

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of ROBERT FUTRELL, Deceased.

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SUSAN BOURDOW, Personal Representative,

Plaintiff-Appellant,

v

HEIDI D. FUTRELL,

Defendant-Appellee.

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UNPUBLISHED

November 20, 2007

No. 272807

Saginaw Probate Court

LC No. 05-118152-DE

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the probate court's opinion and order declaring defendant the owner of the transfer on death (TOD) account of Robert K. Futrell, Sr. ("the decedent"). We affirm.

**I. Basic Facts and Proceedings**

The decedent died in 2005, leaving a valid will and a TOD account with Solomon Smith Barney. The will directed that the decedent's estate be divided equally among his four children. Although the TOD account's beneficiary designation form contained spaces for up to four beneficiaries, the decedent only named defendant, who was married to the decedent's son, Robert K. Futrell, Jr. ("Robert Jr."), as the sole beneficiary. After the decedent's death, defendant and Robert Jr. separated, and defendant gave him approximately half of the balance of the TOD account for the purchase of a home. Before he passed away, Robert Jr. deeded the house to the estate and transferred additional funds to the estate as repayment for the funds from the TOD account.

Plaintiff, the decedent's daughter, as personal representative of the estate, filed a complaint against defendant, arguing that the decedent intended for the funds from the account to be divided equally among his children and alleging lack of capacity and undue influence. The complaint does not contain any allegations of undue influence against Robert Jr., nor was he named as a party. Plaintiff requested that the proceeds of the TOD account be placed in a constructive trust for the benefit of the decedent's four children and sought double damages

against defendant pursuant to MCL 700.1205(4). After a two-day bench trial, the probate court found that the TOD account belonged to defendant.

## II. Admission of Evidence

Plaintiff argues that the trial court erred in refusing to admit evidence.

### A. Standards of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion, but if the "decision involves a preliminary question of law," review is de novo. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 275-276; 730 NW2d 523 (2006). On appeal from a bench trial, we review a trial court's findings of fact for clear error and its legal conclusions de novo. MCR 2.613(C); *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005). However, we must give regard to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

### B. Police Report

At trial, plaintiff sought to introduce, as support for her undue influence claim, a police report that detailed an incident when Robert Jr. physically assaulted the decedent. It is not clear from the record whether the court was excluding the report as irrelevant or as not complying with MRE 404. To the extent that plaintiff challenges the trial court's decision to exclude this evidence, we conclude that it was inadmissible hearsay. Although police reports may be admissible under MRE 803(8), this exception only applies to reports made in a setting that is not adversarial to the one being investigated. *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003). It is undisputed that the setting was one adversarial to Robert Jr., and we will not reverse the trial court's decision where it reached the correct result using the wrong reasoning. *People v Watson*, 245 Mich App 572, 582; 629 NW2d 411 (2001).

### C. Robert Jr.'s Affidavit

Plaintiff also asserts that the trial court abused its discretion in refusing to admit an affidavit signed by Robert Jr. shortly before his death. In the affidavit, Robert Jr. averred that he had "encouraged" the decedent to designate defendant as the beneficiary of the TOD account because she could be trusted to distribute the account in accordance with the decedent's will. MRE 804(b)(3) provides an exception to the hearsay rule contained in MRE 801 as follows:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. . . .

There is no dispute that Robert Jr. passed away before the trial and was therefore unavailable under MRE 804(a)(4). The trial court ruled that the statement could not be admitted because the identified "pecuniary interest [is] in another matter not this matter." However, the plain language of the rule does not include such a requirement. In any event, the statement was

not against Robert Jr.'s pecuniary interest, and it did not tend to subject him to civil or criminal liability. Although the statement demonstrates that Robert Jr. encouraged the decedent to place defendant on the account, it does not indicate that such influence was undue, thereby exposing Robert Jr. to civil liability. Moreover, the statement was not against Robert Jr.'s pecuniary interest because he had already transferred the money he received from the TOD account to the estate. Although the trial court may have reached the correct result using the wrong reasoning, it will be upheld on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

### III. Undue Influence

Plaintiff contends that the trial court failed to apply the proper legal standard to her undue influence claim with respect to Robert Jr.<sup>1</sup> To prove undue influence, plaintiff must show that the decedent was subjected to "threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel" the decedent to act against his inclination and free will. *In re Estate of Karmey*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976); *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, are not sufficient." *Estate of Karmey, supra* at 75. A presumption of undue influence arises upon the introduction of evidence to establish the following: "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *Id.* at 73, quoting *Kar, supra* at 537.

Plaintiff argues that the trial court erred in failing to make a finding of fact regarding whether Robert Jr. exerted an undue influence over the decedent in changing the beneficiary to defendant. Plaintiff's argument is misplaced. In its opinion and order, the trial court found:

Plaintiff also must prove that the insured was under undue influence, coercion or duress, "at the time" the beneficiary form was completed. *There was absolutely no testimony that "at the time" the beneficiary form was completed that Robert Futrell was under any type of undue influence, coercion or distress. Again, the proofs were lacking in this area.* The burden of establishing undue influence is on the contestant or the party who asserts it. *In re Spinner Estate*, 248 Mich 263, 270; 226 NW 862 (1929). The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he or she represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in the transaction. *In re Karmey Estate*, 468 Mich 68, 73; 658 NW2d 796 (2003). [Emphasis added.]

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<sup>1</sup> We note that plaintiff does not challenge the trial court's findings with respect to whether defendant exerted an undue influence on the decedent.

The trial court clearly stated the proper legal standard to plaintiff's undue influence claim and specifically found that the decedent was not under any type of undue influence, coercion or distress. This finding encompasses any claim of undue influence, even if not pleaded in the complaint, against Robert Jr.

In addition, even assuming that if Robert Jr. was in a confidential or fiduciary relationship with the decedent, there is no evidence that he was representing defendant's interest when he encouraged the decedent to designate her as the beneficiary. Rather, plaintiff testified that Robert Jr. trusted defendant, and plaintiff believed that the reason the decedent designated defendant instead of Robert Jr. as the beneficiary was because Robert Jr. had child support obligations and did not want additional assets in his name. There was no evidence to support plaintiff's assertion that Robert Jr. represented defendant's interest at the time he encouraged the decedent to designate defendant as the beneficiary.

A probate court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C); *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* The trial court made sufficient findings on plaintiff's claims of undue influence, and we do not find clear error in those findings.

### III. The Decedent's Capacity

Plaintiff claims that the trial court erred in finding that the decedent had the necessary capacity to change the TOD account beneficiary. In its order and opinion, the trial court relied in part on *In re Estate of Erickson, supra*, as authority for the proposition that contractual capacity provides the proper test for a person's ability to change a beneficiary. Plaintiff asserts that the trial court failed to fully address the issue in its order and opinion. However, a review of the order and opinion reveals that the trial court clearly stated that proofs were lacking regarding capacity but plaintiff had presented witnesses who testified about competency. Competency and capacity are closely linked, and courts treat the two terms almost interchangeably. See *Harris v Copeland*, 337 Mich 30, 34; 59 NW2d 70 (1953); *Estate of Erickson, supra* at 332-333. The test for finding competency is whether the person had sufficient mental capacity at the time of contracting. *Harris, supra* at 34.

To be competent to change an insurance beneficiary, the insured "must, generally, possess 'sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged.'" *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001), quoting *Estate of Erickson, supra* at 332. Because TOD accounts and insurance proceeds are both contractual non-probate assets, we apply the same test to the changing of the beneficiary of a TOD account. There was testimony that the decedent dressed oddly and had poor personal hygiene, and his mental health seemed to be declining. The decedent received assistance from his credit union in paying his bills and did not have a checking account, he had been taken advantage of a woman who occasionally stayed at his house, and he distanced himself from one of his friends. However, several witnesses stated that the decedent drove himself to appointments and was fairly independent; he was described as eccentric, different, and idiosyncratic. The decedent engaged in real estate transactions, debt collection activities, and estate planning, with the help of his attorney. His attorney asserted that he was still able to discuss things fully and recall prior conversations. Further, the decedent drove himself to the

appointment where he changed the beneficiary designation on his own accord and told his financial advisor that defendant had been his primary caregiver. Moreover, while testimony tended to show that the decedent became frailer, both mentally and physically, as he aged, “[i]t is not . . . enough for invalidity that one be enfeebled by disease, be old, or indeed be irrational on some subjects.” *Applebaum v Wechsler*, 350 Mich 636, 648; 87 NW2d 322 (1957); *Anderson v Boulis*, 15 Mich App 515, 520; 166 NW2d 631 (1969). In finding for defendant, the trial court resolved these conflicts in testimony, and we defer to its special opportunity to “judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). The trial court’s findings were sufficient under MRE 2.517(A) to support its conclusion that the decedent had sufficient capacity or competency to change the beneficiary on his TOD account and we find no clear error.

#### IV. Constructive Trust

Plaintiff argues that the trial court erred in failing to order a constructive trust for the benefit of the estate. We disagree. We review the trial court’s findings of fact for clear error, MCR 2.613(C); *Robert Adell Children’s Funded Trust*, *supra* at 249, and issues of equity de novo, *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 496; \_\_\_ NW2d \_\_\_ (2007).

“A court may impose a constructive trust when necessary to do equity or avoid unjust enrichment.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 202; 729 NW2d 898 (2006). “A constructive trust may thus be imposed under any circumstance that renders it unconscionable for the holder of legal title to retain and enjoy the property.” *Id.* Although the circumstances under which a constructive trust may seem broad, a constructive trust cannot be imposed against a party who has not contributed to the inequity to be remedied. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993).

The trial court properly stated that a constructive trust does not require fraud, but may be imposed to avoid unconscionable results. The court then found that a constructive trust should not be imposed in this instance because “there was no evidence of misrepresentation, concealment, undue influence, duress, or the taking advantage of one’s weakness or necessities, that would require a constructive trust to be imposed.” Although the decedent had a complex relationship with many of his family members, including defendant, there was no testimony showing any wrongful act by defendant that would justify the imposition of a constructive trust. The trial court did not err in declining to impose a constructive trust.

Affirmed.

/s/ Michael J. Talbot  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly