

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-18-318

IN THE MATTER OF ESTATE OF
ROBERT M. JELINEK, JR.,
DECEASED

MARIE GUSTIN

APPELLANT

V.

ANGELA TROTTER

APPELLEE

Opinion Delivered December 12, 2018

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FOURTEENTH DIVISION
[NO. 60PR-17-488]

HONORABLE VANN SMITH, JUDGE

AFFIRMED

N. MARK KLAPPENBACH, Judge

Appellant Marie Gustin appeals the December 11, 2017 order of the Pulaski County Circuit Court denying her motion to set aside the February 6, 2017 will of the decedent, Robert Jelinek, Jr., who died on February 19, 2017. Gustin contended that the decedent's will was procured by appellee Angela Trotter and was the product of Trotter's undue influence over the decedent, but the probate court rejected Gustin's contentions. On appeal, Gustin argues that the probate court clearly erred in finding that Trotter did not exert undue influence over the decedent. We affirm.

We review probate matters de novo but will not reverse the circuit court's findings of fact unless they are clearly erroneous. *Shepherd v. Jones*, 2015 Ark. App. 279, 461 S.W.3d 351. A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left on the entire evidence with the firm conviction that a mistake has been committed. *Id.* We must also defer to the superior position of the lower court sitting

in a probate matter to weigh the credibility of the witnesses. *Darr v. Billeaudeau*, 2018 Ark. App. 16, 541 S.W.3d 460.

The evidence presented to the probate court revealed that Jelinek met Trotter and her husband-to-be, Jimmy Wood, in April or May 2016. Jelinek, a man in his early sixties, was a widower with no children; he was described as a free spirit and an old hippie. His parents were deceased, and his only remaining relatives were two cousins, one of whom is appellant Gustin. Jelinek and Gustin had not seen each other in years.

Wood and Trotter met Jelinek because Wood had worked on remodeling a house in Texas that Jelinek had sold. Trotter and Wood helped Jelinek move some of his belongings from Houston to his parents' home in Little Rock, and the three became close friends. In September 2016, Trotter and Wood moved in with Jelinek in his Little Rock home. Trotter did all the household cooking, cleaning, and shopping, and she drove Jelinek (who did not have a driver's license due to DWIs) as needed, including to doctor appointments and back and forth to Texas. Trotter did not work; she received \$735 per month in disability benefits for her bipolar disorder. Wood did repairs around the house. Neither of them was paid for these services, but Jelinek provided them a place to live.

In November 2016, Jelinek was diagnosed with Hodgkin lymphoma. Trotter believed that, up to that point, Jelinek had some depression, a heavy smoking habit (cigarettes and marijuana), and a history of alcoholism, but no other major physical or mental ailments.

Jelinek contacted his attorney, Guy "Randy" Satterfield, to draft a power of attorney to name Trotter as his attorney-in-fact. Wood drove Jelinek to the attorney's office, and

Trotter rode with them, but she remained in the waiting room for the duration of Satterfield's meeting with his client. This power of attorney was executed on November 14, 2016.

On January 11, 2017, Trotter took Jelinek to the hospital because he had shortness of breath. Jelinek's primary diagnosis on admission was pneumonia, but the medical records revealed additional medical issues, including COPD, septic shock, his cancer, MRSA, and an acute lower gastrointestinal bleed. Trotter spent almost all her time with Jelinek during his hospitalization, leaving only to shower. On February 6, 2017, Jelinek's doctors advised him to get his affairs in order very soon. He was in respiratory failure due to end-stage lung disease. Jelinek wrote a note to Trotter to call Satterfield.¹ Satterfield arrived the same day and drafted Jelinek's will while Trotter waited in the hallway. The will was executed the same day, and the two witnesses were Jelinek's accountant, Deborah Minor, and Satterfield. Trotter was not present during the signing of the will.

Minor had been the accountant for Jelinek's parents, and she worked for Jelinek as well. Minor had concerns and suspicions about Trotter, but in her view, Jelinek never wavered on the bequests he wanted to make. She recalled a conversation long before his hospitalization wherein Jelinek said he wanted to give something to the people who had taken care of his mother. Minor was confident that when she witnessed the will, Jelinek understood the contents of the will as written and that he was competent when he executed it.

¹Jelinek had been on a ventilator.

Trotter said she was unaware that she was a beneficiary, but the medical notes indicated that Jelinek did inform Trotter that she would be the beneficiary of his will. Jelinek was transferred to a hospice facility on February 9, and he died on February 19, 2017.

Trotter informed Satterfield of Jelinek's death, and the will was read to Trotter and Wood. Trotter was the primary beneficiary of the will, receiving Jelinek's house in Little Rock and the residue of his entire estate including a family trust. Jelinek made other specific bequests to friends, neighbors, his mother's caretakers, and the caretakers' church, none of whom had any relationship to Trotter.² Trotter filed a petition to probate the will and appoint herself as administratrix on March 8, 2017, and it was admitted and approved in an order filed on March 9, 2017.

In May 2017, Gustin, one of Jelinek's two surviving first cousins, filed a petition to set aside the order admitting the will to probate. Gustin argued that Trotter (1) had procured the will and (2) had exercised undue influence over Jelinek prior to his hospitalization, given his ill health and her short-term-but-close relationship with him. There was no contention that Jelinek lacked capacity to execute the will because he was sharp and alert up until his death, and Gustin conceded that there was no undue influence exerted on February 6, 2017, the date the will was created and executed.

Gustin had not seen Jelinek since 1976, although she claimed that she and Jelinek grew up in a close-knit Catholic family. Gustin lived out of state and had not visited Jelinek, but she said that she kept in touch with cards, letters, and texts. Jelinek's mother had died

²Jelinek gave \$5000 to Tamela Washington (his mother's caretaker), \$5000 to Portia Washington (his mother's caretaker), \$2000 to Janet Murphy (his friend), \$1000 to Jim Eager (his neighbor), \$1000 to Jan Eager (his neighbor), and \$10,000 to New Bethel Baptist Church in Little Rock (Tamela and Portia Washington's church).

in 2015, and Gustin was a beneficiary of her will, but Gustin did not attend her funeral because she did not learn of her death until after the fact. Gustin said that Jelinek had written to her about his mother's death and had written down his cell phone number. Gustin believed that Jelinek was an alcoholic and that he smoked marijuana all the time; he had told her of two DWIs. Gustin contended that Trotter had taken advantage of her short friendship with a very-ill Jelinek.

Trotter agreed that Jelinek had received a Christmas card that year from Gustin but that he never had very positive things to say about her. Trotter noted that Jelinek had changed cell phones when he moved from Texas to Arkansas, so if Gustin used the Texas phone number, he never got those messages. Trotter said that she (Trotter) was like a daughter to Jelinek. Trotter stated that she did not have Gustin's contact information to give to the attorney when Jelinek died. Trotter explained who the individuals were who received specific monetary bequests from Jelinek, and she remembered that Jelinek went with his mother's caretakers to their Baptist church a couple of times even though he was Catholic.

The probate court ultimately found that there was no procurement, which Gustin does not contest on appeal. The probate court found that Trotter did not exercise undue influence over the decedent prior to his hospitalization, stating that Gustin had failed to present any evidence of physical coercion exerted against Jelinek or any fear exhibited by Jelinek. The probate court acknowledged that Trotter's friendship with Jelinek less than a year before his death and her having moved into his house mere months prior to his hospitalization and death could be considered suspicious circumstances. The probate court

found, however, that the evidence showed Jelinek was never in a weakened mental state up until his death, and Gustin had failed to present any evidence to indicate otherwise leading up to his hospitalization. The probate court found that despite Gustin's claim that she and Jelinek were close, there was "no real, positive relationship" between them, so it was "not impossible, therefore, that Mr. Jelinek would draft a will providing for those that he was close to in his last days as opposed to distant relatives." The probate court decided that on the totality of the circumstances, "there is no indication that Ms. Trotter took any steps to overcome Mr. Jelinek's free will" and that there was no evidence of undue influence in the time leading up to the will's execution. Gustin's appeal followed.

