[Cite as *In re Buckner*, 2009-Ohio-2447.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

IN RE: ESTATE OF	:	
MARY BUCKNER, Dec'd.	:	CASE NO. CA2008-07-074
	:	O P I N I O N 5/26/2009
	:	
	:	
	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS,
PROBATE DIVISION
Case No. 2006-ES-04957

Thomas F. Payne, 9726 Delray Drive, Montgomery, OH 45242-6350, for appellant

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YOUNG, P.J.

{¶1} Appellant, Paul P. Buckner, Sr., appeals the decision of the Clermont County Probate Court overruling his exceptions to the inventory of assets filed by appellee, Sharon K. Buckner, Executrix of the Estate of Mary Buckner. We affirm the decision of the probate

court.

{¶2} This case concerns the administration of the estate of the parties' mother, Mary Buckner ("decedent"). The record indicates that after the death of her husband in 1996, the decedent lived alone and enjoyed relatively good health until the spring of 2000 when she suffered a stroke. She did not sustain any debilitating effects from the stroke and was able to maintain an independent lifestyle until March of 2003 when she fell in her house and was hospitalized. The hospital staff informed appellee that the decedent was in need of full-time nursing care, and as a result, appellee made the decision to move her into an assisted living facility. Appellee stated that the decedent consented to this arrangement, and remained in assisted living until her death in November 2005.

{¶3} Appellee and her sister, Susan Clyburn, testified that they enjoyed a very close relationship with the decedent. Clyburn testified that she saw the decedent on a daily basis. Appellee testified that she saw the decedent several times each month, and characterized herself as being part of the decedent's circle of friends. While the decedent was in the assisted living facility, appellee took her to various doctor appointments, purchased clothing and incidentals for her, and took her on trips. She also handled all of the expenses associated with decedent's house, including paying the property taxes and utility bills.

{¶4} Although appellee and Clyburn were residents of the Cincinnati area, appellant testified that he left Ohio in the early 1970s and has lived in Alaska since 1974. According to appellant, he last visited the decedent in 1996 after the death of his father. He testified that prior to that visit he traveled to Ohio approximately every four to five years.

{¶5} After the decedent was placed in assisted living, appellee contacted various institutions on the decedent's behalf, and was told that she needed a power of attorney to assist in handling the decedent's affairs. As a result, appellee contacted Pro Seniors, an organization that provides information and legal representation to senior citizens. Through

Pro Seniors appellee was referred to Victoria Gray, a local elder law attorney. In her deposition, Gray testified that appellee visited her office on March 11, 2003 for an initial consultation. They discussed estate planning issues, and it was determined that the decedent needed both a health care power of attorney and a general power of attorney.

{¶6} Appellee and Gray also discussed the decedent's assets, which, in addition to her house, included cash, over one thousand shares of Procter and Gamble ("P&G") stock valued at approximately $110,000, and 226.711 shares of stock in Merck and Company, Inc. ("Merck") valued at approximately $15,000. Gray prepared a draft of a general power of attorney based on the issues she had discussed with appellee, and visited the decedent at the assisted living facility on March 19, 2003 to ascertain the decedent's wishes. Gray testified that she explained the content of the power of attorney to the decedent and determined that she was mentally competent to sign the document. The decedent executed the power of attorney, appointing appellee and Clyburn as her attorneys-in-fact. Paragraph two of the power of attorney authorized the decedent's attorneys-in-fact, acting jointly or individually, as follows:

{¶7} "To use and spend any of my funds for the purpose of paying for any and all of my necessary living expenses for my maintenance, medical care, comfort, support and welfare. To make gifts to any or all of my children. To make gifts to any person or class of persons, including my agent, or to a charity, which are consistent with any prior history of giving I may have established, or which are part of a plan to minimize my estate tax by taking advantage of the annual gift tax exclusion regardless of any prior history of gifting, or lack thereof."

{¶8} Under the authority of the power of attorney, appellee made the following transfers of the decedent's shares of P&G stock:

{¶9} (1) A transfer on March 25, 2003 of 811.054 shares from an account owned by

the decedent to a transfer on death account titled in appellee's name, with Clyburn designated as its beneficiary;

{¶10} (2) A transfer on May 28, 2003 of 300 certificated shares owned by the decedent to the same transfer on death account; and

{¶11} (3) A transfer in March of 2003 of 300 shares from an account owned by the decedent to an account titled solely in the name of appellee.

{¶12} Appellee also transferred the shares of Merck stock to herself in the spring of 2003. She characterized the stock transfers as gifts to herself and Clyburn pursuant to the decedent's wishes. Appellee testified that when she and Clyburn brought the decedent home from the hospital after her stroke in 2000, the decedent told them "if anything like this ever happens again, I want you two to have my stock." According to appellee, she thought the decedent wanted her and Clyburn to have the stock because "she knew that we were the two that were there for her." At the exceptions hearing, Clyburn testified similarly regarding the decedent's alleged statement.

{¶13} The record indicates that although appellee made the transfers shortly after the decedent executed the power of attorney, the stock was not liquidated to pay for the decedent's care. Appellee testified that she paid approximately $200,000 to the assisted living facility using the decedent's cash resources.

{¶14} After the decedent's death on November 2, 2005, appellee was appointed executrix under her Last Will and Testament. The will provided that the decedent's children were to each receive one-third of the remainder of her estate. Appellee testified that in January of 2006, she transferred 1,100 shares of P&G stock to Clyburn because she "knew that's what my mother wanted." Of the remaining stock held in appellee's name, 77 shares were liquidated to pay for appellee's litigation costs, and additional shares were liquidated to pay the debts of the decedent's estate. The remaining stock, including the Merck shares,

was not liquidated.

{¶15} On August 16, 2007, appellee filed an inventory of estate assets pursuant to R.C. 2115.02. Appellant filed exceptions to the inventory, claiming that the decedent's stock in P&G and Merck were improperly excluded. At the May 29, 2008 hearing on the exceptions, appellant argued that in utilizing the power of attorney to transfer these assets to her sole control, appellee breached her fiduciary duty to the decedent.

{¶16} The probate court issued its decision on June 26, 2008, overruling appellant's exceptions. The court concluded that appellee had established that the stock transfers made under the authority of the power of attorney were valid inter vivos gifts. The court further found that appellant failed to prove, by clear and convincing evidence, that appellee exercised undue influence over the decedent. Pursuant to appellant's request, the court entered its findings of fact and conclusions of law on the matter on August 5, 2008.

{¶17} Appellant appealed the probate court's decision, raising three assignments of error. The issues presented in appellant's first and second assignments are interrelated, and will be considered together.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE [sic] APPELLANT BY HOLDING THAT THE TRANSFERRED STOCK SHOULD NOT BE INCLUDED IN THE ESTATE INVENTORY."

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE [sic] APPELLANT IN ALLOCATING THE BURDEN OF PROOF IN THIS CASE."

{¶22} In his first assignment of error, appellant challenges the trial court's determination that the stock was exempt from the estate inventory. He contends that the stock transfers constituted a breach of appellee's fiduciary duty to the decedent and unjustly

enriched appellee and Clyburn. Appellant further asserts that appellee failed to establish that the stock transfers were valid inter vivos gifts, because there was no "present intention" on the part of the decedent to make such gifts to her daughters to the exclusion of appellant. In his second assignment, appellant contends that the trial court erred in allocating the parties' respective burdens of proof. We disagree with these contentions.

{¶23} At the outset, we note that an appellate court reviews a trial court's ruling on a party's exceptions to an inventory filing under an abuse of discretion standard. *In re Estate of Brunswick*, Warren App. No. CA2006-08-096, 2007-Ohio-5396, ¶8. An abuse of discretion is more than error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A reviewing court will not reverse a trial court's judgment on factual determinations where there is some competent, credible evidence going to all essential elements of the case. See *In re Estate of Perry*, Butler App. No. 2007-03-061, 2008-Ohio-351, ¶15. (Internal citations omitted). Under this highly deferential standard, even "some" evidence is sufficient to sustain the trial court's judgment and prevent a reversal if it applies to all of the essential elements of the case. Id.

