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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0263**

In re the Estate of: Marie M. Moldenhauer, Decedent

**Filed January 27, 2009
Affirmed
Toussaint, Chief Judge**

Dakota County District Court
File No. P6-06-10512

Marnie L. DeWall, Robert A. McLeod, Amy R. Mason, Lindquist & Venum P.L.L.P.,
4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for appellant Charles
W. Eginton)

Karen L. Tarrant, Mary E. Drummer, Tarrant, Drummer & Liska, PLLC, 1539 Grand
Avenue, St. Paul, MN 55105 (for respondent Vance F. Gellert)

Mark S. Genereux, 101 East Fifth Street, Suite 800, St. Paul, MN 55101 (for respondent
Carl A. Gellert)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and
Crippen, Judge.*

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

This is an appeal from the district court's denial of a petition to probate a
September 5, 2003 will executed by decedent Marie M. Moldenhauer. Appellant Charles

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

W. Eginton, Moldenhauer's son-in-law and a named beneficiary of that will, challenges the district court's finding that Moldenhauer lacked testamentary capacity at the time she signed the will. Because that finding is not clearly erroneous, we affirm.

D E C I S I O N

The district court's determination of testamentary capacity is a finding of fact subject to reversal by this court only if clearly erroneous. *In re Estate of Torgersen*, 711 N.W.2d 545, 550 (Minn. App. 2006); Minn. R. Civ. P. 52.01. Findings are clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re Estate of Congdon*, 309 N.W.2d 261, 266 n.7 (1981) (quotation omitted). "Where the evidence as to testamentary capacity . . . is conflicting, findings of the trial court with respect to such questions are final on appeal, even though the appellate court, if it had the power to try the questions de novo, might determine otherwise upon reading of the record." *In re Estate of Olson*, 227 Minn. 289, 295, 35 N.W.2d 439, 444 (1948). "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

To have testamentary capacity, a "testator must understand the nature, situation, and extent of [her] property and the claims of others on [her] bounty or [her] remembrance, and [she] must be able to hold these things in [her] mind long enough to form a rational judgment concerning them." *In re Estate of Healy*, 243 Minn. 383, 386, 68 N.W.2d 401, 403 (1955). Factors relevant to determining testamentary capacity include (1) the reasonableness of the property division in the challenged will; (2) the

testator's conduct within a reasonable time before and after executing the will; (3) prior adjudication(s) of the testator's mental capacity; and (4) expert testimony about the testator's physical and mental condition. *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986) (citations omitted).

Here, we conclude that the district court's lack-of-capacity finding is supported by the evidence and thus not clearly erroneous. The district court based its finding on testimony from Moldenhauer's sons that their mother did not understand the scope of her estate and could not identify her heirs in September 2003. Appellant asserts that the district court failed to give proper weight to purportedly contrary testimony from other witnesses, including Moldenhauer's daughter and the attorney and family friend who wrote the will. But the district court made specific credibility findings discounting their testimony. Aside from our deference to those credibility findings, we note that Moldenhauer's daughter conceded that, in September 2003, her mother probably could not have identified the extent of her possessions.

The bulk of the remaining testimony cited by appellant relates to Moldenhauer's physical ability and her ability to engage in conversation and comprehend television and books. This testimony is consistent with testimony by Moldenhauer's oldest son that his mother mostly talked about things in the present, and is not dispositive of whether she understood her estate and heirs.

Appellant further asserts that a July 28, 2003 order restoring capacity to Moldenhauer following a 27-month conservatorship compels a presumption that she had testamentary capacity when she signed the September 5, 2003 will 39 days later. We

disagree. Notably, the restoration hearing was held without proper notice to Moldenhauer's sons and was based on opinions from experts who believed that the family was seeking to modify the conservatorship in order to reappoint a family member as conservator, not to end the conservatorship altogether. Neither of the testifying doctors was informed of conflicts among family members over the supervision of Moldenhauer's financial affairs. Both doctors gave testimony at the probate hearing that supports the district court's finding that Moldenhauer lacked capacity to execute the September 5, 2003 will.

Finally, appellant asserts that the district court erred by basing its finding that Moldenhauer lacked testamentary capacity on incidents that occurred before the July 2003 restoration order. The district court's finding was not based solely on Moldenhauer's history of dementia but on direct evidence and expert opinion regarding her condition in September 2003 and the preceding months. While there was evidence that Moldenhauer's condition had improved in the months leading up to the July 2003 restoration order, there was also evidence that the improvement peaked around March 2003 and that, by September 2003, Moldenhauer's condition had again worsened. We conclude that the district court properly considered Moldenhauer's history of dementia together with other relevant evidence in making its capacity finding.

Affirmed.