NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0639

SUCCESSION OF JULES G. FOLSE

CONSOLIDATED WITH

NO. 2011 CA 0640

SUCCESSION OF SHIRLEY B. FOLSE

J.P.P.
JEW
by JP

Judgment rendered February 13, 2012.

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Appealed from the
17th Judicial District Court
in and for the Parish of Lafourche, Louisiana
Trial Court Nos. 20696 & 20697
Honorable Jerome J. Barbera, III, Judge

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PLAINTIFF-APPELLEE
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ATTORNEYS FOR
DEFENDANTS-APPELLANTS
(CHILDREN OF JULES G.
FOLSE) GLORIETTA CHIASSON,
MAUREEN FORET, BRYAN
FOLSE, KURT FOLSE, AND
MONICA HOFFPAUIR

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McClendon, J. concurs and assigns reasons.

PETTIGREW, J.

Appellants challenge the trial court's determination that decedent's November 14, 2007 will was valid and should be probated according to law. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This proceeding arises out of the succession of Shirley B. Folse, who died on December 10, 2007. Mrs. Folse was married but once to Jules G. Folse, who predeceased her. Mrs. Folse was survived by nine children: Gerard A. Folse, Glorietta A. Chiasson, Maureen C. Foret, Ferrel P. Folse, Bryan J. Folse, Kurt F. Folse, Madonna A. Eschette, Monica C. Hoffpauir, and Angela M. Falgout. On January 11, 2008, Madonna A. Eschette filed a petition to probate her mother's will and be confirmed as independent executrix of the estate.[1] Attached to the petition was an affidavit of death and heirship and a copy of the November 14, 2007 last will and testament at issue. In response to said petition, five of Madonna's siblings, namely, Monica, Bryan, Maureen, Glorietta, and Kurt (hereinafter referred to as the "Folse siblings"), filed a petition to annul the November 14, 2007 will, alleging lack of testamentary capacity and undue influence. The matter proceeded to a bench trial.

Various witnesses for the parties gave conflicting testimony at trial regarding Mrs. Folse's capacity, or lack thereof, and whether she was coerced into signing the instrument by undue influence. After hearing testimony and considering the evidence in the record, the trial court gave extensive oral reasons for judgment wherein it determined that the November 14, 2007 will was valid. The trial court acknowledged that the inquiry was very fact intensive and concluded that the Folse siblings had failed

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[1] The petition concerning the succession of Mrs. Folse was filed under docket #20697. Also filed that same day by Madonna was a separate petition under docket #20696 to probate the August 18, 1999 will of her deceased father, Jules G. Folse. On March 31, 2008, Madonna filed a motion to consolidate the two actions for the purposes of trial. The motion to consolidate was signed by the trial court on April 2, 2008. Following a trial on the merits concerning both wills, there was a February 18, 2009 consent judgment signed by the trial court declaring the August 18, 1999 last will and testament of Jules G. Folse null and void and also declaring the revocable living trust agreement executed by Jules G. Folse and/or Shirley B. Folse on August 18, 1999, null and void. This February 18, 2009 consent judgment is not at issue in the appeal that is before us now.

to carry their burden of proving by clear and convincing evidence that the will executed by Mrs. Folse on November 14, 2007 was the result of undue influence or that Mrs. Folse lacked capacity on November 14, 2007, when she executed the will. Judgment was signed accordingly on February 18, 2009. From this judgment, the Folse siblings appeal, arguing the trial court erred (1) in finding that Mrs. Folse was not unduly influenced when she executed the will; (2) in finding that Mrs. Folse had capacity to execute the will; and (3) by not considering the totality of the medical records when making its ruling.

APPLICABLE LAW

Testamentary Capacity

Capacity to donate *mortis causa* must exist at the time the testator executes the testament. La. Civ. Code art. 1471. To have capacity to make a donation *mortis causa,* a person must be able to comprehend generally the nature and consequences of the disposition that he is making. La. Civ. Code art. 1477. There is a presumption in favor of testamentary capacity. **Succession of Lyons**, 452 So.2d 1161, 1164 (La. 1984). A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor executed the testament. La. Civ. Code art. 1482(A). To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence. **In re Succession of Crawford**, 2004-0977, p. 8 (La. App. 1 Cir. 9/23/05), 923 So.2d 642, 647, writ denied, 2005-2407 (La. 4/17/06), 926 So.2d 511.

The issue of capacity is factual in nature, and the trial court's finding that the testator possessed or lacked capacity will not be disturbed on appeal in the absence of manifest error. **In re Succession of Brantley**, 99-2422, p. 5 (La. App. 1 Cir. 11/3/00), 789 So.2d 1, 4, writ denied, 2001-0295 (La. 3/30/01), 788 So.2d 1192. The trial court may consider medical evidence, other expert testimony, and lay testimony in the evaluation of mental capacity; as such, there is no "litmus paper" test to apply to the evaluation of mental capacity. La. Civ. Code art. 1477, Revision Comment (f);

Cupples v. Pruitt, 32,786, p. 8 (La. App. 2 Cir. 3/1/00), 754 So.2d 328, 333, writ denied, 2000-0945 (La. 5/26/00), 762 So.2d 1108. Where factual findings are based on determinations regarding the credibility of witnesses, the findings of the trial court are entitled to great deference. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671.

Undue Influence

Louisiana Civil Code Article 1479 provides that a donation *inter vivos* or *mortis causa* shall be declared null "upon proof that it was the product of influence by the donee or another person *that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.*" (Emphasis added.) The burden of proof for one challenging a donation based on "undue influence" is found in La. Civ. Code art. 1483 (emphasis added):

> A person who challenges a donation because of fraud, duress, or undue influence, *must prove it by clear and convincing evidence.* However, if, at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

As with testamentary capacity, the trial court's finding of, or failure to find, undue influence is fact intensive, and such a finding cannot be disturbed on appeal in the absence of manifest error. **In re Succession of Gilbert**, 37,047, p. 4 (La. App. 2 Cir. 6/5/03), 850 So.2d 733, 735-736, writ denied, 2003-1887 (La. 11/7/03), 857 So.2d 493. Reversal is warranted only if the appellate court finds that no reasonable factual basis for the trial court's finding exists in the record, and that the finding is clearly wrong. **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987).

When seeking to annul a donation on the basis of undue influence, it is not sufficient to merely show that the donee exercised some degree of influence over a donor; instead, the challenger must show that the donee's influence was so substantial that the donee substituted his or her volition for that of the donor. See **Succession of Anderson**, 26,947, pp. 2-4 (La. App. 2 Cir. 5/10/95), 656 So.2d 42, 44-45, writ denied, 95-1789 (La. 10/27/95), 662 So.2d 3. To annul a testamentary disposition on the basis

of undue influence, the influence must be operative at the time the testament is executed. **Gilbert**, 37,047 at 5, 850 So.2d at 736. When the evidence shows that the execution of a testament was well within the discretion of the testator, the court should find that the testator's volition has not been substituted by the volition of any donee. *Id.*

DISCUSSION

On appeal, the Folse siblings contend that based on the totality of the circumstances herein, the evidence certainly indicates that the existence of undue influence is highly probable. They further argue it is plausible that taking into account Mrs. Folse's "assortment of health problems[,] ... old age, delusions, various medications, opinions of the witnesses, and radiation therapy at the time of confecting her last testament," that she could not understand the nature and consequences of her actions. In response, Madonna asserts that as much as her siblings would like to "stretch the testimony," they simply did not meet their burden of proving by clear and convincing evidence that Madonna's influence was so substantial that she substituted her volition for that of Mrs. Folse. Moreover, regarding Mrs. Folse's capacity to execute the will, Madonna argues that the trial court's reasons for judgment show that it considered not only her capacity on the day of the execution of the will, but also on the days, weeks, and months prior to the execution of the will. Madonna notes that the trial court reviewed "the nurse's notes, the 'affidavit of facts', the testimony of family members and non family members and correctly concluded that [Mrs.] Folse was in her right frame of mind when she executed the will on November 14, 2007."

Under the manifest error standard of review, a trial court's reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review, even though the court of appeal is convinced that had it been the trier-of-fact, it would have weighed the evidence differently. **Driscoll v. Stucker**, 2004-0589, pp. 17-18 (La. 1/19/05), 893 So.2d 32, 46. As the trier-of-fact, a trial court is charged with assessing the credibility of witnesses and, in so doing, is free to accept or reject, in whole or in part, the testimony of any witness. **Pelican Point Operations, L.L.C. v.**

Carroll Childers Co., 2000-2770, pp. 7-8 (La. App. 1 Cir. 2/15/02), 807 So.2d 1171, 1176, writ denied, 2002-0782 (La. 5/10/02), 816 So.2d 293. When factual findings are based upon determinations regarding the credibility of witnesses, the manifest error standard demands that great deference be accorded to the trier-of-fact's findings. **Hitchen v. Southland Steel**, 2005-1708, p. 5 (La. App. 1 Cir. 6/9/06), 938 So.2d 123, 126.

In the case *sub judice*, after hearing two days of testimony from various witnesses and considering the documentary evidence[2] in the record, the trial court concluded that the Folse siblings had failed to meet their burden of proving by clear and convincing evidence that the will executed by Mrs. Folse on November 14, 2007, was the result of undue influence. The trial court reasoned that there was nothing in evidence to show that Mrs. Folse was suffering from any medical condition that "made her easy to influence or that her will could have easily been replaced by someone else's will." Of particular interest, the trial court noted that Mrs. Folse had executed an affidavit in May 2007, almost six months before she died, and that the terms of the affidavit were almost identical to the terms of the November 14, 2007 will in question. The trial court stated, "So, what that tells me is that six months before she died, she had already made a decision about what she wanted to do. ... The issue is, is that what she did on November 14, 2007 is exactly what she intended to do as early as six months before."

With regard to testamentary capacity, the trial court found no evidence that Mrs. Folse lacked capacity. In fact, the nurse's notes from November 30, 2007, just ten days before Mrs. Folse's death, indicate Mrs. Folse was alert and oriented, her memory was intact, her speech was clear, and her behavior was appropriate. Thus, the trial court

[2] We find no merit to the Folse siblings' argument on appeal that the trial court did not consider the totality of the medical records in making its ruling. It is abundantly clear from a review of the trial court's oral reasons for judgment that the trial court's ruling was based on an adequate review of the medical evidence in the record. The trial court found that there was simply no medical evidence in the record to support a finding that Mrs. Folse was "suffering from dementia or that she was somehow out of her mind or subject to influence, undue influence by other people because of her physical and, therefore, her mental condition."

found the Folse siblings failed to carry their burden of proof by clear and convincing evidence that Mrs. Folse lacked testamentary capacity.

We have thoroughly reviewed the record before us and find no error in the trial court's judgment. The Folse siblings failed to satisfy their burden of proving by clear and convincing evidence that Mrs. Folse lacked testamentary capacity and that the November 14, 2007 will was the product of undue influence. The trial court's reasonable evaluations of credibility and reasonable inferences of fact must be afforded great deference. The trial court did not err in declaring that the November 14, 2007 will was valid and should be probated according to law. The arguments made by the Folse siblings on appeal are without merit.

CONCLUSION

For the above and foregoing reasons, we affirm the February 18, 2009 judgment of the trial court in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B. All costs of this appeal are assessed against appellants, Monica C. Hoffpauir, Bryan J. Folse, Maureen C. Foret, Glorietta A. Chiasson, and Kurt F. Folse.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0639

SUCCESSION OF JULES G. FOLSE

CONSOLIDATED WITH

2011 CA 0640

SUCCESSION OF SHIRLEY B. FOLSE

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McCLENDON, J., concurs and assigns reasons.

Based on the deference owed to the trier of fact, I concur with the result reached by the majority.