STATE OF MICHIGAN

COURT OF APPEALS

In re LILLIAN J. BEHRNS TRUST.

JOSEPH W. BEHRNS and VICKY D. BEHRNS,

Petitioners-Appellants,

v

RORY J. BEHRNS, HOWARD D. BEHRNS, and ROXANNE J. NIXON,

Respondents-Appellees.

UNPUBLISHED
October 26, 2004

No. 246654
Osceola Probate Court
LC No. 2001-000163-DE

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Petitioners appeal by right a judgment of no cause of action entered in favor of respondents following a jury trial. We affirm.

I

Petitioners first argue that the probate court erred by denying their motion for summary disposition with regard to their claim of undue influence. We disagree. We review a trial court's denial of a motion for summary disposition de novo. *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002).

Although petitioners' moved for summary disposition under both MCR 2.116(C)(9) and (C)(10), the motion only raised an issue under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(9) tests the sufficiency of the opposing party's pleadings, and the trial court must accept as true all well-pleaded allegations. *Slater, supra* at 425. Petitioners' motion did not challenge the sufficiency of respondents' pleadings, but rather was based on a claim that documentary evidence and undisputed facts warranted a grant of summary disposition. Accordingly, the motion is properly reviewed under MCR 2.116(C)(10). In reviewing such a motion, a court considers the entire record, including any evidence submitted by the parties, in the light most favorable to the party opposing the motion. *Corley v Detroit Bd of Ed*, 470 Mich

274, 278; 681 NW2d 342 (2004). If the proffered evidence fails to establish a genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

To show undue influence, it must be proven "'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 his inclination and free will.'" *In re Karmey Estate,* 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan,* 399 Mich 529, 537; 251 NW2d 77 (1976). Motive, opportunity, or "even ability to control" are insufficient to establish undue influence absent affirmative evidence "that it [sic] was exercised." *Id.*

A presumption of undue influence is created by the introduction of evidence that establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary or an interest represented by the fiduciary benefits from a transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in the transaction. *Kar, supra* at 537. Even when this presumption is established, the ultimate burden of proving undue influence remains on the party alleging that it occurred. *Id.* at 538. But the presumption satisfies the burden of persuasion, so if a party opposing the allegation of undue influence "fails to offer sufficient rebuttal evidence," then the party alleging undue influence will have met its burden of persuasion, i.e., its burden of showing the occurrence of undue influence. *Id.* at 542. The trier of fact must resolve whether sufficient evidence has been presented to rebut a presumption of undue influence. *In re Peterson Estate,* 193 Mich App 257, 262; 483 NW2d 624 (1992).

We conclude that even if petitioners had established a presumption of undue influence, at the point relevant to the motion for summary disposition, sufficient rebuttal evidence existed to create a genuine issue of material fact regarding that issue. Respondent Roxanne Nixon ("Roxanne") testified at her deposition that she told the attorney who prepared the relevant documents exactly what the decedent, Lillian Behrns ("Lillian"), said regarding her wishes for the trust and that Lillian's remarks indicated she did not want to include petitioners as beneficiaries. Roxanne further testified in her deposition testimony that she read the trust agreement to Lillian word for word before Lillian signed it. Roxanne's deposition testimony was sufficient to create a genuine issue of material fact regarding the question of undue influence because, if credited by a factfinder, it would support a conclusion that the provisions of the relevant documents describing the distribution of Lillian's assets reflected a decision made by Lillian of her free will, rather than from undue influence. Thus, viewing the evidence available at the time of the motion for summary disposition in the light most favorable to respondents, *Corley, supra* at 278, the probate court properly denied the motion. We also note that Lois Wilson, a witness to Lillian's signing of the documents, testified at her deposition that another witness "went over the document briefly with [Lillian] as to what each part of it was that she was signing; did she understand what she was signing, was she signing on her own free will, that type of thing." This was further evidence that a factfinder could reasonably consider as supporting a conclusion that Lillian signed the documents of her own free will.

In light of Wilson's deposition testimony, petitioners' contention that Roxanne's uncorroborated testimony was the only relevant evidence tending to counter the presumption of undue influence is incorrect. Further, petitioners cite no authority supporting their position that

uncorroborated testimony from an interested party is insufficient to create a genuine issue of material fact to avoid summary disposition based on a presumption of undue influence. Moreover, a trial court may not weigh credibility in deciding a motion for summary disposition. *In re Peterson Estate, supra* at 261. Indeed, our Supreme Court has stated that while such testimony from fiduciaries denying that they exerted influence cannot overcome the presumption as a matter of law, it is evidence to be weighed by a jury in resolving an undue influence claim. *In re Cox Estate,* 383 Mich 108, 116; 174 NW2d 558 (1970).

We disagree with petitioners' argument that allowing a denial by a party charged with undue influence to create a genuine issue of material fact with regard to a presumption of undue influence would effectively nullify the presumption and the law of undue influence. The presumption would still have had the effect of forcing a party opposing a claim of undue influence to come forward with evidence, such as testimony, denying the occurrence of undue influence. Also, the presumption satisfies the burden of persuasion and may be weighed by the factfinder in ultimately resolving the claim of undue influence. Moreover, a factfinder could, of course, consider the witness' interest in assessing credibility. Allowing testimony from a party charged with exercising undue influence to create a genuine issue of material fact regarding the matter does not obliterate the presumption of undue influence; it simply recognizes that it is not conclusive of the matter.

II

Petitioners next argue that the probate court erred by submitting this case to a jury because it was an equitable claim that the probate court itself should have decided. We disagree. Whether the undue influence claim should have been submitted to a jury for resolution is a question of law. We review questions of law de novo. *Bertrand v Mackinac Island,* 256 Mich App 13, 28; 662 NW2d 77 (2003).

In *In re Messer Trust,* 457 Mich 371, 386; 579 NW2d 73 (1998), our Supreme Court agreed with the position that "the former distinction between inter vivos trusts, once governed by the law of equity, and testamentary trusts, governed by statute, no longer exists." Critically, the Court stated that when the Legislature amended the probate code to include inter vivos trusts in the jurisdiction of the probate court, "it included the jury trial provision as well." *Id*. The Court was referring to MCL 600.857(1), which allows jury trials in probate court on some factual issues and MCL 700.805(1), which was enacted as part of the 1978 revisions of the probate code, and which provided probate courts with exclusive jurisdiction over the internal affairs of all trusts. See *In re Messer Trust, supra* at 385-386. The Court explained that "[a]ll previous distinctions regarding the right to a jury between trusts created by equity and trusts created by law were abolished when the Legislature enacted MCL 700.805(1)." *Id.* at 386. Thus, that "an issue may arise from a trust that was historically based on equity or law is no longer of any significance." *Id.* at 387. Therefore, there is no longer a distinction between equitable and legal issues with regard to a right to trial by jury in a probate court as to factual issues related to trusts. It follows that petitioners' argument that the factual issues in this case should not have been submitted to the jury because the case involved an equitable claim should be rejected.

We note that the statutory provision that the Court in *In re Messer Trust* referred to as abolishing the distinction between trusts created by law and trusts created by equity, MCL

700.805(1), was repealed effective April 1, 2000, after *In re Messer Trust* was decided, but before Lillian's death. However, MCL 600.857(1), the provision prescribing a right to a jury trial in probate court that was critical to the result in *In re Messer Trust,* remains in force. The importance of MCL 700.805(1) to the result in *In re Messer Trust* was simply that it granted the probate court jurisdiction over inter vivos trusts. Here, petitioners have not questioned the probate court's jurisdiction over the inter vivos trust at issue. Indeed, they initiated this case in probate court. Further, it is apparent that former MCL 700.805(1) has effectively been recodified as MCL 700.7201, which continues to grant the probate court jurisdiction over inter vivos trusts.

Petitioners further argue that, even if some factual issues in this case were properly submitted to the jury, the ultimate issue to be determined, i.e., whether Lillian was unduly influenced, was not a factual issue that should have been submitted to the jury. We disagree. It is apparent that the question of whether Lillian was unduly influenced to execute the relevant trust documents is a factual issue. The parties disagree on how broadly *In re Messer Trust* should be read as to the type of factual issues to be submitted to a jury in probate court. Respondents assert that all factual issues other than that of a trustee's prudence in administering a trust should be submitted to the jury, while petitioners dispute that position. But, we need not precisely delineate the type of factual issues submitted to a jury because it is apparent from *In re Messer Trust,* that the factual dispute at issue in this case was properly submitted to a jury. Determining whether Lillian was subjected to inappropriate conduct that overcame her inclination and free will with regard to the establishment of the trust is the type of determination about a matter of historical fact that is traditionally in the province of the jury.

Although our Supreme Court in *In re Messer Trust* decided that factual issues are generally subject to resolution by a jury in a probate court proceeding regarding a trust, it held that the determination of whether a trustee has breached the duty to act as a prudent person in administering a trust is a question to be determined by the trial court. *In re Messer trust, supra* at 388. The Court noted that almost from the beginning of Michigan's jurisprudence this was deemed to be a question to be determined by the trial court. *Id.* at 387. The Court also expressed that because a statute "provides broad discretion to a trustee, any determination with respect to a breach of that decision-making process is best handled by the probate court," which "has the added benefit of day-to-day experience that makes it uniquely qualified to make such reasoned determinations." *Id.* Underlying our Supreme Court's treatment of the matter of assessing the prudence of a trustee's business decisions is that, in contrast to a determination of whether undue influence occurred, this is not an issue of fact in the ordinary sense, but rather requires a determination of whether the trustee abused its discretion when investing or managing the trust's assets. Because the determination of whether undue influence occurred involves the type of factual assessment a jury typically makes and does not involve assessing an exercise of discretion, we see no reason to except this determination from the general rule that factual issues in a probate court case involving a trust are subject to trial by jury. *Id.* at 388.

Finally, petitioners rely on language in *Robair v Dahl,* 80 Mich App 458, 462; 264 NW2d 27 (1978), indicating that equitable issues should not be submitted to a jury. However, this Court's decision in *Robair,* in contrast to *In re Messer Trust,* did not involve a proceeding in probate court regarding an inter vivos trust. Thus, our Supreme Court's holding in *In re Messer Trust,* that there is no distinction between issues of law and equity for purposes of the right to a

jury trial in such probate court proceedings, is controlling in this case, notwithstanding this Court's prior general statement in *Robair* that equitable issues should not be submitted to a jury.

III

Next, petitioners argue that the probate court erred in its jury instructions regarding the presumption of undue influence. However, after the conclusion of jury instructions, the probate court asked petitioners' counsel if he had "any objections to the instructions," to which petitioners' counsel replied, "No, your Honor." When a party acquiesces to the trial court's jury instructions, that party is not entitled to relief on appeal. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591; 657 NW2d 804 (2002). Thus, petitioner's counsel's affirmative statement that he had no objection to the jury instructions constituted an acquiescence in those instructions that waived any claim of instructional error by petitioners.

IV

Finally, petitioners argue that the probate court erred by denying their motion for judgment notwithstanding the verdict (JNOV). We disagree. We review a trial court's decision on a motion for JNOV de novo. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 124; 680 NW2d 485 (2004). A motion for JNOV should be granted only if there is insufficient evidence to create an issue for a jury. *Id.* at 123.

According to Roxanne's testimony, she read the trust and will to Lillian word for word before Lillian signed the documents, and the sections of the documents about "what everybody got" were read to Lillian in front of other witnesses. In addition, Roxanne indicated that she had earlier prepared a will for Lillian from a kit at Lillian's direction and then contacted an attorney to prepare estate planning documents at Lillian's direction. Roxanne further said that she would have preferred a different parcel of land from the estate than that she was given, but that Lillian "did what she wanted to do." Also, Wilson testified that she heard another witness to Lillian's signing of the documents ask Lillian if she understood the document and was signing it of her own free will. Further, Kathryn Cumberledge, a worker at the nursing home where Lillian was residing at the pertinent time, indicated that from her interaction with Lillian during the relevant period, Lillian knew what she was saying and doing. Considered together, this evidence reasonably supports a finding that Lillian decided upon the distribution of property as provided for by the trust and will in accordance with her own wishes and free will without any undue influence by Roxanne. In particular, Roxanne's testimony reflects that she prepared the initial will in accordance with Lillian's directions, that Roxanne later transmitted Lillian's directions to the attorney, and that Lillian herself decided how the property was to be distributed. Accordingly, assuming that a presumption of undue influence was established, respondents presented sufficient rebuttal evidence to create an issue of fact for the jury as to the actual occurrence of undue influence.[1]

[1] As we have discussed previously, recognizing that the presumption of undue influence was not conclusive in this case is not, as claimed by petitioners, equivalent to rendering the presumption meaningless.

To the extent that petitioners' argument rests on their assertion that respondents were required to present clear and convincing evidence that the trust and will were not the result of undue influence, this position is incorrect. Rather, as discussed previously, even when a presumption of undue influence is established, the ultimate burden of proving undue influence remains on the party alleging that it occurred. *Kar, supra* at 538.

Petitioners have not cited any authority that reasonably supports their position that Roxanne's testimony was insufficient rebuttal evidence to create a factual issue for the jury regarding the occurrence of undue influence. Rather, as indicated previously, her testimony is evidence to be weighed by a jury in resolving an undue influence claim. *In re Cox Estate, supra* at 116. In support of their position that Roxanne's denial of undue influence was insufficient to create a factual issue for the jury, petitioners note this Court's holding in *Isabella Co Dep't of Social Services v Thompson*, 210 Mich App 612, 614-617; 534 NW2d 132 (1995). We do not find *Thompson* apposite to this case. The issue in that case has no reasonable relationship to the undue influence issue involved here.

Further, while there may not have been other direct evidence as to Lillian's intentions regarding the provisions of the trust and will besides Roxanne's testimony, petitioner Vicky Behrns' ("Vicky") testimony circumstantially supported the credibility of Roxanne's testimony that Lillian had decided not to leave assets to petitioners from her estate. Vicky acknowledged that Lillian had previously given her a farm of over one hundred acres. The jury plausibly could have found that Lillian regarded that gift as Vicky's "inheritance." Similarly, Vicky testified that her parents had "paid a lot of child support" for petitioner Joseph Behrns, which the jury likewise plausibly could have found was viewed by Lillian as an early inheritance. In this regard, petitioners' assertion that circumstantial evidence regarding Lillian's possible motive for "disinheriting" them was irrelevant to the undue influence issue is unreasonable. Relevant evidence is evidence having "any tendency" to make the existence of a fact of consequence to the determination of an action more or less probable than it would be without the evidence. MRE 401. Evidence that could reasonably be considered as providing Lillian with a motive to not provide for petitioners in her estate was relevant as evidence making it more probable than not that she would decide of her own free will not to include them.

We affirm.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey