STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CAROL ANN TIMMONS, Deceased.

ARTHUR L. TIMMONS, JR. and EDWARD E. TIMMONS,

Petitioner-Appellees,

v

GAY TIMMONS, Personal Representative of the Estate of CAROL ANN TIMMONS, Deceased,

Respondent-Appellant,

and

IVAN EGNATUK, Successor Personal Representative of the Estate of CAROL ANN TIMMONS, Deceased, CENTURY BANK AND TRUST, Successor Trustee, and LACE D. TIMMONS, Minor,

Appellees.

UNPUBLISHED
October 24, 2000

No. 219650
Branch Probate Court
LC No. 97-030494-IE

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Following a jury trial, the trial court entered an order invalidating a July 1997 codicil to Carol Ann Timmons' will and a July 1997 amendment to her trust.[1] The codicil and amendment effectively disinherited petitioners, who were Timmons' stepsons, and their children and left Timmons' entire estate to respondent and her children. The jury found that the codicil and trust amendment were the product

[1] Carol Ann Timmons will be referred to as Timmons throughout this opinion.

of undue influence by respondent and that Timmons was incompetent to execute the codicil and trust amendment. Respondent appeals as of right, arguing that the trial court should have granted her motion for a new trial on the ground that the jury's verdicts were against the great weight of the evidence. We conclude that the trial court abused its discretion when it denied respondent's motion for new trial and, accordingly, reverse and remand for a new trial.

We note at the outset that the trial court did not meet its obligation with regard to deciding the new trial motion. A new trial may be granted if a verdict is against the great weight of the evidence or is contrary to law. MCR 2.611(A)(1)(e). In ruling on a motion for a new trial based on a claim that the verdict was against the great weight of the evidence, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997).

> A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that a miscarriage of justice would result from allowing the verdict to stand. [*In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999).]

MCR 2.611(F) provides:

> In ruling on a motion for a new trial . . ., the court shall give a concise statement of the reasons for the ruling, either in an order or opinion filed in the action or on the record.

In this case, respondent filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial on the ground that the verdict was against the great weight of the evidence. The standards for JNOV and new trial are different. See *Phinney*, *supra* at 524-525. The record demonstrates that the trial court only reviewed the case under the more strict JNOV standard even though a new trial motion was pending on great weight grounds also. While the trial court did make a conclusory statement that the verdict was not against the great weight of the evidence, it did not set forth its concise reasons for making the finding and did not engage in the required function of determining whether the overwhelming weight of the evidence favored respondent.

We find that the trial court's failure in this regard is not an impediment to our review. The trial court ruled on the new trial motion and the issue is therefore preserved. In reviewing a trial court's decision denying a new trial motion, "[t]his Court's function is to determine whether the trial court abused its discretion" in finding that the verdict was not against the great weight of the evidence. *Phinney*, *supra* at 525.

> A verdict may be overturned on appeal only when it was manifestly against the clear weight of the evidence, and substantial deference will be given by this Court to a trial court's determination that a verdict is not against the great weight of the evidence. [*Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996) (citations omitted).]

Although this Court is required to give the trial court's decision substantial deference, it is incumbent upon this Court to engage in an in-depth analysis of the record. *Arrington v Detroit Osteopathic Hosp,* 196 Mich App 544, 560; 493 NW2d 492 (1992).

An in-depth analysis of the evidence leads to the conclusion that the trial court abused its discretion in denying the motion for a new trial. The jury's verdict was overwhelmingly against the great weight of the evidence.

First, the jury found that the codicil to the will and the amendment to the trust were the product of undue influence.

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. *Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.*
>
> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from the transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in the transaction. [*In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), citing *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976) (emphasis added).]

See also *In re Peterson Estate,* 193 Mich App 257, 260; 483 NW2d 624 (1992).

The introduction of evidence on the aforementioned factors creates a "mandatory inference" of undue influence, which shifts the burden of going forward with contrary evidence to the person contesting the claim of undue influence. *In re Estate of Mikeska,* 140 Mich App 116, 121; 362 NW2d 906 (1985). "However, the burden of persuasion [always] remains with the party asserting such." *Id.* See also *In re Peterson Estate, supra* at 259-260.

In this case, there was evidence to support the presumption. There was a confidential relationship between respondent and Timmons. A confidential relationship is present when a person, who is enfeebled by poor health, relies on another to conduct banking or other financial transactions. *In re Swantek Estate,* 172 Mich App 509, 514; 432 NW2d 307 (1988). In addition, respondent benefited from the change in Timmons' will and trust and it is uncontested that respondent had the opportunity to influence Timmons' decisions. Although the presumption of undue influence arose, it was clearly rebutted at trial.

There was simply no affirmative evidence that respondent exercised undue influence over Timmons. There was no evidence that respondent threatened, misrepresented facts, unduly flattered, committed fraud or physically or morally coerced Carol. To the contrary, numerous witnesses testified that they never saw respondent threaten, coerce or try to manipulate Timmons with regard to anything

other than her alcohol consumption, which respondent tried to limit or stop. In addition, numerous witnesses testified that Timmons was strong willed and coherent unless she was "falling down drunk." There was no evidence that Timmons was in such a condition when she changed her will and trust or when she decided to change the will and trust. Indeed, neither petitioner was able to testify that the codicil and trust amendment were the product of undue influence because they had not seen Timmons in numerous months before the execution of the documents. Petitioner Edward Timmons actually testified that he was unaware of any fraud or influence that respondent had over Timmons and, in fact, testified that Timmons was "too smart" to be influenced unless she was in a stupor. More significantly, Donna Wheaton, who was Timmons' personal secretary for years and also her sister-in-law, testified that she never saw respondent force or threaten Timmons to do anything and never coerced Timmons into giving her anything. Like Edward Timmons, Wheaton testified that no one could force Timmons to do anything and that Timmons always did what she wanted. Wheaton testified that when Timmons was sober or had her alcohol intake regulated, she was clearheaded, functional and able to take care of her own financial affairs. We also find significant the testimony that respondent was opposed to Timmons' disinheriting petitioners.

Moreover, on the videotape wherein Timmons disowned and disinherited petitioners, she stated that she was acting of her own free will. It was uncontroverted that Timmons, herself, arranged the meeting with her own attorney to change the will and trust. Respondent was not present in the room when the videotape was made or the codicil and trust amendment executed. There was a clear absence of direct evidence to support a conclusion that respondent exercised undue influence over Timmons in order to procure the codicil and trust amendment.

In addition, there was no evidence from which to reasonably infer that respondent exercised undue influence over Timmons. First, petitioners' counsel tried to elicit testimony that alcohol was given or withheld in order to influence the decision. He was unable, however, to get a single witness to testify in support of this theory. Timmons had been an alcoholic for more than twenty-five years and, during that time, she had executed numerous documents and taken care of her own financial matters. Timmons' use of alcohol, standing alone, does not translate to a finding of undue influence. More importantly, the testimony at trial showed that respondent did nothing more than Timmons' deceased husband had done with regard to regulating Timmons' alcohol consumption.

Second, there was no testimony to support a conclusion that respondent forced Timmons to open joint checking accounts with respondent or forced or coerced Timmons into allowing respondent to spend money from those joint accounts. The testimony and the videotape itself demonstrate that Timmons was aware that she had joint accounts with respondent and that respondent was spending money from the accounts. There was no evidence that respondent ever spent any money or conducted any business with regard to those accounts in violation of Timmons' wishes or directions. Cf. *Swantek Estate, supra* at 514. Thus, the fact of that there were joint accounts and that significant money was spent from them does not lead to a reasonable inference that there was undue influence.

Finally, the timing of the codicil and amendment further supports the conclusion that they were not the product of undue influence. Testimony revealed that, over a period of time after her husband's death, Timmons contemplated disinheriting petitioners. She discussed it with numerous people, all of

whom indicated that she was coherent when the discussions took place. On July 9, 1997, she stated on a videotape that "something more" would have to happen in order for her to take action. Subsequently, Timmons made her decision to disinherit petitioners after they questioned her competency in letters sent by an attorney whom Timmons had previously terminated. Timmons was angry and upset that her competency was questioned. She believed that petitioners had a "stench" of greed.

In *Kar, supra* at 542-543, this Court found that the deceased was not unduly influenced. She was seventy-two years old and physically declining. *Id.* She had been hospitalized several times. *Id.* However, there was evidence that she was strong-willed and mentally competent and capable of handling her own affairs. *Id.* at 542. Her lawyer testified that she acted of her own will and was not subject to undue influence when she engaged in the transaction that was at issue. *Id.* at 543. Although there was testimony to the contrary, the Court found that evidence establishing that she was strong-willed and capable of handling her own affairs, coupled with the testimony from her lawyer, was sufficient to rebut the presumption of undue influence. The Court, noting that the deceased "sought out and retained independent counsel and [] supplied the impetus behind the procurement of the deed," found that the petitioners failed to meet their burden of persuasion on the issue of undue influence. *Id.* at 543-544.

Here, the evidence presented at trial did not support a reasonable inference of undue influence. As previously noted, motive, opportunity, and ability to control are not sufficient to show undue influence in the absence that they were actually used. Petitioners failed to meet their burden of persuasion on the issue of undue influence and the jury's conclusion to the contrary was perverted. The trial court abused its discretion when it failed to grant a new trial on the ground that the jury verdict was against the great weight of the evidence.

Similarly, the jury's verdict that Timmons was incompetent to make the codicil to the will and the amendment to the trust was against the great weight of the evidence.

It is presumed that a testator has the mental competency to make a will. MCL 600.2152; MSA 27A.2152; *In re Powers Estate,* 375 Mich 150, 158; 134 NW2d 148 (1965). The requirements for testamentary capacity are set out in numerous cases, including *In re Sprenger's Estate,* 337 Mich 514, 521; 60 NW2d 436 (1953) and *In re Carmas' Estate,* 327 Mich 235, 240; 41 NW2d 355 (1950). In *In re Sprenger's Estate, supra* at 521, the Court stated:

> To have testamentary capacity, an individual must be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make. The burden is upon the person questioning the competency of the deceased to establish that incompetency existed at the time the will was drawn. [Citations omitted.]

In *In re Carmas' Estate, supra* at 239-240, quoting *In re Walker's Estate,* 270 Mich 33; 258 NW 206 (1935), the Court stated:

> "In general the requisite is that the testator must at the time of making his will have sufficient mentality to enable him to know what property he possesses and of

> which he is making a testamentary disposition, to consider and know who are the natural objects of his bounty, and to understand what the disposition is that he is making of his property by his will."

The burden is on the person questioning the testator's competency to establish that the testator was incompetent at the time the will was drawn. *In re Vollbrecht Estate*, 26 Mich App 430, 434; 182 NW2d 609 (1970).

In this case, there was testimony that Timmons was only incompetent when she was "falling down" drunk. Petitioners had not seen Timmons for numerous months before the codicil and will were executed and, accordingly, could not testify about her competency at the time the codicil and trust amendment were executed.[2] At trial, there was absolutely no testimony that, at the time the codicil and amendment were executed, Timmons was "falling down drunk" or that she was otherwise intoxicated or incapacitated in anyway. To the contrary, in the month when the codicil and amendment were signed, Timmons was making her own medical decisions, taking care of insurance matters, discussing different issues with her attorney, and coherently discussing disinheriting petitioners because she felt they did not care about her.

The videotape made immediately before the signing of the codicil and trust amendment demonstrates that Timmons knew where she was, knew that she wanted to amend her will and trust, and knew that she was disinheriting and disowning petitioners. Timmons was aware that the last time she saw petitioners was during the time surrounding their father's funeral. She indicated that she felt they were strangers. She also indicated that anyone who "played" with her will should be considered to have predeceased her. On the videotape, Timmons corrected her attorney when she gave wrong information about the location of her husband's burial and, she discussed her own wishes to be cremated. Immediately after the videotape, the documents at issue were executed.

There was no evidence to contradict that Timmons understood the nature and extent of her property. There was no evidence to contradict that she knew what she was doing when she signed the codicil and trust amendment. Rather, the evidence indicated that Timmons knew who she was omitting from the will and trust, knew that, by her actions, she was making provisions for the disposition of her property after her death, and knew that her actions disinherited people who were previously going to partake of her estate. While Timmons may have been physically weak at the time and wrong about certain details, i.e. the specific nature of the legal action against her former attorney in Chicago[3] and

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[2] Interestingly, Edward Timmons testified that he was not even aware that Carol's competency was an issue in the case.

