STATE OF MICHIGAN

COURT OF APPEALS

In re CADARETTE Estate.

JUNE CADARETTE and SHIRLEY BOBOLTZ,

Petitioners-Appellees,

v

NORMAN CADARETTE,

Respondent-Appellant.

UNPUBLISHED
June 9, 2009

No. 284132
Alpena Probate Court
LC No. 04-013709-DE

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Respondent-appellant appeals as of right the probate court's order determining the estate assets of decedent Mae A. Cadarette. We affirm.

Decedent and her late husband were the parents of five children, Norman Cadarette, Shirley Boboltz, June Cadarette, Rosemae Auer, and Donald Cadarette. Decedent's husband passed away in 1976. In 1995, decedent drafted a will that left her property equally to all of her children. Before decedent's death, approximately $94,000 of decedent's assets were transferred into joint accounts with respondent, which he thereafter transferred into his sole name.[1] Following a three-day bench trial, the trial court determined that the transferred funds were estate assets to be divided equally among decedent's children.

[1] In October 1998, respondent removed over $20,000 from a joint account and transferred it to another account in his name alone. In addition, three certificates of deposit, in the approximate amounts of $50,000, $14,000, and $9,000 respectively, were transferred from decedent's sole ownership to joint ownership with respondent on December 28, 1998, and then to sole ownership of respondent on July 26, 2000.

I.

Contrary to the position he took at trial, respondent argues on appeal that the durable power of attorney decedent executed naming respondent as decedent's attorney-in-fact had been revoked, therefore eliminating any fiduciary duty to decedent. At trial, however, respondent argued that a subsequent power of attorney executed by decedent in favor of his sister, June Caradette, was a "springing" power of attorney that never became effective; as such, the durable power of attorney in respondent's favor remained in effect and, by its explicit terms, authorized him to make gifts to himself. Generally, an issue must be raised before and decided by the trial court in order to be preserved for appellate review. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). And further, "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Therefore, we decline to review this argument.

II.

Respondent next argues that that the trial court erred in finding that he owed a fiduciary duty to decedent at the time the transfers at issue were made. We disagree. A trial court's findings of fact in a bench trial are reviewed for clear error, and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

While the grant of a general power of attorney creates a fiduciary relationship, *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983), a fiduciary relationship may exist even where there is no durable power of attorney in effect. A fiduciary relationship exists when one person "stands in a position of confidence and trust" with another person. MCL 700.1212(1). One who owes a fiduciary duty to another is required to act for the benefit of the other on matters within the scope of the relationship. *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003).

At trial, respondent testified that decedent requested his assistance with financial and other matters as she got older and had trouble getting around. Respondent arranged to have decedent's social security and pension income deposited directly into an account he opened in both their names. In addition, respondent testified that he would write checks from the joint account for decedent's needs. Also, respondent testified that he arranged for a relative to care for decedent for a period of two years. Respondent's sister, Rosemae, testified that decedent primarily looked to respondent for assistance, and respondent's brother, Donald, testified that respondent helped decedent every time she needed anything.

These facts establish that respondent stood in a position of trust and confidence in relation to decedent beyond the time period of the effectiveness of the power of attorney. As such, respondent was required to act for decedent's benefit, rather than in his own personal interests. *Id*. The trial court did not err in finding that respondent owed a fiduciary duty to decedent at the time the transfers at issue were made.

III.

Finally, respondent argues that he was entitled to full access to funds in those accounts in which he was a joint owner with decedent. We disagree.

MCL 487.703 governs deposits in the name of joint beneficiaries and provides that the co-owners are treated as joint tenants. The contents of such accounts can be paid to either person during the lifetime of both, or to the survivor after the death of the other co-owner. The statute further provides for a mandatory presumption that the creation of such an account is prima facie evidence of the depositor's intent that there be rights of survivorship in the account. *Id*. However, this presumption can be overcome by evidence of fraud or undue influence. *Id*. With respect to the latter, "[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*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

Sufficient evidence was presented at trial to establish the existence of a fiduciary relationship between respondent and decedent, even if the power of attorney in respondent's favor had been revoked. Moreover, respondent undoubtedly benefited from the transfers of funds into accounts in his sole name, especially in light of his testimony that he spent the money on himself. Finally, respondent's own testimony that he directed decedent to transfer funds in at least one account into joint ownership because of concerns that a sibling was stealing from decedent shows that he had the opportunity to influence the transaction.

The evidence at trial indicates that respondent acted outside his authority as decedent's principal when he transferred the funds from the jointly held accounts into an account in his sole name. The bulk of the funds were transferred on December 28, 1998. It appears that decedent was in the hospital at that time. Therefore, it is unlikely that decedent authorized, or was even aware of, the transfer. In addition, the evidence showed that decedent was unhappy to discover that respondent had opened a checking account in both their names, and that decedent closed this account and transferred the money back into a savings account solely in her name. Respondent has not demonstrated that he was entitled to full access to the funds in jointly held accounts.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly