

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1108

IN THE MATTER OF THE SUCCESSION OF WILLIE Z. FINCH

JEK by JEW
ESB by JEW
JEW

Judgment Rendered: APR 11 2007

Appealed from the 21st Judicial District Court
in and for the Parish of Tangipahoa
State of Louisiana
Probate Number 2004-030265

Honorable Zorraine M. Waguespack, Judge

Sherman Q. Mack
Albany, LA
and
Charles V. Genco
Amite, LA

Counsel for Appellant
Willie R. Finch

Erik L. Burns
Denham Springs, LA

Counsel for Appellees
Linda Dianne Finch Pieri,
James Allen Finch, and
Cheryl Lynn Finch Serpas

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AFFIRMED

KUHN, J.

Appellant contends the trial court erred in determining that a testator lacked the capacity to execute a notarial testament on January 29, 2004. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

This proceeding arises out of the Succession of Willie Z. Finch, who died on July 31, 2004. Mr. Finch was survived by five children: Linda Dianne Finch Pieri, James Allen Finch, Cheryl Lynn Finch Serpas, David Marcel Finch, and Willie R. (“Billy”) Finch. On August 9, 2004, Linda, James, Cheryl, and David filed a petition to open succession proceedings. Attached to their petition was a notarial testament dated March 16, 2002; however, the petitioners disputed the validity of this testament. Although it contained factual information relative to Willie Z. Finch, all references to the testator within the document as well as the signature bore the name “Willie R. Finch.”

In July 2005, Billy filed for probate a subsequent notarial testament executed by his father on January 29, 2004, which named Billy as sole heir. Billy’s siblings countered that this testament was likewise invalid, because their father lacked testamentary capacity at the time of its execution.

At trial, various witnesses for the parties gave conflicting testimony regarding Mr. Finch’s capacity, or lack thereof. After taking the matter under advisement, the trial court issued written reasons for judgment wherein it determined that the January 29, 2004 notarial testament was invalid because Mr. Finch lacked testamentary capacity at the time of its execution. Judgment was signed accordingly on December 29, 2005. From this judgment, Billy appeals.

APPLICABLE LAW

Capacity to donate *mortis causa* must exist at the time the testator executes the testament. La. C.C. 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. C.C. 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. C.C. 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. 1st 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. 1st 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. *Cupples v. Pruitt*, 32,786, p. 8 (La. App. 2d 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. 1st Cir. 9/17/04), 884 So.2d 665, 671.

DISCUSSION

On appeal, Billy contends that the trial court erred in determining that the appellees satisfied their burden of proof because they failed to offer any medical evidence or expert medical testimony establishing Mr. Finch's lack of capacity. However, we note that a trial court is permitted to consider various types of evidence relative to a testator's capacity or lack thereof; there is no "litmus paper" test to apply to the evaluation of mental capacity. La. C.C. art. 1477, Revision Comment (f); *Cupples*, 32,786 at p. 8, 754 So.2d at 333. Hence, the mere fact that the appellees did not present any medical evidence or expert testimony does not, in and of itself, preclude a finding that Mr. Finch lacked the necessary capacity.

Alternatively, Billy argues that none of the appellees saw Mr. Finch on January 29, 2004, rendering them unable to provide any testimony regarding Mr. Finch's capacity at the time he executed the will. However, he posits that other witnesses did see Mr. Finch on that date, and they testified that Mr. Finch was mentally capable of understanding the nature and consequences of his actions. Thus, Billy argues that the evidence establishes, at the very least, that Mr. Finch experienced a lucid interval on January 29, 2004. We disagree.

The 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. *See Morrison v. Morrison*, 97-0295, p. 5 (La. App. 1st Cir. 9/19/97), 699 So.2d 1124, 1127. In the case *sub judice*, the trial court expressly found the testimony of the appellees to be credible in this matter as opposed to that offered by other witnesses. The appellees' testimony established that Mr. Finch began to experience dementia, and that his mental capabilities began to progressively decline in early 2002, such that he was

unable to handle his affairs or understand the legal consequences of his actions in the year prior to his death. In crediting the appellees' testimony, the trial court presumably concluded that Mr. Finch was generally and habitually incapacitated and that it was highly probable that he lacked capacity at the time he executed the January 29, 2004 testament. The trial court's conclusion is buttressed by documentary evidence in the record. The March 2002 notarial testament reflects that Mr. Finch was unable to sign his name correctly at that time. Additionally, correspondence from Mr. Finch's attorney in late 2003 described him as "totally incoherent" and mentally and physically unable to give a deposition. Finally, the undisputed testimony establishes that Mr. Finch's other children provided him with care and assistance, contradicting Mr. Finch's alleged explanation for executing the disputed January 2004 testament. Accordingly, we cannot say the trial court was manifestly erroneous in concluding that Mr. Finch lacked the necessary capacity.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed to Willie R. Finch.

AFFIRMED.