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2015 IL App (3d) 140310-U

Order filed February 24, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
A.D., 2015

<i>In re</i> ESTATE OF JACQUELINE SUE)	Appeal from the Circuit Court
ADAMS,)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois,
Deceased,)	
)	
(Michelle Ford,)	Appeal No. 3-14-0310
)	Circuit Nos. 11-P-174
Contestant-Appellee,)	
)	
v.)	
)	
Diana Givens,)	
)	Honorable Stanley B. Steins,
Respondent-Appellant).)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice McDade and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s findings, which resulted in the court’s decision to set aside the testator’s 2008 will, were not against the manifest weight of the evidence.

¶ 2 Following Jacqueline Adams’ (Jackie’s) death, her 2008 will and her previous 2000 will were filed with the court, in the same probate proceeding, by two separate executors as

individually named in each will. A named beneficiary of the 2000 will filed a petition contesting the validity of the 2008 will due to issues related to attestation of the will, Jackie's lack of testamentary capacity in 2008, and undue influence exerted by the named beneficiaries of the 2008 will. After an evidentiary hearing, the trial court set aside the 2008 will. We affirm.

¶ 3

BACKGROUND

¶ 4

Jackie died on December 6, 2011, at age 74, at the Pleasant View Rehabilitation and Health Care Center in Morrison, Illinois. After her death, Lorrie Machen (Lorrie) filed a "Petition for Probate of Will and for Letters Testamentary," on December 29, 2011, along with a will executed by Jackie on March 15, 2000 (the 2000 will). Subsequently, on February 24, 2012, Diana Givens (Diana) filed a "Petition for Probate of Will and for Letters Testamentary," in the same case, which asked that an attached will executed by Jackie on November 16, 2008 (the 2008 will), be admitted to probate.

¶ 5

The 2000 will named Lorrie as executor¹ and bequeathed all of Jackie's real and personal property in equal shares to Michelle Miller (now known as Michelle Ford) (Michelle) and Howard Gene Givens (Gene). In the event one of the devisees predeceased Jackie, the 2000 will bequeathed Jackie's entire estate to the other surviving devisee. In contrast, the 2008 will revoked all previous wills and named Diana, Gene's daughter, as the executor of Jackie's estate. In the 2008 will, Jackie devised her entire estate to Gene. In the event Gene predeceased Jackie, the 2008 will bequeathed Jackie's entire estate to Gene's daughter, Diana. Gene died in 2010.

¶ 6

Thereafter, on September 10, 2012, Michelle, as an interested party and contestant in the probate proceedings, filed an "Answer to the Petition to Probate the 2008 Will and Affirmative Defenses." In her pleading, Michelle contested the 2008 will, challenging its validity and raising

¹ Lorrie was named executor of the 2000 will under her former name of Laurie [*sic*] Billings.

the affirmative defenses of undue influence and lack of testamentary capacity. As a result, Michelle asked the court to set aside the 2008 will as being null and void and to enforce the 2000 will as written.

¶ 7 On January 21 and 22, 2014, the court held a bench trial on Michelle’s petition to contest the 2008 will. Prior to testimony from any witnesses, the parties stipulated to the admission of a substantial amount of agreed facts contained in multiple documents.

¶ 8 I. Stipulated Evidence

¶ 9 The parties stipulated to several documents. This stipulation included: a 62-page evidence deposition of Dr. Sharon Shipp; Dr. Shipp’s Swedish American oncology records regarding Jackie;² a letter from Dr. Shipp dated November 12, 2008, filed by Nancy Kulas (Nancy) in Whiteside County case No. 08-P-151, *In re JACQUELINE SUE ADAMS*, a guardianship case regarding the lack of Jackie’s decision-making capacity (the guardianship case); a physician’s report by Dr. Shipp filed in the guardianship case on November 24, 2008; multiple photographs of Jackie; the 2000 will executed by Jackie on March 15, 2000; the 2008 will executed by Jackie on November 16, 2008; a 2008 durable power of attorney (POA) dated November 16, 2008, naming Diana as Jackie’s POA³; Gene’s 2008 will executed on November 16, 2008; 41 pages of handwritten notes by Diana; a counter-petition filed by Diana on December 30, 2008, in the guardianship case; and copies of attorney Elwin Neal’s client file records from November of 2008 regarding his preparation of Jackie’s POA and the 2008 wills of Jackie and Gene.

² These records include Dr. Shipp’s detailed notes of her examination of Jackie on October 30, 2008.

³ The document naming Diana as POA, prepared by attorney Neal, is a single “Durable” POA only giving Diana POA to Jackie’s financial and property matters and bears no language indicating it gave Diana medical POA over Jackie’s healthcare matters.

¶ 10

II. Diana's Initial Burden of Proof

¶ 11

Although the court scheduled the bench trial for Michelle's petition contesting the 2008 will, the court noted that Diana carried the initial burden of establishing a *prima facie* case with regard to the actual admission of the 2008 will to probate. Diana's first witness, attorney Neal, testified he was the attorney who drafted the 2008 wills for Jackie and Gene and Jackie's POA. Attorney Neal said he previously drafted a will for Gene in 1998, but he had not represented Jackie in the past. Attorney Neal stated, on November 3, 2008, he met with both Gene and Jackie together to discuss preparing a new will for each of them. Attorney Neal stated he recalled Jackie coming into the office with Gene and signing the 2008 will in his presence on November 17, 2008, claiming the November 16 date on Jackie's 2008 will was a scrivener's error.⁴

¶ 12

Attorney Neal said he did not meet with Jackie separately, and either Gene, Diana, or both, were with Jackie on both November 3 and November 16 or 17, 2008. Attorney Neal's records indicated that attorney Neal did not open a separate work file for Jackie as his client, but revealed that his work on Jackie's will was documented through Gene's client file. Gene personally paid for attorney Neal's professional services to prepare Jackie's 2008 will. Attorney Neal's file documented he received full payment for his services for both Gene's will and Jackie's will and POA on November 16, 2008.

¶ 13

Cindy Hoogerwerf testified that she was employed as a secretary by attorney Neal in November 2008. Hoogerwerf said she had no independent recollection of the execution of the signatures on the 2008 will, however, she never worked for attorney Neal on a Sunday.

⁴ Neal testified that November 16, 2008 was a Sunday.

¶ 14 Following the testimony of attorney Neal and his secretary, the court found Diana demonstrated a *prima facie* case with regard to the admission of the 2008 will of Jackie. Thereafter, Michelle presented her case-in-chief to support her petition contesting the 2008 will.

¶ 15 III. Michelle's Evidence

¶ 16 Michelle's evidence included the testimony of Lorrie. Lorrie testified that she met Jackie in 1984 while both women worked for the Illinois Department of Human Services, Public Aid department. According to Lorrie, she and Jackie were co-workers for years until Jackie retired in 2004 or 2005. Lorrie said Jackie was very close to both Nancy and Michelle and Jackie treated Michelle like a granddaughter. Jackie personally told Lorrie, if anything happened to Jackie, "Michelle was to get everything."

¶ 17 Around 1998, Jackie told Lorrie she named Lorrie the executor of Jackie's estate if anything happened. When Jackie had encephalitis, around 2002 or 2003, in Gene's presence, Lorrie said Jackie again told her everything she owns goes to Michelle if Jackie died. Gene had difficulty speaking due to a prior stroke but, when Jackie told Lorrie she wanted Michelle to receive "everything," Gene reminded Jackie that everything should be divided equally between Michelle and Gene. Thereafter, Jackie agreed, in Lorrie's presence, that all her property should be split between Michelle and Gene. Jackie designated Lorrie to be the executor of Jackie's 2000 will.

¶ 18 Lorrie first met Diana when Jackie was sick with encephalitis and Diana visited Jackie once at the hospital.⁵ According to Lorrie, Jackie told Lorrie that Gene's daughter, Diana, did not like Jackie when Gene and Jackie first started dating in 1991. After Jackie retired in either 2004 or 2005, Lorrie believed Jackie started developing a relationship with one of Diana's

⁵ Nancy testified Jackie contracted encephalitis in 2005.

daughters, Gene's granddaughter Ashley, because Jackie and Gene went to Diana's house or Ashley's house for some holidays.

¶ 19 Lorrie testified that Nancy called Lorrie in early November 2008 to express concerns that Gene was not giving Jackie the proper medication amounts. Based on this information, Lorrie telephoned Jackie and noticed Jackie was slurring her words and sounded "not really with it." Now concerned, Lorrie went to visit Jackie and Gene, and Lorrie shared Nancy's concerns and reported her concerns about Jackie's well-being to Lutheran Social Services of Illinois (LSSI) caseworkers.

¶ 20 Lorrie testified that Lorrie had been Jackie's supervisor at work in the past. Lorrie believed Jackie normally would have noticed the misspelling of her own name in the 2008 will.⁶

¶ 21 Following Lorrie's testimony, the court received Nancy's testimony. According to Nancy, she first met Jackie in 1978 when Nancy started dating Jackie's son, Jerry. Nancy and Jerry became engaged to be married, but Jerry died in a car accident in 1981 before their marriage. Michelle was six years old when Jerry died. After Jerry died, Nancy and Michelle continued a close relationship and visited with Jackie in each other's homes. Nancy said she and Michelle traveled with Jackie to Hawaii and the Bahamas. After Jackie met Gene, Nancy and her husband and Jackie and Gene socialized together by going out for pizza on Saturday nights. In addition, Nancy's husband ran errands for Gene and Jackie. Nancy also described an Alaskan cruise that she and her husband took with Jackie and Gene in 2007.

¶ 22 In 2005, Nancy said Jackie was diagnosed with encephalitis and she started having recurring brain tumors that would come and go. At that time, Jackie frequently felt sick and Nancy started helping Jackie with her health care appointments and personal needs. In April

⁶ The 2008 will misspelled Jackie's first name throughout the document as "Jacquiline" rather than Jacqueline.

2008, Jackie's health deteriorated to such an extent that Nancy took Jackie and Gene to the Mayo Clinic, where Jackie was diagnosed with lung cancer that had metastasized to her brain. Nancy stayed at a hotel near the Mayo Clinic for six weeks while Jackie received Gamma knife treatments for her brain tumors. When Jackie completed her treatment at the Mayo Clinic and returned home, Nancy helped Jackie contact Dr. Sharon Shipp, a local oncologist. Jackie's local chemotherapy (chemo) treatments began in June 2008. Nancy drove Jackie to have lab work completed the day before receiving her chemo treatments and then drove Jackie to her chemo treatment appointments the following day. Nancy usually went back to the exam room with Jackie for these treatments. Gene also attended most of Jackie's chemo treatment appointments.

¶ 23 Nancy said, after June of 2008, she started helping Jackie with Jackie's daily personal hygiene and housework. Nancy also cared for Jackie's cats because Jackie could not perform these tasks anymore.

¶ 24 Nancy said Jackie was "more like herself" in June of 2008, but, as time progressed, Jackie had memory problems and could not carry on a conversation. Nancy helped Jackie with her finances from June 2008 through November 2008 at Jackie's request. At the end of October 2008, Jackie's physical condition deteriorated. She was cold all the time, suffered from memory loss, and could not perform simple tasks such as dialing a telephone.

¶ 25 On October 30, 2008, Nancy was in the exam room, together with Gene and Jackie, when Dr. Shipp asked Jackie about her end of life and future healthcare choices. Dr. Shipp advised Jackie she needed to get a POA executed within the next couple of days while she was still able to do so. Nancy heard Jackie tell Dr. Shipp she wanted Nancy to be her POA, as documented in Dr. Shipp's notes.⁷ After leaving Dr. Shipp's office on October 30, 2008, Nancy drove Gene

⁷ Dr. Shipp's notes from October 30, 2008, admitted as a stipulation, provided that Nancy, "[Jackie's] caregiver" and Gene were present at this appointment. This record noted,

and Jackie to the Pignatelli Law Office and scheduled an appointment for November 7, 2008, to execute the POA for Jackie.

¶ 26 On November 4, 2008, Gene told Nancy the appointment with attorney Pignatelli had been cancelled. Nancy said she was upset because Dr. Shipp said this needed to be done as soon as possible. The next day, Michelle returned to Illinois to help Nancy address this situation. Nancy and Michelle went to Jackie's house on November 6, 2008, and Jackie did not seem to recognize Michelle immediately. At that time, Nancy observed Gene fill a syringe completely full of Keppra, an oral medication, and hand it to Jackie to drink. Nancy said she tried to get the syringe away from Gene because she thought Jackie was prescribed approximately half of that dosage. Gene gave the full syringe to Jackie and Jackie drank the full amount.

¶ 27 At that point, Nancy said she and Michelle took Jackie with them to have a " 'girls' day out." They went to the hair studio and the antique store, but Jackie was very weak and lethargic. Finally, they went to attorney Kelli Walker's office to inquire about getting a POA prepared.

¶ 28 According to Nancy, attorney Walker first spoke to Jackie alone and then attorney Walker met with Jackie, Michelle and Nancy together. After this meeting, they left the office for awhile and went to Dairy Queen to eat lunch. After lunch, Nancy, Michelle, and Jackie returned to attorney Walker's office to sign the POA. In Nancy's opinion, Jackie was in worse physical condition on November 6 than she was on October 30, 2008, when Nancy was with Jackie in Dr. Shipp's office.

"Nancy is medical POA," but Dr. Shipp discussed the need for a "general POA" for Jackie's "general care and finances." This record also stated Jackie clearly said she wanted "Nancy to be her POA for general care and finances" and Dr. Shipp recommended that Jackie and Nancy go to a lawyer as soon as possible. Dr. Shipp noted she also discussed "Code Status" and issues surrounding Jackie's living will. In Dr. Shipp's notes, she said she spent 50 minutes discussing these issues with Jackie.

¶ 29 Nancy testified that, after a confrontation had occurred when they returned Jackie to her house on November 6, 2008, Gene no longer talked to Nancy or wanted Nancy to care for Jackie. The next day, November 7, 2008, Nancy and Michelle decided to address their concerns with LSSI. Nancy explained that she requested LSSI caseworkers to check on Jackie and investigate Jackie's circumstances and current situation.

¶ 30 Subsequently, on November 17, 2008, Diana contacted Nancy and informed her that Nancy was no longer designated as the POA for Jackie. Diana informed Nancy that Diana was now authorized to act as Jackie's POA. Attorney Neal also talked to Nancy on that date and told Nancy to return all of Jackie's personal checks and money to Diana and to return the house keys to Gene. Based on her continuing concerns, Nancy filed a petition for the guardianship of Jackie in the circuit court on November 24, 2008.

¶ 31 During the court hearing on Michelle's contestation of the 2008 will, Michelle testified that she first met Jackie when she was four or five years old when Michelle's mother, Nancy, began dating Jackie's son, Jerry. Jerry unexpectedly died in 1981, but Michelle and Nancy maintained a close relationship with Jackie. Michelle told the judge that Jackie loved to travel and recounted a trip she and her mother took with Jackie to Hawaii in 1991, when Michelle was in high school. Michelle also indicated she enjoyed other vacations with Jackie, which included trips to Wisconsin, the Bahamas, and Disney World.

¶ 32 Michelle testified she served in the Navy after she graduated from high school. Following her discharge from the Navy, Michelle obtained her bachelor's degree in business management. Michelle advised the court she also enjoyed a good relationship with Gene. Jackie and Gene visited Michelle twice while she was in the Navy and stationed in San Diego.

Michelle said Jackie and Gene also traveled together to Maryland to attend Michelle's wedding. At the time of this court hearing, Michelle lived in Maryland.

¶ 33 Concerning the events surrounding meeting with attorney Walker, Michelle testified that she came back to Illinois from November 5-8, 2008, to assist Nancy and Jackie with respect to the POA paperwork. Michelle stated it was during this visit in November of 2008 she met Diana for the first time.

¶ 34 According to Michelle, Nancy and Michelle visited Jackie on November 6, 2008. While they were at Jackie's house, Michelle saw Gene give Jackie a full syringe of medication. Michelle noted that Jackie had trouble staying awake after receiving that medication from Gene. During this visit, Michelle noticed that Jackie was very disheveled, her hair was messy, she was "frumpy," which was out of character for Jackie. When Michelle and Nancy tried to converse with Jackie, she "just kind of nodded along." On that date, Michelle and Nancy took Jackie to the hairdresser and then to an antique store where Nancy and Michelle purchased a brass piece for Jackie.

¶ 35 Next, the three women arrived at attorney Walker's office for an appointment to obtain the POAs. At that point in time, Michelle stated Jackie was very weak and Michelle and Nancy had to help support Jackie down the stairs to attorney Walker's office.

¶ 36 The next day, Michelle called Jackie to invite Jackie out for breakfast so they could visit together one more time before Michelle left the state. Jackie initially accepted Michelle's invitation, but then declined to meet with Michelle after Michelle heard Gene in the background saying, "No." Consequently, Michelle did not see Jackie again before Michelle left on November 8, 2008. Michelle stated she flew back from Maryland a couple of times to visit Jackie after Jackie was placed in the nursing home.

¶ 37 A former LSSI caseworker, Cydney Franks, testified she worked in the senior protective division of LSSI and investigated complaints or concerns about elder abuse. Franks went to Jackie's house on November 7, 2008, to investigate a complaint received by LSSI. On that date, Franks stated that she sat with Jackie at the kitchen table while Gene and Diana were also present in the room. She observed Jackie's appearance to be good at that time. Franks said she conducted a "mini mental state exam" (MMSE) to help Franks determine Jackie's cognitive and physical abilities. During this MMSE, Jackie could only tell Franks her name and address, but could not answer any other questions.

¶ 38 Jackie's score on the MMSE was very low and, after Franks consulted with her supervisor by telephone, it was Franks' opinion, on November 7, 2008, Jackie was severely mentally impaired and unable to perform daily tasks to care for herself without assistance. Additionally, Franks felt Jackie did not have "executive functioning skills" which are skills necessary to assess a situation and then make good decisions about the best approach to handle the situation at hand. According to Franks, based on Jackie's low MMSE score, LSSI investigators, as service providers for elderly people, would be authorized to obtain information about the elderly person without getting releases signed.

¶ 39 Franks followed up her investigation by speaking to Nancy, Jackie's doctor, and persons at Jackie's bank. Several days later, after Franks received a new report alerting her to the fact that Jackie made a new will and a new POA, Franks met with Jackie again on November 18, 2008. Diana and Gene were home at the time, but Franks asked to meet with Jackie alone to discuss the new POA and the new will. Jackie could not answer any of Franks' questions about the new 2008 will and POA. Franks said Jackie kept looking at Gene and Diana to answer questions for her. According to Franks, this behavior is typical for persons with severe dementia.

Franks felt that Jackie's condition of severe dementia had not changed since their last meeting on November 7, 2008.

¶ 40 Betty Snitchler testified that she was employed at the Sterling Federal Bank as a customer service representative and handled some of Jackie's financial accounts. Snitchler stated she met with Jackie monthly, since 2006, to discuss her accounts. Snitchler said Jackie was her friend and had a close relationship with Nancy and Michelle.

¶ 41 Kelli Walker testified she prepared both a healthcare POA and a financial POA for Jackie on November 6, 2008. Attorney Walker said she did not have an independent recollection of the circumstances surrounding the execution of those POAs for healthcare and for finances and property. Attorney Walker said it was her customary practice to assess the mental capacity of the client at the time he or she requested and signed a POA. She testified she had no independent recollection of Jackie's execution of these POA's, but she most likely followed her normal practices on this occasion. Attorney Walker testified she must have thought Jackie was mentally competent on November 6, 2008, because she allowed Jackie to execute the POAs.

¶ 42 As Michelle's adverse witness, Diana testified she met Jackie in 1991 when her father began dating Jackie. Diana stated she developed a close relationship with Jackie, but admitted she did not care for Jackie or assist her with household chores or finances before November 3, 2008. When Diana first began caring for Jackie on November 3, 2008, Diana maintained a detailed journal regarding the numerous healthcare or personal services she performed for Jackie. This journal was admitted into evidence by stipulation. Diana testified that Jackie depended on Diana for daily caregiving.

¶ 43 On Sunday, November 16, 2008, Diana said she drove Jackie and Gene to attorney Neal's office. Diana explained to the court that she initially went into attorney Neal's office to

“discuss the issues that Jackie wanted [Diana] to discuss with him.” Diana estimated she was in the office for approximately half of the time Jackie met with attorney Neal. Diana said she did not see a copy of Jackie’s 2008 will until Gene died in January of 2010.

¶ 44 According to Diana’s testimony, Diana and Gene went to Jackie’s banks on November 18, 2008, to inform the bank staff that Diana had a financial POA for Jackie’s property. However, the banks refused to share any of Jackie’s financial information with Diana because of the existence of two conflicting financial POAs, one naming Nancy as POA (as prepared by attorney Walker) and the second naming Diana as POA (as prepared by attorney Neal).

¶ 45 On November 25, 2008, Diana learned Nancy had filed a petition for guardianship and the court awarded Nancy temporary guardianship of Jackie. Diana filed a counter-petition for guardianship in December of 2008. Michelle then rested her case-in-chief regarding her petition to contest the 2008 will.

¶ 46 IV. Diana’s Evidence

¶ 47 Diana’s attorney then called Diana as a witness in response to Michelle’s evidence contesting the 2008 will. Diana testified she spent time with Jackie at the hospital when Gene had his stroke in 1995. In 1996, Jackie and Gene attended Diana’s graduation at Sauk Valley College. Diana said Jackie and Gene took Diana’s daughter, Ashley, on a trip to Wisconsin once and Jackie and Gene visited Ashley at the hospital when Ashley had her first baby in February of 2003. They both also attended Ashley’s wedding reception in Sterling, Illinois, in August of 2003.

¶ 48 Diana said, in November 2008, Gene and Jackie telephoned Diana and complained about Nancy opening some of their mail and reviewing some of Jackie’s bank statements. Diana stated she began making notes in a journal on November 3, 2008, after Gene and Jackie asked Diana to

become their POA and Diana started providing assistance to Jackie and Gene on an almost daily basis. According to Diana, during that time, Jackie told Diana she was going to change her will.

¶ 49 Diana testified that Gene and Jackie asked her to cancel Jackie’s appointment at attorney Pignatelli’s office. On November 6, 2008, Gene called Diana asking her to come to his residence. When Nancy and Michelle returned home with Jackie, Nancy yelled at Gene, upsetting him. Consequently, Diana asked Nancy and Michelle to leave. Diana said, throughout the time she kept the journal in November 2008, Jackie was able to intelligently communicate with Diana.

¶ 50 During closing arguments, Michelle’s attorney argued Michelle proved each of the legal elements necessary to raise the presumption of undue influence. Further, he argued Jackie lacked the testamentary capacity on November 16 or 17, 2008, to execute the 2008 will. Finally, Michelle’s attorney challenged the attestation of the 2008 will.

¶ 51 In response, Diana’s attorney argued the insufficiency of the evidence regarding each of the elements necessary to establish a rebuttable presumption of undue influence under the law. Diana’s attorney also argued that Michelle’s evidence failed to establish Jackie lacked the testamentary capacity to execute the 2008 will. Further, Diana’s attorney contended the evidence showed the proper attestation to the 2008 will.

¶ 52 After closing arguments, the trial judge reserved ruling and took the matter under advisement. On February 21, 2014, the judge gave his decision on the record in open court.

¶ 53 V. Court’s Ruling

¶ 54 First, the court determined it would not set aside the 2008 will on grounds of improper attestation. Next, the court addressed the issue of testamentary capacity. The court noted, when executing a will, the person must be “capable of knowing the extent of their property, who are

the natural objects of their bounty and also able to understand the nature, consequence and effect of the act of executing a will.” Relying on Dr. Shipp’s medical records, the court found Jackie required continued assistance in the home as early as July 3, 2008. From July through September 2008, Dr. Shipp’s medical records also indicated Jackie was confused and had “rambling or inappropriate” conversation. On October 30, 2008, Dr. Shipp had an end-of-life discussion with Jackie and, by that time, Jackie required continuous care and was more confused, less attentive, unable to perform her daily routine tasks, and had rambling speech and inappropriate conversation. The court found, at Nancy’s request for purposes of the guardianship case, Dr. Shipp prepared a letter on November 12, 2008, indicating Jackie lacked decision-making ability and had increased lethargy and inability to care for herself.

¶ 55 The court further found, in Nancy and Diana’s respective petitions for guardianship filed shortly after Jackie signed the 2008 will, both Nancy and Diana alleged Jackie’s inability to manage her person and estate due to mental deterioration and physical incapacity. After the court in the guardianship case appointed a guardian *ad litem* (GAL) for Jackie on November 24, 2008, the court subsequently authorized Jackie to be placed in a nursing home around December 11, 2008, based on correspondence exchanged between Jackie’s GAL and Dr. Shipp that Jackie needed constant supervision.

¶ 56 While announcing its decision in this case, the court addressed the fact that both attorney Walker and attorney Neal believed Jackie had the mental capacity to make proper decisions before signing the legal documents prepared by each attorney. However, the court noted both attorneys based their decisions on observing Jackie for a very short period of time and having no previous knowledge of Jackie or her capabilities.

The court found there was substantial testimony about Jackie going out to lunch, going to various attorneys' offices, and that she was not bedridden or in a wheelchair in November 2008. However, the court found all evidence indicated, in November 2008, Jackie could not be left alone for any period of time due to Jackie's inability to tend to her daily tasks stemming from her mental incapacity rather than physical incapacity. The court stated it relied on the following evidence, in part, as proof of Jackie's mental incapacity. The court focused on the fact that on November 6, 2008, Jackie did not recognize Michelle in spite of their longstanding, close relationship. Also, on November 6, 2008, Michelle and Nancy said Jackie was unable to participate in a conversation and neither felt Jackie had the competency or capacity to sign a legal document. On November 7, 2008, LSSI caseworker Cydney Franks, who the court considered to be an unbiased witness trained in issues regarding the elderly, made an unannounced visit at Jackie's home. Franks conducted a MMSE and discovered Jackie could not answer any questions. Based on her own observations, Franks determined that Jackie had no executive functioning skills on November 7, 2008, as a result of severe dementia which prevented Jackie from performing her activities of daily living. The court noted, on November 18, 2008, Franks made a follow-up visit with Jackie and determined that Jackie could not answer questions regarding a new will and a new POA and kept looking at Gene and Diana for answers. The court also noted that Jackie's first name was misspelled throughout the 2008 will. The court found the improper spelling could have been a scrivener's error, however, based on Jackie's work and business history and testimony about her personality, Jackie would have understood the importance of correct spelling in a legal document such as a will. Therefore, the court found, if Jackie were capable, she "would have caught" that error. Additionally, the court found that Diana's journal indicated, on November 12, 2008, Jackie could not be left alone while Diana

accompanied Gene to an appointment. Following a review of these facts, the trial court found “there is evidence throughout this case with regard to Jackie’s mental incapacity,” and the evidence showed that “Jackie lacked the mental capacity to execute a will on November 16th.”

¶ 58 The court also addressed the issue of undue influence. The court indicated Jackie’s mental incapacity was interconnected with the undue influence ground for setting aside the 2008 will. At the time of executing the 2008 will, the court found a fiduciary relationship existed based on the domestic or personal relationship between Jackie and both Gene and Diana. The court also found, based on Jackie’s diminished mental capacity and her need for daily assistance in every aspect of her life, Gene and Diana were in a position to dominate and control Jackie. Next, the court found Jackie “reposed trust and confidence” in both Gene and Diana who were beneficiaries and received a substantial benefit under the terms of the 2008 will when compared to other persons who have an equal claim to the testator’s bounty. The court found Gene and Diana were beneficiaries of the 2008 will and Gene was instrumental in the procurement of the 2008 will on November 16, 2008, and Jackie’s 2008 will mirrored Gene’s will.⁸ The court found Jackie did not have the ability to tend to her own daily activities in November 2008, and could not have initiated discussions as complex as estate planning at that time.

¶ 59 The court again found Jackie “lacked the testamentary capacity to make the [2008] will,” and her diminished mental capacity made her more susceptible to undue influence. The court observed that prior to November of 2008, Michelle “occupied a great position in Jackie’s life” and Jackie treated Michelle as a granddaughter. Jackie also made it known to her coworker, Lorrie, that Michelle was Jackie’s beneficiary. After the progression of Jackie’s illness, the court

⁸ Upon our review of the wills, we note that, although Gene and Jackie’s wills mirrored each other in format, however, Jackie’s will left her entire estate to Gene with the remainder to Diana if Gene predeceased Jackie, and Gene’s will left his entire estate to Diana (not Jackie) with the remainder going to Ashley if Diana predeceased Gene.

observed that the testimony revealed that Jackie was easily persuaded to go along with whoever was with her or caring for her at the moment. The court concluded Jackie did not have the capacity to make decisions for herself.

¶ 60 For all those reasons, the court found, having considered all the evidence, “there was a presumption that there was undue influence and that presumption has not been rebutted.” The court set aside Jackie’s 2008 will based on undue influence as well as lack of testamentary capacity. The court entered a written order on that same day, February 21, 2014.

¶ 61 VI. Posttrial Motion

¶ 62 Diana filed an amended posttrial motion on March 21, 2014, alleging the trial court erred in finding Jackie lacked the testamentary capacity to execute the 2008 will. Further, Diana alleged the court erred in finding that a fiduciary relationship existed between Jackie and Diana and/or Gene to support the presumption of undue influence. This motion did not raise a due process argument that Diana was denied the opportunity to rebut the presumption of undue influence. The court denied Diana’s posttrial motion on April 4, 2014. Diana filed a timely notice of appeal. Michelle did not file a notice of appeal or cross-appeal.

¶ 63 ANALYSIS

¶ 64 Diana raises two issues on appeal. Diana contests the trial court’s finding that Jackie lacked sufficient mental capacity in November 2008 to execute the 2008 will. In addition, Diana claims the trial court erred by first finding that she and Gene exerted undue influence over Jackie, and also by improperly failing to make a specific finding during trial indicating to Diana’s counsel that Michelle’s evidence gave rise to a rebuttable presumption of undue influence. Further, Diana argues on appeal that the trial court unfairly failed to provide Diana an opportunity to offer evidence to rebut that presumption.

¶ 65 On appeal, Michelle argues the trial court properly set aside the 2008 will on the basis of lack of testamentary capacity and undue influence. However, Michelle asserts the trial court erred by finding the 2008 will was properly witnessed and executed in spite of the undisputed irregularity with respect to the date of attestation of the 2008 will.

¶ 66 I. Testamentary Capacity

¶ 67 We begin with Diana’s contention that the trial court improperly found Jackie lacked testamentary capacity to execute the 2008 will. It is well established when a party challenges a court’s finding of fact regarding mental capacity, we apply the manifest weight of the evidence standard of review. *In re Estate of Kline*, 245 Ill. App. 3d 413, 426 (1993); *Cook ex rel. Cook. v. AAA Life Ins. Co.*, 2014 IL App (1st) 123700, ¶ 51. The appellate court must give great deference to the circuit court’s credibility findings, since the trial court is in the best position to evaluate the evidence and the demeanor of the witnesses, and we will not substitute our judgment for that of the circuit court. *Cook*, 2014 IL App (1st) 123700, ¶ 51. A finding is against the manifest weight of the evidence if the finding is arbitrary, unreasonable, or not based in evidence. *Id.* Therefore, we will not disturb the findings and judgment of the circuit court if the record contains any evidence to support such findings. *Id.*

¶ 68 The Probate Act of 1975 (Act) describes the capacity of the testator as follows: “Every person who has attained the age of 18 years and is of sound mind and memory has power to bequeath by will the real and personal estate which he has at the time of his death.” 755 ILCS 5/4-1 (West 2012). The standard used for testamentary capacity or the soundness of mind and memory is that “the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and also be able to understand the nature, consequence, and effect of the

act of executing a will.” *DeHart v. DeHart*, 2013 IL 114137, ¶ 20 (quoting *Dowie v. Sutton*, 227 Ill. 183, 196 (1907)).

¶ 69 “To set aside a will on the grounds of lack of testamentary capacity, the petitioner must demonstrate that at the time the will was executed the testator lacked sufficient mental ability to know he was making a will, to know and remember the natural objects of his bounty, to comprehend the character and extent of his property and to make disposition of his property according to a plan formed in his own mind.” *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26 (quoting *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1013 (1997)). To be relevant, the proof surrounding the testator’s lack of testamentary capacity must pertain to or be contemporary with the time the will was made. *Harn*, 2012 IL App (3d) 110826, ¶ 26; *In re Estate of Dossett*, 159 Ill. App. 3d 466, 473 (1987). It is well settled, if a person has sufficient mental capacity to transact ordinary business and act rationally in the ordinary affairs of life, he or she has sufficient mental capacity to dispose of property by will. *Harn*, 2012 IL App (3d) 110826, ¶ 27.

¶ 70 Here, the 2008 will was executed either on November 16 or 17, 2008. When determining Jackie’s mental capacity on the date of her signature, the trial court relied heavily on two pieces of evidence, specifically, Dr. Shipp’s notes and Franks’ testimony.

¶ 71 The record shows Dr. Shipp began an on-going relationship with her patient, Jackie, when Jackie was released from the Mayo Clinic in June of 2008. Dr. Shipp’s notes document, in late October of 2008, Jackie was more confused, less attentive, unable to perform her daily routine tasks, and had rambling speech and inappropriate conversation. Due to this steady decline, Dr. Shipp’s notes documented her discussion with Jackie, Nancy, and Gene on October 30, 2008, pertaining to end-of-life decision-making. Dr. Shipp discussed living will and code status issues with Jackie and advised Jackie of the need to obtain a “general POA” for general

care and finances. Dr. Shipp's notes stated Nancy was already named as Jackie's "medical POA."⁹

¶ 72 Dr. Shipp's notes further document that on October 30, 2008, Jackie told Dr. Shipp she also wanted Nancy to be her "POA for general care and finances." Based on this conversation with Jackie, Dr. Shipp recommended that "[Jackie] and Nancy go to a lawyer as soon as possible."

¶ 73 Later, at Nancy's request for purposes of guardianship proceedings on Jackie's behalf, Dr. Shipp prepared a letter dated November 12, 2008, indicating Jackie lacked decision-making ability and was unable to care for herself as of her October 30, 2008, examination of Jackie.

¶ 74 Next, the court also relied on the testimony from the LSSI caseworker, Cydney Franks. The court specifically found Franks to be a credible, unbiased witness.

¶ 75 The record shows Franks made unannounced visits with Jackie at her house on November 7 and November 18, 2008. According to Franks, on November 7, 2008, after performing the MMSE test, Jackie could not answer any questions and had no executive functioning skills due to severe dementia. Franks said this condition remained the same during her November 18 visit with Jackie.

¶ 76 Diana submits the trial court should not have disregarded the opinions of two attorneys, attorneys Walker and Neal, who both believed Jackie was able to make rational decisions regarding her personal affairs in spite of her illness during office visits on November 6, 2008, and November 3 and November 16 or 17, 2008, respectively. In addition, Diana argues her own testimony established Jackie was able to make her own decisions. Diana submits that this court should conclude Dr. Shipp also believed Jackie had a sound mind for purposes of making end-of-

⁹ Contrary to the assertion of Gene's appellate counsel, Dr. Shipp's notes indicated Nancy was the person Jackie previously designated to be Jackie's POA regarding medical care issues.

life and POA decisions on October 30, 2008. Finally, Diana suggests Nancy knew Jackie was of sound mind when she presented Jackie for an appointment with attorney Walker on November 6, 2008, and argues Nancy and Michelle's testimony that Jackie was not mentally capable of decision-making on that date is contrary to their actions.

¶ 77 It is obvious that the court received conflicting testimony with respect to Jackie's mental status when executing the 2008 will on November 16 or 17, 2008. When evaluating the evidence, the court rejected the opinions of attorney Walker and attorney Neal by noting that neither attorney had a previous relationship with Jackie, and both were evaluating her mental capacity based on short conversations with Jackie. Instead, the trial court relied on Dr. Shipp's records and the testimony of Franks, whom the court found to be a neutral and credible witness.

¶ 78 While the court received conflicting opinions from multiple witnesses regarding Jackie's mental capacity on November 16, 2008, it is obvious to this court that the trial court carefully considered all the testimony and had a sound understanding of the evidence. It is significant to this court, as noted by the trial court, that Jackie signed the 2008 will, prepared by attorney Neal, in November 2008, which did not contain a proper spelling of her own name. By all accounts of those who knew Jackie well, such an oversight on Jackie's part was extremely unusual. Interestingly, attorney Neal only prepared a POA for Jackie's financial and property matters at that time, although the need for a financial POA was based on Jackie's serious medical and healthcare issues.

¶ 79 Having carefully considered the record in this appeal, we conclude there is ample evidence in this record to support the court's findings that Jackie lacked the testamentary capacity to execute the 2008 will on November 16, 2008. Therefore, we conclude the court's

decision to set aside the 2008 will as void due to lack of testamentary capacity was not against the manifest weight of the evidence.

¶ 80

II. Undue Influence

¶ 81

On appeal, Diana also challenges the trial court's finding that the 2008 will should be set aside based on the unrebutted presumption of undue influence arising out of Gene and Diana's role as Jackie's only caretakers. Although we have already determined the court properly set aside the 2008 will based on Jackie's lack of testamentary capacity, in the interests of a complete analysis of the issues raised in this appeal, we will also address the court's ruling with respect to undue influence by Gene and Diana. Here, we again apply the manifest weight of the evidence standard of review. *Kline*, 245 Ill. App. 3d at 426; *Cook*, 2014 IL App (1st) 123700, ¶ 51.

¶ 82

To invalidate a will on the basis of undue influence, the petitioner must establish "the intent of the testator was overpowered and that he was induced to do or refrain from an act without free will, causing him to devise his property according to the plan of another person." *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1018 (1997) (citing *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993)); *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460 (1983)); *Kline*, 245 Ill. App. 3d at 422. The influence must have been felt at the time the will was executed. *Roeseler*, 287 Ill. App. 3d at 1018. The *Roeseler* court established that "the more enfeebled the mind of the testator, the less evidence is required to establish the existence of undue influence." *Id.*

¶ 83

A presumption of undue influence is established by proof of each of the following four elements:

“(1) a fiduciary relationship between testator and a person who receives a substantial benefit under the will (compared to other persons who have an equal claim to testator’s bounty);

(2) a testator in a dependent situation in which the substantial beneficiaries are in dominant roles;

(3) a testator who reposed trust and confidence in such beneficiaries; and

(4) a will prepared or procured and executed in circumstances wherein such beneficiaries were instrumental or participated.’ ” *Kline*, 245 Ill. App. 3d at 422 (quoting *In re Estate of Henke*, 203 Ill. App. 3d 975, 978 (1990)).

¶ 84

A. Fiduciary Relationship

¶ 85

With respect to the first element, a fiduciary relationship, this court has previously determined that a fiduciary relationship may exist where there is trust reposed on one side and resulting superiority and influence on the other. *Kline*, 245 Ill. App. 3d at 425-26. A fiduciary relationship may arise from a relationship which is “moral, social, domestic or personal in its origin.” *Roeseler*, 287 Ill. App. 3d at 1018. Some of the factors to consider when determining whether a fiduciary relationship exists include: “degree of kinship, disparity in age, health, mental condition, education, and whether a servient party entrusted a dominant party with the handling of their business or financial affairs.” *Kline*, 245 Ill. App. 3d at 426.

¶ 86

In this case, the record shows Gene and Jackie resided together in Jackie’s home beginning in 2001, and continued to reside together in Jackie’s home until Jackie was moved to a nursing home on December 11, 2008. Once Jackie became seriously ill, Jackie relied on others for transportation, the administration of prescribed medication, and her daily hygiene and

constant supervision. The court found Jackie trusted both Gene and Diana to provide for her daily needs creating a fiduciary relationship between Jackie and both Gene and Diana.

¶ 87 B. Dependent Testator/Dominant Beneficiaries

¶ 88 Next, we consider whether Gene, as a primary beneficiary, and Diana as a remainder beneficiary if Gene predeceased Jackie, occupied a position of dominance or control over Jackie at the time the 2008 will was executed. The record shows that once Diana became involved in Jackie's care beginning on November 3, 2008, several significant changes took place. First, Diana directed Nancy to leave Jackie's house on November 6, 2008. Gene and Diana isolated Jackie from others and Gene influenced Jackie's decision concerning whether she would allow Michelle to visit Jackie on November 7, 2008, before leaving the area.

¶ 89 With respect to the dominant role of the beneficiaries, Gene and Diana, the record shows once Diana directed Nancy to leave Jackie's home on November 6, 2008, Nancy was not allowed to have any subsequent contact with Jackie. These facts support the court's finding that Gene and Diana, the only named beneficiaries of the 2008 will, assumed a dominant role and controlled every aspect of Jackie's living environment.

¶ 90 C. Trust and Confidence

¶ 91 The third element required to support a finding of undue influence focuses on whether Jackie had to place her trust in Gene and Diana. Franks, a caseworker for the elderly, testified that in November 2008, Franks witnessed Jackie turning to both Gene and Diana for answers when Jackie did not know or understand the answers to Franks' questions. This observation by Franks, an independent witness and a caseworker for the elderly, alone supported the court's finding that Jackie placed her trust in both Gene and Diana in November 2008.

¶ 92 D. Participation by Beneficiaries in the Preparation of the 2008 Will

¶ 93 Finally, we consider whether the fourth element is present, namely, whether the beneficiaries were instrumental or participated in the execution of the 2008 will. It is undisputed Diana canceled the appointment with Attorney Pignatelli and Gene made the appointment for Jackie to meet with attorney Neal. Gene was present during both appointments with attorney Neal and paid for the services attorney Neal provided to Jackie. Finally, the trial court emphasized that Jackie did not have the mental capacity or ability to schedule an appointment with attorney Neal and Gene initiated this meeting. The court was mindful that Jackie's 2008 will seemed to mirror Gene's will. Further, Jackie was never alone with attorney Neal during either appointment, since Gene or Diana or both were present in the room. Thus, there was ample evidence to show both Gene and Diana participated in the procurement of the 2008 will naming them both as beneficiaries.

¶ 94 After a careful review of the record, there were sufficient facts presented to the trial court to support all four elements necessary to raise a presumption of undue influence as required by existing and well established case law. The court's finding addressing the presence of each one of these four elements was not against the manifest weight of the evidence.

¶ 95 E. Evidence Rebutting the Presumption of Undue Influence

¶ 96 Next, we address the contention that the court did not allow Diana an opportunity to offer evidence to rebut the presumption of undue influence. Procedurally, Michelle had the burden to prove the presumption of undue influence. Michelle ended her case-in-chief with Diana's testimony, as an adverse witness. After Michelle concluded her evidence, the court allowed Diana's attorney to present additional testimony or evidence. Diana's counsel elected to call his client to testify on her own behalf after Michelle rested her case. During Diana's testimony, she

attempted to rebut matters relevant to the issue of undue influence and testamentary capacity.

¶ 97 In fact, Diana denied imposing her own will upon Jackie and clarified for the court that Diana did not set up the appointments for Jackie with attorney Neal. Diana advised the court that Gene selected attorney Neal and set up those appointments. Diana also explained to the court that, contrary to some of the testimony presented by Michelle, Jackie was able to communicate her wishes to Diana. The record contradicts Diana's appellate counsel's view that the trial court did not allow Diana an opportunity to offer evidence to refute or rebut the presumption of undue influence arising out of the fiduciary relationship between Gene and Diana with respect to Jackie.

¶ 98 Therefore, Diana's contention that the trial court conducted the proceeding in an unfair fashion is unsupported by the record. In this case, we conclude the trial court did not prevent Diana from offering sufficient evidence for the purposes of rebutting the presumption of undue influence resulting from Gene and Diana's close, personal, fiduciary relationship with Jackie at the time of the 2008 will.

¶ 99 III. Improper Attestation Jurisdiction

¶ 100 Finally, Michelle requests this court to address the issue of whether the attestation of the 2008 will was improper. Diana argues this court does not have jurisdiction to address that issue because Michelle did not file a cross-appeal pursuant to Supreme Court Rule 303(a)(3) (eff. June 4, 2008).

¶ 101 Michelle's attorney contends that a cross appeal is not permitted under the circumstances in the case at bar, since the trial court granted Michelle's prayer for relief in its entirety by setting aside the 2008 will. See *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 386 (1983). The *Material Service* court held, "It is fundamental that the forum of courts of appeal

should not be afforded to successful parties who may not agree with the reasons, conclusions or findings below.” *Id.* (quoting *Illinois Bell Telephone Co. v. Illinois Commerce Com.*, 414 Ill. 275, 282-83 (1953)). However, since a reviewing court does not have to accept the reasons given by the trial court in rendering its decision, an appellee who received judgment in her favor is still permitted to present argument on appeal regarding *findings* of the trial court that were adverse to the appellee. *Id.*

¶ 102 Therefore, we conclude this court may properly consider Michelle’s challenge to the court’s finding that the 2008 will was properly witnessed. However, since we have resolved the issues raised in this appeal against the appellant, we elect to refrain from considering the attestation issue on the merits.

¶ 103 CONCLUSION

¶ 104 For the foregoing reasons, we affirm the trial court judgment setting aside the 2008 will and finding it void.

¶ 105 Affirmed.