

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1711

IN RE: INTERDICTON OF SHIRLEY BICKMANN VOELKEL
FICHTEL

Judgment Rendered: JUN 05 2015

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2013-15531

The Honorable William J. Knight, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

¹ Throughout most of the record, this petitioner is referred to as "Gretchen Voelkel Campbell," including in the petition and in a power of attorney. However, in the brief and a motion filed with this court, her counsel refers to her as "Gretchen Campbell Voelkel." Since it is apparent from the record that this petitioner's maiden name was "Voelkel," this court will refer to her as "Gretchen Voelkel Campbell" throughout this opinion.

DRAKE, J.

The defendant, Shirley Bickmann Voelkel Fichtel, appeals a judgment of the trial court ordering her interdiction and appointing Matthew Christian Voelkel as curator and Gretchen Voelkel Campbell as undercuraturix. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Petitioners, Mary Voelkel Williams, Mark Herbert Voelkel, Gretchen Voelkel Campbell, and Matthew Christian Voelkel, the children of Shirley Fichtel and Christian Michael Voelkel,² filed a petition for the full interdiction of Shirley Fichtel and for the appointment of a curatrix/curator and undercuratrix. Following the death of Christian Michael Voelkel, Shirley Fichtel married John W. Fichtel, Jr. in 1994. Prior to that marriage, the Fichtels signed a matrimonial agreement to keep all of their property separate and not enter into a community of acquets and gains. The petitioners filed a rule for temporary full interdiction of Shirley Fichtel. In connection therewith, Dr. James M. Robinson, an internist who had been caring for Shirley Fichtel since 2008, determined that her “cognitive ability is markedly impaired to such a degree that [Shirley] Fichtel is incapable of making reasoned decisions regarding finances or family matters.” By affidavit, Dr. Robinson testified that Shirley Fichtel had been suffering from ongoing memory loss for approximately three and one-half years, “during which time there has been a progressive and continuous marked decrease in her cognitive ability.”

The trial court appointed Dr. Ted Bloch, III, a psychiatrist, to perform an independent evaluation of Shirley Fichtel. On April 7, 2014, a hearing was held on the Petitioners’ Rule for Temporary Full Interdiction. Following the hearing, the trial court declared Shirley Fichtel to be a full temporary and preliminary

² Christian Michael Voelkel was married for approximately forty years to Shirley Fichtel before he passed away. He had been deceased for approximately twenty-three years at the time of the trial.

interdict as to her property and partially as to her person. The trial court also ordered visitation by the petitioners, family therapy, and appointed a temporary and preliminary curator, Jeff Bratton, and undercurator, Mark Lambremont. The matter subsequently came for trial on the merits of Shirley Fichtel's full interdiction. The trial court granted the full interdiction and appointed Matthew Voelkel as curator and Gretchen Voelkel Campbell as undercuratrix. Shirley Fichtel appeals, urging the evidence was insufficient to support a finding of a full interdiction as to her person, finances, or property and that the trial court failed to consider less restricted means to protect her interests.

DISCUSSION

A court may order the full interdiction of a natural person of the age of majority, or an emancipated minor, who due to an infirmity, is unable consistently to make reasoned decisions regarding the care of his person **and** property, or to communicate those decisions, and whose interests cannot be protected by less restrictive means. La. C.C. art. 389. Full interdiction is a last resort and, as a result, is warranted only when a person's interests cannot be protected by less restrictive means. A person's interests can be protected by less restrictive means if, for example, his interests (1) are currently being protected by other legal arrangements, including a procuracy, mandate, or trust, or (2) could be protected by other legal arrangements, including limited interdiction. La. C.C. art. 389, Revision Comments—2000, (e).

If a person is consistently unable to make reasoned decisions regarding the care of both his person and his property, or to communicate those decisions, he is a candidate for full interdiction. La. C.C. art. 389, Revision Comments—2000, (b). A person is unable to consistently make reasoned decisions if, for example, he suffers from an infirmity which intermittently deprives him of reason. A person who experiences periodic deprivations of reason can inflict substantial harm to

himself or his property during such bouts and is a candidate for full interdiction. In short, that a person suffering from an infirmity may experience lucid intervals does not render him ineligible for full interdiction. La. C.C. art. 389, Revision Comments—2000(d).

A court may order the limited interdiction of a natural person of the age of majority, or an emancipated minor, who due to an infirmity is unable consistently to make reasoned decisions regarding the care of his person **or** property, **or** any aspect of either, or to communicate those decisions, and whose interests cannot be protected by less restrictive means. La. C.C. art. 390.

The petitioner in an interdiction proceeding bears the burden of proof by clear and convincing evidence. La. C.C.P. art. 4548. To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence. *In re Interdiction of DeMarco*, 09-1791 (La. App. 1 Cir. 4/7/10), 38 So. 3d 417, 424.

The determination of whether to order interdiction is a finding of fact. Thus, the trial court's judgment will not be set aside in the absence of manifest error or a clearly wrong determination. *Interdiction of Cornwell v. Cornwell*, 97-425 (La. App. 3 Cir. 10/15/97), 702 So. 2d 938, 940 (citing *Stobart v. State, Through DOTD*, 617 So. 2d 880 (La.1993)). When the trial court's findings are based on determinations regarding the credibility of witnesses, the manifest error standard accords great deference to those factual findings, because only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what was said. *State ex rel. Smith*, 38,192 (La. App. 2 Cir. 3/3/04), 867 So. 2d 890, 894 (citing *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989)).

The trial court may accept or reject, in whole or in part, uncontradicted opinions expressed by an expert as to ultimate facts, based upon the other evidence admitted at trial. *Interdiction of DeMarco*, 38 So. 3d at 424.

In order to have a person fully interdicted, the party petitioning for the interdiction must prove by clear and convincing evidence, that the person to be interdicted is mentally incapable of administering his estate **and** that he is unable to care for his person. *Cornwell*, 702 So. 2d at 940. A limited interdiction is proper when either form of incapacity is proven and necessity is shown. *Cornwell*, 702 So. 2d at 943.

Prior to the trial, the trial court had ordered the temporary interdiction of Shirley Fichtel as to her property based on the parties' stipulation to the report of Dr. Bloch.³ Pursuant to that order, Shirley Fichtel was "divested of her capacity to initiate transactions or enter into contracts that may bind her financially." Dr. Bloch had opined that "[b]ased upon a preponderance of evidence" Shirley Fichtel was "incapable of managing her own affairs, i.e., financial/legal." Dr. Bloch noted that Shirley Fichtel was suffering from "Alzheimer's dementia, a progressively deteriorating neurologic condition, and as such, will not regain capacity." Dr. Bloch indicated that Shirley Fichtel also exhibited "clear-cut memory deficits as well as executive function deficits" and "progressive dementia."

At the trial, the parties stipulated to the records of Dr. Bloch and agreed that his report was already entered into evidence from the temporary interdiction hearing. Dr. Bloch did not testify at trial, and the only witness to testify on behalf of the petitioners was Matthew Voelkel. Shirley Fichtel claims on appeal that the evidence presented at trial was insufficient to prove by clear and convincing evidence that she is unable to handle her financial situation. Petitioners claim that

³ The stipulation of the parties was that if Dr. Bloch were called to testify, he would testify consistent with his report.

the issue of her being unable to handle her finances was not objected to at trial, and therefore, Shirley Fichtel cannot raise the issue for the first time on appeal.

Petitioners had the burden to prove, by clear and convincing evidence, that Shirley Fichtel was unable to consistently make reasoned decisions regarding the care of her person **and** property or was unable to communicate those decisions. La. C.C. art. 389; La. C.C.P. art. 4548; *Cornwell*, 702 So. 2d at 940. Therefore, Shirley Fichtel was not required to object at trial, and the issue of whether petitioners carried their burden with regard to the property of Shirley Fichtel is properly before this court.

The trial court took into consideration the report of Dr. Bloch, which the trial court believed was unmistakable evidence that Shirley Fichtel required an interdiction relative to her property. A review of the records of Dr. Bloch, which contained records of other treating physicians, is sufficient proof that Shirley Fichtel required an interdiction with regard to her property. On February 27, 2014, Shirley Fichtel saw Dr. Nisha P. Chhabria, a neurologist. In the medical notes for that visit, Dr. Chhabria documents that John Fichtel stated that she “repeats herself, repeats conversations, and has trouble recalling words.” Her husband also stated that the patient was forgetful, had gotten lost while driving, was paranoid, suspicious, and suffered visual hallucinations. Dr. Chhabria diagnosed her with dementia and tremors.

In his report, Dr. Bloch used the words “a preponderance of evidence” with regard to Shirley Fichtel needing an interdiction as to her property. In his letter to the trial court, Dr. Bloch stated:

There is no question about Shirley Fichtel requiring a limited interdiction at the very least with respect to her managing her own affairs, i.e., financial/legal. [Emphasis in original text.]

There is evidence in Dr. Bloch’s records that Shirley Fichtel could not give the setting she was in at the time, her age, or the current year, month, day, or time

of day. Shirley Fichtel had trouble subtracting currency and completing the task of writing a check. Dr. John Fanning, a clinical neuropsychologist, opined that Shirley Fichtel exhibited a major neurocognitive disorder consistent with an Alzheimer's type dementia. He believed that Shirley Fichtel needed assistance with finances and financial decision making, with interdiction being a possibility.

The evidence presented at trial also established that Gretchen Voelkel Campbell, a certified public accountant, had been handling the finances for Shirley Fichtel since before Christian Michael Voelkel passed away, including throughout her marriage to John Fichtel, which at the time of trial was approximately twenty years. Shirley Fichtel had granted Gretchen Voelkel Campbell and Matthew Voelkel power of attorney on February 17, 2009. She also granted Matthew Voelkel power of attorney as to her healthcare decisions on February 24, 2011. Both of these documents were revoked by Shirley Fichtel in November 2013.

Matthew Voelkel testified that he noticed that his mother was having memory problems about two to three years prior to the trial. She also exhibited forgetfulness and repeated herself, and all the siblings were concerned. Matthew Voelkel also testified that in July 2013, he and his siblings met with the Fichtels at the Fichtel home. Everyone at the meeting observed the cluttered nature of the home and several photographs were introduced into evidence. At the meeting, they decided not to sell a piece of property owned by Shirley Fichtel in Colorado, which the siblings wanted to sell to help with the finances of their mother, but instead to get a tenant for that property. Matthew Voelkel also testified how on one occasion his mother was unable to remember how to use the stove to make tea. He further testified regarding the difficulty of having a conversation with his mother because she was unable to "remember one conversation to the next." Matthew Voelkel also explained that six weeks prior to the trial, the utilities were turned off

at a condominium in Mississippi owned by Shirley Fichtel, at which time John Fichtel was handling the finances.

Whether plaintiffs carry their burden of proof and whether testimony is credible are questions of fact to be determined by the trier of fact. *Allman v. Washington Parish Police Jury*, 04-0600 (La. App. 1 Cir. 3/24/05), 907 So. 2d 86, 88. Although Dr. Bloch used the phrase “preponderance of evidence” in his report, the fact-finder had to determine from the totality of the evidence if the “clear and convincing” burden of proof was met. See *Lubom v. L.J. Earnest, Inc.*, 579 So. 2d 1174, 1180 n.1 (La. App. 2 Cir. 1991). The trial court is afforded great deference in weighing an expert witness’s testimony and “may accept or reject, in whole or in part, uncontradicted opinions expressed by an expert as to ultimate facts, based upon the other evidence admitted at trial.” See *La. State Bar Ass’n v. Carr and Associates, Inc.*, 08-2114 (La. App. 1 Cir. 5/8/09), 15 So. 3d 158, 171, writ denied, 09-1627 (La. 10/30/09), 21 So. 3d 292. The trial court was free to accept or reject any part of the expert witness’s opinion. The trial court used his own observations of Shirley Fichtel, as well as the medical and factual findings to determine that the petitioners met the burden of proof. We agree with the trial court that the record contains sufficient evidence to meet the clear and convincing standard that Shirley Fichtel was unable to make reasoned decisions regarding her property or was unable to communicate those decisions.

Shirley Fichtel argues that the petitioners did not prove her property interests could not be protected by less restrictive means. Neither Shirley nor John Fichtel testified at trial. However, the trial court noted that he had observed Shirley Fichtel, eighty-five years old at the time of trial, on a few occasions. Given the evidence recited above regarding Shirley Fichtel’s memory loss, trouble writing checks, having the utilities discontinued at her condominium, and her diagnosis of cognitive impairment, we cannot find that the trial court committed

manifest error in finding that Shirley Fichtel required an interdiction as to her property.

As the trial court noted, the second question was whether Shirley Fichtel should be interdicted as to her person. The petitioners put on evidence regarding the daily living activities of Shirley Fichtel due to her memory problems, which included the testimony of Matthew Voelkel and the records of Dr. Bloch. The medical records reflect that Shirley Fichtel requires supervision taking medication to ensure accurate dosage. Furthermore, she requires assistance to perform daily living tasks and has to be cued to remember steps to take in her daily activities. Lillian M. O'Cain, an occupational therapist, conducted an examination on March 25, 2014, and recommended that Shirley Fichtel: receive gradually increasing supervision, up to twenty-four hour supervision; not drive until she completed a driving evaluation; supervision for meal preparation; medication management; assistance in housekeeping and cooking; supervision when operating electrical appliances; and that numerous safety precautions be put in place. The occupational therapist also noted that Shirley Fichtel was at risk for falls due to visuospatial deficits. The record contained evidence of tripping hazards and the cluttered condition of Shirley Fichtel's home.

Dr. Bloch made several recommendations with regard to Shirley Fichtel's healthcare, mental health, and general well being. Dr. Bloch adopted the recommendations of the occupational therapist, which mainly dealt with the care of Shirley Fichtel's person: that she discontinue driving; that she receive certain medication therapy; and that she engage a company to assist with housekeeping, meal preparation, medication supervision, and safety awareness.

Dr. Fanning also recommended that Shirley Fichtel refrain from driving until a driving evaluation was completed and that she not use the stove by herself. He also concluded that her future needs had to be taken into consideration.

Additionally, the family therapist, Claude Guillotte, observed: (1) prior to the disagreement, John and Shirley Fichtel and the four adult children “all” said they enjoyed a mutually respectful and pleasant relationship; (2) when the children visit their mother without the husband being present, all enjoy their time together; (3) yet, following the disagreement, the children began to have trouble getting access to their mom; (4) the husband, John Fichtel, “is not open to allowing frequent visits between his wife and her children, and clearly has no intention to do so. His demeanor and presentation throughout the session indicate an unwillingness to cooperate with them”; and (5) “it would be fitting and appropriate that he [John Fichtel] undergo psychiatric and/or neurological evaluation to ascertain whether or not he has any cognitive deficits of his own that would be disrupting what should be a ‘normal’ and pleasant familial relationship between the six of them.” The above evidence supports the trial court’s decision to grant an interdiction as to Shirley Fichtel’s person.

The only witness to testify on behalf of Shirley Fichtel was Courtney Blich, the owner of a business providing personalized services for seniors to remain in their home. Ms. Blich has no medical training but did have experience with elderly clients. Ms. Blich testified that she was hired on April 4, 2014 and began seeing Shirley Fichtel on April 14, 2014, approximately five weeks prior to trial. She had worked approximately forty-five hours with Shirley Fichtel at the time of trial.

Ms. Blich did not administer medication, but helped with the housekeeping and safety issues around the home. Ms. Blich testified that Shirley Fichtel did need assistance with household tasks and cleaning the home, but that she was able to dress herself, apply her makeup, and use the restroom alone.

The trial court is afforded great deference in weighing the credibility of witnesses. *State ex rel. Smith*, 867 So. 2d at 894. Shirley Fichtel suggests that

greater weight should have been placed upon the testimony of Ms. Blich. However, Ms. Blich is not a physician or trained as a healthcare professional. She has no training in the care of the elderly, holds a business degree, and only cared for Shirley Fichtel for approximately forty-five hours at the time of trial. The trial court reasonably could have found that the observations of Dr. Bloch, other healthcare professionals, and Matthew Voelkel, who had known his mother his whole life, were more accurate and persuasive. Therefore, we find no manifest error in the trial court's determination that Shirley Fichtel should be interdicted as to her person.

Shirley Fichtel claims that the trial court erred in failing to dismiss the application for interdiction based on insufficient evidence. Given that this court has determined that the evidence at trial was sufficient, this assignment of error is without merit.

Shirley Fichtel also asserts that the trial court did not consider less restrictive means prior to ordering her full interdiction. It is well-settled that an appeal is taken from a final judgment, not from written reasons for judgment that are the trial court's explanations of determinations made. See La. C.C.P. art. 2083. It is, however, not improper for the court of appeal to consider written reasons for judgment in determining whether the trial court erred. *State in the Interest of Mason*, 356 So. 2d 530, 532 (La. App. 1 Cir. 1977); see La. C.C.P. art. 1917.

The trial court's reasons for judgment clearly indicated that it considered whether the interests of Shirley Fichtel could be protected with less restrictive means. The trial court noted that Dr. Bloch explored not only his field of expertise, but ancillary fields related to the care of an elderly person. He also took note of the recommendations from Dr. Bloch with regard to the healthcare, mental health and general well-being of Shirley Fichtel. Furthermore, the trial court's judgment places certain restrictions on the curator and undercuratrix with regard to

the sale of the home or changing her residence; requires certain specific safety measures be taken; appoints an attorney to oversee that an appropriate financial plan is implemented; and orders family therapy for all parties involved. The trial court also set a hearing to review the matter four months after the trial. The only less restrictive means that seemed to be suggested by Shirley Fichtel was the care she had received from Ms. Blich, which the trial court noted may have only been received in response to these proceedings. The trial court also noted the uncooperative attitude of John Fichtel. There is no manifest error in the trial court's consideration of less restrictive means.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to defendant, Shirley Bickmann Voelkel Fichtel.

AFFIRMED.