Arkansas caselaw related to undue influence is as follows. The party contesting the validity of the will has the burden of proving by a preponderance of the evidence that the testator lacked mental capacity at the time the will was executed or that the testator acted under undue influence. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). The existence of a confidential relationship between a primary beneficiary and a testator gives rise to a rebuttable presumption of undue influence. *Simpson v. Simpson*, 2014 Ark. App. 80, 432 S.W.3d 66. A confidential relationship arises between a person who holds power of attorney and the grantor of that power. *Darr, supra*.

The questions of mental competency and undue influence are so closely related and interwoven that we consider them together. *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963). In a case in which the mind of the testator is strong and alert, the facts constituting undue influence would be required to be far stronger than a case in which the mind of the testator was impaired, such as by disease or advancing age. *Short v. Stephenson*,

238 Ark. 1048, 386 S.W.2d 501 (1965). Testamentary capacity means that the testator must be able to retain in his mind, without prompting, the extent and condition of his property, to comprehend to whom he is giving it, and relations of those entitled to his bounty. *Id.* Undue influence is defined as not the legitimate influence which springs from natural affection but the malign influence that results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property. *Darr, supra.* Undue influence may be inferred from the facts and circumstances of a case, and cases involving questions of undue influence will frequently depend on a determination of witness credibility. *Id.* A testator has the legal right to dispose of his or her property in any manner that he or she sees fit, even if the disposition might appear on its face to be unnatural or inequitable, so long as such disposition expresses the will of the testator. *Dunklin v. Black*, 224 Ark. 528, 275 S.W.2d 447 (1955); *Breckenridge v. Breckenridge*, 2010 Ark. App. 277, 375 S.W.3d 651.

In this case, Gustin conceded that the testator possessed testamentary capacity at the time he executed his will, and Gustin does not contest the probate court's finding that Trotter did not procure the will. Thus, we are limited to reviewing the finding that the testator was not subjected to undue influence in the time leading up to the testator's hospitalization. Trotter clearly had a confidential relationship with the testator due to her having his power of attorney, giving rise to a rebuttable presumption of undue influence. Nonetheless, we see no clear error in the probate court's order. On de novo review, it is clear that, based on the weight of the evidence and the credibility determinations made by the probate court, Trotter effectively rebutted the presumption of undue influence.

Jelinek gave bequests to friends who were important to him and to a church he had attended, and he gave the remainder to Trotter, who had cared for him in the months leading up to his death. A testator's decision to favor a person with whom he had developed a close and affectionate relationship is not, of itself, proof that the favored beneficiary procured the will by undue influence. *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999). The issue of undue influence will frequently depend on the credibility of witnesses, and we give due deference to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *See Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001). Jelinek was a widower with no children. Jelinek formed a close friendship with Trotter and entrusted her with his power of attorney. Jelinek relied on Trotter to provide him with personal care and transportation and to run his household. The probate court found that he did not have a close relationship with his cousin Gustin, whom he had not seen since 1976 and with whom he had limited contact. Jelinek was competent, despite his illnesses, to decide the disposition of his estate. After our de novo review of the evidence in this case, we are not convinced that the probate court clearly erred in rejecting Gustin's claim of undue influence and in denying Gustin's motion to set aside the will.

Affirmed.

GRUBER, C.J., and VAUGHT, J., agree.

Richard E. Worsham, for appellant.

Satterfield Law Firm, by: *Guy "Randy" Satterfield*, for appellee.