COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 9, 1996

No. 95-2594

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

IN THE MATTER OF THE ESTATE OF JUANITA WENDLAND, DECEASED: PROPONENT OF THE ESTATE, ROMAN FELTES, PERSONAL REPRESENTATIVE,

Petitioner-Appellant,

v.

VIOLA GROB, NOMINATED PERSONAL REPRESENTATIVE OF THE PRIOR WILL,

Objector-Respondent.

APPEAL from an order of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Roman Feltes, proposed personal representative of the estate of Juanita Wendland, deceased, appeals an order denying a will to probate. Feltes argues that the trial court erroneously determined that (1) Juanita lacked testamentary capacity to execute the February 17, 1989, will, and

(2) the will was a product of undue influence. Because the record supports the trial court's determination, we reject these arguments and affirm the order.

Juanita Wendland, born in 1908, was preceded in death by her husband of forty years, Ed Wendland, in 1977. They had no children. In November 1988, Juanita and her friend Thaddeous Kotlarz visited an attorney, Mark Franklin, for the purpose of drawing a new will. Kotlarz was her spokesman, and he told Franklin that Juanita wanted to leave her entire estate to him. Franklin asked Kotlarz to leave the room and, after talking to Juanita alone, it was obvious to him that "there were some mental problems, that she wasn't sure what she was doing, who her heirs were .... [S]he didn't know how much property she had." Because Franklin questioned her competency, he decided not to draft her will and advised her by letter.

Guardianship proceedings were initiated, and Juanita retained Franklin to oppose them, even though he had determined that she was not sufficiently competent to execute a will. However, in December 1988, Juanita and Kotlarz visited Franklin's office again, and Franklin felt that she was much sharper. She was angry with her late husband's relatives, believing they started the guardianship proceedings and she wanted to make sure they inherited nothing from her. Franklin testified that after Kotlarz left the room, Juanita said she wanted to leave one-third of her estate to Kotlarz, one-third to her friend and attorney Roman Feltes, and one third to her church.

Franklin asked Dr. Richard Pallazza, a psychologist, to examine her for competency with regard to the guardianship and will. Pallazza met with her on December 16, 19 and 30, 1988. Pallazza concluded that she was a charming lady, but "she really was gravely, gravely impaired ...." He concluded that she was mentally incompetent as a result of Alzheimer's disease and "this is a woman who has suffered a devastating loss of competence."

Pallazza testified that this disease is progressive and irreversible. He concluded that she could not function as a truly independent person, but "required the presence and support and hand holding and contact with Mr. Kotlarz." While in his office, she "began sort of whimpering and half raising herself from the chair indicating that she wanted to go or fetch him from the waiting room."

Franklin was surprised by Pallazzo's conclusions and felt that it was possible that Juanita could execute a will. After drafting a will, he attempted on two or three occasions to have her execute it, but felt she was incompetent to do so; "either she had the heirs wrong, or she didn't have the amount of property even close."

On February 17, 1989, Kotlarz let Franklin know that Juanita was having a good day. Franklin arrived at her house and taped his conversation with her. The transcript of the taped conversation includes the following:

[Franklin]: Do you have a husband, or do you have a husband still living?

Juanita: I think Ted [Kotlarz] is my husband, we aren't married officially, but I consider him my husband.

[Franklin]: Were you married before?

Juanita: No I wasn't.

[Franklin]: Who is Edward Wendland?

Juanita: Well he was a friend of mine but I really wasn't married to him.

[Franklin]: You never got married to him?

Juanita: No, he lived out in our area, we were neighbors.

Kotlarz was married to another at the time, although he obtained a divorce in 1990. The taped transcript reveals that Juanita also told Franklin that she owned some farm land. This was incorrect because the farm land had been sold to Kotlarz some years before.

Juanita signed the will in the presence of Franklin and his secretary. Franklin testified that she later corrected her answers and he made a note to that effect at the bottom of the transcript. According to his secretary, Juanita did not make the correction before she signed the will.

Franklin believed that Juanita was not under undue influence and was able to understand the nature and extent of her estate and her relationships with relatives whom she might want to include in her will. He disregarded Pallazzo's opinion because he received a different opinion from her treating physician and thought that she may have been having a bad day with Pallazzo, a stranger.

After Juanita's death, Viola Grob, the personal representative named in Juanita's will dated February 16, 1988, objected to the probate of the February 17, 1989, will. At trial, Edward's relatives testified that they were concerned about Juanita's behavior because she acted like she did not recognize them and she was dressed in a fur coat and boots in August. Joseph Fernholz, Juanita's neighbor, stated that in approximately 1988, he would find Juanita chasing cats in the neighborhood, although her own cats were dead in the basement of her home. She asked him to help her find Kotlarz's telephone number in the Sears Roebuck catalog.

Attorney Bruce Kostner testified that he was retained to establish Juanita's guardianship and visited her in November 1988. Although he thought her hat rather inappropriate, Juanita conversed intelligently for a few minutes, until she asked him why he had not been bitten by her dog. She did not have a dog.

Kotlarz, age sixty-four, testified that after her death, he filed a claim against her estate in excess of $54,000, at the rate of $10 per hour, for services he provided Juanita between 1985 and 1988, such as driving. When he took her to restaurants to eat, she paid for the meals and gas. In February 1989, she gave him a new Crown Victoria car. Her 1984 Ford was traded in, and Juanita wrote a large check for the approximately $12,000 balance. Her account, however, did not have sufficient funds to cover the check. Juanita also had deeded her house to Kotlarz, but the transaction was set aside by the court in an earlier proceeding.

The trial court found by clear and convincing evidence that Juanita lacked testamentary capacity on February 17, 1989, and that the will executed on that date was the product of undue influence. It denied the will to probate.

Feltes argues that the trial court's findings are against the great weight and clear preponderance of the evidence. We disagree. Findings of fact will not be upset on appeal unless they are clearly erroneous. Section 805.17(2), STATS. This is essentially the same test as "great weight and clear preponderance." ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643-44, 340 N.W.2d 575, 577 (Ct. App. 1983). The trial court is the arbiter of the credibility of witnesses, and we do not overturn its credibility assessment except when testimony is patently incredible, in conflict with the course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the court did not but could have reached. ***In re Estate of Dejmal,*** 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). Appellate court deference takes into consideration the fact that the trial court has the superior opportunity to observe the demeanor of the witnesses and gauge the persuasiveness of their testimony. ***Id***. at 151-52, 289 N.W.2d at 818. If more than one reasonable inference can be drawn from the testimony, we must accept the inference drawn by the trial court. ***Id.*** at 151, 289 N.W.2d at 818.

The record supports the trial court's determination that Juanita lacked testamentary capacity on February 17, 1989. A testator must have mental capacity to comprehend the nature and extent of her property. ***In re Estate of Becker***, 76 Wis.2d 336, 344, 251 N.W.2d 431, 434 (1977). She need not have a detailed itemization of every asset or a perfect memory. ***Id.*** She must know and understand her relationship to persons who might naturally be expected to become objects of her bounty. ***Id.*** She must understand the scope and general effect of the provisions of her will. "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.***

In its memorandum decision, the trial court assessed credibility of conflicting witness testimony. Although Feltes attempted to discredit Pallazza with the testimony of another doctor who challenged Pallazza's testing, the trial court found that Pallazza's testimony was more credible because he had actually met with Juanita while the other doctor did not. Also, the challenged

test was just one of several methods used to assess Juanita's competency. The trial court was entitled to believe Pallazza.

The taped conversation made when Juanita executed her February 17, 1989, will also supports the trial court's finding. Because Juanita did not recall that she had been married for forty years and thought her late husband had been a neighbor, the trial court could reasonably infer that Juanita did not recognize her relationships with persons who might naturally be expected to be objects of her bounty. Because she was unaware that she no longer owned farm land, the trial court could reasonably infer that Juanita did not understand the extent of her estate. Based upon the clear, satisfactory and convincing testimony, including Pallazzo's opinion and the recorded conversation with her attorney, the trial court was entitled to find that any lucid interval she may have had was not of sufficient duration to render her competent to execute her will.

Feltes argues that opposing inferences may be drawn. For example, he argues that the February 17, 1989, will reflects a rational selection of beneficiaries. It is not this court's function to assess weight and credibility, or to resolve conflicts in the evidence. ***Dejmal***, 95 Wis.2d at 151, 289 N.W.2d at 818. The trial court could give less weight to Feltes' and Kotlarz's testimony because they stood to gain under the will.

Feltes argues that Franklin's testimony that Juanita possessed testamentary capacity should be given great weight. We must defer to the trial court's assessment of weight and credibility. Section 805.17(2), STATS. Here the trial court gave greater weight to Pallazzo's opinion, the tape-recorded conversation and the testimony of Kostner and Fernholz.

Feltes argues that letters of a Dr. Heise, Juanita's physician, support his contentions. Because the trial court sustained hearsay objections to the letters, they are not part of the record we consider on appeal. Feltes' reply brief contention that the evidentiary ruling is erroneous is not sufficiently developed to be considered. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).

Next, Feltes argues that the trial court erroneously determined that the will was a product of Kotlarz's undue influence. Because the trial court's finding that Juanita lacked testamentary capacity is sufficient to sustain the

order denying the will to probate, it is unnecessary to address this second basis for its order. *See* ***Sweet v. Berge,*** 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). Nonetheless, we conclude that the record abundantly supports the trial court's finding of undue influence.

There are two tests to prove undue influence. We discuss the traditional test that has four elements: (1) susceptibility to influence; (2) opportunity to influence; (3) disposition to influence and (4) coveted result. ***In re Estate of Vorel,*** 105 Wis.2d 112, 116, 312 N.W.2d 850, 852 (Ct. App. 1981). The elements must be proved by clear, satisfactory and convincing evidence. ***Becker***, 76 Wis.2d at 347, 251 N.W.2d at 435. First, Juanita's age, inability to handle her own affairs and Alzheimer's disease demonstrates her susceptibility. Second, the record, as well as Feltes' brief, characterize Kotlarz as "Juanita's only true companion who took some time out to take her out to eat, to church every Sunday and on Sunday drives," demonstrating his opportunity to influence.

Third, Kotlarz took Juanita to Franklin, acting as her spokesperson, and advising Franklin that she desired to leave her entire estate to him, at a time when even the attorney questioned her competence. Kotlarz accepted free meals, a new Crown Victoria car and a house from Juanita when she was suffering from Alzheimer's. This record shows more than a desire to obtain a share of the estate, "it implies grasping and overreaching, a willingness to do something wrong or unfair," ***Dejmal,*** 95 Wis.2d at 159, 289 N.W.2d at 821, demonstrating Kotlarz' disposition to influence her. Finally, as a result of his pursuit of undue influence, he stands to inherit under her will, demonstrating a coveted result. The record clearly and convincingly supports the trial court's finding of undue influence.

Finally, we address Grob's motion to declare the appeal frivolous and to strike portions of Feltes' brief.[1] The appeal essentially challenged factual findings, arguing that the great weight and preponderance of the evidence required reversal. Although this argument is weak in light of the factual underpinnings of the trial court's rulings, we are unprepared to hold that the appeal was entirely frivolous.

[1] Feltes retained attorney William Skemp to represent him on appeal. The brief, therefore, was not written by Feltes, but by Skemp.

We agree, however, that Feltes' brief blatantly mischaracterizes a portion of the record. On pages 20 to 21 of appellant's brief, Feltes represents that during the taped conversation, "Juanita answered the heir questions correctly; she knew the extent of her property; she stated that she did not want her in-laws to obtain anything; she reflected that Mr. Feltes had been a very good friend over the years and had earned and deserved what was coming to him; she related that Mr. Feltes was a better friend than any of her in-laws had ever been ...."

This summary misrepresents the contents of the transcript of the taped conversation.[2] It is unprofessional conduct to misrepresent facts. "Misleading representations, whether deliberate or careless, misdirect the attention of other lawyers and the district judge." ***Skycom Corp. v. Telstar Corp.,*** 813 F.2d 810, 819 (7th Cir. 1987). The court's time is scarce and must not be frittered away trying to ascertain misrepresented facts. Pursuant to our discretionary powers under § 809.83(2), STATS., we strike the above quoted section from the appellant's brief, award motion costs, and order attorney Skemp to pay a $200 penalty as additional costs to be awarded the respondent.

By the Court. – Order affirmed. Costs to respondent.

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

[2] Appellant's brief cites R62. We have reviewed R62 to determine the accuracy of the quoted portion of appellant's brief.