COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1067 **Cir. Ct. No. 2009PR22**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF STELLA CYCHOSZ:

LEONARD CYCHOSZ, ON BEHALF OF THE ESTATE OF STELLA CYCHOSZ,

APPELLANT,

V.

JOHN CYCHOSZ AND ROBERT CYCHOSZ,

RESPONDENTS.

APPEAL from an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This appeal arises out of a will contest involving the sons of the deceased. Leonard Cychosz, on behalf of the estate of Stella Cychosz, appeals an order admitting Stella's 2008 will to probate. Leonard argues

that Stella did not have full knowledge of significant portions of her will, she lacked testamentary capacity and was subjected to undue influence. We affirm the circuit court's order.

¶2 Stella died on January 18, 2009. Stella executed a will on September 2, 2008, giving the residue of her estate in equal shares to her sons Leonard, Dennis, John, and Robert. The will included the following provision:

> Article III (c)(1.)
>
> I direct as follows with respect to all real property included in the residue of my estate (currently, approximately 240 acres[1] in Portage County, Wisconsin):
>
> All real property shall be distributed in kind, without sale, to the residuary beneficiaries, as tenants in common with percentage interests reflecting their share of the residue of my estate. It is my wish that this real property be divided after my death only as agreed upon by all of the residuary beneficiaries. To this end, the real property that is included in my estate shall be distributed to such residuary beneficiaries only on the condition that they agree that such real property shall not be partitioned for a period of thirty years after my death without the approval of all persons at any time owning such real property. By accepting an interest in the real property that is part of my estate, each beneficiary shall be deemed to have agreed to this restriction on the partition; any beneficiary who refuses to be bound by this agreement shall be obligated to disclaim his or her interest in such real property, in which case the disclaiming person's interest shall be distributed proportionately to the other non-disclaiming residuary beneficiaries of my estate….

[1] Two weeks prior to the execution of the 2008 will, Leonard Cychosz sold approximately 177 acres of the land to John Bushman, in Leonard's capacity as Stella's power of attorney. The circuit court found that Leonard did not tell his mother or his brothers of the sale in advance.

¶3 John and Robert offered Stella's 2008 will for probate. Leonard, as personal representative, objected and asked the circuit court to admit a prior 2003 will that had no restrictions on the sale or partition of the land. Leonard claimed the 2008 will was invalid because it was improperly executed, Stella lacked testamentary capacity and was unduly influenced.

¶4 After a trial to the court extending over several days, the court issued an oral decision with extensive findings of fact. The court determined that the 2008 will was executed with the required statutory formalities, and that Stella had sufficient testamentary capacity at the time of the execution of the will and was not unduly influenced. The court therefore admitted the 2008 will.

¶5 Leonard moved for reconsideration. At the hearing on the reconsideration motion, the circuit court stated that it had reviewed its extensive notes taken during trial, the briefs and the transcript of its oral decision. The court concluded, "I understand moving counsel's arguments, but that's not the way this Court saw the facts and made the findings in the case." The court reaffirmed its decision and Leonard now appeals.

¶6 Leonard argues that Stella did not have full knowledge of significant provisions of the 2008 will. He insists that Stella never contemplated the provision in her will conditioning the distribution of the real estate upon an agreement by each beneficiary that the property would not be partitioned for thirty years. Leonard also contends Stella did not understand that any beneficiary who refused to be bound by this agreement was obligated to disclaim his or her interest in the property.

¶7 "Proof that a will has been duly executed creates a presumption that the will is valid." ***Malnar v. Stimac***, 73 Wis. 2d 192, 199, 243 N.W.2d 435

(1976). However, the presumption is overcome by evidence showing that the testatrix did not know the contents of the instrument at the time of its execution. ***Id.*** Proponents may attempt to show that the contents of the will were communicated to the testatrix or that the will was drafted according to her directions. ***Id.*** at 200.