{¶24} A power of attorney is a "written instrument authorizing an agent, known as an 'attorney in fact,' to perform specific acts on the principal's behalf." *Rasnick v. Lenos*, Butler App. No. CA2004-02-033, 2005-Ohio-2916, ¶20, citing *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164. The holder of a power of attorney has a fiduciary relationship with the principal. *Silcott v. Prebble*, Clermont App. No. CA2002-04-028, 2003-Ohio-508, ¶22. This relationship is "one in which special confidence and trust is reposed in the integrity and fidelity of another." Id., quoting *In re Scott* (1996), 111 Ohio App.3d 273, 276.

{¶25} With regard to the validity of gratuitous property transfers made by an attorney-in-fact pursuant to a power of attorney, the First District Court of Appeals has concluded that

a general, durable power of attorney "does not authorize an attorney-in-fact to transfer the principal's property to themselves or to others, unless the power of attorney explicitly confers this power. An attorney-in-fact may not make gratuitous transfers of the principal's assets unless the power of attorney from which the authority is derived expressly and unambiguously grants the authority to do so." *MacEwen v. Jordan*, Hamilton App. No. C-020431, 2003-Ohio-1547, ¶12. In *MacEwen*, a brother brought suit against his sister, alleging that she had exceeded the authority granted to her as attorney-in-fact under their father's power of attorney, and breached her fiduciary duty of care when she transferred their father's property to herself. Id. at ¶1.

{¶26} Citing its prior decision in *Brooks v. Bell* (Apr. 10, 1998), Hamilton App. No. C-970548, ¶11, the court noted "attorneys-in-fact act outside the scope of their authority when they use a general, durable power of attorney to make gifts to themselves." Such self-gifting "raises 'a suspicion that undue influence may have been exerted' on the principal by the attorney-in-fact.'" Id. However, the facts in *MacEwen* differed from those in *Brooks* in that the power of attorney at issue specifically conferred authority to the attorney-in-fact to gift her father's property to herself. Id. at ¶15. The power of attorney permitted her "to make gifts at any time, or from time to time, to anyone, including my [a]ttorney-in-[f]act, in such amounts and using such property as my [a]ttorney-in-[f]act shall determine." Id. at ¶2. As a result, the court in *MacEwen* reasoned that when a principal has "made an express grant of authority to an attorney-in-fact to make gifts to third persons, including the attorney-in-fact, the attorney-in-fact may, in the absence of evidence of undue influence upon the principal, make such gifts." Id. at ¶12. In such a circumstance, the suspicion of undue influence and a presumption that the transfer was invalid is no longer present. Id. at ¶11, ¶14.

{¶27} In addressing the respective burdens of proof when a gifting clause is present, the court in *MacEwen* determined that attorneys-in-fact bear the initial burden of proving the

validity of the transfer to themselves pursuant to the power of attorney, while the party attacking the transfer retains the ultimate burden of proving undue influence by clear and convincing evidence. Id. at ¶13. In determining whether the initial transfer was valid, a court must first look to the express grant of authority in the language of the power of attorney. Id. at ¶14.

{¶28} A court must then look to other considerations, based upon the unique facts of the case. Id. These considerations may include the following: "whether a transfer depleted assets necessary to maintain the principal's lifestyle; whether the principal knew of the gift and authorized it in some manner; whether the recipient of the transfer was the natural object of the principal's bounty and affection; whether the transfer was consistent with the principal's estate plan; whether the gift was a continuation of the principal's pattern of making gifts; and whether the transfer was made for another legitimate goal, such as the reduction of estate taxes." Id.

{¶29} After closely reviewing the record, we conclude that the probate court did not abuse its discretion in finding that the transferred stock was exempt from the estate inventory. With regard to the initial burden of proving the validity of the transfer, the court determined that the decedent's donative intent was clearly established by virtue of the language of the power of attorney, which "expressly conferred upon [appellee] the power to transfer the [d]ecedent's property to herself and others." Contrary to appellant's argument, appellee was not required to show, by clear and convincing evidence, a present intention on the part of the decedent to make a gift. See *MacEwen* at ¶16.

{¶30} In addition, the trial court examined several of the considerations outlined in *MacEwen*. First, the court determined that there was no evidence presented to suggest that the stock transfers depleted assets necessary to maintain the decedent's lifestyle, as appellee produced uncontroverted evidence to indicate that all of the decedent's needs were

met while she was in the assisted living facility. Second, the court determined that the testimony of appellee and Clyburn regarding their conversation with the decedent indicated that she was aware of and consented to the transfers. Although appellant argues that this testimony was self-serving, the court noted that appellant failed to present any evidence to refute or rebut it. Third, the court found that appellee was the natural object of the decedent's bounty and affection because in addition to being her daughter, the evidence demonstrated that she had been the decedent's primary caretaker. Finally, the court concluded that although the decedent's donative intent to gift appellee and Clyburn the stock was not "wholly consistent with the [d]ecedent's intent in her Will to divide her estate equally between [t]he children," appellee and Clyburn were "expressly contemplated by the [d]ecedent, in her Will, as being entitled to a sizable share of her estate."

{¶31} After finding that appellee satisfied her burden of proving the validity of the power to transfer the stock, the court's analysis turned to appellant's burden of establishing, by clear and convincing evidence, that appellee exerted undue influence upon the decedent. The court found that appellant failed to satisfy this burden, as he did not present any evidence of undue influence, either at the time of the grant of the power of attorney, or "at any other time subsequent to the execution of the power of attorney."

{¶32} Appellant takes issue with the probate court's reliance on *MacEwen*, arguing that its analysis and holding is in conflict with this court's decisions in *Brate v. Hurt*, 174 Ohio App.3d 101, 2007-Ohio-6571 and *Rasnick v. Lenos*, Butler App. No. CA2004-02-033, 2005-Ohio-2916. We disagree with this contention, as both cases are distinguishable from the case at bar. First, our decision in *Brate* did not involve gifting pursuant to a power of attorney. In addition, although in *Rasnick* we held that the power of attorney at issue was insufficient to authorize the decedent's son to transfer the decedent's property to himself, the power of attorney did not expressly and unambiguously authorize such transfers. Id. at ¶22,

citing *MacEwen* at ¶2.

{¶33} Appellant also contends that the court misallocated the burden of proof in this case. He maintains that despite the court's holding in *MacEwen*, a presumption of undue influence exists because of the fiduciary relationship between appellee and the decedent. Appellant argues that appellee was required to set forth evidence to overcome this presumption by proving the validity and fairness of the stock transfers. We find this assertion without merit. As previously discussed, a presumption of undue influence is not present in this case, as the power of attorney at issue specifically authorized appellee to make gifts to the decedent's children, which included gifts to herself and Clyburn.

{¶34} As a result of the foregoing, appellant's first and second assignments of error are overruled.

{¶35} Assignment of Error No. 3:

{¶36} "WHETHER THE TRIAL COURT ERRED IN CONSIDERING THE EVIDENCE OF A TELEPHONE CALL BY THE [sic] APPELLANT TO SUSAN CLYBURN AS A DISCLAIMER OF THE [sic] APPELLANT'S DISTRIBUTIVE SHARE."

{¶37} In his third assignment of error, appellant argues that the trial court erred in considering Clyburn's testimony regarding an alleged telephone conversation she had with appellant after the death of the decedent. Appellant claims that the trial court improperly viewed this evidence as a disclaimer of his distributive share of the estate.

{¶38} At the hearing, Clyburn testified that appellant called her three days after the decedent's death to tell her that he would not be traveling to Cincinnati for her funeral due to health issues. According to Clyburn, appellant inquired about what they were going to do with the decedent's property and mentioned that he was aware of "some stocks." Clyburn testified that appellant told her that he did not want the stock, and that she and appellee could have the stock because they had taken care of the decedent. Appellant did not object

to Clyburn's testimony. Accordingly, he has waived all but plain error.

{¶39} A plain error is one that is "obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse effect on the character and public confidence in judicial proceedings." *In re J.M.*, Clermont App. No. CA2006-11-096, 2007-Ohio-4219, ¶31, quoting *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 209. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." Id., quoting *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 1997-Ohio-401, syllabus.

{¶40} Upon review, we conclude that appellant has failed to demonstrate the existence of plain error. Contrary to appellant's argument, there is no evidence to indicate that the court considered Clyburn's testimony regarding her alleged conversation with appellant as a "disclaimer" of his distributive share of the estate. In addition, there is nothing to suggest that the court relied on this testimony in reaching its decision, as it made no specific finding with respect to this alleged conversation. Accordingly, appellant's third assignment of error is overruled.

{¶41} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

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