COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1965 **Cir. Ct. No. 02PR000041**

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

IN RE: WALTERS FAMILY TRUST:

WALTERS FAMILY TRUST, BY MICHELLE PUCEK AND JODY POKRANDT,

PETITIONERS-RESPONDENTS,

V.

SCOTT WALTERS,

INTERESTED PERSON-APPELLANT,

MINOR CHILDREN OF SCOTT WALTERS, BY THEIR GUARDIAN AD LITEM,

INTERESTED PERSON-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Scott Walters appeals an order declaring that an amendment to a testamentary trust established by his parents was valid. Walter claims that the trial court applied the wrong standard of law in determining his father's competency at the time of the amendment's execution and that the evidence was insufficient to support the competency determination. We affirm the trial court's decision for the reasons discussed below.

BACKGROUND

¶2 In January 1996, James Walters, Sr., and his wife Shelby created a revocable living trust whose proceeds would be divided equally upon their deaths among their four children, James Jr. (Jim), Michelle, Scott and Jody. In December of 1998, James and Shelby met with their attorney to review their estate plan and expressed concern about Scott's ability to handle money. In response, the attorney drafted an amendment to the trust document which bypassed Scott, instead giving Scott's quarter share of the estate to his children. James reviewed the document prior to Christmas and asked his daughter Michelle to look it over as well.

¶3 The family gathered at the Walters' home on January 5, 1999, as James lay dying of lung disease. Everyone present agreed that James was taking a number of medications, including morphine; that he alternated between periods of consciousness and sleeping throughout the day; and that he was physically weak and fading quickly. Sometime after 10:00 p.m., Shelby expressed concern to several of the children that James had not yet signed "his will," and might not have the strength to lift a pen. Someone called the family accountant, who advised them that the document could be signed with an "x" if necessary. While Scott stayed in the kitchen with his mother, Michelle and Jody took the amendment into James's room.

¶4 James had his eyes closed and appeared to be sleeping when Michelle and Jody entered their father's room. Jim was at his bedside. All three of the children who were present testified that Michelle told her father that she had the amendment, and asked him if he knew what it was. He nodded or mumbled yes. She asked if he wanted to sign it, and he again answered affirmatively. She told him he could sign it with an "x," and either Michelle or Jody put the pen in his hand and directed his hand to the signature line of the amendment. No other page of the amendment was visible. James made his mark.

¶5 Scott produced two expert opinions regarding whether James could have been competent at the time he made his mark given his stage in the death process and the likely effect of the medications he was taking. Although neither of Scott's experts examined James that day, each reviewed the available records and statements, including notes made by the attending hospice nurse earlier in the evening. Dr. Brody concluded that both lack of oxygen and the sedative effect of the medications would likely have affected James's competency, although he acknowledged that someone who is medicated is not necessarily incompetent. Dr. Gorelick similarly concluded that the dose of morphine James had received would have left him "[v]ery sedate, more cyanotic, and really quite somnolent," and that he would not have had the capacity to make decisions. The trial court found that James was competent, notwithstanding the expert testimony, based on evidence that James knew what he was doing when he initiated the creation of the amendment and the observations of the family members who were present the evening of James's death.

DISCUSSION

¶6 Whether a person was possessed of testamentary capacity at the time of executing a testamentary instrument is a question of fact. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 354, 302 N.W.2d 508 (Ct. App. 1981). The parties disagree on who has the burden of proving testamentary capacity where, as here, the instrument at issue does not contain an attestation clause in which witnesses aver to having observed the signature of the executor. We need not resolve the parties' disagreement on that point, however, because the trial court stated it was convinced by "clear and convincing" evidence that James was competent. Thus, regardless of the trial court's reference at one point to a presumption of competence, the record shows that the trial court ultimately found that the respondents had produced enough evidence to carry the burden of proof in their favor. Accordingly, we will sustain the trial court's finding of testamentary capacity unless it is clearly erroneous. ***Id***.

¶7 The parties agree that the mental capacity required to execute a testamentary trust, or an amendment to a testamentary trust, is the same as that needed to execute a will. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(2) (2003).

¶8 The standard for testamentary capacity is well-established:

> The testator must have mental capacity to comprehend the nature, the extent, and the state of affairs of his property. The central idea is that the testator must have a general, meaningful understanding of the nature, state, and the scope of his property but does not need to have in his mind a detailed itemization of every asset; nor does he need to know the exact value of his property.... The testator must know and understand his relationship to persons who are or who might naturally or reasonably be expected to become the objects of his bounty from which he must be able to make a rational selection of his beneficiaries. He must understand the scope and general

> effect of the provisions of his will in relation to his legatees and devisees. 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.

O'Brien v. Lumphrey, 50 Wis. 2d 143, 146-47, 183 N.W.2d 133 (1971), *cited with approval in* ***Gittel v. Abram***, 2002 WI App 113, ¶40, 255 Wis. 2d 767, 649 N.W.2d 661, *review denied*, 2002 WI 121, 257 Wis. 2d 117, 653 N.W.2d 889 (Wis. Sep. 26, 2002) (No. 01-1132).

¶9 Scott correctly points out that the relevant time of inquiry for a competency determination is that of the amendment's execution, not its drafting. That does not mean, however, that the court cannot consider other time periods in order to put the moment of execution into context. We are satisfied that is what the trial court did here.

¶10 The trial court properly discussed the details of how the amendment had come to be drafted as being relevant to the questions whether James knew what he was signing and whether he intended to do so at the time he made his mark. The court made an inference about James's recognition of family members based on James's attempt to bid a final farewell to them. It was not necessary for someone to have explicitly asked James questions about his knowledge of the extent of his finances at the time of the execution of the amendment in order for the trial court to make inferences about James's understanding. In sum, the family members' consistent testimony that James was physically weak, but that he recognized people and was making appropriate statements and responses throughout the evening, was sufficient to support the trial court's finding of competence.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).