STATE OF MICHIGAN

COURT OF APPEALS

UNITED OF OMAHA LIFE INSURANCE CO., 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	UNPUBLISHED March 22, 2012 No. 302639 Jackson Circuit Court LC No. 07-002157-CZ

AFTER REMAND

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant/cross-plaintiff Mattie I. Tomlin[1] appeals by right the trial court's order after remand. We affirm.

This matter involves the proper distribution of proceeds from a life insurance policy held by the decedent, Willis Tomlin. It was commenced as an interpleader action by plaintiff United of Omaha Life Insurance Company against Mattie and defendant/cross-defendant Jerri L. Nees, individually and as conservator of the estate of Makenzie A. Nees. Mattie is Willis's mother. Jerri was Willis's live-in girlfriend for the better part of a decade, and Makenzie is Willis's and

[1] Because many of the parties share family names, we will refer to them by their first names.

Jerri's minor daughter. Willis also has an older son from a prior relationship, Davin Henry Reinicke.

In 1993, Willis designated Mattie as the sole beneficiary under the life insurance policy. Willis met Jerri in 1996 and they entered into a dating relationship; they eventually lived together, and Makenzie was born in 2003. In 2005, Willis began to have serious medical problems. In August 2006, he had surgery, but it went poorly. He was confined to a hospital bed thereafter. After the surgery, he was unable to speak, but, critically, there is disagreement as to the extent—if any—to which he could communicate through other means, such as nodding, moving his lips, and gesturing. In September 2006, Willis executed a medical and general power of attorney authorizing Jerri to act on his behalf; Jerri was not present when Willis signed it.

Jerri testified that she and Willis had discussed updating the beneficiary of the life insurance policy at issue in this matter when she was pregnant with Makenzie. She testified that about a week before he died, Willis told her he wanted to change the beneficiary designation and that she completed the forms pursuant to Willis's directions. The proceeds were to be divided equally between herself and Makenzie. Jerri contacted the hospital social worker because she thought it was "odd" that she was the beneficiary rather than Willis's son. Jerri was not at the hospital when Willis executed the change of beneficiary forms, but the social worker and a notary were. They both testified that Willis could communicate, that he understood the document, and that he intended to execute it. Neither the social worker nor the notary believed Willis was hesitant about executing the document.

Jerri's sister testified Willis had told her he would never name Jerri as a beneficiary and that Jerri had threatened to leave Willis if he did not make the change. Jerri and her sister admitted that they had a strained relationship, and the trial court found Jerri's sister's testimony not credible. Mattie testified that on the way to the hospital before his surgery, Willis said he wanted her to have his life insurance benefits. There was conflicting testimony, however, that Willis said his benefits were going to his mom or his son.

Previously, this Court determined that the trial court erred when it found that Mattie had not established a presumption that Jerri unduly influenced Willis to change the beneficiary of his life insurance policy. *United of Omaha Life Ins Co v Jerri L Nees*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2010 (Docket No. 292316), at 1, 4-5. The case was remanded for the trial court to make new findings as to whether Jerri rebutted the presumption. *Id.*, unpub op at 5. On remand, after hearing further arguments, the trial court ruled that Jerri had rebutted the presumption of undue influence. The trial court noted that Jerri's testimony of Willis communicating by moving his lips and gestures was corroborated by the social worker and the notary; Willis was medically cleared before signing the document; the social worker believed Willis understood what he was doing and that it was his wish to do so; the social worker did not have any concerns that Willis was coerced or improperly influenced; Jerri was not present when Willis executed the change of beneficiary; and the only testimony indicating coercion was from Jerri's sister and was not credible. Mattie now argues that the evidence does not rebut the presumption of undue influence.

Undue influence is an equitable matter. *Adams v Adams*, 276 Mich App 704, 714 n 5; 742 NW2d 399 (2007). "When reviewing an equitable determination reached by the trial court,

we review the conclusion de novo, but we review the supporting findings of fact for clear error." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). "A finding of fact is clearly erroneous only if there is no evidence to support it or if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995) (citation omitted). However, in actions sounding in equity this Court "must examine the entire record and weigh all of the evidence, subjecting the trial court's findings of fact to closer scrutiny than we would employ on review of a jury verdict." *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983) (internal quotation omitted). At the same time, "this Court accords considerable weight to the lower court's findings of fact in an equity case in light of its special opportunity to hear the evidence presented and see the witnesses before it." *Id.* (citation omitted).

Undue influence must be shown by evidence that the grantor was subjected to threats, flattery, or any other coercion or influence that would overcome his or her free will and destroy his or her free agency. *In re Hannan's Estate*, 315 Mich 102, 123; 23 NW2d 222 (1946); *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), overruled on other grounds by *In re Estate of Karmey*, 468 Mich 68; 658 NW2d 796 (2003). However, "[m]otive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient." *Kar*, 399 Mich at 537. Undue influence will be mandatorily presumed if the evidence establishes "(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*. The party contesting the claim of undue influence therefore has the burden of providing evidence to rebut the presumption, but the ultimate burden of persuasion remains with the party claiming undue influence. *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985).

Mattie first argues that the evidence that Willis could respond by moving his lips does not constitute competent and legally sufficient evidence to rebut the presumption of undue influence. Mattie argues that Willis was weakened and vulnerable, he only minimally responded to inquiries, and he could not manage his affairs. However, there was testimony that Willis could communicate, and the trial court is in the better position to evaluate the credibility of the witnesses before it. While Willis could not manage his own affairs because of his physical condition, most of the evidence tended to show that Willis could communicate his wishes to Jerri and that Jerri carried them out. The absence of an attorney's involvement in the change of beneficiary is not fatal, given the presence of the social worker and notary, both of whom verified that Willis understood what he was doing and wished to do so. The trial court found Jerri's testimony that she acted at Willis's direction credible, and we cannot find on this record that the trial court committed clear error.

The trial court's conclusion that Jerri rebutted the presumption, particularly in light of her testimony that Willis could communicate and wanted to change the beneficiary and the testimony of the social work and the notary which corroborated this, was supported by competent and credible evidence. See *Reed v Breton*, 475 Mich 531, 539; 718 NW2d 770 (2006) (explaining that "competent and credible evidence" is the usual standard for overcoming a rebuttable presumption).

Mattie next argues that Jerri's testimony is self-serving and uncorroborated, so it does not rebut the presumption of undue influence. Jerri's testimony about her communications with Willis when no one else was in the room was, indeed, uncorroborated. However, the subject of those communications, specifically that Willis wished to change the beneficiary of the life insurance policy to Jerri and Makenzie, *was* corroborated by the testimony of the social worker and the notary, both disinterested parties. The testimony of disinterested third parties has been found persuasive as to whether there was undue influence. See, e.g. *Kar*, 399 Mich at 543 (attorney who drafted a contested will and deed believed the individual acted in accordance with her own will); and *In re Erickson*, 202 Mich App 329, 333; 508 NW2d 181 (1993) (insurance agent who assisted with a beneficiary change testified that the individual had difficulty understanding financial matters but understood the change and that the agent would not have made the change if the individual had not understood it). The trial court's conclusion was supported by competent and credible evidence. *Id.*

Mattie also argues it is irrelevant that Jerri was not present when the document was executed. We disagree. The party rebutting the presumption must present contrary evidence showing that the grantor was not "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." *Kar*, 399 Mich at 537; *Mikeska Estate*, 140 Mich App at 121. The fact that Jerri was not present when Willis executed the change of beneficiary supports that Willis was not subject to her influence when he changed the beneficiary and was relevant for the trial court's consideration.

Finally, Mattie argues that even if Willis was mentally competent, he was in a weak and vulnerable physical state, supporting the presumption of undue influence. While an accurate argument, there was other competent and credible evidence before the trial court favoring rebutting the presumption. Specifically, there was evidence that Willis could communicate, he was medically cleared before executing the change of beneficiary, the social worker and notary testified he understood the document and wished to execute it, Jerri was not present when Willis executed the document, and the social worker and notary did not have any hesitations about Willis executing the document. The trial court's conclusion that Jerri rebutted the presumption of undue influence is not clearly erroneous. *Reed*, 475 Mich at 539. The trial court's conclusion does not require reversal.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen Fort Hood