STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of MARION E. BURNETT, Deceased.

JEFFERY BURNETT,

Petitioner-Appellant,

v

MARGO SABOURIN and GRANT BURNETT,

Respondents-Appellees.

UNPUBLISHED
October 19, 2001

No. 227455
Chippewa County Probate Court
LC No. 99-024256-SE

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Petitioner appeals by right from the trial court's admission of decedent's 1989 will into probate following a jury verdict that petitioner exercised undue influence over decedent and that decedent lacked testamentary capacity to make a 1997 will. We affirm.

We first hold that petitioner's appeal is improperly presented. Although the jury found the 1997 will to be invalid based on the grounds of (1) lack of testamentary capacity, and (2) undue influence, petitioner appeals two issues with regard to only one (undue influence) of the two mutually exclusive grounds. Petitioner was required to address all the bases for the jury verdict. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Therefore, even if petitioner prevails on both of the issues appealed, the decedent's lack of testamentary capacity remains sufficient to void the 1997 will. Compare SJI2d 170.41, SJI2d 170.44.

Even if we were to consider petitioner's claims, his first argument on appeal, that his respondent siblings' testimony about their life experiences with him were prejudicial, is without merit. A trial judge's evidentiary rulings are within its discretion and will not be disturbed on appeal absent a clear abuse of that discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998); *Gillam v Lloyd*, 172 Mich App 563, 586; 432 NW2d 356 (1988). Respondents' testimony concerning their petitioner-brother's behavior growing up and in isolated instances during their adult lives was relevant to the undue influence claim because it tended to show his general personality and how he may have acted toward the decedent. MRE 401, 402.

The lack of temporal proximity of some of the testimony to the time the will was drafted was relevant to its weight, not to its admissibility. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999).

In examining the prejudice factors set out in *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995), we find that a majority of them weigh in favor of admission. The trial court admonished counsel to keep respondents' testimony brief; their evidence was not especially cumulative because only petitioner's respondent siblings could testify to their unique experience; the testimony directly addressed the fact sought to be proved; the testimony was very important to respondents' case; there was not a good deal of potential for confusion because respondents were fairly clear; and respondents' firsthand experiences with petitioner could not easily be proved by extrinsic sources. *Haberkorn*, *supra* at 362. Therefore, the evidence was more probative than prejudicial and did not represent an abuse of discretion. MRE 403; *Chmielewski*, *supra* at 613-614; *Gillam*, *supra* at 586.

Second, petitioner argues that the testimony of the probate judge, who related his observations of petitioner and the decedent when he presided over the decedent's guardianship and conservatorship proceedings, prejudiced petitioner's case because it embraced an ultimate issue of fact to be decided by the jury. We disagree and conclude his testimony, that he observed petitioner exercise undue influence over the decedent as it related to the petition for guardianship, was admissible. Code of Judicial Conduct, Canon 2(C); MRE 605, 704. See, e.g., *Mumaugh v McCarley*, 219 Mich App 641, 650-651; 558 NW2d 433 (1996); *Meehan v Michigan Bell Telephone Co*, 174 Mich App 538, 553-554; 436 NW2d 711 (1989); *Sells v Monroe Co*, 158 Mich App 637, 645; 405 NW2d 387 (1987). Clearly, Judge Ulrich's testimony was relevant. MRE 401, 402. Further, the judge's testimony regarding his opinions or inferences were permissible where they were "(a) rationally based on [his] perception . . . and (b) helpful to a clear understanding of [his] testimony or the determination of a fact in issue." MRE 701.

Again, our analysis of the prejudice factors in *Haberkorn*, *supra* at 362, leads us to conclude that any prejudice was outweighed by the testimony's relevance and was cured by jury instructions. *Ilins v Burns*, 388 Mich 504, 511; 201 NW2d 624 (1972). The trial court repeatedly instructed the jurors that they were to consider the testifying judge as a lay witness, that the judge had made no ruling on undue influence, and that the standards for undue influence in a guardianship proceeding differ from those in a will challenge. SJI2d 170.42; *Ilins*, *supra* at 511. Given the deference afforded to the trial court's temporal assessment of the evidence in this equitable matter, *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993); *Wilkins v Wilkins*, 149 Mich App 779, 792; 386 NW2d 677 (1986), this Court finds no abuse of discretion. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Affirmed.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter