2015 IL App (4th) 140600-U

NO. 4-14-0600

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of JAMES ROBERT SCHUTZBACH, Deceased,	)	Appeal from Circuit Court of
ROBERT SCHUTZBACH and JOHN SCHUTZBACH, Petitioners-Appellees,	)	Coles County No. 11P88
v.	)	
MARITA G. STOLTZ, Respondent-Appellant.	)	Honorable Teresa K. Righter, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The verdict in this case came down to witness credibility, and thus the trial court's denial of respondent's motion for a judgment notwithstanding the verdict or, in the alternative, a new trial was not erroneous.

¶ 2 In August 2011, respondent, Marita G. Stoltz, filed a petition for probate of the will of decedent, James Robert Schutzbach. In February 2012, petitioners, Robert (Bob) and John Schutzbach, who are two of decedent's four brothers, filed a petition to contest the validity of decedent's will, asserting undue influence and a lack of testamentary capacity. Respondent filed a counterclaim, seeking construction of the will provision related to decedent's farm. After a March 2014 trial, the jury found the document in question was not the valid last will of decedent. Respondent filed a motion for a judgment notwithstanding the verdict (judgment *n.o.v.*) or, in the alternative, a new trial, which the Coles County circuit court denied in June 2014.

¶ 3 Respondent appeals, asserting the trial court erred by failing to enter a judgment *n.o.v.* or, in the alternative, granting her a new trial. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Decedent was born in 1954 to Cyril and Dolores Schutzbach. Decedent had an older brother, Bill, who died in a car accident and had no children, and four younger brothers, John, Tom, Mark, and Bob. Decedent was married once and later divorced. He never had any children. In 1982, decedent and Jerry Hamner opened the Charleston Service Center (Shop), an automotive repair shop. In 1985, Bob began working in the Shop. In November 1998, Hamner and decedent entered into a corporate buy-sell agreement to provide for the surviving stockholder's purchase of the common stock owned by the deceased stockholder. Under the agreement, upon the death of either stockholder, the surviving stockholder agreed to purchase the deceased stockholder's shares. The agreement noted the parties had insurance policies on the life of each other in an amount adequate to purchase all of the stock of the other shareholder. The purchase price of the stock was to be paid to the deceased shareholder's estate within 30 days after the qualification of the estate's legal representative. The agreement addressed other issues such as stock price and termination of the agreement and also provided the agreement could only be modified in writing. The agreement was drafted by an attorney referred to as "Mr. Plunkett," and when Plunkett stopped practicing law, James Grant became the Shop's attorney.

¶ 6 In 2006, decedent began dating respondent. They maintained separate residences, which were about 60 miles apart. Respondent had one daughter, Jennifer, who married Brad Mayes. Jennifer and Mayes had three children.

¶ 7 On May 10, 2011, decedent had his gallbladder removed in Charleston, Illinois. The next day, he went to Barnes-Jewish Hospital in St. Louis, Missouri. There, he learned he

had cancer. Decedent was released from Barnes-Jewish Hospital on May 14, 2011. On May 19, 2011, decedent met with an oncologist in Charleston and learned it was stage four cancer with few treatment options. He was given a life expectancy of three to six months. Decedent began hospice care on June 3, 2011.

¶ 8 Decedent lacked a will, and Kevin Clark referred him to attorney Kristen Bays. Bays drafted decedent's power of attorney for health care, power of attorney for property, and will. On June 1, 2011, decedent executed his power of attorney for health care and power of attorney for property, naming respondent as his agent and John as his successor agent. On June 13, he executed his will in the presence of Bays and her brother, Kevin Crouse. The will named respondent as the executor and John as the successor. As to decedent's boat, the typed will bequeathed it to John, but John's name was crossed out and respondent's name written next to it with decedent's initials. Decedent's truck went to Bob and noted his hope Hamner would continue to make the payments on it. The will noted decedent's business would be handled under the terms of the business agreement between him and Hamner. Regarding decedent's farm, decedent gave petitioners jointly "the first right to purchase" the farm and the personal property associated with it for a total price of $75,000. The proceeds of the sale were to be used to pay off the farm's mortgage. If petitioners chose not to exercise their right, then the property was to be sold and the proceeds of the sale added to decedent's liquid assets and considered part of his estate. Decedent gave all of his remaining property to respondent.

¶ 9 On June 24, 2011, decedent died at his home. He was survived by his parents and four younger brothers. In August 2011, respondent filed a petition for the probate of decedent's will, letters testamentary, and independent administration of the estate. In February 2012, petitioners filed their petition to contest the will's validity on the bases of undue influence and a

lack of testamentary capacity. In response, respondent filed a counterclaim, seeking construction of the will provision related to the farm.

¶ 10 In March 2014, the trial court held a jury trial on the will contest. Petitioners presented the testimony of (1) Hamner; (2) respondent, as an adverse witness; (3) Grant; (4) Matthew Iwan, decedent's friend; (5) Michael Albin, decedent's friend; (6) Bob; (7) John; (8) Carrie Schutzbach, Bob's wife; and (9) Tom Bishop, decedent's friend. Respondent presented the testimony of (1) Brad Johnson, an independent insurance agent who sold Mass Mutual policies; (2) Leah Jenkins, an insurance agent at Cooper Bumpus Insurance Agency; (3) Clark; (4) Kay Wheeler, a hospice nurse; (5) Richard Stark, a State Farm Insurance agent; (6) Bays; (7) Crouse; (8) Mayes; (9) respondent; and (10) Robert Waggoner, a former co-owner of decedent's farm. John testified on rebuttal. The documentary evidence included the following documents and records of decedent: (1) the June 13, 2011, will; (2) the June 1, 2011, power-of-attorney documents; (3) handwritten notes; (4) medical and hospital records; (5) hospice records; (6) bank statements; (7) bank account signature cards; (8) the corporate buy-sell agreement; (9) the May 16, 2011, Jackson National Insurance Company beneficiary-change form; (10) the June 3, 2011, Mass Mutual Financial Group beneficiary-change form; and (11) the insurance check payable to Hamner.

¶ 11 The evidence relevant to the issues on appeal is set forth below. Hamner testified that, after decedent's cancer diagnosis, they had a conversation in respondent's presence about decedent's assets and the Shop. Decedent mentioned his truck, Dewalt tools, guns, home, and farm. As to the Shop, decedent expressed his desire for Bob to get his interest. Decedent proposed that, if Hamner took Bob as a partner, he could keep the insurance check, and if he did not take Bob as a partner, then Hamner should give the money to Bob. Hamner testified he and

decedent believed they could do whatever they wanted under the buy-sell agreement. Hamner later called decedent and told him that he did not want Bob as a partner.

¶ 12 On June 17, 2011, Hamner went to decedent's home to have him sign the annual documents required by the Secretary of State's office. Decedent was tired and weak. The first two times the decedent signed, he was coherent. However, the last three times he was not really "with it" because Bob had to tell decedent to stop signing. In Hamner's opinion, decedent knew what he was signing when Hamner first arrived, but toward the end, decedent did not. After decedent's death, Hamner was surprised the insurance check was not made out to Bob and learned he and decedent could not have done whatever they wanted under the buy-sell agreement. Also, after decedent's death, Hamner mentioned to respondent decedent wanted Bob to have the life insurance check for the Shop, and respondent indicated things may have changed after decedent told him want he wanted to happen.

¶ 13 Respondent testified that, while decedent was at Barnes-Jewish Hospital, he started writing down his estate plan. He completed the top portion of his handwritten notes in the hospital and the second part during the weekend of June 4, 2011, which he spent with petitioners. On May 20, 2011, she went with decedent to his bank to execute signature cards, making her a joint owner of his personal bank accounts. Thereafter, she started paying decedent's bills, but he knew what checks she was writing. On June 3 or 6, 2011, she started filling decedent's pillbox for his convenience. However, she did not administer his medication until June 19, 2011. On June 6, 2011, respondent started staying at decedent's home. Respondent denied driving decedent to the insurance agencies. However, she was present for his first meeting with Bays and the second meeting, during which decedent signed his power-of-

attorney documents. However, on June 13, 2011, she stayed in the car while decedent signed his will. She believed his appointment with Bays that day was at 4 p.m.

¶ 14 Additionally, respondent testified she knew decedent wanted Bob to have his interest in the Shop but denied Hamner and decedent talked about the insurance money going to Bob. Respondent also stated decedent wanted John and Bob to have the farm and considered conveying it to them before his death. Respondent testified she told decedent to do whatever he wanted to do with the farm but cautioned him about the capital gains tax. Respondent also testified about the weekend of June 10 through 12, 2011, when she and the decedent went to Indiana to babysit her grandchildren. She stated decedent was taking pain medication every four hours but denied it made him drowsier than he usually was with his condition. Decedent did have to lie down in the car because of tiredness.

¶ 15 Grant, the Shop's attorney, testified that, on June 3, 2011, he received a telephone call from decedent but was out of the office that day. He did return the call but could not recall when and what they discussed. Grant did testify he never discussed the potential transfer of decedent's interest in the Shop to Bob. After decedent's death, Grant discussed the buy-sell agreement with Hamner. Grant also testified it was Hamner who could have changed the beneficiary of the life insurance on decedent related to the Shop.

¶ 16 Iwan testified he met decedent in 1979. After decedent's diagnosis, he first saw decedent on May 27, 2011, and stayed with him until May 30, 2011. Decedent expressed his disappointment about Hamner not wanting Bob as a partner and his desire that Bob would get the insurance money. During the visit, decedent seemed like himself, except for his tiredness. Iwan had fixed up decedent's boat, and decedent told him that he did not think John, who had co-owned boats with decedent in the past, wanted his current boat. Decedent asked Iwan to sell the

boat and give the proceeds to John. Decedent tried to give Iwan the title, but Iwan took a copy of it instead.

¶ 17 Iwan saw decedent again on June 11, 2011, at the home of respondent's daughter and son-in-law in Indiana. In Iwan's opinion, decedent had deteriorated a lot since the end of May. When they arrived, decedent was lying on the couch. When asked if he and decedent were able to have a meaningful conversation, Iwan said, "[n]ot much," but they did talk about the good times. Respondent brought decedent his pain medication, and decedent fell asleep for a couple of hours. When decedent offered to get Iwan and his wife a soda, he was unable to get himself up to get the soda. Iwan "highly doubt[ed]" decedent had the ability to understand his estate and the distribution of it on June 11. Iwan noted his own experience with pain medication and decedent's deterioration from May. In Iwan's opinion, on June 11, decedent would have been unable to (1) understand a document, (2) effectively communicate his wishes and desires, and (3) demonstrate an understanding of all of it. According to Iwan, decedent was totally dependent on respondent.

¶ 18 Albin met decedent in 1974. He learned of decedent's terminal illness on May 24, 2011. From then until decedent's death, Albin saw decedent quite often, more than a couple of times a week. Albin noted that before his diagnosis decedent kept his to-do list in his head, but afterwards, he had it on a piece of paper and would mark off things when accomplished. During the first week of June 2011, decedent began discussing his assets with Albin. Decedent wanted Bob to have his interest in the Shop, but after Hamner did not want Bob as a partner, he wanted the life insurance associated with the Shop to go to Bob. Decedent also wanted his farm to go to John and Bob. Albin encouraged him to sell the farm to them before his death, but decedent noted the capital gains tax. Albin agreed with decedent that, if he was selling the farm for more

than he paid for it, he would have to pay capital gains taxes. Sometime during the week of June 12 through 15, Albin thought decedent was unnecessarily concerned with his expenses. Decedent was concerned about how his bills would get paid and how his insurance worked into all of it if he lived for six months. Decedent talked about selling his boat to meet expenses. Albin later testified decedent's concern was over medical expenses. He noted respondent never addressed decedent's concerns. Albin also noted decedent never mentioned he had Iwan already trying to sell the boat. Albin opined that, by early June, decedent lacked the ability to understand his assets and make a plan to dispose of them. He noted decedent's paranoia about how the bills would get paid, which was unlike decedent because decedent knew numbers and how to make business decisions.

¶ 19 While Bob saw decedent every day, he was on vacation from June 10 through 16, 2011. Bob's wife, Carrie, testified respondent called them on either June 14 or 15, 2011, and said decedent had taken a turn for the worse. Respondent noted decedent had become weak and his body was starting to slow down. John testified the side effects of decedent's medications included drowsiness and disorientation.

¶ 20 Bishop, who had been friends with decedent since grade school, testified he saw decedent on Memorial Day 2011 and talked with him a lot. At that time, decedent communicated appropriately. Bishop did not see decedent again until June 17, 2011. He noticed a big change in decedent. Decedent was slurring his words and sleeping during conversations. It seemed like decedent was drunk. Bishop was present when Hamner brought the Shop documents to decedent. Decedent was distraught about signing the documents and indicated things did not make sense to him. Decedent did not appear to know what he was signing. In Bishop's opinion, on June 17, 2011, decedent did not have the ability to understand his assets and

make a plan to dispose of them. Bishop also noted that, the next day, decedent could not remember his computer password and could not log on to his computer.

¶ 21 Johnson testified that, on June 3, 2011, decedent brought in a change-of-beneficiary form to his office. Decedent was alone, and his conversation was appropriate. Johnson had no concerns about decedent understanding what he was doing. Jenkins testified that, on May 16, 2011, decedent came into the office by himself to change the beneficiary on his annuity to respondent. Decedent mentioned having a life insurance policy, of which a gentleman was the named beneficiary, and he did not want to do anything with that. Jenkins estimated decedent was in the office for 30 minutes, and she had no concerns about him understanding what he was doing. Stark testified that, sometime in June 2011, decedent came in and made a claim on a lost ring. John came with him. Stark had no concerns about decedent's mental functioning.

¶ 22 Clark testified that, after decedent's diagnosis, he was talking with decedent at the Shop, and decedent mentioned not having a will. Clark referred decedent to Bays because her husband was Clark's boss.

¶ 23 Bays testified decedent was her mechanic. In May 2011, she talked with him on the telephone about setting up an appointment for a power of attorney for healthcare, a power of attorney for property, and a will. In the middle of May 2011, Bays met with decedent at his home. Respondent was present, and decedent did not want her to leave. Bays first discussed the two different types of a power of attorney, and decedent did not want to place any limits on respondent's authority. Since decedent and respondent were not married and Bays had heard some comments by Carrie that raised concerns about respondent and decedent's family getting along, Bays made sure decedent was certain he wanted respondent to serve as his agent under the

power-of-attorney documents. Decedent wanted John to be the successor agent. Bays then discussed with decedent his family members. Decedent mentioned everyone, except his deceased brother. They also discussed why decedent only wanted to leave property to two of his four brothers, and decedent mentioned they were the brothers to whom he was the closest.

¶ 24 After talking about decedent's family, they discussed decedent's assets and liabilities. As to the farm, Bays testified decedent stated he wanted John and Bob to have the right of first refusal to purchase it for $75,000. Decedent also wanted the personal property that went with the land to stay with it. Bays explained the right of first refusal meant that, in the event decedent's executor wanted to sell the property, the brothers would have the right to purchase it, and if they did not, the executor could sell it outright or retain it. Decedent also indicated he did not want his guns mentioned in his will because they would be taken care of before his death. Decedent stated he wanted his boat to go to John, his home to go to respondent, and his truck to go to Bob. Decedent also told Bays she did not need to worry about the Shop because it was taken care of in the buy-sell agreement. Bays asked if she could contact the attorney that was involved with the agreement, and decedent told her no because he was taking care of it. During the discussion that day, Bays testified decedent appeared to be the same person mentally as she had known him to be for over 15 years.

¶ 25 After the first meeting, decedent called and asked Bays if he could sign the power-of-attorney documents before the will. On June 1, 2011, she met with decedent at her office. Bays read through the power-of-attorney documents and explained their provisions to him. She felt he understood what she was explaining to him. Decedent signed the documents and had respondent and John sign the documents that day as well. During this meeting, Bays mentioned the Shop and asked if decedent had talked with Grant yet. Decedent had not, and she

again offered to contact him. Decedent again declined her offer. Additionally, sometime near the June 1, 2011, meeting, decedent called Bays and asked her to give the boat to respondent instead of John. Decedent did not give her a reason for the change.

¶ 26 Bays met with decedent again on the afternoon of June 13, 2011. Bays read the will to decedent. Decedent followed along with her. He had one question about the boat. The will gave the boat to John, and decedent had wanted it to go to respondent. Bays's secretary was not there, so Bays tried to pull up the document on her secretary's computer. However, she was unable to do so. Bays gave decedent the option of coming back at a later date and signing a clean document or making the change in writing on the current document with him initialing the change in front of the witnesses. Decedent chose the latter. In Bays's opinion, decedent gave no indications he did not understand what he was doing. At the will signing, Bays again discussed the farm with decedent. She recommended he sell it to John and Bob before his death, and decedent did not want to do that. Bays then asked if he wanted a time frame for when the purchase should happen, and decedent did not want one. Decedent also told Bays he had talked with Grant about the Shop and it was all taken care of. Bays had her mother and Crouse witness the will signing. In the presence of the witnesses, Bays asked decedent a series of question about whether he understood certain things, and he replied in the affirmative each time. She also pointed out the error regarding the boat. Bays had no concerns about decedent's soundness of mind, memory, or ability to understand the will. Decedent had said he would like to get the will done so he could go home and take his pain medications.

¶ 27 Crouse testified he had known decedent since 2002 and had no concerns about certifying decedent was of sound mind and body on June 13, 2011. That day, he and decedent had a conversation about trucks. Crouse was present when the will was read to decedent, and

decedent's only question was about the error in the document regarding the disposition of decedent's boat. Crouse also testified he had not seen decedent in awhile before the will signing, but he had notarized decedent's signature on June 1, 2011.

¶ 28 Wheeler's testimony and hospice notes indicate she saw decedent on June 3, 6, 9, 16, and 20-22, 2011. On June 3, 2011, she rated decedent at 40% on the Karnofsky scale, which means he required special care and assistance. Wheeler testified that, even as of June 6, 2011, decedent should not have been left alone. Wheeler had been trained on performing assessments on patients' mental functioning. Wheeler assessed decedent's mental function during every visit. She rated decedent's mental function as good until June 20, when she found his mental status was poor and deteriorating. Wheeler acknowledged she never talked with decedent about his assets or his estate. On June 9, Jennifer Cooper, the hospice social worker, also noted decedent's mental status was good and did not note any deficiencies. However, she did note decedent reported getting disoriented at night. Wheeler testified she had no concerns about decedent traveling to Indiana the weekend of June 10 through 12. On June 15, 2011, decedent called and reported having frequent nausea and an emesis with a tinge of blood. On June 16, when Wheeler evaluated decedent, nothing caused her to believe he was unable to understand instructions or had diminished mental capacity. However, her note for that day states the following regarding decedent's emotional behavior: "diminished interest in most activities, lack of concentration, and withdrawal from social interaction." As to decedent's pain on June 16, Wheeler's note indicated decedent's pain never went away but was tolerable. Additionally, on June 16, decedent was still independent as to bathing, toileting, eating, hygiene, and ambulation.

¶ 29 Mayes met decedent in 1999 or 2000 and married respondent's daughter in 2006. Respondent and decedent came to his home the weekend of June 10 through 12, 2011. They had

lunch at a Mexican restaurant on June 10, and decedent required no assistance. Decedent appeared mentally to be the same person he had always been. Decedent did show some signs of physical weakness related to the cancer. Decedent engaged in casual conversation during lunch. Mayes also saw decedent that evening during dinner, and decedent conversed appropriately. It was again casual conversation. On June 11, Mayes saw decedent in the late morning. They sat outside in lawn chairs and talked for about an hour. Mayes asked about the boat, and decedent indicated he was trying to sell it. Decedent also expressed his disappointment about paying into the social security system and then not receiving any benefits from it. Decedent and Mayes also talked about investments and retirement savings. Decedent remarked he probably could have done better for retirement if he had investments. Additionally, decedent voiced concerns about the Shop due to Hamner occasionally forgetting to make an invoice or to put parts on an invoice.

¶ 30 After the conversation on June 11, Mayes and his wife left for Chicago, leaving respondent and decedent with a four year old and two-year-old twins. He had no concerns about leaving respondent to care for decedent and the three children. Mayes and his wife came home around 9 a.m. on June 12. Decedent again engaged in an appropriate, casual conversation with Mayes. Before decedent left, he came up to Mayes, shook his hand, and said, "See you, Brad." According to Mayes, decedent had never done that in the past and appeared to know it was the last time he would see Mayes.

¶ 31 At the conclusion of the trial, the jury returned a general verdict that the document in question was not the valid last will of decedent. On April 24, 2014, respondent filed a motion for a judgment *n.o.v.* or, in the alternative, a new trial, asserting the evidence was insufficient for the jury to find undue influence or lack of testamentary capacity. At a June 3, 2014, hearing, the trial court denied respondent's posttrial motion.

¶ 32 On July 3, 2014, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Since the probate proceedings did not end with the trial court's June 2013 ruling, this court has jurisdiction of the will contest under Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010) (providing a judgment or order entered in the administration of an estate which finally determines a right or status of a party is appealable without a special finding).

¶ 33 II. ANALYSIS

¶ 34 A. Judgment *N.O.V.*

¶ 35 Respondent first asserts the trial court erred by denying her request for a judgment *n.o.v.* Petitioners assert the trial court properly denied respondent's request.

¶ 36 Section 2-1202(b) of the Code of Civil Procedure (735 ILCS 5/2-1202(b) (West 2012)) permits a judgment *n.o.v.* and states "[r]elief after trial may include the entry of judgment if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, even though no motion for directed verdict was made or if made was denied or ruling thereon reserved." Furthermore, our supreme court has stated the following:

> "A motion for judgment *n.o.v.* should be granted only when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand. [Citation.] In other words, a motion for judgment *n.o.v.* presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable

> to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case. [Citation.] The standard for entry of judgment *n.o.v.* is a high one and is not appropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. [Citation.] *** Our standard of review is *de novo*." (Internal quotation marks omitted.) *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37, 983 N.E.2d 414.

Additionally, "[i]n ruling on a motion for a judgment *n.o.v.*, a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Maple v. Gustafson*, 151 Ill. 2d 445, 453, 603 N.E.2d 508, 512 (1992).

¶ 37 In this case, petitioners sought to invalidate decedent's will on two bases, undue influence and lack of testamentary capacity. The jury returned a general verdict, finding the June 2011 will was not decedent's valid last will. Under the two-issue rule, a general jury verdict will not be disturbed on review if the case involved two or more causes of action or theories for recovery and sufficient evidence was presented to support at least one of the issues presented to the jury free from error. *Robinson v. Boffa*, 402 Ill. App. 3d 401, 406, 930 N.E.2d 1087, 1093 (2010).

¶ 38 We begin our analysis by examining the evidence presented in support of petitioners' lack-of-testamentary-capacity claim. Under Illinois law, a testator is presumed competent to execute a will. *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 227, 658 N.E.2d 462, 467 (1995). Thus, the parties who assert a testator's lack of testamentary capacity must prove

such by a preponderance of the evidence. See *Roller v. Kurtz*, 6 Ill. 2d 618, 628, 129 N.E.2d 693, 697 (1955); *Kuster*, 276 Ill. App. 3d at 227, 658 N.E.2d at 467. "Proof by a preponderance of the evidence means that the fact at issue *** is rendered more likely than not." *People v. Houar*, 365 Ill. App. 3d 682, 686, 850 N.E.2d 327, 331 (2006). This court has defined "testamentary capacity" as " 'the ability to know and understand the natural objects of one's bounty, the nature and extent of one's property, and to make a disposition of property according to some plan formed in the mind.' " *Kuster*, 276 Ill. App. 3d at 227, 658 N.E.2d at 467 (quoting *Manning v. Mock*, 119 Ill. App. 3d 788, 804, 457 N.E.2d 447, 456 (1983)); see also *DeHart v. DeHart*, 2013 IL 114137, ¶ 20, 986 N.E.2d 85. The absence of any one of the aforementioned requirements indicates a lack of testamentary capacity. *DeHart*, 2013 IL 114137, ¶ 20, 986 N.E.2d 85. " 'Evidence of physical impairment standing alone is insufficient to establish a lack of testamentary capacity.' " *Wiszowaty v. Baumgard*, 257 Ill. App. 3d 812, 817, 629 N.E.2d 624, 629 (1994) (quoting *In re Estate of Osborn*, 234 Ill. App. 3d 651, 658, 599 N.E.2d 1329, 1333 (1992)).

¶ 39 "To be relevant, evidence of a lack of testamentary capacity must relate to a time at or near the execution of the will." *Kuster*, 276 Ill. App. 3d at 227, 658 N.E.2d at 467. "Evidence of mental condition at other times, unless it fairly tends to show the condition of the testator at the time the will was actually executed, is wholly inconsequential." *Shevlin v. Jackson*, 5 Ill. 2d 43, 47, 124 N.E.2d 895, 897 (1955). While Illinois courts have not defined the relevant time period, we recognize our supreme court has held proof of a testator's mental condition two years before the will's execution was properly received. *Kuster*, 276 Ill. App. 3d at 227, 658 N.E.2d at 467.

¶ 40 A majority of the evidence cited by petitioners in support of the jury's finding in their favor is the opinions of three of decedent's longtime friends, Albin, Iwan, and Bishop. "A lay witness may give her opinion regarding the unsoundness of a testator's mind [citation], so long as that witness had a sufficient opportunity in a conversation or some other transaction in which to form that opinion." *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1016, 679 N.E.2d 393, 402 (1997). Moreover, our supreme court has a explained "a lay witness must testify to sufficient facts and circumstances to afford reasonable ground for a belief in the soundness or unsoundness of mind of the person whose mental capacity is questioned and to indicate that his opinion is not a guess, suspicion, or speculation." *Butler v. O'Brien*, 8 Ill. 2d 203, 210, 133 N.E.2d 274, 278 (1956). At the trial in this case, respondent did not raise any objections to the opinion testimony of decedent's friends. Thus, on review, respondent has forfeited any challenge to the admission of such testimony. See *C.D.L., Inc. v. East Dundee Fire Protection District*, 252 Ill. App. 3d 835, 848, 624 N.E.2d 5, 14 (1993) (noting that, in general, "the failure to object to certain testimony at the time it is presented waives the objection for purposes of review").

¶ 41 At trial, Iwan testified that, if he had put a document in front of decedent on June 11, 2011, decedent would not have been able to understand the document. He further testified that, on that date, decedent was unable to effectively communicate his wishes and desires and demonstrate an understanding of his wishes. According to Iwan, that day, respondent lacked energy, was in a great deal of pain, and fell asleep after taking his pain medication. Albin, who saw decedent more than a couple of times a week during decedent's illness, testified that, in early June 2011, decedent would have been unable to understand his assets and make a plan to dispose of them. During every meeting Albin had with decedent, decedent got confused or disoriented about things. According to Albin, decedent was paranoid about how his bills were going to get

paid. He also testified about a conversation with decedent in which decedent was thinking about selling the boat to pay expenses, and decedent had already given the title to another friend to sell it. Bishop saw decedent on June 17, 2011, and opined decedent at that time lacked the ability to understand his assets and form a plan for the distribution of those assets. Bishop testified decedent did not understand the business documents Hamner brought for him to sign. He also explained decedent was slurring his speech and sleeping during conversations. Decedent also could not recall the password for logging on to his computer.

¶ 42 The aforementioned evidence shows decedent lacked the ability to understand his property and make a plan to distribute the property as soon as early June 2011. Accordingly, we find petitioners presented enough evidence to establish a *prima facie* case of decedent's lack of testamentary capacity. Since we need only find one basis to support the jury's verdict, we find the trial court properly denied respondent's motion for a judgment *n.o.v.* and do not address petitioners' undue-influence claim.

¶ 43 B. New Trial

¶ 44 In the alternative, respondent asserts the trial court erred by not granting her a new trial. Petitioners again argue the trial court's decision was proper.

¶ 45 As to a request for a new trial, our supreme court has noted the following:

> "[O]n a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. [Citation.] A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence. [Citation.] This

> court will not reverse the trial court's ruling on a motion for a new trial unless it is affirmatively shown that the trial court abused its discretion." *Lawlor*, 2012 IL 112530, ¶ 38, 983 N.E.2d 414.

Moreover, "[i]n determining whether the trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Maple*, 151 Ill. 2d at 455, 603 N.E.2d at 513. We also keep in mind "[t]he presiding judge in passing upon the motion for new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." (Internal quotation marks omitted.) *Maple*, 151 Ill. 2d at 456, 603 N.E.2d at 513 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74, 199 N.E.2d 256, 257-58 (1964)).

¶ 46 Initially, we note respondent did not object to petitioners' closing argument at the jury trial, and thus respondent has also forfeited any challenge to that on review. See *C.D.L.*, 252 Ill. App. 3d at 848, 624 N.E.2d at 14. However, we have reviewed the record and will disregard any arguments not based on the evidence presented at the jury trial.

¶ 47 In addition to the testimony of decedent's longtime friends, disorientation was a possible side effect of decedent's medications. Respondent herself noted decedent had a "little confusion" the evening of June 5. Cooper's June 9 note mentioned decedent reported having disorientation at night. Moreover, while decedent's mental status was good, with intact mental functioning, on June 16, the hospice note also stated decedent had a lack of concentration, diminished interest in activities, and withdrawal from social interactions. On either June 14 or 15, respondent called Carrie and Bob on their vacation to tell them decedent had taken a turn for

the worse. Moreover, despite being a businessman, decedent did not seem to comprehend the buy-sell agreement did not provide for Hamner giving the life insurance to Bob.

¶ 48 We recognize respondent's evidence included the testimony of Bays, the attorney who drafted decedent's will, and Crouse, Bay's brother who witnessed the will signing. They both testified they had no concerns about decedent's ability to understand his will on the day he signed it. Moreover, Wheeler, the hospice nurse, did not note decedent's mental status and mental functioning as poor until June 20. On June 16, she found decedent could communicate effectively and gave appropriate responses to her questions. Mayes, decedent's friend and respondent's son-in-law, saw decedent the same weekend as Iwan and testified decedent seemed mentally to be the same person he had always been. Respondent also presented the testimony of three insurance agents that decedent met with after his diagnosis. None of them had concerns decedent did not understand what he was doing.

¶ 49 In this case, the jury found petitioners' evidence more credible, possibly because their witnesses had known decedent longer. Thereafter, the trial court that observed the same witnesses found the jury's verdict was not against the manifest weight. Under our standard of review, we give deference to the trial court because of its superior position to judge credibility. While the evidence could have supported an opposite verdict, we find the trial court did not abuse its discretion by denying respondent's motion for a new trial.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the Coles County circuit court's judgment.

¶ 52 Affirmed.