COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1212

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

IN THE MATTER OF THE ESTATE OF FLORENCE M. MACCALL, DECEASED:

DANIEL DONEHUE and REBECCA SIRECI,

Proponents-Appellants,

v.

SUE C. SCHMOLDT,

Objector-Respondent.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Daniel Donehue and Rebecca Sireci appeal from an order denying admission of a will executed by Florence M. MacCall. The

issue is whether the trial court's finding that MacCall lacked testamentary capacity is clearly erroneous. We conclude it is not. We affirm.

MacCall died on February 17, 1993. The appellants offered for probate a will she executed on January 27, 1993, in her hospital room. Sue C. Schmoldt, named beneficiary in an earlier will, objected. The trial court concluded that MacCall lacked testamentary capacity.

To have testamentary capacity, a testator must have had the mental capacity to comprehend the nature, extent and state of affairs of her property. ***Estate of Sorensen***, 87 Wis.2d 339, 344, 274 N.W.2d 694, 696 (1979). She would have to be aware of those who were or might be the natural objects of her bounty. ***Id.*** She would also have to understand the scope and general effect of her will. ***Id.*** Testamentary capacity is determined as of the time of the making of the will. ***Id.*** at 345, 274 N.W.2d at 697. The objectors must prove lack of testamentary capacity by clear, convincing and satisfactory evidence. ***Id.*** at 344, 274 N.W.2d at 696.

The appellants argue that the trial court misallocated the burden of proof. They rely on this statement in the trial court's memorandum decision: "In this case there is no evidence that the testatrix at the time of the drafting and execution of the will was aware of the extent of her estate." This argument might have merit if the trial court had said nothing else. However, it is clear from the trial court's discussion of relevant law and the evidence before it that the trial court properly applied the burden of proof.

The appellants argue that the trial court's finding of lack of capacity is contrary to the evidence. We affirm the finding unless it is clearly erroneous, and we are to give due regard to the opportunity of the trial court to judge the credibility of witnesses. Section 805.17(2), STATS. There was ample evidence in support of the trial court's finding. Most of the testimony that MacCall had testamentary capacity came from interested parties. The trial court noted that most of the testimony from disinterested observers was that MacCall was confused at times before and after the execution of the will. There was testimony and medical records showing that hospital staff usually found MacCall confused or disoriented. Therefore, we conclude that the finding of lack of capacity was not clearly erroneous.

By the Court.—Order affirmed.

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