

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

Appeal No. 01-2826

Cir. Ct. No. 98-CV-83

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**THE ESTATE OF LUCILLE A. SALWEY, BY CHIPPEWA
COUNTY FAMILY SERVICES, INC., HER SPECIAL
ADMINISTRATOR,**

PLAINTIFF-RESPONDENT,

V.

CONNIE S. KLEIN,

DEFENDANT-APPELLANT,

**M&I MORTGAGE CORPORATION AND FLEET MORTGAGE
CORPORATION,**

DEFENDANT.

APPEAL from a judgment of the circuit court for Buffalo County:
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Connie Klein appeals from a judgment in favor of the estate of Lucille A. Salwey, by Chippewa County Family Services, Inc., her special administrator (hereafter, the estate). The judgment requires Klein to pay the estate \$90,707 plus costs and imposes a constructive trust on Klein's home to ensure payment of the funds. The trial court determined that Salwey's gift of \$80,000 and other payments to Klein were made as the result of Klein's undue influence and that Klein violated her fiduciary duty to Salwey. On appeal, Klein argues that the court's determinations are erroneous. We affirm the judgment.

STATEMENT OF FACTS

¶2 The background facts are undisputed. In January 1995, Salwey, a seventy-seven-year-old widow, hired attorney Robert Hagness to assist her in contesting a guardianship proceeding. On February 1, after successfully defending the proceeding, Salwey executed a new durable power of attorney, changing her agent from her brother to Klein, a forty-seven-year-old friend. At the time, Salwey was living in a nursing home.

¶3 In July, Salwey and Klein decided to purchase a house for Klein. According to Klein, it was their intention that Salwey would be able to visit and spend time at the home. They selected a house, and Salwey gave the owner \$1,000 earnest money. On August 8, Salwey signed a gift affidavit in support of Klein's application for a mortgage, indicating that she would give Klein \$80,000. Klein purchased the home on August 16, using the \$80,000 gift and a \$50,000 mortgage. Only Klein's name appears on the deed.

¶4 Throughout 1995 and early 1996, Klein performed financial transactions for Salwey. In many instances, Klein made purchases and then reimbursed herself using Salwey's checking account.

¶5 In July 1996, Salwey was declared incompetent and Chippewa County Family Services, Inc., was named her guardian. Family Services was specifically ordered to investigate the relationship between Salwey and Klein to determine whether there was any misconduct. In a February 1997 report, Family Services concluded that Klein had used her position as Salwey's agent to divert Salwey's income and assets to herself. Specifically, the report alleged that Klein had provided inadequate accounting for \$12,019 in payments she made on Salwey's behalf and questioned the propriety of the \$80,000 gift to Klein.

¶6 On November 6, 1998, Family Services, acting as Salwey's guardian, filed this action against Klein. It alleged that Klein had wrongfully applied Salwey's funds. It asked the court to order Klein to repay Salwey.

¶7 Salwey subsequently died. Family Services amended its complaint to pursue the claims on behalf of Salwey's estate. It also added as defendants the mortgage companies that held a mortgage on Klein's house, which had been purchased with the \$80,000 gift.¹

¶8 The case was tried to the court. The court concluded that Klein had exercised undue influence over Salwey, resulting in payments of \$90,707 to Klein. It ordered Klein to repay the funds and imposed a constructive trust on her home to ensure payment. This appeal followed.

¶9 On appeal, Klein seeks reversal of the judgment, arguing that the trial court erroneously concluded that Klein (1) exercised undue influence over Salwey and (2) obtained \$90,707 from Salwey in violation of her fiduciary duty to

¹ The interests of those defendants are not at issue in this appeal.

Salwey as her agent. We affirm the judgment with respect to undue influence and therefore need not address Klein's second argument. *See Clark v. Waupaca County Bd. of Adj.*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (We need only address dispositive issues and decide the matter on the narrowest ground).

LEGAL STANDARDS

¶10 Undue influence in the execution of an inter vivos conveyance is proved in the same way that undue influence is proved in the execution of a will. *In re Estate of Taylor*, 81 Wis. 2d 687, 699, 260 N.W.2d 803 (1978). One of two methods of proving undue influence is to establish four elements: (1) susceptibility; (2) opportunity to influence; (3) disposition to influence; and (4) coveted result. *Id.* The burden is on the objector to prove by clear, satisfactory and convincing evidence that the conveyance was a result of undue influence. *See id.* However, when three of the four elements have been established by the required quantum of proof, only slight evidence of the fourth element is required. *Id.*

¶11 On appeal, we accept the trial court's factual findings with respect to undue influence unless they are clearly erroneous.² *See Mielke v. Nordeng*, 114 Wis. 2d 20, 25, 337 N.W.2d 462 (Ct. App. 1983). We will search the record for evidence to support the findings that the trial court made, not for findings that the

² *Mielke v. Nordeng*, 114 Wis. 2d 20, 25, 337 N.W.2d 462 (Ct. App. 1983), used the terminology "against the great weight and clear preponderance of the evidence" rather than "clearly erroneous." The clearly erroneous standard is the modern equivalent of the great weight and clear preponderance of the evidence standard. *See Neff v. Pierzina*, 2001 WI 95, ¶35 n.7, 245 Wis. 2d 285, 629 N.W.2d 177.

trial court could have made but did not make. *In re Estate of Becker*, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). It is for the trial court, not the appellate court, to resolve conflicts in the testimony. See *Fuller v. Riedel*, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

DISCUSSION

¶12 At issue are the trial court's findings with respect to susceptibility, opportunity to influence, disposition to influence and coveted result. See *Taylor*, 81 Wis. 2d at 699. We conclude that these findings are not clearly erroneous and affirm the judgment.

I. Susceptibility

¶13 With respect to the issue of an individual's susceptibility to undue influence, the court has stated that the factors to be considered are the person's age, personality, physical and mental health and ability to handle business affairs. *In re Estate of Dejmál*, 95 Wis. 2d 141, 156, 289 N.W.2d 813 (1980). If consideration of these factors demonstrates that the individual was unusually receptive to the suggestions of others and consistently deferred to them on matters of utmost personal importance, then the first element is established. *Id.* at 156-57.

¶14 Here, the trial court found that Salwey was seventy-seven years old and in frail health. The court noted that although Salwey was strong-minded, she was subject to influence by others. This was exhibited by Salwey's many changes

to her will and her attitude toward relatives and acquaintances. The court also found that Salwey was a thrifty person not known to give her property to others before the time period in question.

¶15 Credible evidence supports the trial court's finding. It was undisputed that during the time in question, Salwey, who was living in a nursing home, relied on Klein to serve as her power of attorney for both finances and health care. Additionally, Klein became Salwey's agent only after Salwey successfully defended a guardianship proceeding. Finally, Salwey's attorney, Hagness, testified that Salwey had admitted to him that she felt pressured about the disposition of her assets through her will.

¶16 Klein disputes the trial court's finding, arguing that because there was evidence that Salwey was strong-minded, the evidence did not prove that she was susceptible to the influence of others. It is the trial court's role, not the appellate court's role, to resolve conflicts in testimony. *See Fuller*, 159 Wis. 2d at 332. The court was free to rely on evidence that Salwey was susceptible to influence, and the record contains ample evidence on which the court could rely.

II. Opportunity to influence

¶17 The trial court found that Klein had the opportunity to influence Salwey. Klein concedes this element, stating:

It could be argued that Connie [Klein] had the opportunity to influence Lucille [Salwey] due to her attentiveness to Lucille. ... Connie had known and been close [to] Lucille since she was a teenager. As an adult Connie continued her close relationship with Lucille. Connie often visited with Lucille when she lived in both the independent care section and the full care sections of the nursing home. Connie was with Lucille when she died.

In light of Klein's apparent concession and the evidence supporting the trial court's decision, we will not disturb the court's finding on this element.

III. Disposition to influence

¶18 Disposition to influence implies a willingness to do something wrong or unfair. *First Nat'l Bank v. Nennig*, 92 Wis. 2d 518, 537, 285 N.W.2d 614 (1979). The trial court found that Klein had a disposition to wrongfully influence Salwey so that Salwey would give Klein a large gift. Klein disputes this finding, arguing:

Nothing in the testimony shows that Connie acted with a willingness to do something wrong or unfair. In fact, during the time period that Lucille gifted Connie with the down payment on her house Lucille met on at least two separate occasions with [bank employees]....

No testimony was presented that Lucille ever voiced a concern over the gift being made to Connie. Lucille was known to voice concerns over people treating her in an unfair [manner].

¶19 We nevertheless conclude that there is credible evidence to support the trial court's finding. For example, the court heard evidence that Salwey was concerned about Klein's involvement in the drafting of Salwey's will. Hagness testified that in February, he assisted Salwey in drafting a new will. He explained that the first draft of the will provided that Klein would receive one-half of Salwey's estate if she was still serving as Salwey's agent at the time of Salwey's death. Hagness mailed Salwey the draft in mid-February and asked her to review it.

¶20 Hagness then met with Salwey, and she told him that she wanted to distribute her estate differently than they had originally discussed. Hagness drafted a new will, pursuant to which Klein would receive \$5,000 and was

nominated to serve as Salwey's personal representative. Salwey executed the will on March 13.

¶21 On March 16, Hagness met with Salwey at the nursing home. With Salwey's permission, he tape-recorded a portion of their meeting to document his concerns about Klein's reaction to the March 13 will. This tape, which was played at trial, included the following introduction:

[HAGNESS]: We have been discussing for the last few minutes the concerns [Salwey] has related to Connie Klein who is now acting as her appointed attorney-in-fact pursuant to a durable power of attorney. This all resulted from Lucille signing a will a few days ago, which was then later read by Connie and Connie became quite upset. Connie then returned to [my law] office with Lucille saying Lucille wanted her to read it and that the Will was not what Lucille really wanted her to have. ... Lucille had assured me in advance that it was exactly the way that she wanted it to be. That she is now quite concerned about Connie's involvement and feels Connie may be attempting to assert more influence or to obtain more of her property.

¶22 Hagness then proceeded to discuss what had happened since Salwey executed the March 13 will:

[HAGNESS]: I understand that the way [the draft will] had been written before would have provided that it went to Connie and, if Connie hadn't lived, it went half and half to her children and to the Salvation Army.

[SALWEY]: Yes.

....

[HAGNESS]: And, of course, she shouldn't have seen that Will either, in my opinion. I don't know why you're sharing this with her. And you should not do that.

[SALWEY]: I know I shouldn't have. But it was her coaxing on me, her coaxing me, because she wanted to know all where the money went to, see.

[HAGNESS]: Yah. Well, I'm still saying that you should not do it anyway.

[SALWEY]: No. No. No more. I know. ... But she – Now, just recently, she had her daughter move up to Eau Claire.

[HAGNESS]: Well, that's all right.

[SALWEY]: Yah. But then where did they get the money? They [were] planning on me for the money.

¶23 Later in the conversation, Salwey again addressed her perception of Klein's intentions with respect to Salwey's estate:

[SALWEY]: All of this came about because Connie is the one that stirred me up so bad.

[HAGNESS]: Yah.

[SALWEY]: Because she was just grabbing and grabbing and grabbing. That's why her daughter went to Eau Claire to live, off of my money monthly. And it isn't supposed to be that way.

[HAGNESS]: You're referring to – When you said you felt like she kind of prompted you in giving her the \$500 a month [as payment for being her agent].

[SALWEY]: Oh, yes. That's right.

[HAGNESS]: Okay.

[SALWEY]: Well, I mean I was sick. And I'm a lot, lot better now. And now I want it the right way. And she isn't here, and I don't want her here.

[HAGNESS]: Okay. So she's not going to have anything to do with your Will.

[SALWEY]: No.

Ultimately, Salwey executed a new will on March 16 that still gave Klein \$5,000, but no longer nominated her to be the personal representative. This evidence is

sufficient to sustain the trial court's finding that Klein had the disposition to wrongly influence Salwey into giving Klein a large gift.

IV. Coveted result

¶24 The element of coveted results goes to the naturalness or expectedness of the conveyance. *First Nat'l Bank*, 92 Wis. 2d at 538. This element has been said to signify more than simply a result favorable to the person who is alleged to have exerted undue influence. *Dejmal*, 95 Wis. 2d at 159. Whether a conveyance is unnatural must be determined from a consideration of all the surrounding circumstances. *In re Estate of Fechter*, 88 Wis. 2d 199, 218, 277 N.W.2d 143 (1979).

¶25 The trial court found that Klein's "coveted result of obtaining substantial sums of money from Lucille's assets occurred during the period Connie was her attorney-in-fact." This finding is not clearly erroneous. The court found that between February 1, 1995, and July 12, 1996, the value of Salwey's assets decreased from \$158,752 to \$35,658. Additionally, Hagness testified that he and Salwey had discussed preserving her estate. At trial, he read a portion of a letter that he wrote to Salwey on February 9 summarizing their estate planning discussions:

We agreed that no drastic action should be taken to reduce your net worth through giving away your property. You feel strongly that you and your husband worked hard to accumulate what you have and you don't wish to squander it or to voluntarily impoverish yourself.

If you learn you are going to become totally unable to live independently and you knew of some person with a great financial need, you certainly would consider that situation at the time. You don't have that situation now. So you plan to retain what you were able to save over the years.

¶26 Klein argues that Salwey voluntarily gave Klein the money to purchase her home, as well as funds to make several mortgage payments, because Salwey wanted to help Klein. She notes that Salwey, a widow, had no children and had minimal contact with her other family members. Accordingly, Klein contends it would be natural for Salwey to give her a gift. The trial court was free to adopt Klein's position, but instead resolved conflicts in the testimony in the estate's favor. See *Fuller*, 159 Wis. 2d at 332. When more than one reasonable inference can be drawn, the reviewing court must accept the inference drawn by the trier of fact. *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Because there is credible evidence to support the court's findings, we will not disturb them.

By the Court.—Judgment affirmed.

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