STATE OF MICHIGAN

COURT OF APPEALS

UNITED OF OMAHA LIFE INSURANCE COMPANY,

Plaintiff,

v

JERRI L. NEES, Individually and as Conservator of the Estate of MAKENZIE A. NEES, a Minor,

Defendant/Cross-Defendant-Appellee,

and

MATTIE I. TOMLIN,

Defendant/Cross-Plaintiff-Appellant.

UNPUBLISHED
September 23, 2010

No. 292316
Jackson Circuit Court
LC No. 07-002157-CZ

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over the proper distribution of the proceeds from a life insurance policy, cross-plaintiff Mattie I. Tomlin appeals as of right the trial court's entry of judgment in favor of cross-defendant Jerri L. Nees, individually and as the conservator of the estate of Makenzie A. Nees, after a bench trial. On appeal, we must determine whether the trial court erred when it found that Tomlin had not established a presumption that Nees had unduly influenced Willis Tomlin (Willis) to change the beneficiary designation on his life insurance policy shortly before he died. We conclude that the trial court clearly erred in its findings concerning the presumption of undue influence. Further, although there is evidence to support the trial court's ultimate finding that the change in beneficiaries was not the result of undue influence, on this record, we cannot conclude that the trial court would have made the same findings had it properly applied the presumption. For that reason, we vacate the trial court's ruling from the bench and the judgment in favor of Nees and remand for new findings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Willis had the life insurance policy at issue through his employer, the Michigan Department of Corrections. In 1993, he designated Tomlin, who is his mother, as his sole beneficiary under the policy. Willis met Nees in about 1996 and after a few years he moved into Nees' home. According to Nees, they dated for nine-years, but never married. During the relationship, Willis and Nees had a daughter, Makenzie Nees.

Willis began to have serious medical problems in the summer of 2005. He had surgery the following summer to remove a mass on his liver, but it went poorly. He remained in the hospital until his death in December 2006.

According to Nees, Willis "wasn't himself" after the surgery and never regained the use of his voice. She testified that, despite Willis's inability to talk, she learned to read his lips, and that he was able to communicate what he wanted by moving his mouth and gesturing. Tomlin testified that Willis could not communicate at all. Another witness likewise described Willis as wholly unable to communicate, but others described him as being able to communicate but minimally.

Willis executed a medical power of attorney and a general power of attorney authorizing Nees to act on his behalf. Nees testified that she was not present when Willis signed the powers of attorney, but that he was "medically cleared" by the hospital before he signed.

Nees testified that she and Willis had also discussed updating the beneficiary designation on the life insurance policy after she learned that she was pregnant, but Willis had procrastinated. She stated that about a week before Willis died, he "told [her] that he was ready to update his benefits, and he wanted [her] to bring the forms to him." Nees said that she filled out the change of beneficiary form in accordance with Willis' instructions. According to Nees, although Willis could not talk, he instructed her how to fill out the change form "by moving his mouth." The change form provided 50% of the insurance proceeds to appellee and 50% to their daughter.[1] Nees testified that she was not at the hospital when Willis changed the beneficiary designations on his policy. She explained that she thought it was "odd" for him to make her his beneficiary rather than his son[2] and so she requested that a social worker and notary help with the documents and told him that she "didn't want him to sign it in front of [her] because he put me on there." Nees denied resorting to any threats, coercion, or flattery of any kind to induce Willis into changing beneficiaries.

A social worker and a notary public who were involved with the execution of Willis' change form both testified that Willis understood the nature of the document, and wished to sign it.

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[1] The same day, Nees filled out two other change forms—one for retirement benefits and one for a different life insurance policy. She listed Makenzie as the sole beneficiary for both and neither is at issue on appeal.

[2] Willis had an older son from a previous relationship.

Nees' sister testified that Willis once told her that he would never list Nees as a beneficiary because of the way she treated him. She also stated that, after Willis' death, Nees admitted that she had threatened to leave Willis if he did not change the beneficiary designation:

> she went up to the hospital and told [Willis] that if he didn't sign them papers, that she was not going to ever come back up there again, and she was going to take down all the pictures of Makenzie that was on the wall, and he would never see her again.

Nees and her sister admitted that they had a strained relationship, and the trial court found Nees' sister's testimony to not be credible.

After Willis died, Tomlin apparently disputed the change in beneficiaries with the insurer, United of Omaha Mutual Insurance. In August 2007, United sued Nees, in her individual capacity and as the conservator of Makenzie's estate, as well as Tomlin, in order to resolve the dispute over the proceeds of Willis' policy. United asked the trial court to compel Tomlin and Nees to interplead their claims. See MCR 3.603. After United deposited the disputed insurance proceeds with the clerk, the trial court signed an order discharging United from any further liability under the policy and ordering Tomlin and Nees to interplead their claims.

In April 2008, Tomlin cross-complained against Nees. In her cross-complaint, Tomlin alleged that Nees had unduly influenced Willis to change the beneficiary of the policy from Tomlin to Nees and Mackenzie. After a bench trial, the court found that Nees had not unduly influenced Willis to change the beneficiary. For that reason, the trial court entered a judgment in favor of Nees and ordered that the proceeds of the insurance policy be distributed to her in her individual capacity and as the conservator of Makenzie's estate.

This appeal followed.

II. THE PRESUMPTION OF UNDUE INFLUENCE

The sole issue on appeal is whether the trial court erred when it determined that Tomlin had not established the presumption of undue influence. An action to have a testamentary transfer set aside on the grounds that the transfer was procured through undue influence is equitable in nature. *Adams v Adams*, 276 Mich App 704, 714 n 5; 742 NW2d 399 (2007). When reviewing a trial court's decision regarding equitable relief after a bench trial, this Court reviews the trial court's findings of fact for clear error, but reviews de novo whether equitable relief was warranted under the facts. *Flint v Chrisdom Properties, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009).

To establish the existence of undue influence, the charging party must present evidence that the grantor's will was overborne:

> "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 his inclination and free will. Motive, opportunity, or even

ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient." *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

However, there is a presumption of undue influence in transactions where the evidence establishes "'(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction.'" *In re Karmey Estate*, 468 Mich at 73, quoting *Kar*, 399 Mich at 537. If the charging party establishes a presumption of undue influence, a "mandatory inference" is created that shifts "'the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion.'" *In re Peterson Estate*, 193 Mich App 257, 260, 483 NW2d 624 (1991), quoting *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985).

In this case, the trial court recognized that Nees had some form of a fiduciary relationship with Willis: "And I did find that by being named power of attorney, and health care power of attorney, or patient advocate, Ms. Nees had a duty to act for the benefit of Willis Tomlin as it pertained to the use of the powers of attorney." Nevertheless, the trial court concluded that this element had not been met because Nees "did not use the power of attorney to change the beneficiary." The trial court also found that Nees "clearly benefited from the change in the life insurance," but found that Nees did not have the opportunity to influence Willis. The court explained that only Nees' sister testified that Nees had threatened Willis and she was not credible. Further, the trial court stated that Nees was only at the hospital out of concern for Willis.

We conclude that the trial court clearly erred when it found that Tomlin had not established the presumption of undue influence. The undisputed evidence established that Nees had been given a general power of attorney over Willis' affairs. The grant of a general power of attorney establishes a fiduciary relationship as a matter of law. See *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983). And whether she used her fiduciary relationship to effect the change in the beneficiary is irrelevant. Further, in addressing the third element for a presumption of undue influence, the trial court focused on the evidence that Nees *actually* asserted undue influence and her motive for visiting Willis in the hospital. However, the issue with regard to that element was whether Nees had the *opportunity* to unduly influence Willis' decision and not whether she actually did. Given the undisputed evidence, Nees clearly had the opportunity to influence Willis to change the beneficiary designation on his insurance policy. See *In re Karmey Estate*, 468 Mich at 73. Thus, Tomlin established the presumption and Nees had to present evidence to rebut that presumption. *In re Peterson Estate*, 193 Mich App at 260.

III. CONCLUSION

Although the trial court clearly erred in its findings concerning whether Tomlin established the presumption, the trial court also clearly found that Willis' decision to change the beneficiary was not the product of undue influence. Nevertheless, on this record we cannot ascertain whether the trial court's ultimate finding was influenced by its erroneous determination that Tomlin had not established the presumption. The trial court may very well have concluded

that—in the absence of the presumption—Tomlin simply had not presented enough evidence to establish undue influence and found accordingly. Given that the trial court is in the best position to make findings and assess credibility, we conclude that this case should be remanded to the trial court for further findings. Specifically, the trial court shall make new findings concerning whether—in light of the established presumption of undue influence—Nees rebutted the presumption. Accordingly, we vacate the trial court's ruling from the bench, vacate the judgment entered in favor of Nees, and remand this case for further findings consistent with this opinion.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Tomlin may tax costs. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly