COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2501 **Cir. Ct. No. 2006PR3**

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

IN RE THE ESTATE OF MAE D. SMART:

JUNE SHANNON, JONI SHANNON SHARPE, JOSHUA BINDL, A MINOR, KERRY SHANNON, ROBERT SHANNON, SARAH MUNZ AND TIMOTHY MUNZ,

APPELLANTS,

V.

UW-RICHLAND CAMPUS FOUNDATION AND BONNIE MOERER,

RESPONDENTS.

APPEAL from a judgment of the circuit court for Richland County: MICHAEL T. KIRCHMAN, Judge. A*ffirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. June Shannon, Joni Sharpe, Joshua Bindl, Kerry Shannon, Robert Shannon, Sarah Munz and Timothy Munz appeal from an order

admitting the will of Mae Smart into probate over their objections. The Appellants challenge both the trial court's findings of fact and its conclusion that Smart did not execute the will as the result of undue influence. Respondents UW-Richland Campus Foundation and Bonnie Moerer move to strike an argument they claim was raised for the first time in the Appellant's reply brief and ask this court to declare the appeal frivolous. As we will explain below, we decline to strike an argument from the reply brief, but do conclude that the appeal is frivolous. Accordingly, the probate order is affirmed and the Respondents shall be awarded their costs, fees and attorney fees.

BACKGROUND

¶2 Mae Smart died on February 9, 2006, at ninety-three years of age. Her most recent will, executed the year before her death, left her house to Kinship of Richland County and a family farm to the UW-Richland Campus Foundation. Smart's niece Shannon filed an objection to the administration of the will, alleging it was the result of undue influence and that Smart had lacked testamentary capacity when it was executed. A number of other relatives who had been named beneficiaries of a prior will joined Shannon's objection.

¶3 Following an extended evidentiary hearing, the trial court found that Smart was suffering some infirmities of aging by 2005, including forgetfulness and mild dementia, and that she appeared less able to take care of herself and her house than in the past. Ciel Simonson and her husband began doing odd jobs and chores for Smart, and Simonson acted as something of a personal assistant for her. However, Smart continued to live alone and manage her daily activities—including grocery shopping, cooking, cleaning and paying her bills—up until her

death. While she appreciated the assistance, she did not become overly dependent upon Simonson.

¶4 Before she even met Simonson, Smart told her attorney as well as several other people that she was thinking of changing her will to give most of her estate to the University. After executing the new will, Smart told people that she made the bequests because of her late husband's involvement in education. Her husband had been on the board of the Richland County Teacher's College and played a role in the creation of the UW-Richland Center. Smart also told several people, including her attorney, that she wanted to keep the farm intact, and she feared if she gave it to extended family members, they would subdivide it and sell it off.

¶5 The court found that Smart was a strong-willed and independent person who was not easily persuaded or timid in her dealings with others. She also knew the extent of her wealth and who her extended family members were, as demonstrated by signing a number of certificates of deposit over to family members shortly before changing her will. Although Simonson took a number of actions to assist Smart in changing her will, the court found there was no evidence that Simonson or anyone else ever told Smart what to do with her estate. When the attorney asked Smart outside of Simonson's presence whether anyone was influencing her, she responded that "Nobody did and nobody could."

¶6 The trial court concluded that Smart had sufficient testamentary capacity to make the will and that the objectors had failed to establish three of the four elements of an undue influence claim. The objectors challenge only the undue influence ruling on appeal.

STANDARD OF REVIEW

¶7 The parties both suggest that we review the trial court's undue influence decision to determine whether it was "against the great weight and preponderance of the evidence." That language has been superseded but is identical in meaning to the "clearly erroneous" test now set forth in WIS. STAT. § 805.17(2) (2007-08)[1] for reviewing a circuit court's factual findings after a trial to the court. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). 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.

Id. at 643-44 (citation omitted).

