NOT DESIGNATED FOR PUBLICATION

Nos. 124,939
124,940

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Estate of
Edward Eugene Cassell.

MEMORANDUM OPINION

Appeal from Cherokee District Court; KURTIS I. LOY, judge. Opinion filed February 24, 2023. Affirmed.

Thomas W. Harris, of Harris Law Office LLC, of Roeland Park, for appellant Kristi Yost.

Mark A. Werner, of Law Office of Mark A. Werner, of Pittsburg, for appellees Michael Cassell, Sherry Cassell, John Cassell, Debra Cassell, and Jeffrey Yost.

Before ARNOLD-BURGER, C.J., HILL and SCHROEDER, JJ.

PER CURIAM: Just before his death, a man with a large estate, Edward Eugene Cassell, known as Gene, signed his will and some transfer-on-death deeds that disposed of his property. After his death, some of his children did not agree that Gene was mentally competent when he signed those documents. So they filed two actions, one contesting the will and one contesting the deeds. The district court ruled that Gene was competent and that the will and deeds should be enforced. The children who lost bring these appeals. In this consolidated appeal, we consider both appeals and affirm the district court in all respects.

As time passes, Gene makes preparations for the disposition of his property.

We glean these facts from the record. After his wife's death, Gene, in January 2011, with help from attorney Samuel Marsh, signed several transfer-on-death deeds for certain tracts of his real property. Then, in 2013, Gene signed more transfer-on-death deeds with the help of Marsh. These deeds transferred certain real property to his children and one of his grandchildren upon his death. Gene owned a large amount of farmland and residential real estate.

In November 2016, Gene was admitted to Chetopa Manor nursing home. The nursing home records as early as November 18, 2016, noted that Gene had dementia.

Gene had four living children: Michael Cassell, John Cassell, Kristi Yost, and Charles Cassell. Michael was married to Sherry. John was married to Debra. Kristi had a son, Jeffrey Yost. Gene had one other child, Jacquelyn Burns, who predeceased him. Jacquelyn had two sons, Robert Burns and Jason Burns.

In April 2017, Gene stopped paying his bills on his own but he had Debra write out the checks and Gene signed them. Debra visited weekly or every 10 days. John visited maybe a couple of times a week. Kristi visited Gene every day. She brought Gene his mail. Whenever any issues arose concerning Gene at Chetopa Manor, the staff contacted Debra.

The nursing home administrator, Bob Cuthbertson, asked attorney Darrel Shumake to assist Gene with estate planning. Gene did not ask Cuthbertson to do so. Shumake had done some work for Gene in the 1970s or 1980s.

Shumake met with Gene first on May 5, 2017, and then two other times before the signing of the will. At the May 5 meeting, Gene detailed his assets. He identified his

properties by nicknames. John, Debra, and Kristi were present. Debra testified, "Gene did all the talking." Kristi agreed that Gene identified the properties he wanted to go to particular children. Kristi never objected or raised a concern. At that meeting or another meeting, Gene identified his living children and told Shumake he had a deceased daughter as well. He also identified his grandsons that helped with the farming.

At a later meeting, Shumake showed Gene some maps to help Gene locate his real estate. Gene told Shumake who he wanted certain properties to go to. Shumake color-coded the various tracts of land Gene designated for particular beneficiaries. Shumake then pulled the deeds that corresponded to the properties Gene had identified to draft the estate plan. Gene stated that he wanted to exclude Charles completely from his estate plan. Shumake then drafted a will and a power of attorney using the information he obtained from Gene.

Shumake also drafted transfer-on-death deeds that replaced the earlier deeds. Many stayed the same. But Gene severed a portion of land he had deeded to Kristi and gave one portion to John and Debra instead. Gene transferred another tract to Michael and Sherry that he had originally deeded to Kristi.

During one of the meetings, John commented to Shumake, "I can't believe my dad is not leaving Kristi more." Shumake testified he asked Kristi, "[A]re you okay with this? Do you understand what you've got here? Do you understand?" Kristi responded, "Yes. No problem, everything is fine." Shumake did not show Kristi the will or deeds, nor did he explain their effect.

Debra testified that Gene had a strong personality and was very private. He wanted no one to know his business. Nobody knew Gene's business. They did not know about the prior transfer-on-death deeds. Kristi explained, "[Y]ou don't get in dad's business." Debra testified that if Kristi had told Gene what she wanted, he probably would have refused.

