COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1222 **Cir. Ct. No. 02PR000066**

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

IN RE THE ESTATE OF BRIDGET MARY VANDYKE, A/K/A BRIDGET VANDYKE:

HELEN SCHLICHT, JAMES GLEESON, PHIL GLEESON AND KATHERINE CURRAN,

INTERESTED PARTIES-APPELLANTS,

V.

ESTATE OF BRIDGET MARY VANDYKE, A/K/A BRIDGET VANDYKE,

RESPONDENT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Helen Schlicht, Phil Gleeson, James Gleeson and Katherine Curran, the siblings of the decedent, Bridget Mary Van Dyke, appeal from a circuit court order for formal administration of Van Dyke's estate after the circuit court rejected their challenge to Van Dyke's testamentary capacity at the time she made her will.

¶2 A testator is presumed to have the capacity to make a will. ***Mueller v. Gaudynski,*** 46 Wis. 2d 393, 398, 175 N.W.2d 272 (1970). Testamentary capacity means that the testator has "a general, meaningful conception of the nature, extent and scope of his [or her] property and the natural objects of his [or her] bounty." ***Zelner v. Krueger***, 83 Wis. 2d 259, 279, 265 N.W.2d 529 (1978).

¶3 The test is whether the testator possessed sufficient capacity at the time the will was executed, not at some other time. ***Fischbach v. Knutson,*** 55 Wis. 2d 365, 372, 198 N.W.2d 583 (1972). The question of whether a testator "had testamentary capacity at a particular time must be determined by the immediate circumstances of the transaction examined in the light of human experience." ***Steussy v. First Wis. Trust Co.,*** 74 Wis. 2d 413, 422, 247 N.W.2d 75 (1976). The siblings bore the burden to prove that Van Dyke lacked testamentary capacity. ***Mueller***, 46 Wis. 2d at 398.

¶4 The circuit court's findings of fact will be upheld unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).[1] Whether these findings satisfy the legal standard of testamentary capacity is a question of law which we decide *de novo*. *See* ***Nottelson v. ILHR Dept.***, 94 Wis. 2d 106, 116, 287 N.W.2d

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

763 (1980). Even though this aspect of our review is de novo, the circuit court's very thorough and thoughtful decision is of great assistance to us.

¶5 On appeal, the siblings cite what they characterize as overwhelming evidence that Van Dyke lacked testamentary capacity when she executed her will on December 23, 2001. The circuit court viewed the evidence otherwise.[2] The court found that there was nothing in the record to indicate that at the time she executed her will, Van Dyke lacked testamentary capacity.

¶6 The circuit court placed great weight on the testimony of the attorney who met with Van Dyke in the hospital and drafted the will. Attorney Robert Henzl testified that he met with Van Dyke on December 23, the second day of her hospitalization, to address her concerns about medical decisions in the event of her incapacity. She was lucid and recognized Attorney Henzl, whom she knew from legal matters involving her husband's estate. Van Dyke requested a power of attorney for her finances and designated her sister, Margaret Williams, as the initial holder of the power, with Margaret's husband in a secondary position. Attorney Henzl and Van Dyke then discussed a will. Van Dyke designated Margaret and Margaret's husband as her heirs because they had been the nicest to her. She excluded her other siblings as heirs. Van Dyke also did not want to provide for her late husband's children from a prior marriage (although she agreed they could have various items of personal property). Counsel felt that Van Dyke understood their conversation.

[2] We note that the appendix to the appellants' brief does not contain the entire transcript of the circuit court's decision from the bench. The redacted version of the decision does not give us the circuit court's findings as contemplated by WIS. STAT. RULE 809.19(2). We appreciate that the respondent's brief provides the entire transcript of the decision.

¶7 Counsel returned that afternoon with the documents for Van Dyke to sign. Counsel reviewed the documents with Van Dyke. Counsel believed that Van Dyke had the requisite testamentary capacity when they discussed the preparation of the will and when she executed the will later in the day.

¶8 In addition to placing great weight on Attorney Henzl's testimony, the circuit court also relied upon information from Van Dyke's medical chart indicating her degree of orientation and lucidity at the time she executed her will on December 23. The medical notes for the date of admission (December 21) indicate that Van Dyke was alert and oriented to person, place and time.[3] On the evening of the day she signed the will, Van Dyke was trying to leave her bed without assistance and against medical advice. She was placed in soft restraints so that she would not injure herself. The circuit court did not see this turn of events as evidence of a lack of testamentary capacity. Rather, it was a safety measure. The physician's note from the day after she executed the will indicate that Van Dyke had a medical condition which could cause confusion, but the physician did not state that she was actually confused. It is clear that Van Dyke's health and mental capacity deteriorated thereafter as indicated by the medical records from December 24 to December 31.

¶9 The witness to the will testified that Van Dyke appeared competent and lucid enough to sign her will. Van Dyke's sister Margaret testified that from the time Van Dyke was admitted to the hospital until she signed her will two days

[3] We stress that the relevant inquiry is Van Dyke's capacity when she executed the will, not thereafter. Therefore, we do not discuss any evidence of Van Dyke's capacity and condition in the period subsequent to the execution of the will.

later, she was somewhat agitated and "quite a handful" for the nurses. But, Van Dyke was not confused on the day she executed her will.

¶10 The siblings would have us weigh the evidence before the circuit court differently and place greater weight on the testimony of a neuropsychologist who opined that Van Dyke lacked testamentary capacity.[4] This expert formed his opinion based on his review of the medical records; he never examined Van Dyke. The siblings also contend that the medical records indicate that Van Dyke was not competent to make a will, and that her behavior toward family members was erratic.

¶11 We decline to independently weigh the evidence. The weight of the evidence and the credibility of the witnesses was for the circuit court as the finder of fact. ***Patrickus v. Patrickus,*** 2000 WI App 255, ¶26, 239 Wis. 2d 340, 620 N.W.2d 205. The circuit court was aware of Van Dyke's strong personality and her apparent dislike for her siblings and stepchildren. However, these traits, "examined in the light of human experience," ***Steussy***, 74 Wis. 2d at 422, do not mean a testator lacks testamentary capacity. The siblings also argue that Van Dyke was not competent after December 27. However, this date is outside the relevant period for evaluating testamentary capacity.

¶12 We conclude that the circuit court's findings of fact are not clearly erroneous, and they support a legal conclusion that Van Dyke had testamentary capacity when she executed her will.

[4] The siblings also ignore the standard of review we apply to the circuit court's findings of fact and wrongly attempt to relitigate the case on appeal.

¶13 Next, the siblings argue that Van Dyke's sister, Margaret, unduly influenced her in the execution of her will. To prove undue influence, the siblings must prove Van Dyke's susceptibility to undue influence, together with Margaret's opportunity and disposition to influence, and the achievement of a coveted result. *See* ***Glaeske v. Shaw,*** 2003 WI App 71, ¶27, 261 Wis.2d 549, 661 N.W.2d 420, *review dismissed*, 2003 WI 32, 260 Wis. 2d 756, 661 N.W.2d 103 (Wis. Apr. 7, 2003) (No. 01-3056).

¶14 The siblings focus on the contact between Margaret and Van Dyke before Van Dyke executed her will. Van Dyke had expressed an interest in living with Margaret, but Margaret was unable to accommodate that request. After she was hospitalized, Van Dyke agreed that Margaret could handle her check book and her car keys. Margaret also informed Attorney Henzl that it was urgent that he meet with Van Dyke to prepare the necessary documents.

¶15 The circuit court did not draw the same inference from Margaret's conduct as have the siblings. The court found that Van Dyke was aware that she would not be able to handle her finances or her vehicle and that she needed to pass these items along to someone. The court found no evidence that Margaret threatened or forced Van Dyke to take these steps. The court found that counsel was contacted initially because Van Dyke wanted control over her medical treatment. Counsel's discussions with Van Dyke then expanded to include a will. The court found no evidence that Margaret exercised any influence over Van Dyke with regard to the provisions of her will.

¶16 The siblings argue that the court erred when it read depositions which were not admitted into evidence. However, the siblings do not point to any aspect of the circuit court's decision which relies upon such material. Therefore,

this issue is inadequately briefed and we address it no further. *See* ***State v. Pettit,*** 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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