DISCUSSION

Motion to Strike

¶8 As a threshold matter, the Respondents ask this court to strike an argument in the Appellants' reply brief that the bequest of Smart's town house to Kinship could, in and of itself, invalidate the will, even if Smart was not unduly

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

influenced to leave her farm to the Foundation. They claim that issue was neither raised in the Appellant's opening brief, nor brought to the trial court's attention. It is true that this court need not address arguments which are raised for the first time in a reply brief or were not made in the trial court. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661; ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388. These principles have long been recognized as part of what has historically been called the "waiver rule," and has more recently been called the "forfeiture rule." *See* ***State v. Ndina***, 2009 WI 21, ¶29, — Wis. 2d —, 761 N.W.2d 612 (clarifying that the term "waiver" should be used only for the intentional relinquishment of a right, while the failure to preserve or timely assert a right should be referred to as a "forfeiture"). However, because the forfeiture rule is a doctrine of judicial administration, we retain the authority to address an issue on appeal even if it has not been properly preserved. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by statute on other grounds as stated in* ***Wilson v. Waukesha County***, 157 Wis. 2d 790, 460 N.W.2d 830 (Ct. App. 1990). Thus, raising a new argument in a reply brief does not violate the rules of appellate procedure and does not provide grounds to strike an argument from a brief, even if this court may ultimately choose not to address the issue. However, we need not decide whether the Appellants' contention in the reply brief that the bequest to Kinship was sufficient in and of itself to invalidate the will was a new argument subject to the forfeiture rule or merely an extension of arguments already made in their opening brief. As we explain below, we uphold the trial court's determination that there was no undue influence with respect to either bequest.

Undue Influence

¶9 In order to prove a claim of undue influence, an objector to a will must establish that the testator was susceptible to undue influence; that the person alleged to have exerted undue influence had both the opportunity and disposition to influence the testator; and that a result coveted by the person alleged to have exerted undue influence was actually achieved by the will.[2] ***Glaeske v. Shaw***, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420. The susceptibility element takes into consideration factors such as the testator's "age, personality, physical and mental health and ability to handle business affairs." ***Lee v. Kamesar***, 81 Wis. 2d 151, 159, 259 N.W.2d 733 (1977). A 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. The coveted result element "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. "When the objector has established three of the four elements by clear and convincing evidence, only slight evidence of the fourth is required." ***Hoeft v. Friedli***, 164 Wis. 2d 178, 185, 473 N.W.2d 604 (Ct. App. 1991).

¶10 The parties do not dispute that Simonson had the opportunity to unduly influence Smart. The objectors challenge the trial court's factual findings regarding the other three elements, and its resulting conclusions that the objectors had not satisfied their burden of proof to show undue influence.

[2] There is an alternate two-part test for situations involving a fiduciary relationship which the parties agree does not apply here. *See* ***Glaeske v. Shaw***, 2003 WI App 71, ¶27, 261 Wis. 2d 549, 661 N.W.2d 420.

¶11 With respect to susceptibility, the objectors argue that the court placed "too much emphasis" on the testimony of Smart's attorney and not enough on the concerns of people who had known Smart longer and watched her gradual mental and physical deterioration. That argument, however, presents precisely the type of weighing of credibility and conflicting evidence which lies outside of this court's scope of review. It does not matter that there was substantial evidence in the record on which the court could have based a finding that Smart was susceptible to undue influence as long as there was sufficient evidence from which the court could reasonably have drawn the competing inference. Smart's attorney testified that he made inquiries regarding undue influence, and explained why he was satisfied that Smart was making her own decisions and was not being unduly influenced by Simonson at the time she executed the will. The court was entitled to give greater weight to the attorney's observations, particularly since they included both the actual day the will was executed and events leading up to that point before Smart even knew Simonson. The attorney's observations were also generally supported by Smart's banker and a long-time friend who testified that she was a strong-minded woman who was not easily influenced by others. Thus, the court's finding that Smart was not susceptible to influence was not clearly erroneous.

¶12 With respect to a disposition to influence, the objectors point out that Simonson took actions such as telling Smart about the Foundation and Kinship; scheduling meetings between Smart and her attorney and attending those meetings with her; setting up a meeting between Smart and representatives of the Foundation and attending that meeting; printing out a will template from the internet, then helping Smart fill it out in advance of a meeting with counsel; and calling someone from the Foundation on the day of Smart's death to inform him

that the Foundation would be receiving the farm. They argue that Simonson's active participation in facilitating Smart's execution of the new will shows that Simonson was "desperate to have [Smart] disinherit her family" and give her assets to organizations which Simonson herself favored. Once again, however, even if such an inference could reasonably be drawn, it is not the *only* reasonable inference. A competing reasonable inference is that Simonson was simply helping an older woman to do what she said she wanted to do. That inference was amply supported by the evidence that Smart had indicated before she even met Simonson that she was concerned family members would subdivide and sell the farm, and that she told numerous people that it was her own decision to change her will to keep the farm intact and to honor her late husband's involvement in education. Moreover, Simonson testified that she was merely attempting to help Smart organize her thoughts, not to make decisions for her, and the trial court plainly found Simonson's testimony credible when it found "no evidence that [Simonson] ever told [Smart] what to do with her estate." There was nothing inherently wrong or unfair about suggesting the names of organizations which might be able to fulfill Smart's wishes, and facilitating contact with them. Therefore, it was not clearly erroneous for the court to determine that Simonson's actions in helping Smart did not show that she had a disposition to unduly influence.

¶13 With respect to a coveted result, the objectors contend that Simonson benefited by Smart's bequests to the Foundation and Kinship because Simonson's involvement in facilitating the new will gave her "prestige and public attention" and her husband subsequently became a member of the Foundation's board. The trial court found, however, that it was Smart, not Simonson who suggested Simonson's husband join the Foundation's board after the will had already been executed, and no one who asked to be on the board was ever denied. Any

inference that Simonson received a coveted benefit from the will was therefore very weak. In any event, to the extent that Smart's will excluded any natural objects of her bounty, there was evidence in the record to explain Smart's decision. She had already made other provisions for family members by naming them as beneficiaries of certificates of deposit. It was not clearly erroneous for the court to determine that Simonson had not achieved a coveted result, in that it was not "unnatural" or "unexpected" that a woman with no children, a strong desire to keep a farm intact, and a husband with strong ties to the education community would choose to leave substantial property to educational organizations. In sum, there is no basis to overturn the trial court's findings of fact or its ultimate conclusion that the will was not executed as the result of undue influence.

MOTION FOR COSTS

¶14 Finally, the Respondents seek an award of costs and attorney fees under WIS. STAT. RULE 809.25(3) on the grounds that the appeal was frivolous. They argue that the Appellants should have known they had no reasonable basis for setting aside the trial court's undue influence decision, given the trial court's findings of fact and this court's standard of review. The Appellants cite ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1, for the proposition that, so long as there is at least one argument on appeal with arguable merit, the appeal cannot be found frivolous. However, we do not agree with their reading of that case. What ***Baumeister*** says is that we will not impose costs and attorney fees "unless the entire appeal is frivolous," and that the inclusion of a frivolous argument is not enough to find the whole appeal frivolous. It does not follow that the reverse is true—that is, that the inclusion of a meritorious argument is sufficient to find the entire appeal meritorious. Rather, it is possible for an entire appeal to be frivolous, notwithstanding a meritorious

argument on one or more issues, if the Appellants could not prevail on the appeal as a whole even if they prevailed on any meritorious argument.

¶15 Here, while the Appellants' argument with regard to Smart's susceptibility to influence may not have been frivolous given the extensive evidence in the record about Smart's declining abilities, that argument was not sufficient to render the entire appeal meritorious when there was no reasonable basis to challenge the trial court's findings on the disposition and coveted result elements. The court's findings on those last two elements were based in large part upon a credibility assessment of Simonson, which is not reviewable by this court, and was amply supported by other evidence from the record. Disagreeing with the inferences the trial court chose to make from evidence in the record is simply not a basis for appeal. The Appellants could not have prevailed on appeal without prevailing on their challenges to all three elements. We therefore find the appeal was frivolous and grant the Respondents' motion for costs and attorney fees. Because this court is not equipped to make factual findings, we remand the matter to the circuit court for a determination as to the amount of costs and attorney fees incurred upon appeal.

By the Court.—Judgment affirmed.

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