As for Gene's mental condition, Kristi said, "I kept my mouth shut." She worried her father would lash out if she tried to say something.

Shumake did not know Gene had Alzheimer's dementia. Shumake did not inquire into Gene's medical condition or why he was in a nursing home. Shumake testified, "He had long-term memory and he had short-term memory. He was able to point out his real estate and know the people that were there. I didn't find anything wrong with his memory." Shumake had no concerns about Gene's mental capacity to sign the will or the deeds. Shumake verified the information Gene gave him with family members and in the land records.

Debra testified she did not know Gene had Alzheimer's. She testified, "He always knew what was going on." She did not notice a mental decline. Kristi, however, did notice a general decline in Gene's mental faculties.

On May 27, 2017, Pamela Goodnight, a nurse at Chetopa Manor, performed a quarterly brief interview for mental status assessment on Gene with a result of 9 out of 15 points, showing a moderate mental impairment.

Gene signs the will.

On June 14, 2017, the day he signed the will, Nancy Whetstone, a registered nurse, assessed Gene because he was unsteady with walking. He was trembling, washed his face twice (which was not normal), and took two hours to eat breakfast. These things suggested his health was declining. He did not eat lunch. He had low blood pressure. He *did* know that his wheat was being harvested and that his son was combining his crops.

Majel Gramm, a speech language pathologist, also evaluated Gene on June 14, 2017. Her report suggested Gene had an attention and concentration deficit. He had a 60-

79 percent impairment on spoken language comprehension. His impairment was moderate/severe, meaning "Able to complete 25% of the task. Able to follow simple phrases, sentences with cues. Able to follow simple directions, questions with cues. Responds consistently to auditory stimuli. Repetition necessary to enhance comprehension. Response time may be delayed. May exhibit difficulty retaining information. May require cues." As early as February 2017, Gramm noted in Gene's medical records that to communicate with him you had to ask yes or no questions. In March, Gramm noted that Gene required verbal or demonstrative cues to complete tasks or stay on track. The district court later excluded all of Gramm's testimony and records from trial.

On the morning of June 14, 2017, Shumake met with Gene in the dining area of the nursing home and went over the documents. Shumake reviewed the properties going to each child and that one child would be disinherited. Basically, Shumake told Gene, "[Y]ou know, here is the real estate that Kristi is going to get . . . . Here is the real estate that John is . . . . And that sort of thing." Gene told Shumake that Kristi's name was misspelled. Kristi was not at that meeting.

Shumake returned that afternoon around 3:30 or 4 p.m. for the signing of the documents. Linda White accompanied Shumake to serve as notary and witness. White recalled Gene was lying down when they arrived. Also present were John, Debra, and Kristi. Kristi was the first to arrive and had found Gene asleep. Patty Darnell, a banker at Bank of Commerce, arrived to serve as a witness. Darnell recalled Gene was lying down when she arrived. Someone got him up and into a chair. Shumake testified he asked the family members if they had any concerns. They said no.

Shumake asked Gene how he was doing. Gene responded, "They tell me I ain't doing worth a shit." Shumake told Gene he had to change the name of one of the

witnesses on the will because Shumake's mother was not feeling well and could not be a witness. Gene said, "I hope she's all right" or something like that.

Shumake maintained that he discussed the documents with Gene in the afternoon while he was waiting on Darnell to arrive, but he also testified he did not remember if that had just occurred at the morning meeting. Whenever it occurred, Shumake explained the documents and Gene nodded and said, "okay." But Gene did not repeat back any of the contents of the documents. Shumake testified, "I don't recall him specifically saying, 'well, I got five children and four of them are living, one is deceased,' but he knew who they were." Gene also did not outline his assets at the execution meeting. When pressed for anything that objectively revealed Gene knew what he was doing, Shumake stated,

> "[T]hat afternoon, we discussed it. He knew what was going on. We had general conversation about—when we talked about my mother, he knew my mother. . . . [H]e was aware in my opinion and what he had before him and what he was signing, and we talked about the power of attorneys and the authority that the agents were to have. And he acknowledged that."

White recalled that Shumake did not discuss the contents of the documents with Gene at the meeting when they were signed, as that was Shumake's normal practice to protect client privacy. White was clear that she was in the room with Gene and Shumake. Gene was not asked who his heirs were or what property he owned. Shumake asked Gene if he was ready to sign his last will and testament. Gene said, "Yes, let's do it." Shumake said, "[H]ere is your will," turned to the correct page, and showed Gene where to sign. White believed Gene knew what he was signing. She did not observe any confusion or hesitation by Gene.

Darnell later recalled, "They got him up in the chair, they discussed the paper in front of him and told him what he was doing, and I just watched him sign the paper." She did not remember what was said. Neither the contents of the will, nor the names of

Gene's children, nor the assets Gene owned were discussed. When asked if it appeared he knew what he was signing, she responded, "As far as I know he did." She did not know how to tell whether he was competent to sign the will; she just witnessed the signature.

Shumake had not corrected the spelling of Kristi's name in the documents. There was no testimony showing whether Gene noticed the misspelling in the afternoon. There was a discussion of how Gene should sign his name. Debra told Gene to "sign your name there like you were signing a check."

Shumake believed Gene had the capacity to sign the documents. He testified Gene "absolutely" knew what was he was signing. Shumake did not know about how Alzheimer's dementia affected a person's brain or ability to understand.

Gene's medical records revealed he had Alzheimer's dementia, abnormally low blood pressure, atrial fibrillation, major depressive disorder, anemia, and hypothyroidism. He was 87 years old when he died.

The will provides: "It is my intention to make no provisions in this Will for Charles Cassell, and he is familiar with the reasons." The will made five specific bequests of real property:

(1) John and Debra;

(2) Michael and Sherry;

(3) Jeffrey;

(4) Kristi; and

(5) Jason and Robert.

The residue of the estate was left to Michael and John. Michael, John, and Debra were named cotrustees.

Events after the will was signed included two lawsuits.

On June 18, 2017, Gene was acting abnormally. He was "getting upset with staff, cussing and shaking his fist at staff." On June 19, 2017, Nurse Goodnight performed another brief interview for mental status assessment on Gene; this time with a result of 3 out of 15 points, which revealed he had a severe mental impairment. He continued to rapidly decline, reaching a score of 0 out of 15 points on July 7, 2017. He died on July 12, 2017, of Alzheimer's dementia. The certificate of death states: "[O]nset, years."

Gene had over $300,000 at Exchange State Bank and over $500,000 at American Bank. He left the Exchange account to John and the American account to Kristi, by pay-on-death beneficiary designations with the banks.

In August 2017, Michael, John, and Debra filed a probate case in Labette County offering the will to probate. Kristi and Charles contested the will. Charles filed suit in Cherokee County challenging the will and transfer-on-death deeds executed on June 14, 2017, contending his father lacked capacity because of Alzheimer's dementia. Kristi filed a cross-petition making the same allegations. The cases were consolidated for discovery and trial. Kristi moved for summary judgment voiding and setting aside the will and deeds executed on June 14, 2017. The district court denied summary judgment.

Majel Gramm was uncooperative in her deposition. She was retired and did not remember evaluating Gene. The defendants moved to strike her testimony as an expert witness. At the pretrial conference, Kristi's counsel stated Dr. Steven Arkin's expert opinion would not be affected if the court struck Gramm's testimony. "His opinion is not going to change that the guy had progressive dementia, just because on one particular day there was a manifestation of that."

At a hearing on August 27, 2021, the district court ruled that this was a question of weight rather than admissibility and admitted Gramm's records. But the court cautioned the parties about their use of the records:

> "The bottom line is this, this is a question of weight versus admissibility now. It is a record and I'm going to let it in. Her testimony as to those records, you can introduce it, but I've read it all multiple times. The weight that I'm going to give to her opinions is minimal, if anything. I want you to know that.
>
> "Reliance upon her opinions has to be limited, and I know it was a contemporaneous record and she put those down, but she's got to be able to testify to the clinical observations and why before we can say her opinions can be admitted completely.
>
> "So I'm just telling you that right now. That if they are admissible, the weight is very limited that I'm going to give to it. If you are relying upon that for your final analysis, it would be a mistake. With regard to Dr. Arkin saying he looked at those . . . .
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> "He looked at thousands of pages, not just these. But to the extent he's relying on Majel Gramm, I'm not going to allow that. I just want you to know that.
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> "So I don't think that disqualifies his opinion, you didn't have this ruling early on, you couldn't. You couldn't get the deposition of Majel Gramm until July, then you couldn't get the Judge to do this, and then we couldn't get the attorneys available.
>
> "We got everybody together, and here is my ruling for you today. The record can come in as a record, but as far as its content, it is going to be severely limited. I'm not going to order redaction, keep it clean for the appeal.
>
> "All right. Tom, here is my question. I want you to talk to Dr. Arkin and see if he needs to do an addendum to his report. If not, that's fine. But I'm going to give you that opportunity, because we've still got a little less than 60 days.
>
> ". . . [B]ecause I do know that he mentioned these records in his report, and I want to give him the opportunity because there was no opportunity to have this ruling until now."

In other words, the court ruled that Gramm's report was admissible, though it would be given little weight. The court further ruled that the expert, Dr. Arkin, could not rely on Gramm's opinions.

Later, the court excluded Gramm's testimony and reports from the trial because Gramm did not remember Gene or the reports she prepared. Seeing the records did not refresh her recollection. There was insufficient foundation for the content of the records. At the deposition she could not testify concerning the opinions she recorded or what led to her conclusions. The court ordered that "Chetopa Manor records which were delivered en mass, shall include the records of Majeel Graham [*sic*], however the content of any record prepared by Majeel Graham [*sic*] and her testimony will not be admitted into evidence at trial and may not be relied upon for any purpose." There was a hearing the next day to consider objections to the final pretrial order. Kristi did not object to the court's October 14 order.

Trial was held in October 2021.

After the testimony of Shumake, White, and Darnell, the district court found the proponents of the will had made a prima facie showing as required by K.S.A. 59-601 and K.S.A. 59-606, and admitted the will to probate. Kristi then called several witnesses.

Cindy Major, the nurse practitioner at Chetopa Manor responsible for Gene's medical care, testified that Alzheimer's dementia was the appropriate cause of death for Gene.

Dr. Arkin was a neurologist who had taken care of over 1,000 patients with Alzheimer's. He had reviewed Gene's medical records but did not personally evaluate Gene. Dr. Arkin's medical opinion was that Gene would not have understood the implications and ramifications of the documents signed on June 14, 2017.

He testified people with dementia pretend that they understand statements that are being made, even though they do not. They will respond automatically to a trusted person telling them to do something. If someone explained documents to a person with moderate

dementia in the morning, they would not remember the documents in the afternoon. Dr. Arkin did not believe Gene could have had an intelligent understanding of his disposition scheme or the capability to comprehend the nature of the claims to his family members. He explained how Gene's physical condition would have adversely affected his mental ability. Dr. Arkin testified family members may be unable to determine exactly what is going on when someone has Alzheimer's. Dr. Arkin was paid a substantial amount for his testimony as an expert witness.

Charles' attorney began asking Dr. Arkin about some of the Chetopa nursing home records he had reviewed from February and March 2017. The district court recognized that those were reports Gramm had prepared. The court sua sponte interjected. The attorney responded that he believed only Gramm's June 2017 report had been excluded. The court stated, "All Majel Gram [*sic*] records were excluded. . . . All her opinions, all of her data, everything she put down were excluded." Kristi's attorney chimed in, "I told [Dr. Arkin] to ignore all that stuff."

At the end of his testimony, at the court's prompting, Dr. Arkin expressly stated his medical opinion was not based on any of Gramm's records. Kristi's attorney offered into evidence Exhibit 201 "which is the disc and whatever was on it." He explained the disc contained the Chetopa Manor records that appellee's counsel produced, including Gramm's records. The attorney explained that he had sent the disc to Dr. Arkin in 2019 but later told Dr. Arkin not to heed the Gramm records after the court so ordered. The disc was conditionally admitted subject to appellee counsel's review. The disc is not in the record on appeal.

The court ruled that the parties who objected to the admission of the will and the deeds had failed to meet their burden of proof that Gene lacked mental capacity and admitted the will to probate. The court denied any objection to the documents executed on June 14, 2017. In its journal entry of December 20, 2021, the court reiterated its prior

memorandum and order granting judgment, and then severed the cases. The court found Gene had the necessary mental capacity on June 14, 2017, to execute his last will and testament and his transfer-on-death deeds. Kristi appeals.

Kristi raises four issues on appeal; all concern Gene's mental capacity when he signed the final will and deeds on June 14, 2017.

Did the district court err when it excluded Majel Gramm's testimony and records?

Kristi contends that Gramm had scientific, technical, or other specialized knowledge about speech and language pathology that was helpful to determine whether Gene would have likely understood the documents that he signed. Gramm was qualified by knowledge, skill, training, or education because she had an active license, held a master's degree in speech language pathology, and practiced in the field for more than 20 years.

She argues that Gramm's testimony was based on sufficient data because she personally examined her patients and used standard practices and protocols generally recognized in her field. The opinions Gramm reached after examining Gene were made according to principles and methods established within her field. Gramm was adamant that she reliably applied the principles and methods recognized in her profession during her examination and evaluation of Gene. Kristi contends the district court abused its discretion by reversing the oral ruling it made at the hearing after counsel had sent trial exhibits to witnesses relying on the court's earlier ruling. Kristi contends Gramm's report was admissible as a past recollection recorded.

In opposition, the appellees contend Gramm's testimony was properly excluded because at the deposition, Gramm would not give information about her education, certification, licensing, or history of employment; she would not verify the contents of

the medical records she had prepared; and she stated she had no specific recollection of preparing the records or performing the tests on Gene. Appellees agree that at the August 27, 2021 hearing, the district court did not rule that Gramm's reports would be excluded from trial. Rather, the district court found her reports to be an issue of weight versus admissibility. But the court did state it would not allow Dr. Arkin to rely on Gramm as part of his expert testimony. Then on October 14, 2021, the court issued an order excluding Gramm's reports and testimony.

The appellees also argue that Kristi failed to preserve this issue for appeal because she did not object to that order.

Indeed, Kristi did not specifically object to the district court's pretrial order excluding Gramm's testimony and reports. Generally, Kansas courts require a party to specifically object to the admission or exclusion of evidence at trial. But for the exclusion of evidence, the only statutory requirement is that a party proffer the substance of the evidence being excluded to ensure the court had the opportunity to fully consider its admissibility. See *State v. Bliss*, 61 Kan. App. 2d 76, 93-96, 498 P.3d 1220 (2021), *rev. denied* 314 Kan. 856 (2022). Here, it is especially true that Kristi should have objected because the court's ruling changed. But that does not preclude our review.

Kristi's position was clear at the pretrial hearing. Kristi made an adequate record for this court's review. See *State v. Evans*, 275 Kan. 95, 101, 62 P.3d 220 (2003). Gramm's deposition and her reports are in the record on appeal. At trial, Dr. Arkin was asked about some of Gramm's reports, which prompted the district court to renew its prior ruling that anything related to Gramm was excluded. Therefore, we hold this issue was preserved for our review.

Kansas trial courts have been gatekeepers of expert testimony since 2014, when the Legislature adopted the expert testimony standards of *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 589-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See K.S.A. 2021 Supp. 60-456. In turn, appellate courts generally review admission or exclusion of expert testimony under that law for an abuse of discretion. Our review is de novo when the district court's admission of expert testimony is based on statutory interpretation. See *In re Care and Treatment of Cone*, 309 Kan. 321, 325, 435 P.3d 45 (2019).

The problem confronting the trial court here was the reliability of the evidence. Gramm was very uncooperative in her deposition and that gave the district court no real way to judge the reliability of her prior reports about Gene. In her deposition, Gramm testified she was a speech language pathologist for 20 years. She had completed a master's degree in speech language pathology. She had an active Kansas license as a speech language pathologist. She followed all the guidelines for those credentials but did not remember specifics.

She could not authenticate her June 14, 2017 report. Reviewing the document did not refresh her memory. But she had no reason to dispute it. She testified she followed generally accepted practices for a licensed speech pathologist.

While it appears that Gramm did have the necessary education and experience, and testified that she always used the methods generally accepted in her field, she simply could not give an opinion about Gene's level of impairment because she had no memory of her assessment of Gene even after reviewing her report. She would not authenticate the report. She did not remember assessing Gene and could not independently identify which tools she applied to perform his assessment. She could not explain how she reached the conclusions in her report. Gramm could not give opinion testimony because she had no opinion about Gene.

Kristi unpersuasively argues that the written memorandum may be admissible as a "past recollection recorded." That is a different ground for admitting the report than she used at trial and is not permitted on appeal. See *Bliss*, 61 Kan. App. 2d at 103. But, more importantly, Gramm, in her deposition, cannot authenticate that her report was accurate at the time it was created or even that she made the report itself. See *Mathis v. Stricklind*, 201 Kan. 655, 661, 443 P.2d 673 (1968).

We find no error or abuse of discretion here.

Did the district court rely on evidence not admitted at trial to discredit an expert?

When the district court ruled that Gramm's testimony was inadmissible, that ruling affected a later ruling on an expert witness. The district court discounted Dr. Arkin's testimony because his disclosure mentioned Gramm:

> "Dr. Arkin's opinions and testimony are tempered or are to be ignored because he failed and refused to follow the orders of the Court and considered facts not in evidence (Majeel Graham [*sic*] records) and such records had been specifically excluded. The doctor was given the opportunity to supplement his report not considering the Majeel Graham [*sic*] records, and intentionally states in his supplemental disclosure filed September 7, 2021, paragraph 3 'The findings of Majeel Graham [*sic*] are consistent with what I would expect . . .' The doctor by this reference is clearly and intentionally referring to records not in evidence and therefore facts which are not in evidence. To make matters even more concerning regarding Dr. Arkin's testimony, Robert Myers during questioning of Dr. Arkin is asking questions directly from Dr. Arkin's letter dated 11/13/19. In fact, the questions being asked of Dr. Arkin are underlined in a copy of the 11/13/19 letter found within a Kristi Yost exhibit book referred to occasionally during trial as the white notebook. The disturbing part to this Court is that questions asked of Dr. Arkin from paragraph 4 of his letter dated 11/13/19 are from Majeel Graham [*sic*] records in a report dated 2/14/17. . . . This is a direct violation of the Court's order facts that Dr. Arkin clearly knew."

The court concluded that "the testimony of Dr. Arkin, did not comply with the rules of evidence as he clearly considered statements or documents not part of the testimony or records introduced at trial. Dr. Arkin's testimony is therefore not credible." We find no such documents in this record.

Kristi argues the district court erred by relying on those reports to discredit Dr. Arkin's testimony, and based its decision on documents not in evidence. The appellees contend that Kristi did admit Dr. Arkin's September 7, 2021 supplemental report into evidence at trial in contravention of the district court's October 14, 2021 order excluding references to Gramm's records.

Dr. Arkin wrote a one-page supplemental disclosure letter dated September 7, 2021, after the hearing on the admissibility of Gramm's testimony and reports. In the letter, Dr. Arkin merely stated that he read several hundred pages of documents from Chetopa Manor and that Gramm's findings were consistent with what he would expect. Dr. Arkin concluded with, "It is my professional opinion, to a reasonable degree of medical certainty, that Mr. Cassell was not mentally capable of understanding the legal documents that he signed, whether the evaluation of Majel Gramm is considered or not."

Appellate courts review a district court's findings of fact for substantial competent evidence. Appellate courts do not pass on the credibility of witnesses. *Cresto v. Cresto*, 302 Kan. 820, 835, 358 P.3d 831 (2015). This court cannot pass on Dr. Arkin's credibility. With this record, we cannot overrule the district court's finding.

The proponents of the will and the deeds presented a prima facie case.

Kristi contends there was no evidence Gene had an intelligent understanding of the documents he signed. She describes a hurried scene. Just before he signed the documents, he was awoken from his bed after having a bad day. He required help from nurses to get

him up and positioned. Shumake asked only if Gene was ready to sign. Shumake then placed the documents in front of Gene and turned the pages for him, showing where Gene should sign. The documents were not read to him or explained to him at the execution meeting. He did not identify his children, his property, or state an intention to change the disposition of his property. The witnesses did not have the knowledge or experience to determine his mental capacity. No meaningful inquiries were made to determine Gene's mental status at the time he signed the documents. Dr. Arkin was unequivocal that Gene could not have remembered what was explained to him on the documents earlier in the day.

In response, the appellees contend that Gene had earlier identified his property and to whom he wanted each holding to go. Shumake met with Gene in the morning and reviewed the documents in detail. Gene noticed Kristi's name was spelled incorrectly at that meeting. Kristi was present at most of the meetings between Shumake and Gene, including the execution meeting, and never expressed any concern for Gene's lack of capacity. Darnell and White testified that Gene was attentive and that he knew what he was signing. Dr. Arkin did not personally observe Gene and could not know his condition at the time he signed the documents.

The district court ruled that the proponents of the will and deeds had made a prima facie showing of Gene's testamentary capacity.

The law that controls this issue is well settled. When a will or other testamentary document is contested, the proponent has the initial burden of proving a prima facie case for its validity. The proponent must offer proof that the testator had testamentary capacity and that the execution of the document complied with the requisite statutory formalities. Once the prima facie case for validity has been made by the proponent of the document, the burden shifts to the opponent of the document to overcome the presumption of validity by clear and convincing evidence. *Cresto*, 302 Kan. at 831.

On appeal we review a district court's finding of fact of testamentary capacity for substantial competent evidence. Substantial evidence is such relevant evidence "'a reasonable person might accept as being sufficient to support a conclusion.'" *Cresto*, 302 Kan. at 835. When considering the sufficiency of the evidence to support the district court's findings of fact, appellate courts do not reweigh the evidence or pass on the credibility of witnesses. *Cresto*, 302 Kan. at 835.

The key legal term here is testamentary capacity.

Testamentary capacity requires a basic understanding of the property at issue and how the testator wants to dispose of it:

> "'The test of a testamentary capacity is not whether a person has capacity to enter into a complex contract or to engage in intricate business transactions nor is absolute soundness of mind the real test of such capacity. The established rule is that one who is able to understand what property he has, how he wants it to go at his death and who are the natural objects of his bounty is competent to make a will even though he may be feeble in mind and decrepit in body.'" *In re Estate of Moore*, 310 Kan. 557, 573, 448 P.3d 425 (2019).

Kansas courts apply the same standard of testamentary capacity to determine whether the decedent had capacity to execute a valid transfer-on-death deed. *Estate of Moore*, 310 Kan. at 574. So we will use the same test in our analysis of both the question of the will and the deeds.

The question now is, did the proponents of the will and the deeds make a prima facie case? "A prima facie case of capacity requires a showing that the testator was of sound mind and majority at the time the will was executed. [Citation omitted.]" *In re Estate of Farr*, 274 Kan. 51, 60, 49 P.3d 415 (2002).

At the time the testamentary document is executed, the testator must:

- know and understand the nature and extent of their property;
- have an intelligent understanding of the disposition they desire to make of it;
- realize who their relatives are and the natural objects of their bounty; and
- comprehend the nature of the claims of those they desire to include and exclude from participation in the property distribution.

Estate of Farr, 274 Kan. 51, Syl. ¶ 5.

Timing is important here. "The time when the will is made is the time of primary importance in considering if the testator possessed testamentary capacity." *Estate of Farr*, 274 Kan. at 64. Evidence of capacity or lack of capacity before or after that time is only an aid in determining whether the testator had capacity at the time the testamentary document was executed. *Estate of Farr*, 274 Kan. at 64.

A review of some pertinent cases is helpful at this point. The fact that Gene suffered from Alzheimer's dementia is not the determining factor that he lacked testamentary capacity. See *Estate of Farr*, 274 Kan. at 65. In *Farr*, the court upheld the trial court's finding that Farr had testamentary capacity where he executed a will two years before dying of severe progressive dementia. 274 Kan. at 73. Farr's attorney met with Farr in the intermediate care facility where Farr resided for the will's execution. After engaging in small talk with Farr, the attorney gave a copy of the will to Farr and read the will aloud to him. The director of nursing and another nurse were present. The attorney testified that in the presence of the witnesses, Farr identified that he owned farmland, machinery, cash investments, a home in Scott City, and an oil well. Farr said he was leaving his property to Marvin and Howard, his children, and showed he was ready to sign. Farr asked whether his will was the same as his previous will. There were some discrepancies in the witnesses' testimony, but all testified that Farr either proclaimed or acknowledged most of the assets in his estate and his intent to leave his property to his sons Marvin and Howard. The witnesses testified that Farr was alert and that he seemed

to understand what was happening. Farr was 82 years old at the time of the execution of the will.

In *In re Estate of Oliver*, 23 Kan. App. 2d 510, 517, 934 P.2d 144 (1997), this court upheld the trial court's finding that Oliver had testamentary capacity to make a will four years before her death, though Oliver had degenerative dementia. Over the years, Oliver made several different wills. By the time the last will was executed, Oliver had a guardian and conservator involuntarily appointed for her. Oliver met with an attorney, reviewed a previous will, and made specific changes. For the execution of the will, the attorney and two of his employees went to Oliver's nursing home. When they arrived, Oliver was playing cards. They reviewed her previous will and the new one. The attorney testified Oliver knew her family, her land, and where her bank certificates and accounts were generally located, but she was not sure how much money was in the accounts. She knew to whom she wanted her property to go. She listed her relatives and extensively discussed her personal and real property. 23 Kan. App. 2d at 511-13, 517-18.

In *In re Estate of Fearn*, No. 109,862, 2013 WL 6726122, at *1 (Kan. App. 2013) (unpublished opinion), a panel of this court upheld the trial court's decision that the proponent of a will failed to present a prima facie case of the decedent's testamentary capacity. Fearn met with an attorney to change his will. Fearn wanted to disinherit his children. When his wife was diagnosed with cancer, the will became urgent. Fearn told his adopted daughter he wanted to get it done right away and not wait on the attorney. Fearn told her what he wanted in the will. The will gave everything to his wife if she survived him and, if she predeceased him, to two charities that cared for him as an orphaned child. The daughter prepared a will after doing some internet research. Fearn read the document and instructed her to make certain changes. She made the changes and then drove him to the bank at which Fearn was a customer. Fearn spoke with the bank manager about his wife's cancer. After 5-10 minutes, the manager asked two bank employees to witness the will. The witnesses had known Fearn for at least seven years.

They watched Fearn sign the will. Fearn appeared to be competent. He did not exhibit any behavior which would lead them to believe he did not want to sign the will. Fearn died about nine months later. The court held that the proponent of the will presented no evidence that Fearn knew and understood the extent of his property, or that he knew his relatives and the natural objects of his bounty. The court found that the daughter could have provided testimony of that nature based on earlier conversations she had with Fearn when she drafted the will, but failed to do so. 2013 WL 6726122, at *1-2, 5-6.

Here, the proponents offered the testimony of Shumake, Darnell, and White to make their prima facie case of testamentary capacity. Gene died of Alzheimer's dementia a month after he signed the testamentary documents. The witnesses believed Gene understood what was going on. But at no time on the day of execution did Gene make statements that would confirm he knew and understood the nature and extent of his property and his desired disposition of it, or that he knew his relatives and the natural objects of his bounty. Shumake explained the documents to Gene in the morning and Gene responded "okay." In the morning, Gene noticed that Shumake had spelled Kristi's name incorrectly. Shumake did not explain the documents at the afternoon meeting.

We emphasize that the time when the will was made is the most important time to consider, but evidence of capacity before can aid the court. *Estate of Farr*, 274 Kan. at 64. Shumake testified Gene identified his property and his children during their May meetings. Gene did not identify his children or his assets at the execution meeting. But Shumake insisted that Gene knew who they were and what he was signing at that time. Shumake described the documents to Gene and Gene acknowledged them. Shumake believed Gene's mental capacity was intact when he signed the documents. White and Darnell believed Gene knew what he was signing. Thus, there was evidence to support the district court's decision that the proponents made a prima facie case. We will not alter the district court's findings on appeal.

Did those who opposed the will and the deeds present enough to defeat their enforcement?

Opponents to a testamentary document must prove lack of testamentary capacity by clear and convincing evidence. *Estate of Farr*, 274 Kan. at 64.

A finding that a party failed to meet their burden of proof is a negative finding. Without arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice, that finding of the district court cannot be disturbed. *Cresto*, 302 Kan. at 845.

Frankly, we are asked to reweigh the evidence on appeal. This we cannot do. Kristi contends the opinion of her medical expert, Dr. Arkin, was entitled to substantial weight. She contends the medical records and reports, including Gramm's reports, showed it was highly probable Gene did not have testamentary capacity when he signed the documents. In contrast, the witnesses had no training or expertise in evaluating mental capacity. There were no questions to ask Gene during the execution meeting through which an observer could objectively judge Gene's understanding.

The appellees contend that Dr. Arkin ignored the testimony of the witnesses in favor of the Chetopa Manor records that followed the document signing, Dr. Arkin did not personally observe Gene or his medical condition, and Dr. Arkin was a well-paid expert witness.

"Both expert and lay testimony is competent on the question of mental capacity." *Estate of Farr*, 274 Kan. at 66. The court, as trier of fact, does not have to adopt the opinions of an expert, no matter how highly qualified, and to reject nonexpert testimony. The court may weigh the testimony of all witnesses and follow the evidence which the court finds is entitled to the most weight and credence. *Estate of Farr*, 274 Kan. at 66.

Appellate courts cannot pass on the credibility the trial court placed on an expert's testimony. *Estate of Farr*, 274 Kan. at 69.

The district court noted that Dr. Arkin never met Gene in person. The witnesses, the proponents of the will, and the deeds presented all dealt with Gene in person. Their testimony was persuasive to the court. Since this court cannot reweigh the evidence or redetermine Dr. Arkin's credibility, we must affirm. We will not, on appeal, substitute our judgment for the district court's judgment on these evidentiary questions.

Affirmed.