¶8 Here, no one testified at trial that Stella was unaware of the contents of her will. Attorney James Noonan, who prepared the will, directed its execution and was one of the attesting witnesses, testified that he went through the will with Stella prior to its execution and discussed provisions of the will. Noonan specifically discussed the provision that would prohibit the beneficiaries from partitioning the property for thirty years. Noonan testified this was a "simple concept" that Stella understood. Noonan also testified that he did not consider it necessary to discuss "the way in which that was achieved."

¶9 Noonan's testimony was certainly probative of Stella's knowledge of the content of her 2008 will, and the circuit court found it sufficient to demonstrate the will was drafted according to her intent. *See* ***id.*** The court found:

> [Stella] gave a detailed account to Attorney Noonan…. She wanted all her children to have it.
>
> They discussed dividing it up. Attorney Noonan told her that the statute prohibits rules against partition for over 30 years, what's commonly known as a rule against perpetuities.
>
> She told Attorney Noonan she did not want the land divided up….
>
> ….
>
> But she want[ed] them to agree [on] what to do.

¶10 The court found that "Attorney Noonan tried and did achieve" the result directed by Stella. We will not upset the circuit court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2).[2] We cannot say the court's findings were clearly erroneous.

¶11 Leonard places much weight on the testimony of two attorneys who testified that Stella should have been made aware of the disclaimer provision in order to have a full understanding of the contents of her will. However, the court accepted Noonan's testimony that it was not necessary to discuss "whether or not she had to actually know the mechanics of how her will would be effected." Where there is conflicting testimony, the circuit court is the ultimate arbiter of witness credibility. ***L.M.S. v. S.L.S.***, 105 Wis. 2d 118, 120, 312 N.W.2d 853 (Ct. App. 1981). If more than one reasonable inference may be drawn, we must accept the one drawn by the circuit court. ***C.R. v. American Standard Ins. Co.***, 113 Wis. 2d 12, 15, 334 N.W.2d 121 (Ct. App. 1983).

¶12 Leonard also insists that Stella lacked testamentary capacity when executing the will. Leonard emphasizes the fact that Stella was declared "medically incapacitated" in April 2008, and hospitalized two weeks prior to, and six days after, the execution of her will.

¶13 However, testamentary capacity is determined as of the time the will was executed, and a will signed at a lucid interval is valid. *See* ***Steussy v. First Wisc. Trust Co.***, 74 Wis. 2d 413, 422, 247 N.W.2d 75 (1976). Whether a will was executed during a lucid interval is a question of fact to be determined by evidence

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

of the "immediate circumstances of the transaction examined in the light of human experience." ***Id.*** We will not upset a factual finding with respect to testamentary capacity unless it is clearly erroneous. WIS. STAT. § 805.17(2).

¶14 Applying these standards to the present case, we conclude that the circuit court's findings of testamentary capacity are not clearly erroneous. Stella's longtime personal physician, Dr. Paul Munck, opined that Stella experienced episodes of confusion caused by hepatic encephalopathy which, due to liver dysfunction, can cause a reversible degradation of mental capacity. Dr. Munck also indicated that Stella's mental capacity was acceptable when she was not suffering from these infectious processes. Dr. Munck agreed that to the best of his knowledge, when the certificates of incompetency were completed, the doctors did not have the benefit of the diagnosis of hepatic encephalopathy.

¶15 Attorney Noonan testified that Stella was "very sharp" when he met with her in August 2008 to discuss the terms of her will. Noonan testified there was "no question" concerning her testamentary capacity, and that she gave him a detailed account of her real estate and how she wanted it distributed in kind and not sold. Stella also seemed to understand what was in her prior 2003 will although she did not then have a copy. In addition, Noonan testified that he was comfortable that Stella had sufficient testamentary capacity at the time of the execution of her will on September 2, 2008.

¶16 The circuit court also noted in its oral decision that other "[d]isinterested witnesses have said that her mental capacity was okay when she wasn't suffering from some medical situation such as urinary tract infection." The court correctly stated the determinative factor regarding Stella's testamentary capacity:

> is not whether she did the best or the wisest thing theoretically, but whether she had sufficient active memory to collect in her mind, to comprehend without prompting, the condition of the testator's property, the testator's relation to her own children and other beneficiaries, and the scope and bearing of the will, and to hold these things in mind a sufficient length of time to perceive their obvious relation to each other and to form a rational judgment in relation thereto. And she certainly had that.

¶17 As the final arbiter of the credibility of witnesses and the weight and credit to be given their testimony, the circuit court was entitled to accept the testimony supporting testamentary capacity despite contradictory inferences. The court recognized that "throughout the last year of her life her general health was declining." But the court also recognized that "[a]ll of the people who observed her said her health was up and down." The court found, "It's clear that she had the capacity at the time that she executed the will." The court's finding that Stella possessed the requisite testamentary capacity is not clearly erroneous.

¶18 Finally, we conclude that the record supports the circuit court's finding that Stella was not subjected to undue influence at the time she executed the 2008 will. An opponent of a will must prove undue influence by clear, satisfactory and convincing evidence. *See* ***O'Brien v. Lumphrey***, 50 Wis. 2d 143, 148, 183 N.W.2d 133 (1971). All influence is not undue; "[p]eople in everyday life make up their minds because of the influence of others." ***Id.*** at 149 (citation omitted). An influence is undue only "when it becomes so strong it overpowers and compels the exercise of the will of the person subjected to it." ***Id.*** (citation omitted).

¶19 In Wisconsin, there are two distinct methods that may be used to establish undue influence. The first method is a four-prong test where the objector must prove: (1) the testator's susceptibility to undue influence; (2) an opportunity

to unduly influence; (3) a disposition to unduly influence; and (4) the achievement of a coveted result. *See* ***Fischbach v. Knutson***, 55 Wis. 2d 365, 373, 198 N.W.2d 583 (1972). Under the second method, the objector must satisfy a two-prong test: (1) a confidential or fiduciary relationship between the testator and the favored beneficiary; and (2) "suspicious circumstances" surrounding the making of the will. ***Id.***

¶20 Regarding the four-part test, Leonard challenges the circuit court's findings that Stella was not susceptible to undue influence, and a coveted result was not achieved. Under the two-prong test, Leonard also challenges the court's findings of no confidential relationship and lack of suspicious circumstances.

¶21 Under the susceptibility element, Leonard argues the evidence "conclusively establish[es] that not only was Stella susceptible to influence, but that she was actually influenced by Robert and John relative to her estate planning issues, including her will." However, the circuit court found the record also contained evidence that Stella had a mind of her own. *See* ***Rahr v. East Wisc. Trustee Co.***, 88 Wis. 2d 199, 215, 277 N.W.2d 143 (1979). The circuit court stated, "I don't think that Stella was susceptible to undue influence. I think that she was troubled by the fact that her sons could not get along. She stated clearly what she wanted." Again, conflicting testimony regarding Stella's susceptibility was a matter for the circuit court to resolve as the ultimate arbiter of the weight and credibility of the evidence. The court was unable to find that the evidence of susceptibility to undue influence was clear and convincing.

¶22 The coveted result element addresses the disposition's naturalness, given the totality of the circumstances. *See* ***id.*** at 218. The circuit court concluded the 2008 will's result was not unnatural. Rather, "it's a result that is consistent

with the mother's wishes." The court found that the 2008 will reflected a reasonable disposition of Stella's property. This finding is not clearly erroneous.

¶23 The circuit court's findings regarding confidential relationship or suspicious circumstances are also not clearly erroneous. The court noted that "the confidential relationship is really between Leonard and mother because Leonard has the power of attorney. He's the one that handled all the finances. She said she trusted him." The court also found that even assuming John had a confidential relationship, there were no suspicious circumstances surrounding the making of the 2008 will. Leonard insists that various circumstances in this case are suspicious, including John and Robert meeting with attorney Noonan without Leonard's knowledge. The court acknowledged that although the circumstances in this case may be viewed as suspicious in many families, they were not suspicious in the context of this family. As the court observed, "This is the way they do things as is evidenced by Leonard selling off the property and not telling anybody." The totality of the facts did not require the court to find suspicious circumstances. The will was properly admitted to probate.

By the Court.—Order affirmed.

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