[3] On July 9, 1997, Timmons indicated on the videotape that she was involved in a lawsuit against her former attorney in Chicago. While discovery was ongoing in the matter in Chicago and papers had been filed with the courts, no formal pleadings had not yet been filed. Thus, she was not formally a party. This was a fact that the petitioners emphasized when trying to convince the jury that she was not competent. Similarly, in the July 28, 1997 videotape, she referred to the lawsuit as a "class action" and it was not. Petitioners emphasized this fact to demonstrate her incompetence.

whether her pre-codicil will still included terms for her deceased husband, those factors do not negate the legal standard for testamentary competency, which is a minimal standard.

In *Guntzviller v Gitre,* 195 Mich 695, 704-705; 162 NW 290 (1917), the Court stated:

> [I]nstruments, testamentary in character or effect, disposing of property, are not to be set aside merely because the grantors or testators are old or weak, or foolish, or lack the average mental capacity of their neighbors or relatives. If they possess sufficient mentality to know and understand the transaction in which they are engaged, the extent and value of their property, those who are the natural objects of their bounty, are able to carry in their minds the general scope of the instrument and its effect, to whom they are giving and from whom withholding, they have the mental capacity to make such disposition, and if sufficient capacity exists it is not for the court to measure degrees of capacity or to indulge in comparison with other minds.

The only evidence presented by petitioners to oppose Timmons' competence was the testimony of Rita Brown, a worker at the Laurels nursing home. Brown testified that, on July 28, 1997, Timmons returned to Laurels with alcohol on her breath and Brown did not believe that Timmons fully understood the subsequent discussion that Brown had with her. However, Brown never spoke to or saw Timmons before she made the videotape and executed the documents at issue. Brown also could not testify when Timmons was returned to Laurels. Thus, even if Brown's testimony, which was strongly contradicted by Timmons' attorney and respondent, was true, it does not negate Timmons' competence at the time of the signing of the codicil and trust amendment. The competency of the testator is judged at the time of the making of the will and the testator only must know the requisite factors "long enough to dictate his will without prompting from others." *In re Thayer's Estate,* 309 Mich 473, 476-477; 15 NW2d 712 (1944). Timmons' attorney, who was present at the time the videotape was made and the codicil and amendment executed, testified that Timmons was not under the influence and was coherent and competent at the time.

In *In re Thayer's Estate, supra* at 477, the Court stated that "[m]ere eccentricity of behavior on the part of the testator will not cause an inference strong enough to invalidate a will" providing the necessary factors for competency are present. Here, while there was evidence of eccentric behavior, including lavish spending and alcoholism, and evidence that Timmons was unsophisticated with regard to legalese, there was no evidence of mental incompetency to invalidate the testamentary instruments.

In *In re Weber's Estate,* 201 Mich 477, 479-480; 167 NW 937 (1918), the testatrix was an alcoholic for years and died an early death as a result of cirrhosis of the liver. Before her death, she was angered by her son's diversion of some of her money to a joint bank account and by his court action, questioning her abilities. *Id.* There was evidence both pro and con that during the time frame surrounding the making of her will, she was having mental difficulties. *Id.* at 481. The Court did not invalidate her will. It noted that she had disposed of her home a few months before the will was made and no one had questioned her competency to do that. In addition, no one testified that she was under the influence of liquor at the time the will was executed or for two weeks before that. *Id.* The testatrix sought out a lawyer to write her will. *Id.* at 481-482. Those present at the time the will was executed

testified that the testatrix was entirely competent. *Id.* at 482. There was no evidence at all that on the day she signed her will she was incompetent. *Id.* The Court noted that the mental capacity required to make a valid will is less than that which is required to form a contract. *Id.* It also found that the question of the use of intoxicating liquor did not change the ruling with regard to her competency. *Id.* at 482-483.

We find that the evidence presented at trial preponderates so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ Gary R. McDonald