COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0319

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

IN RE THE ESTATE OF GEORGE T. HADDICAN:

DIANE HADDICAN-CZESTLER,

OBJECTOR-APPELLANT,

V.

MITCHELL J. BARROCK, ON BEHALF OF THE ESTATE OF GEORGE T. HADDICAN,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Diane Haddican-Czestler appeals from the December 17, 1997 probate court decision and order declaring valid the will of her father, George T. Haddican, and ordering that the will be admitted for probate.

She argues that the court erred in concluding she did not meet her burden to prove her contentions that the will was invalid due to: (1) her father's insane delusion; (2) her father's failure to comprehend fully the nature of his assets; (3) residual effects of two strokes her father suffered prior to execution of the will; and (4) undue influence. We reject her contentions and affirm.

I. BACKGROUND

George T. and Ethel Haddican had four children: Diane Haddican-Czestler, George Haddican, Jr., Thomas Haddican, and Antoinette (Haddican) Cattani. On September 29, 1992, Mr. Haddican executed the will at issue. In it, he nominates and appoints his sons as his personal representatives, divides his estate equally among three of his children (George, Jr., Thomas, and Antoinette), and specifically states that he makes no provision for his daughter, Diane. In previous wills, he had divided the estate equally among all four children.

Mr. Haddican died on December 20, 1995. Thomas and George, Jr., filed an application to admit the will to informal probate. Diane filed an objection to the proving and admission to probate of the will and demanded formal proceedings. As grounds for her objection, Diane claimed that her father was infirm, incompetent and unable to execute a valid will, and that the will was the product of undue influence. Diane also filed a petition seeking to undo her father's March 1992 inter vivos transfer of a joint tenancy in a $300,000 U.S. treasury note to Thomas, and seeking to add this treasury note to the estate.

Following a hearing and the submission of briefs, the court dismissed Diane's objections to the will, ruling that she had failed to establish "by clear, convincing and satisfactory evidence" that her father "lacked testamentary

capacity or was under undue influence" when he executed the will. The court declared the will valid and ordered that it be admitted for probate. Diane appeals.

II. DISCUSSION

In Wisconsin, a testator is required to:

> 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. A perfect memory is not an element of a testamentary capacity. 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.

Estate of O'Loughlin, 50 Wis.2d 143, 146-47, 183 N.W.2d 133, 136 (1971) (citation omitted). In a will contest, the objector must "show by clear, convincing and satisfactory evidence that the mind of the testator was deranged. The legal presumption is in favor of sanity and sufficient legal capacity to make a valid will, and the burden of showing such insanity or incapacity is upon the [objector]." ***Estate of Bickner***, 259 Wis. 425, 433, 49 N.W.2d 404, 408 (1951). The test of sufficiency of testamentary capacity is applied at the time of execution of the will, "even in situations where the testator has suffered periods of incapacity." ***Estate of Velk***, 53 Wis.2d 500, 504, 192 N.W.2d 844, 847 (1972). As an appellate court,

we review questions of law *de novo*. *See* ***State v. Ludwigson***, 212 Wis.2d 871, 875, 569 N.W.2d 762, 764 (Ct. App.1997). We are, however, obliged to uphold the lower court's factual findings unless they are clearly erroneous. *See* ***Estate of Taylor***, 81 Wis.2d 687, 696, 260 N.W.2d 803, 806 (1978).

Diane first argues that the will is invalid because, at the time it was executed, her father suffered from an insane delusion, mistakenly believing that she was retaining or stealing his social security and pension checks. She reasons that this delusion was material to the drafting of the will, that the respondent failed to rebut her contention, and that the will must therefore be rejected as a matter of law.

An insane delusion has been defined as "a false belief which would be incredible to the victim if he were of sound mind, and from which he cannot be dissuaded by any evidence or argument." ***Estate of Evans***, 83 Wis.2d 259, 271, 265 N.W.2d 529, 533-34 (1978). "The test of whether an erroneous belief is an insane delusion is whether a sane person could have formed such a belief from the evidence." ***Id.*** at 271, 265 N.W.2d at 534. Under Wisconsin law, an insane delusion "would not invalidate the will unless it materially affected the making of the testamentary disposition embodied therein." ***Will of Quam***, 10 Wis.2d 21, 28-29, 102 N.W.2d 217, 221 (1960). If it is "reasonably certain that but for the insane delusion, [a testator's] children would have received a substantial devise," then

"mental incapacity is sufficiently shown to invalidate the will made." ***Estate of Mahnke***, 6 Wis.2d 508, 513, 95 N.W.2d 405, 408 (1959).

Evidence at the hearing established that, in preparation for drafting Mr. Haddican's will, his attorney, John S. Spacek, made notes for himself on an earlier version of the will. The notes stated: "I remember my daughter[,] Diane Czestler[,] and make no provisions for her under this[,] my last will [and] testament" and "[d]uring time services rendered by Diane, she was paid by retaining social security checks and [L]adish pension." Diane asserts that she never retained her father's social security checks or pension and, therefore, she contends that Attorney Spacek's testimony and notations indicate the will excluded her as heir solely because of her father's insane delusion. She argues that because "there is no factual basis to support the deceased's sole stated reason for the change in his will," excluding her as an heir based upon the insane delusion invalidates the will as a matter of law.

As stated earlier, an insane delusion does not invalidate a will unless it has had a material effect upon its execution. *See* ***Quam***, 10 Wis.2d at 28-29, 102 N.W.2d at 221. The probate court noted that credible evidence indicated other factors may have influenced Mr. Haddican's decision to disinherit Diane. This evidence included: (1) Diane's testimony regarding a serious disagreement between her husband and her father which caused Diane to feel as though she had to choose between them; (2) Diane's testimony that she was estranged from her father from the time of that disagreement until shortly before her father's death; and (3) Thomas's testimony that their father was upset with Diane and her husband regarding a real estate transaction. The probate court concluded that, based on this evidence, it was not reasonably certain that but for Mr. Haddican's

belief that Diane was retaining his assets, he would have included her as one of his heirs. The evidence supports the court's conclusion.

Diane next argues that the will is invalid due to her father's failure to fully comprehend the nature, extent and state of affairs of his property at the time of execution. Attorney Spacek testified, however, that: (1) he had known Mr. Haddican for over fifty years; (2) he had always known him to be strong-willed and stubborn; (3) he believed him mentally competent to execute the will; and (4) Mr. Haddican knew what his assets were. Further, as the respondent points out, the evidence established that Mr. Haddican was living independently and managing his own finances during the time frame in which he purchased the treasury note. Additionally, George, Jr., Thomas, and Antoinette testified their father was in complete control of his checking account and had assumed responsibility for paying his household bills at the time surrounding the execution of the will. The probate court considered the evidence and found that Mr. Haddican was handling his own financial affairs and understood the nature of his assets; the evidence supports these findings.

Diane next argues that her father lacked testamentary capacity to execute the will due to residual effects of two strokes he had suffered. A testator, however, "needs only to have testamentary capacity at the time of executing the will; it is not necessary he is or remains competent for any great length of time before or after the execution." ***O'Loughlin,*** 50 Wis.2d at 147, 183 N.W.2d at 136. Bruce Chimelewski, an expert witness on neurorehabilitation, testified that Mr. Haddican had learned to compensate for post-stroke mental and physical problems to the point where he was able to live at home and accomplish his activities of daily living. Robert Sodlanek testified that he had known Mr. Haddican for over forty years, that they socialized on a regular basis, and that they were good friends

during the time the will was drafted; he believed that although Mr. Haddican had some residual physical problems related to the strokes, he was not impaired mentally. The probate court also noted evidence that Mr. Haddican had recovered sufficiently from the strokes to regain his driver's license, and found that "specific and credible testimony was presented that he was of completely sound mind and mentally competent" when he executed the will. Once again, the evidence supports the court's conclusion.

Finally, Diane argues that the will is invalid because of undue influence. A duly executed will is presumably valid, but this presumption may be overcome by clear, convincing and satisfactory evidence of undue influence. *See* ***Estate of Sensenbrenner***, 89 Wis.2d 677, 685, 278 N.W.2d 887, 890 (1979). To determine the existence of undue influence, the "ease in which a confidant can dictate the contents, and control or influence the drafting, of a will either as the draftsman or as one who procures the drafting" must be analyzed. *See* ***Estate of Malnar***, 73 Wis.2d 192, 204-05, 243 N.W.2d 435, 442 (1976). Only when an influence "becomes so strong it overpowers and compels the exercise of the will of the person subjected to it" is it considered to be undue. ***O'Loughlin***, 50 Wis.2d at 149, 183 N.W.2d at 138.

In Wisconsin, two methods may be used to establish undue influence. Under the first, the objector must prove: (1) the testator's susceptibility to undue influence; (2) an opportunity to unduly influence the testator; (3) a disposition to unduly influence the testator to "procure an improper favor"; and (4) the achievement of a coveted result. *See* ***Estate of Von Ruden***, 55 Wis.2d 365, 373, 198 N.W.2d 583, 586 (1972). When any three of the four elements are established by clear and convincing evidence, only slight evidence is needed to establish the fourth one. *See* ***Evans***, 83 Wis.2d at 281, 265 N.W.2d at 538. Under

the second method, the objector must establish the existence of: (1) a confidential or fiduciary relationship between the testator and the favored beneficiary; and (2) suspicious circumstances surrounding the making of the will. *See* ***Von Ruden***, 55 Wis.2d at 373, 198 N.W.2d at 586.

Under the four-factor test, "[a]ge, personality, physical and mental health and ability to handle business affairs" are to be considered when determining whether a testator was susceptible to undue influence. ***Estate of Kamesar***, 81 Wis.2d 151, 159, 259 N.W.2d 733, 738 (1977). As evidence of susceptibility to undue influence, Diane claims that her father's two strokes left him significantly impaired. As previously noted, however, Attorney Spacek testified that Mr. Haddican had been strong-willed and stubborn throughout the half century he had known him. George, Jr., testified that his father was strong-willed, mentally sharp, very determined to function independently, and definitely not easily influenced by others. Thomas testified that his father was strong-willed and that he was handling his own financial affairs. Antoinette testified that her father experienced post-stroke emotional lability but was very competent during the time frame in which he executed the will.

Regarding the opportunity to influence, Diane declares that because her father "relied upon Tom Haddican as power of attorney, … the element of opportunity to influence is satisfied." The respondent does not dispute that Thomas and the other beneficiaries had an opportunity to influence Mr. Haddican during the time he was estranged from Diane. Thus, Diane's evidence met the first test.

Regarding the second factor, "disposition to influence unduly involves more than just a desire to obtain a share of the grantor's estate. It implies

a willingness to do something wrong or unfair." ***Taylor***, 81 Wis.2d at 700, 260 N.W.2d at 807. Diane claims that this element is easily satisfied "due to George [,] Jr.'s animosity toward [her], T[homas]'s personal financial interest in the $300,000 [t]reasury [n]ote given to him by his father, and the fact that he concealed the [n]ote and the contents of the [w]ill from his sisters" until after their father's death. Diane relies upon a 1961 law review article and contends that Thomas's claim that he did not ask for the treasury note is irrelevant because it matters only that he received it and then concealed it. The article Diane cites states:

> [t]he same rules apply to proving undue influence in obtaining a gift as apply in obtaining a will. But the fact that a person with modest means parts with a substantial sum is sufficient evidence to prove the result; the fact that a donor had impaired mental faculties is indicative that he could be susceptible to influence; and concealment of the facts, as well as frequent requests for gifts, are indications of a disposition to influence.

George Kroncke, Jr., *A Decade of Probate Law*, 1 WIS. L. REV. 82, 93 (1961) (footnote omitted). More recent case law, however, emphasizes that a disposition to influence "implies grasping and overreaching, and a willingness to do something wrong or unfair." *See* ***Evans***, 83 Wis.2d at 282, 265 N.W.2d at 539. Diane offered nothing to establish that Thomas or her other siblings did anything wrong or unfair. The probate court found that Diane failed to meet her burden of proof regarding a disposition to influence; we agree.

Regarding the fourth factor, the coveted result element addresses the disposition's naturalness, given the totality of the circumstances. *See* ***Estate of Fechter***, 88 Wis.2d 199, 218, 277 N.W.2d 143, 152 (1979). Diane claims that she

met her burden of proof regarding this element simply because, under the will, she receives nothing while each sibling receives a one-third share. We disagree.

The fact that an alleged influencer is a named beneficiary does not establish the existence of a coveted result. *See* ***id.*** Diane testified she became estranged from her father in the summer of 1992 and had no further contact with him although she and her father were neighbors. George, Jr., Thomas, and Antoinette, however, continued to have regular contact with their father and were helpful to him. The probate court correctly concluded that although Diane was the only child excluded as an heir, this fact alone did not render the disposition unnatural. "[W]here the record shows that a testator was alienated from the natural objects of his affection or felt that they had abandoned him in his hour of need, a will may be natural even though it makes no provision for them." ***Evans***, 83 Wis.2d at 284, 265 N.W.2d at 539.

Under the two-prong test regarding undue influence, the first element must be established by proving the existence of either a confidential or a fiduciary relationship. Thomas held power of attorney over his father's affairs; as a matter of law, this satisfies the first prong. *See* ***Estate of Friedli***, 164 Wis.2d 178, 187, 473 N.W.2d 604, 607 (Ct. App.1991) (power of attorney creates fiduciary relationship). This court, therefore, need not address Diane's claim that her siblings enjoyed confidential relationships with their father during the months just prior to execution of the will.

The second prong of the test requires the existence of suspicious circumstances surrounding the making of the will. Suspicious circumstances may be established by evidence that: (1) the beneficiary participated in the drafting or execution of the will; (2) the testator was feeble-minded or weak and especially

vulnerable to influence; or (3) the provisions of the will are not natural and just. *See* ***Will of Faulks***, 246 Wis. 319, 359, 17 N.W.2d 423, 440 (1945). Diane claims that suspicious circumstances exist in the instant case because: (1) her father experienced strokes in 1990 and 1991; (2) her father suffered from an insane delusion that she was stealing his social security and pension checks; (3) when they received or were offered sizable treasury notes by their father, Thomas and George, Jr., held power of attorney over his affairs; and (4) Thomas failed to tell her about their father's 1992 will change or his inter vivos transfer of the $300,000 treasury note. Still, even if these claims could establish suspicious circumstances, the will would not be invalidated unless clear and convincing evidence also established that Mr. Haddican's free agency had been destroyed. *See* ***Sensenbrenner***, 89 Wis.2d at 686, 278 N.W.2d at 891. The probate court found no evidence of the destruction of Mr. Haddican's free agency. The evidence supports the court's conclusion.

By the Court.—Order affirmed.

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