COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2013

Diane M. Fremgen
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. 2012AP2096 **Cir. Ct. No. 2010PR98**

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

IN RE THE ESTATE OF WILLIAM G. WENKMAN:

ANNE BEARD AND GREGORY WENKMAN,

APPELLANTS,

V.

ESTATE OF WILLIAM G. WENKMAN AND MARCIA THOMPSON, PERSONAL REPRESENTATIVE,

RESPONDENTS.

APPEAL from an order of the circuit court for Juneau County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Anne Beard and Gregory Wenkman, pro se, appeal an order that admitted the will of their deceased father, William Wenkman, into

probate.[1] Anne and Gregory had challenged the will based on allegations that one of their siblings, Marcia Thompson, unduly influenced their father into drafting a new will in her favor.

¶2 In their separately filed briefs, Anne and Gregory raise numerous complaints about the circuit court proceedings in this matter, and their statements of issues group these claims together into identical formulations of three omnibus claims: (1) the circuit court did not "'apply the law to the facts of the case'"; (2) the circuit court was biased in favor of Marcia and did not provide them with "a fair and impartial trial, with equal justice and due process of law under the Constitution"; and (3) the circuit court did not "consider or accept 'all' 'the controversy' and 'relevant-evidence,' both direct and circumstantial, to this case." Anne's and Gregory's rambling briefs fail, however, to develop for any of their claims coherent arguments that apply relevant legal authority to the facts of record, and instead rely largely upon conclusory assertions to demand relief.

¶3 This court need not consider arguments that are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See* WIS. STAT. RULE 809.19(1)(d) and (e) (2011-12)[2] (setting forth the requirements for briefs); ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (regarding unsupported arguments); and ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (regarding undeveloped arguments). While we will make some allowances for the failings of

[1] To avoid confusion among multiple family members who share last names, we will use first names in this opinion.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

pro se briefs, "[w]e cannot serve as both advocate and judge," and will not scour the record to develop viable, fact-supported legal theories on an appellant's behalf. ***Pettit***, 171 Wis. 2d at 646-47. *See also* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999).

¶4 While we could dismiss Anne's and Gregory's appeal solely on the inadequacy of their briefs, we note that the respondents, Marcia and the Estate of William G. Wenkman, have filed a brief that methodically discusses the evidence relevant to each element of an undue influence claim. We view this as a reasonable response to Anne's and Gregory's first and third claims that the circuit court failed to apply the law to the facts of the case or to consider all of the evidence, and will structure our own discussion in the same manner.

¶5 As to the second claim regarding a fair trial, Anne and Gregory make repeated derogatory remarks about Marcia, the estate's lawyer, and the judge throughout their briefs. We note that such personal attacks are strongly disfavored and do nothing to persuade this court about the merits of the appeal. *See* ***Strook v. Kedinger***, 2009 WI App 31, ¶6, 316 Wis. 2d 548, 766 N.W.2d 219 ("Venom, arrogance and *ad hominem* attacks are not to be condoned, whether they are by a member of the practicing bar or a person acting pro se."). We emphasize that nothing in our review of the record indicates that the judge had any personal interest in the outcome of this case or establishes any bias in the circuit court's factual findings or ultimate determination, and we will not further address that issue.

¶6 For the reasons that we will discuss below, we conclude that the evidence amply supported the circuit court's determination that Marcia did not exert undue influence upon William. Any additional arguments that we do not

explicitly address are deemed denied. *See* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention"). Accordingly, we affirm the order admitting William Wenkman's will into probate.

BACKGROUND

¶7 William had four children by his first wife: Marcia, Mark, Gregory, and Anne. William executed a will dated May 11, 2009, naming Marcia, Anne, and Anne's two sons, Justin Beard and Brandon Beard, as secondary beneficiaries in the event that his second wife, Georgia, who had been diagnosed with Alzheimer's Disease, did not survive him by more than ninety days. Over the following year, however, a bitter dispute developed among family members over the care of Georgia, who had been placed in a nursing home and then hospice care due to her declining health. The dispute culminated in Anne filing an elder abuse complaint against William and Marcia, and also filing an injunction action against William in which she alleged that William was trying to kill Georgia. Both the complaint and injunction action were determined to be unfounded.

¶8 On March 16, 2010, a few weeks after Anne filed the injunction action, William Wenkman executed a new will, naming Marcia as his primary beneficiary, with a bequest to his grandson Justin. William died only months later on November 27, 2010, at eighty-eight years of age, from injuries he sustained after crashing a plane he had been piloting.

¶9 Anne and her brothers challenged the admission of William's new will into probate, contending that Marcia had exercised undue influence over William to induce him to change his will. The circuit court denied their challenge,

and Anne and Gregory appeal. We will discuss additional details surrounding the execution of William's final will in the course of our discussion below.

STANDARD OF REVIEW

¶10 An allegation of undue influence must be proved by clear and convincing evidence. ***Johnson v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Because claims of undue influence are tried to a court, and the circuit court's ultimate determination as to whether undue influence occurred is intertwined with a series of factual findings, we will not set aside the circuit court's determination unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2) (addressing fact-finding in a trial to the court); ***Odegard v. Birkeland***, 85 Wis. 2d 126, 134, 270 N.W.2d 386 (1978) (treating undue influence as a question of fact subject to what was then known as the "clear preponderance of the evidence" test); ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (explaining that the currently-used "clearly erroneous" standard is substantively the same as the old "'great weight and clear preponderance'" of the evidence test).

¶11 Under the clearly erroneous standard:

> "The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact."

Noll, 115 Wis. 2d at 643-44 (quoted source omitted).

DISCUSSION

¶12 The four standard elements of an undue influence claim are that: (1) the testator was susceptible to undue influence; (2) the person alleged to have exerted undue influence had the opportunity to influence the testator; (3) the person alleged to have exerted undue influence had the disposition to influence the testator; and (4) a result coveted by the person alleged to have exerted undue influence was actually achieved by the will. ***Glaeske v. Shaw***, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420.

¶13 The first element, susceptibility, takes into consideration factors such as the testator's age, personality, and physical and mental capacity to handle business affairs. ***Lee v. Kamesar***, 81 Wis. 2d 151, 159, 259 N.W.2d 733 (1977). Here, the circuit court found that William was a strong-willed individual and that he was a full participant in the drafting of his new will, "not some elderly, feeble minded gentleman being [led] around." The court's finding that William was not susceptible to influence was supported by the testimony of William's attorney, Paul Polacek, that William always did things his way and was confident in his decisions; that he was opinionated and would not yield to arguments or suggestions from others; that he was able to manage his own business affairs; and that he himself initiated discussions about changing his will, drove himself to his lawyer's office to sign the will, and was mentally competent and physically able up until his plane crash.

¶14 As to the second element, opportunity, the circuit court noted that Marcia was in Florida during the entire time that William was discussing changing his will with his attorney, and she did not return to Wisconsin until after the will had been executed. Moreover, although Marcia may have had some opportunity

to exert influence when William asked for her input on a draft of the will, the court found that she did not use that opportunity to attempt to guide her father as to how he should dispose of his assets. That determination was supported by Polacek's testimony that Marcia had nothing to do with suggesting or procuring the actual changes to the will, and Marcia's testimony that her only comment on reading the draft was to point out that her name had been misspelled.

¶15 The third element, disposition to unduly influence, requires more than a desire to obtain a share of the estate; "[i]t implies a willingness to do something wrong or unfair." ***Id.*** at 161. Here, Marcia testified that she had no such disposition. We can infer from the circuit court's comments that it found Marcia credible.

¶16 The fourth element, coveted result, goes to the naturalness or expectedness of the bequest, and whether there are reasons in the record why the testator may have left out those who might be considered natural beneficiaries of his or her bounty. ***Id.*** at 162-63. Here, Polacek testified that William had not included his sons, Mark and Gregory, in either of the wills Polacek had prepared for him, because William was not close with either of them, and William also felt that Gregory had his own money. Additionally, by the time he drafted the second will, William felt that both Gregory and Mark (who had appeared at the injunction hearing in support of Anne) were aligned with Anne against him. Diane and Ronald Hedrich, who witnessed William signing the will, similarly testified that

William said he was changing his will because Anne had taken him to court, and that he was disgusted but not surprised that Mark had backed her.[3]

¶17 In sum, none of the circuit court's factual findings that William was not susceptible to influence, that Marcia did not have the disposition or exercise any opportunity to influence the changes to the will, and that the disposition of William's assets was a natural result given the family dynamics, are clearly erroneous, and they fully support the determination that the will was not produced as the result of undue influence by Marcia.

By the Court.—Order affirmed.

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

[3] This same reasoning shows that the alternate test for undue influence, that the will was executed under suspicious circumstances, was not met here. *See* KATHERINE W. LAMBERT, 15 WIS. PRAC., DEATH IN WISCONSIN § 8:32 (9th ed. 2008) (setting forth alternate test for undue influence claims where there was a fiduciary relationship, and a will was executed under suspicious circumstances). Respondents cite 1 JAMES B. MACDONALD, WISCONSIN PROBATE LAW AND PRACTICE, §§ 6.35, 6.42, at 358, 380 (1994), which is an older version of the Lambert treatise. As there is no discernible difference in the content of the relevant sections of the treatises, we cite to the newer version.