-factor test for undue influence. Because the trial court's findings are not clearly erroneous and adequately address all of the issues presented, we affirm the order.

¶2 Kron signed the disputed will on July 14, 2001, four days before his death. The will gives most of Kron's estate to Kinsman, his great niece. She was the closest living relative with whom he had any contact. The will replaces a will executed four months earlier that left most of Kron's estate to his friends, Robert Krcma and his wife. The Krcmas challenged the final will, arguing that Kron lacked testamentary capacity and that the will was the product of Kinsman's undue influence under a four-factor test or an alternative two-factor test. The trial court found Kinsman's testimony credible and rejected Krcmas' challenge to the will without specifically addressing the two-factor test.

¶3 Sufficient evidence supports the trial court's finding that Krcma failed to prove Kron lacked testamentary capacity. Krcma had to prove that Kron did not understand the nature and extent of his property, his relationship to possible beneficiaries or the effect that his distribution of property would have on those beneficiaries. *See* ***Estate of Becker***, 76 Wis. 2d 336, 344, 251 N.W.2d 431 (1977). A witness to the will signing, Reverend Kent Angelhoff, testified that Kron was mentally competent at the time he signed the will. That assessment is partially confirmed by nurses' reports indicating that Kron knew his name, his location and the date. While Krcma challenged the credibility of Kinsman's witnesses and presented other evidence suggesting that Kron might not have been lucid at times before and after the will signing, the trial court found Kinsman's witnesses more credible and properly focused on Kron's competency at the time he signed the will. *See* ***Estate of Kitz***, 13 Wis. 2d 49, 59-60, 108 N.W.2d 116

(1961). The trial court is the arbiter of the witnesses' credibility and the weight of the evidence. *See* ***Leciejewski v. Sedlak***, 116 Wis. 2d 629, 637, 342 N.W.2d 734 (1984) It is not this court's function to weigh the contrary evidence. Rather, we must search the record for evidence that supports the trial court's findings. ***Becker***, 76 Wis. 2d at 346. The trial court's finding that Krcma failed to prove lack of testamentary capacity is adequately supported by the medical records, Angelhoff's testimony and reasonable inferences it could draw from the evidence.

¶4 Krcma attempted to establish undue influence under both a four-factor test and a two-factor test. Under the four-factor test, Krcma had to establish by clear and convincing evidence that Kron was susceptible to undue influence, that Kinsman had the opportunity and disposition to unduly influence him and that the will made an apparent "unnatural or unjust" disposition of Kron's estate. ***Becker*** at 347. The two-factor test required Krcma to prove by clear and convincing evidence that Kinsman enjoyed a fiduciary or confidential relationship with Kron coupled with the existence of "suspicious circumstances." *See* ***Estate of Vorel***, 105 Wis. 2d 112, 117, 312 N.W.2d 850 (Ct. App. 1981).

¶5 Sufficient evidence supports the trial court's findings that Krcma failed to establish undue influence under either test. The trial court found that Kron was strong willed, as indicated by his refusal to sign the initial draft of the will presented eight days earlier because it did not include a $5,000 bequest to a friend. Kinsman's opportunity to influence Kron's decisions was very limited based on the small number and short duration of her visits with him after he contacted her to assist in getting his financial affairs in order. The record shows no attempts by Kinsman to influence Kron to change his will or to transfer any property directly to her during his lifetime. The trial court also reasonably found that Kron leaving most of his estate to his closest living relative with whom he had

regular contact was not an unnatural result. Therefore, sufficient evidence supports the trial court's finding that Krcma failed to establish any of the elements of the four-factor test.

¶6 We need not review the first element of the two-factor test, a fiduciary relationship, because we conclude that the evidence supports the trial court's implicit finding that Krcma failed to establish suspicious circumstances. The trial court believed Kinsman's testimony that Kron contacted her and asked her to come to hear his final instructions. Kron asked her to have a will drafted giving her the majority of his estate. After she drafted the will using computerized forms available at the law office where she worked, she presented it to Kron. He refused to sign it because it omitted a $5,000 bequest to a friend. Kinsman redrafted the will and faxed it to her brother-in-law, Angelhoff, for him to present to Kron at the hospital. Angelhoff had visited Kron earlier that week and Kron had raised the topic of the will, asking Angelhoff if he had the will with him. When Angelhoff received the final draft, he read it in its entirety to Kron and asked if the will accurately expressed his wishes. Kron nodded affirmatively, gestured for a pen and signed the will.

¶7 When the trial court has not specifically addressed a question of fact, this court may assume that the missing finding was determined in favor of the judgment. *See* ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). The trial court implicitly found that Krcma did not establish suspicious circumstances by clear and convincing evidence when it rejected his undue influence allegation. That finding is not clearly erroneous. Although Krcma suggests negative inferences that can be drawn from Kinsman's involvement in the will's preparation, the trial court could reasonably infer that the circumstances surrounding the preparation of the will were not suspicious.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).