COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1976 **Cir. Ct. No. 01-PR-121**

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

IN RE THE ESTATE OF ROBERT A. BUTLER, JR.:

ERIN T. O'CONNOR, PROPONENT OF A WILL DATED MAY 11, 2001,

APPELLANT,

V.

STUART KORSHAVN AND CHRISTINA KORSHAVN, SPECIAL ADMINISTRATORS FOR THE ESTATE, AND PROPONENTS OF A WILL DATED JUNE 17, 1999,

RESPONDENTS.

APPEAL from an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Erin O'Connor appeals a circuit court order rejecting the admission of Robert Butler's May 11, 2001, will to probate and voiding a power of attorney and several change of beneficiary forms. The 2001 will named O'Connor the sole beneficiary, the power of attorney form granted her the power, and the beneficiary forms named her the new beneficiary for several assets. The trial court concluded that Butler lacked the testamentary capacity to make the will O'Connor offered and that Butler lacked the mental capacity to sign the power of attorney and change of beneficiary forms. O'Connor raises several arguments that, when distilled to their essence, constitute one claim: The trial court erred in its factual findings. Because the record supports the trial court's findings, we affirm the order.

Background[1]

¶2 Butler executed a will on June 17, 1999, naming his wife Nadine and their son Alex beneficiaries. In March 2000, Nadine filed for divorce. Butler was suffering from a rare form of cancer. Butler met O'Connor in 1994, and she was his fiancée at the time of his death. O'Connor had accompanied Butler to California and Indiana for medical treatment. His last admission to Bellin Hospital in Green Bay was May 2, 2001, where he died May 12.

¶3 On May 11, 2001, a final hearing was held on the Butlers' divorce. Butler's divorce attorney, J. Michael Jerry, visited Butler in the hospital that day.

[1] We note the special administrators' argument that O'Connor's factual recitation contains portions of testimony the trial court rejected. Our background section is therefore based largely on the trial court's factual findings. *See* ¶14, *infra*, regarding our review of facts on appeal.

When Jerry arrived around noon, Butler was unresponsive. Medical records indicate he had been lethargic and unresponsive for most of the day.

¶4 At the divorce proceeding, Jerry testified that around 2:30 p.m. he was able to get a clear "yes" from Butler when he asked whether Butler still wanted a divorce. Jerry appeared in front of the divorce court, explained why his client could not be present, and asked the court to waive Butler's personal appearance. The court did so, and ultimately granted the divorce around 4:30 p.m. Jerry returned to the hospital and informed O'Connor and Butler's mother that the divorce had been finalized. This was at approximately 5 p.m.

¶5 Sometime around 6 p.m., O'Connor presented a new will to Butler for his signature, along with a power of attorney and change of beneficiary forms for several assets. Butler allegedly signed these documents. He died less than twelve hours later. Following Butler's death, O'Connor submitted the 2001 will to the probate court. The 1999 will had already been admitted. Alex, Nadine, and the special administrators of Butler's estate objected to the 2001 will.

¶6 At trial, the court heard testimony from several nurses, a treating physician, Jerry, O'Connor, and O'Connor's two witnesses to the will—her sister Colleen Wenk and her friend Ellen Urbanovitch. The physician, Dr. Thomas Saphner, testified that Butler had been admitted for "heroic measures," which he, as a physician, would not have recommended to his own patients. He testified that up until May 11, Butler had been on "a major dose of a very strong narcotic pain reliever," Fentanyl. That medication would be sufficient to put a healthy person to sleep. On May 11, Saphner switched the medication from Fentanyl, administered through a duragesic patch, to Dilaudid, administered intravenously. Dilaudid is "one of the most powerful pain control medicines we have … and a narcotic."

¶7 Saphner testified that on May 11, he felt Butler was unable to make decisions and that he therefore took great pains to document all discussions with O'Connor and Butler's mother regarding his medical care should a question of consent or authorization arise later. Saphner could not recall Butler being cognizant at any time, and he testified that he could not have a meaningful discussion of ideas, concepts, or consent directly with Butler.

¶8 Nurse Kari Barrett testified that around 4 p.m. on May 11, Butler's temperature spiked to 106.2º. Saphner testified that he did not think he had ever seen a temperature that high and stated that the higher a fever, the less a person is able to understand. Sometimes, he stated, patients with high temperatures may experience seizures. While he admitted he was not in Butler's room during the time of his fever, Saphner testified that fevers basically contribute to confusion. He also stated that, except where called upon to speculate, his answers were given to a reasonable degree of medical certainty.

¶9 Saphner interpreted a medical record for the court, which indicated that medication scheduled to be administered to Butler at 6 p.m. on May 11 could not be given because Butler was unresponsive. Nurse Nancy Gaedtke testified that by 8 p.m. that evening, Butler's temperature had only fallen to 104.3º.

¶10 Jerry testified that he had in fact represented to the divorce court that Butler understood the nature of the proceedings and that before May 11, he never doubted Butler's capacity to participate in his divorce. Jerry's representation regarding Butler's competency, however, was based primarily on Butler's participation before the final hearing and his final hospitalization. Jerry also testified that when he arrived on May 11, Butler was breathing with some difficulty and that although his eyes were open, he was not focusing or speaking.

He was unable to get a response from Butler until around 2:30 p.m. when Butler responded with a clear "yes" to Jerry's question. Jerry also testified that other than that single response, nothing he observed indicated Butler was aware of what was going on around him. Jerry stated that, in his professional capacity, he would not have had Butler sign a will that evening because he did not believe Butler was competent for that purpose.

¶11 Wenk testified she arrived between 5:45 and 6 p.m. on May 11. She stated that Butler spoke to her and recognized her. She claims O'Connor asked Butler to wiggle his toes, but he refused. She testified that the topic of the will came up, at which point it was placed in front of Butler, who reviewed it for approximately one minute.

¶12 Urbanovitch testified that she arrived around 5:30 p.m. that day. She said Butler said hello and called her by name, inquiring about a school project she had mentioned several days before. She also recalled O'Connor asking Butler to wiggle his toes. She testified he was not saying bizarre things or losing consciousness. She, too, stated that when the will was put in front of Butler, he examined it for about one minute. Additionally, she testified that on May 11 Butler did not seem much different from how he had been in the past several months.

¶13 The court concluded, based on the medical testimony, that Butler was rapidly deteriorating on May 11, that he was in the active dying process, and that he did not have a lucid interval in which he could have signed the 2001 will. The court also concluded that Butler lacked the mental capacity to sign the power of attorney or change of beneficiary forms. It denied admission of the 2001 will to probate and voided the other forms. O'Connor appeals.

Standard of Review—Testamentary Capacity

¶14 "The burden of proof at trial when a will is challenged for want of the testator's testamentary capacity is that of introducing clear, convincing, and satisfactory evidence." ***Estate of Sorensen***, 87 Wis. 2d 339, 343, 274 N.W.2d 694 (1979). [2] We affirm the trial court's finding on testamentary capacity unless it is contrary to the great weight and clear preponderance of the evidence, ***id.*** at 343; that is, unless it is clearly erroneous. ***Schorer v. Schorer***, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993).

Discussion

¶15 "Where competing inferences arise and the credible evidence will support or deny either inference, it is for the trier of fact to draw the proper inference …." ***Borneman v. Corwyn Trans.***, 212 Wis. 2d 25, 32, 567 N.W.2d 887 (Ct. App. 1997). In this case, the trial court implicitly found O'Connor's witnesses to be incredible. It wrote:

> I did consider the witnesses' interest or lack of interest in the results of this matter, their conduct and demeanor on the witness stand, their bias or prejudice if any was shown, the clearness … of their recollections, as well as their opportunity for observing and knowing the matters and things given in evidence by them. …

---

[2] O'Connor additionally argues that the question whether a will has been properly executed is a question of law we review without deference to the trial court. While this is true, ***Estate of DeThorne***, 163 Wis. 2d 387, 390, 471 N.W.2d 780 (Ct. App. 1991), we are not presented with this question. Execution of a will is governed by WIS. STAT. § 853.03 and concerns the details of the writings, signatures, and witnesses, not the credibility of witnesses testifying about a testator's mental capacity.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> Erin O'Connor not only has a substantial emotional interest in these proceedings, but if she prevails, would receive a great deal of Dr. Butler's property. In addition, as to the critical moment of execution, she is supported only by her sister and a good friend. They, especially vis à vis the medical personnel, have an interest in her well-being and a bias toward her.
>
> ….
>
> [O'Connor, her sister, and her friend] were fully cognizant of the fact that the nurses were very much concerned about his prognosis and treatment. Yet, [O'Connor] suggests that when, on a day it had to be obvious … [Butler] had substantially deteriorated and he was in extremis, he made a remarkable and dramatic improvement, but no one felt the need to inform [the] hospital staff …. That, too, substantially diminishes the weight and credit to be given [O'Connor's] claim of a "lucid interval."

¶16 The court considered the medical personnel, including Saphner, to be "credible witnesses." It determined that the medical charts independently supported Saphner's conclusion that Butler's medication and temperature "further diminished" his cognitive functions. The court also credited Jerry's testimony that he would not have had Butler sign a will because, in the attorney's opinion, Butler was not competent to do so.

¶17 A testator "must have the mental capacity to comprehend the nature, the extent, and the state of affairs of his property." ***Estate of O'Loughlin***, 50 Wis. 2d 143, 146, 183 N.W.2d 133 (1971). "The testator must know and understand his relationship to persons … reasonably … expected to become the objects of his bounty from which he must be able to make a rational selection of his beneficiaries." ***Id.*** "He must understand the scope and general effect of the provisions of his will in relation to his legatees and devisees." ***Id.*** "Finally, the testator must be able to contemplate these elements together for a sufficient length of time, without prompting, to form a rational judgment in relation to them, the

result of which is expressed in the will." ***Id.*** at 146-47. The relevant time of inquiry is the time of execution of the will, not its drafting. *See* ***Estate of Velk***, 53 Wis. 2d 500, 504, 192 N.W.2d 844 (1972).

¶18 The trial court considered taking O'Connor's witnesses' testimony at face value and still concluded that Butler lacked testamentary capacity. First, O'Connor made no attempt to discuss the terms of the will with Butler when she presented it for execution. Her witnesses both testified that Butler examined it for about one minute. The court concluded from this that Butler was unaware of the document's contents. Indeed, one minute hardly seems sufficient to "contemplate these elements together." Second, the court noted the 2001 will "drastically altered" the stipulated property division the divorce court had approved a mere ninety minutes before execution of the will, which hardly evinces Butler's comprehension of the "state of affairs" of his property. Finally, the trial court noted that when O'Connor presented a general power of attorney form, Butler, according to O'Connor's witnesses, mistook it for the medical power of attorney he had already signed. From this confusion, the court concluded that Butler could not have understood the will either. The court's conclusion that Butler lacked testamentary capacity on May 11, 2001, is not clearly erroneous.

¶19 Nevertheless, O'Connor raises four main arguments regarding the court's rejection of Butler's 2001 will. She argues that (1) the trial court applied the wrong legal standards to her witnesses; (2) a showing of a lucid interval rebuts a showing of testamentary capacity; (3) the appointment of the guardian ad litem in the Butlers' divorce was not dispositive of Butler's mental state; and (4) the court failed to hold the objectors to their burden of proof.

¶20 The trial court wrote regarding O'Connor's witnesses that "the two women testified that Robert Butler was 'competent' and 'sane.' … While his competency is [at issue], these witnesses are not experts on the issue of competency." O'Connor then spends a great deal of time in her brief explaining that no witness to a will need be an expert.

¶21 O'Connor misreads the trial court's reasoning. The court was not stating that O'Connor's witnesses were not legally qualified to witness the will's execution. Rather, the court was explaining why it rejected their testimony regarding Butler's testamentary capacity. Whether a person is competent in the sense that he has testamentary capacity is a legal conclusion. The trial court observed that the two witnesses had no training in the legal definition of the word. Thus, it was opining that their legal conclusions were of no consequential weight.

¶22 O'Connor, however, contends that "nowhere in the probate court's decision is there a finding that either woman's testimony was not credible, or that they appeared, to the court, to be lying." Thus, she contends there was no reason for the trial court to discount her witnesses' testimony.

¶23 The trial court, not the appellate court, is the arbiter of witness credibility. *See* WIS. STAT. § 805.17(2); ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975). When the trial court accepts one of two competing inferences, it necessarily rejects that which it does not accept. Because the trial court accepted the medical testimony that Butler could not have had a lucid interval, it implicitly rejected the testimony O'Connor and her witnesses presented. The trial court need not have explicitly done so.

¶24 O'Connor next argues that her showing of a lucid interval rebuts the objectors' showing of testamentary incapacity. She claims that Jerry's statements to the divorce court and the testimony of her witnesses establish a lucid interval.

