COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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. 95-2996

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

In the Matter of the Estate of
Bernice M. Houtakker, Deceased:

GERALD F. HOUTAKKER,

Appellant,

v.

CAROL CAREW, SISTER CATHERINE HOUTAKKER and
ESTATE OF BERNICE M. HOUTAKKER,

Respondents.

APPEAL from an order of the circuit court for LaFayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Gerald Houtakker appeals from an order admitting the will of his mother, Bernice Houtakker, to probate. Gerald

challenged the will as a product of Bernice's unsound mind and the undue influence of his sister Carol Carew. The trial court rejected his challenge. The issue on appeal is whether the trial court's findings of fact on that issue are clearly erroneous. Because we conclude that they are not, we affirm.

On January 25, 1991, Bernice, then age 79, met with Attorney Norman Kvalheim to discuss a will. She was accompanied by Carol. Bernice returned to his office on January 30, again accompanied by Carol, and signed a will leaving her property in equal shares to her four children, Gerald, Carol, John Houtakker and Sister Catherine Houtakker. After signing the will, Carol and Bernice discussed whether Carol should receive an option to buy the family farm from Bernice. Two days later, Bernice returned to Kvalheim's office with Carol and asked him to prepare a revised will containing an option agreement. After interviewing Bernice privately, Kvalheim prepared a revised will granting Carol an option to buy the farm for $5000 within six months of Bernice's death. In all other respects the will remained the same as the one executed on January 30. Witnessing both wills were Kvalheim and his wife, Gretchen Kvalheim. Carol's option allowed her to buy property worth approximately $100,000. Bernice died in 1994.

At the hearing on the will, Bernice's family treating physician testified that he did not believe she possessed the necessary mental capacity in February 1991 to execute a valid will. Attorney Kvalheim testified otherwise and Carol, Sister Catherine and John also testified that their mother was mentally capable at that time. Both sides fully developed the facts surrounding the will signings, and asked the court to draw opposite inferences from them as to Bernice's mental capacity and Carol's alleged undue influence. This appeal results from the court's decision that Gerald failed to prove either mental incapacity or undue influence.

UNDUE INFLUENCE

The basic question in undue influence cases is whether the testator's free agency was destroyed. ***Estate of Hamm***, 67 Wis.2d 279, 294-95, 227 N.W.2d 34, 41 (1975). The four-step method of proving undue influence requires evidence of the testator's susceptibility, the beneficiary's opportunity to influence the testator, the beneficiary's disposition to influence and a coveted

result. ***In re Estate of Dejmal***, 95 Wis.2d 141, 155, 289 N.W.2d 813, 819 (1980). If the challenger to the will establishes three of those elements by clear, satisfactory and convincing evidence, only slight evidence of the fourth element is necessary. ***Id***.

A second two-step method of proving undue influence requires evidence that the beneficiary had a confidential and financial relationship with the testator and that suspicious circumstances surrounded the making and execution of the will. ***In re Estate of Becker***, 76 Wis.2d 336, 350-51, 251 N.W.2d 431, 437 (1977). Under either method, proof of undue influence may rest on circumstantial evidence because acts of undue influence are usually performed in secrecy. ***Hamm***, 67 Wis.2d at 288, 227 N.W.2d at 38.

The trial court's findings of fact in a probate proceeding were formerly reviewed under the great weight and clear preponderance of the evidence standard. ***Dejmal***, 95 Wis.2d at 154, 289 N.W.2d at 819. We now apply the clearly erroneous standard to the trial court's findings of fact, § 805.17(2), STATS., although the methodology of review remains the same. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). In reviewing whether the trial court clearly erred, we must examine the record "`not for facts to support a finding the trial court did not make or could have made, but for facts that support the finding the trial court did make.'" ***Dejmal***, 95 Wis.2d at 154, 289 N.W.2d at 819 (quoted source omitted).

There is sufficient evidence to support the trial court's finding that Gerald did not prove undue influence under the four-step method. It is undisputed that Carol had the opportunity to influence Bernice and that the will provided her with a coveted result. However, the evidence conflicted as to whether Bernice was susceptible to undue influence. While one could reasonably infer from her age and various infirmities, including Alzheimer's disease, that she was susceptible, the trial court chose the opposite inference based on the observations of Attorney Kvalheim, Sister Catherine and John. The court's decision to accept the testimony of those witnesses concerning Bernice's state of mind is one of weight and credibility that is not subject to review. ***Noll***, 115 Wis.2d at 644, 340 N.W.2d at 577. Additionally, as the trial court noted, there was no evidence presented that Carol was disposed to unduly influence her mother. Although the court might have reasonably inferred that disposition from Carol's close attendance to her mother during the

will conferences, the inference that her attendance showed innocent concern for her mother is also reasonable. When more than one reasonable inference can be drawn from the credible evidence, we must accept the inference chosen by the trial court. ***Id***.

The evidence also supports the trial court's determination that Gerald did not prove undue influence using the two-step method. Gerald proved a confidential relationship as a matter of law by showing that Bernice conveyed a power of attorney to Carol before the will signings. ***In re Estate of Friedli***, 164 Wis.2d 178, 187, 473 N.W.2d 604, 607 (Ct. App. 1991). Gerald contends that he also proved suspicious circumstances surrounding the planning and execution of the will. Primarily, he cites Carol's attendance at the three conferences with Attorney Kvalheim, her negotiations with Bernice during those conferences, and the fact that Bernice appeared to abruptly change her mind, and grant the option, just two days after signing the January 30 will. However, the trial court accepted as credible and gave due weight to testimony that explained away those circumstances. Bernice needed help with transportation and it was natural and understandable for her daughter to accompany her on errands. Attorney Kvalheim testified that he did not observe Carol pressure Bernice regarding the option, and that the decision to grant one on very beneficial terms was Bernice's alone, based on rational considerations. When Attorney Kvalheim wished to speak privately with Bernice, Carol excused herself without objection. It was Attorney Kvalheim's opinion, which the trial court accepted, that Bernice intended to grant Carol an option even when she signed the January 30 will. The only change of mind that occurred in the ensuing two days was Bernice's decision to make the option a part of the will as opposed to a separate agreement. The court also heard testimony from Sister Catherine and John that Bernice did not appear to be unduly agitated during this period of time, as she would have if she was being pressured or coerced in some way. Given this evidence, the trial court could reasonably infer that the will was not executed under suspicious circumstances, even though the opposite inference may have been available.

MENTAL CAPACITY

The testator must be of sound mind. Section 853.01, STATS. To satisfy this requirement the testator must have the mental capacity to comprehend the nature, extent and state of affairs of her property, an understanding of her relationship to potential beneficiaries, and the ability to understand the scope and general effect of the will. ***In re Estate of Sorenson***, 87 Wis.2d 339, 344, 274 N.W.2d 694, 696 (1979). Because Gerald is again challenging the trial court's findings of fact in support of its conclusion, we again use the clearly erroneous standard on review.

The facts of record support the trial court's finding that Bernice was mentally capable. Attorney Kvalheim testified that Bernice fully understood the nature of the option and its effect on Carol and her other children, and reasonably explained why she was favoring Carol at the others' expense. The trial court expressly found that testimony credible, as well as the testimony of Sister Catherine and John that supported it. Gerald argues that the trial court erred in doing so because that testimony conflicted with the opinion of her physician, Dr. Ruf. He contrasts Dr. Ruf's thorough examinations of Bernice over a period of time with what he describes as Attorney Kvalheim's cursory and nonmedical examination of Bernice's capacity. However, as the trial court noted, Dr. Ruf had no direct knowledge of Bernice's condition on the days she conferred with Attorney Kvalheim, nor had he ever examined her specifically for the purpose of determining her mental status. Furthermore, he conceded that Bernice's mental state was not a constant and her ability to comprehend may have been significantly enhanced at various times. On comparable facts, the supreme court in ***Becker*** declared that the trial court did not err by accepting the testimony of the attorney who drafted the will as to the testator's mental capacity, although it directly contradicted the generalized opinion of a treating physician. ***Becker***, 76 Wis.2d at 345, 251 N.W.2d at 434.

By the Court.—Order affirmed.

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