

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of Sam W. Richardson, Deceased.

SANDRA L. MCGONEGAL,

Petitioner-Appellee,

v

CAROLYN ST. JOHN,

Respondent-Appellant.

UNPUBLISHED

December 20, 2002

No. 231605

Jackson Probate Court

LC No. 99-094747-SE

Before: Whitbeck, C.J., Zahra and Murray, JJ.

PER CURIAM.

Respondent appeals as of right the probate court's order setting aside the testamentary trust and last will and testament of Sam W. Richardson and several deed conveyances involving Richardson's real estate all dated November 5, 1997. The trust and will effectively disinherited petitioner and left Richardson's estate to respondent. The probate court found all the necessary elements were present to create a presumption of undue influence by respondent. However, the probate court found that no evidence existed to rebut the presumption. We disagree. Respondent's sole issue on appeal is that the probate court erred in failing to find the presumption of undue influence rebutted, and in failing to reallocate the burden to petitioner to prove undue influence. Upon reviewing the evidence, we conclude that the trial court erred in finding that no evidence existed to rebut the presumption of undue influence. Accordingly, we reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

"Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is clearly erroneous if the reviewing court "is left with a definite and firm conviction that a mistake has been made." *Id.*

"To prove 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." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999).

“Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.” *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

“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 a transaction, and (3) the fiduciary had an opportunity to influence the grantor’s decision in that transaction.” *In re Erickson Estate, supra*, 202 Mich App 331. However, the presumption merely places the burden of producing evidence on the petitioner; it does not shift the burden of proving the lack of undue influence to the petitioner. *Widmayer v Leonard*, 422 Mich 280, 291; 373 NW2d 538 (1985). Therefore, if the evidence offered to rebut the presumption casts doubt on the issue of undue influence, the burden of proving undue influence rests squarely on the respondent.

The probate court correctly found that petitioner was entitled to the presumption of undue influence by respondent. However, the probate court concluded that no evidence existed to rebut the presumption. We find clear error in this finding. Evidence was presented at trial that (1) the testator was unhappy with his children, including respondent; (2) the testator had excluded some of his children from past estate planning; (3) that petitioner provided the primary care for the testator’s wife before her death and was the primary care provider for testator subsequent to the death of testator’s spouse; and (4) the attorney that prepared the trust did not find the testator reluctant or unsure of himself at either of the two meetings to set up the trust, and further, the attorney found the testator competent to execute the appropriate documents. Therefore, evidence was presented by respondent that should have been considered by the fact finder.

We note that the proofs were presented in a bench trial and thus, the probate court could have concluded that the evidence presented by petitioner was not credible. Under such circumstances we would defer to the fact finder’s superior ability to assess credibility and judge the demeanor of witnesses while testifying. However, the record does not support the conclusion that the probate court made credibility findings. Instead, the court found that there was no evidence presented to rebut the presumption. It is this specific finding we deem clearly erroneous.

Accordingly, we reverse and remand this case so that the probate court can make credibility determinations relating to the evidence presented to rebut the presumption of undue influence.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Christopher M. Murray