¶25 As indicated in resolving O'Connor's closely related preceding argument, simply because she claims Butler experienced a lucid interval does not make it so. The trial court rejected this view of the evidence. Even accounting for her witnesses' testimony, the trial court concluded that Butler lacked testamentary capacity to make the 2001 will.

¶26 O'Connor spends a great deal of time discussing the Butlers' divorce proceeding to support her claim of a lucid interval. The divorce is irrelevant. First, Jerry testified that he was able to get Butler to answer "yes" when asked if he still wanted a divorce. Jerry, however, told the divorce court that before his "yes" answer, Butler had been unresponsive. Jerry had also spent two hours trying to get a response. Butler's "yes" also came before his fever spiked to 106º and at least three hours before the 2001 will was signed. The medical records indicate Butler's condition deteriorated between the time Jerry sought an answer on the divorce and the time O'Connor had him sign the will. Thus, even assuming Butler had a lucid interval in the second he responded to Jerry, this is not evidence of a lucid interval when O'Connor allegedly had him sign the will.

¶27 While the probate court noted that the divorce court must have found Butler incompetent to appoint a guardian ad litem for the final divorce proceeding and may have relied on this to support its finding that Butler lacked testamentary capacity, this was not the only fact upon which the trial court relied. Even if we were to rule the guardian ad litem evidence inadmissible, there is still satisfactory evidence to support the probate court's finding of testamentary incapacity.

¶28 Finally, O'Connor contends that the trial court failed to hold the objectors to the "clear, convincing, and satisfactory" evidence standard regarding Butler's last two days of life. We reiterate, however, that the inquiry does not span two days—it covers only the period when Butler allegedly considered and executed the 2001 will. *See* ***Velk***, 53 Wis. 2d at 504. Nonetheless, O'Connor claims that an audio recording of telephone messages contradicts Saphner's conclusions and renders his testimony suspect.

¶29 O'Connor sought to present a recording of five telephone messages from her answering machine allegedly made on May 10. This, she claimed, would show Butler clearly oriented to time and place, whereas Saphner testified that Butler was in poor condition on that day as well as on May 11. In the messages, Butler refers to his room number, 315. The trial court provisionally allowed the tapes in, over objection, based on the assurance that Butler was in room 315 only for his last hospital stay, and O'Connor argues that the objectors cannot prove the messages were not made on May 10.

¶30 The proponent of evidence is responsible for proving the evidence is what it claims to be. *See* WIS. STAT. § 909.01. Thus, the objectors need not disprove the date of creation if O'Connor cannot conclusively prove it first. Still, the objectors presented evidence that Butler had been in room 315 for an earlier stay in February and March, which the trial court noted cast doubt upon the time of the tape's creation. Moreover, by O'Connor's own admission, the electronic time stamp on her answering machine was malfunctioning. Thus, in the last message Butler refers to the time as 4:30 p.m., although the time stamp is 1:12 a.m. Without further proof of the time and manner of creation, the trial court rejected O'Connor's attempt to impeach Saphner with the tapes. In any event, the messages were made well before Butler executed the 2001 will. There is clear,

convincing, and satisfactory evidence from the medical staff that Butler would most likely have been unconscious at the time O'Connor claims he had his lucid interval. The trial court did not fail to hold the objectors to their burden of proof.

Beneficiary Forms

¶31 There are five change of beneficiary forms in the record. The forms are all copies of an original fax from Prudential to Jerry. Three of the forms are for changes to Prudential accounts, but two have the Prudential letterhead blacked out and the names of other companies written in. The trial court noted that "[t]he haste with which Ms. O'Connor obtained the forms and presented them to Dr. Butler … make it obvious that the transfer of those assets reflected her wishes, not his."

¶32 O'Connor argues that the trial court's ruling that Butler lacked capacity to sign these forms was based on erroneous facts. She claims the trial court should not have considered the haste she used in obtaining a signature because until Butler's divorce was final, a court order prevented any changes. She also contends that the insurance company had not been forthcoming with the forms; indeed, she had only received faxed copies from Jerry after he returned from the divorce proceeding. These facts, regardless whether the trial court was correct, are irrelevant because the trial court found a lack of capacity on other grounds that are supported by the record.

¶33 A change of beneficiary form is in the nature of a contract. Thus, when a will is invalidated for lack of testamentary capacity, this does not always result in automatic invalidation of change of beneficiary forms. *See* WIS. STAT. § 853.18. Nonetheless, a person signing the change of beneficiary forms must have the capacity to contract. The law presumes every adult is competent until

satisfactory proof to the contrary is presented. ***Hauer v. Union State Bank***, 192 Wis. 2d 576, 589, 532 N.W.2d 456 (Ct. App. 1995). "The test for determining competency is whether the person involved had sufficient mental ability to know what he or she was doing and the nature and consequences of the transaction." ***Id.***

¶34 The trial court concluded that Butler did not know the consequences of what he was doing. The change of beneficiary forms produced results inconsistent with the divorce decree. There was no discussion about what Butler wanted to accomplish through the changes and therefore no indication he knew what he was doing. If anything, the trial court concluded, Butler was barely conscious when he signed the changes. Moreover, O'Connor admitted that she completed some of the forms after they were signed, which means Butler could not have known the consequences that would result. Because O'Connor could not recall which forms she completed after they were signed, the trial court concluded they were all suspect. There was sufficient, credible evidence from which the trial court could conclude that Butler was unaware of the potential consequences of his actions and, as such, we uphold its findings.

Power of Attorney

¶35 The trial court believed O'Connor's argument regarding the power of attorney was that the form provided her the authority to complete the change of beneficiary forms after Butler had signed them, and that the trial court therefore should not weigh her post-signing changes against her. The court concluded that Butler lacked the capacity to sign the form and in any event, the form was statutorily invalid. Thus, O'Connor was unable to make changes to the beneficiary forms because she was not Butler's agent. O'Connor argues that the power of attorney was submitted to the trial court to show that Butler had

sufficient presence to recognize he had previously signed a different power of attorney, contrary to the trial court's belief that this evidenced confusion on Butler's part.

¶36 The trial court concluded that Robert did not have testamentary capacity based in part on the fact that if he was conscious, he did not want to sign the power of attorney because he thought he had already signed one. Butler had previously signed a medical power of attorney. O'Connor contends this mistake does not prove he was incompetent but rather suggests he was lucid enough to recall that he had already signed something called a power of attorney. We reject O'Connor's argument. The power of attorney says, "I, Robert Andrews Butler, being of sound mind and memory, do make, publish and declare Erin Theresa O'Connor be given full power of attorney over all of my personal and financial affairs."

¶37 Assuming Butler was as lucid as O'Connor claims, the trial court implicitly found it unlikely that Butler could have mistaken this thirty-two-word form for his medical power of attorney. Moreover, the court could infer confusion as easily as lucidity. Not only was there the confusion over this simple form, but there was medical testimony that the fever and medication would have impaired Butler's mind. The inference of confusion the trial court found is at least as likely and supported by the record as O'Connor's claim that the confusion really indicated lucidity.

¶38 To the extent there is argument over whether Butler was competent to execute the power of attorney, we conclude such a discussion is irrelevant because the form is invalid as a matter of law. The court was uncertain whether

this was meant to be a power of attorney for finances and property or a durable power of attorney, but either is invalid.

¶39 To create a basic power of attorney for finances and property, the document must conform to WIS. STAT. § 243.10(1), which specifies detailed wording, requires the principal's initials in several locations, and requires a witness. Alternatively, a document that "complies substantially" with the wording of § 243.10(1) may be legally sufficient. WIS. STAT. § 243.10(2). In either case, the agent must sign the form. ***Id.*** It is undisputed that O'Connor, the agent, has not signed the form. Because she has not signed and because the form does not comply with the clear language requirements of the statute, this is an invalid power of attorney for finances and property.

¶40 WISCONSIN STAT. §243.07(1)(a) states:

> "Durable power of attorney" means a power of attorney by which a principal designates another as his or her agent in writing *and the writing contains the words "this power of attorney shall not be affected by subsequent disability or incapacity of the principal", or "this power of attorney shall become effective upon the disability or incapacity of the principal", or similar words* showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity. (Emphasis added.)

¶41 Regardless why O'Connor offered the power of attorney, she cannot rely upon it. Butler's form does not contain the required language. Thus, it is also invalid as a durable power of attorney. *See* WIS. STAT. § 243.10(4).

Conclusion

¶42 The trial court's finding that Butler lacked testamentary capacity when he executed the 2001 will is not clearly erroneous. Thus, it is our duty to

affirm the court's finding. The court's finding that Butler lacked the mental capacity to execute the change of beneficiary forms is likewise supported by the record. Finally, the power of attorney is invalid as a matter of law because it fails to conform to statutory requirements.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.