IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

YVETTE ROSENBERG,
Plaintiff/Appellant,

v.

MARILYN KOKE SANDERS,
Defendant/Appellee.

No. 1 CA-CV 21-0246
FILED 5-31-2022

Appeal from the Superior Court in Maricopa County
No. CV2018-013707
The Honorable Andrew J. Russell, Judge

REVERSED AND REMANDED

COUNSEL

Jaburg & Wilk, PC, Phoenix
By David L. Allen, David N. Farren
Counsel for Plaintiff/Appellant

Becker & House, PLLC, Scottsdale
By Mark E. House, Andrea Burnett O'Neill, Amanda L. Barney
Co-Counsel for Defendant/Appellee

Jones Skelton & Hochuli, PLC, Phoenix
By Eileen Dennis GilBride
Co-Counsel for Defendant/Appellee

OPINION

Judge David D. Weinzweig delivered the opinion of the Court, in which Presiding Judge Peter B. Swann and Judge Paul J. McMurdie joined.

¶1 A beneficiary deed is voidable as the product of undue influence when signed by the grantor under the grantee's undue influence. We must decide whether a grantor's statements to family and a hospital physician, made 14 months after he signed the deed, were relevant and admissible evidence of undue influence for the superior court at summary judgment. The superior court did not consider this evidence because it applied the eight non-exclusive factors set forth in *In re McCauley's Estate*, 101 Ariz. 8, 10 (1966). We hold the evidence should have been considered on summary judgment. When so considered, along with dueling medical evidence of the grantor's earlier state of mind, the record had just enough evidence to create a factual dispute and defeat summary judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 Alex Brandt and Marilyn Sanders dated for several years, first in California. Brandt proposed marriage in 1994, but the couple never got married. Later that year, Brandt moved to Arizona and bought a home. Sanders followed and they lived together in Brandt's home. Brandt bought a pair of investment properties in Arizona, and he gifted an ownership interest to Sanders. But their relationship ended in 1997, and Brandt asked Sanders to transfer her ownership interest back to Brandt. Sanders agreed because she "thought it was fair."

¶3 Brandt moved on to a new relationship with Marilyn Mishkin in 1998. Brandt proposed to Mishkin, but the couple never got married. In August 2001, Brandt signed and notarized a beneficiary deed, leaving his home and both investment properties to Mishkin on his death. But their relationship ended in 2005.

¶4 Later in 2005, Brandt revisited his estate plan. This time, he signed and notarized a second beneficiary deed, leaving his home and one investment property to Yvette Rosenberg on his death. Rosenberg was Brandt's niece, the daughter of his sister Susan. She lived in Canada. Brandt used the same beneficiary deed he used before, just changing the named beneficiary from Mishkin to Rosenberg.

¶5 Brandt and Sanders reconnected in 2008. Sanders had returned to live in California, and Brandt visited her there to return the engagement ring used to propose marriage in 1994. It was a long-distance relationship at first. Sanders shuttled back and forth "every two to three weeks," but Sanders returned to Arizona in 2014 and moved into Brandt's home.

¶6 Brandt got sick in late 2016. Sanders cooked his meals and took him to doctor appointments. In March 2017, she rushed him to the hospital and signed the admission papers. Brandt did not tell his family about the hospital visit. He was diagnosed with "memory loss" and "cognitive impairment."

¶7 A month later, Brandt again revisited his estate plan. This time, in April 2017, he signed and notarized a third beneficiary deed ("2017 deed"), leaving Sanders his home and one investment property on his death. As before, Brandt used the same beneficiary deed with the same language, just changing the named beneficiary from Rosenberg to Sanders, but he did not tell Sanders about the deed for two months. At her deposition, Sanders recounted how Brandt presented her the beneficiary deed on her 70th birthday in June 2017. Brandt did not tell his family about the deed.

¶8 Almost a year later, in May 2018, Brandt was again hospitalized. By June 2, he wanted to leave the hospital, but the medical staff concluded he should remain hospitalized because he was "not decisional." Sanders agreed. According to the hospital records, Brandt called the police and said he was trapped in the hospital.

¶9 Rosenberg contacted Brandt in the hospital and described him as "very distressed." She and Susan immediately traveled to Arizona to visit Brandt in the hospital. Brandt told them he was "afraid of [Sanders]," "she was trying to kill him and steal his assets," and "he wanted the hospital to block [Sanders] from coming to his room or from talking to him on the phone." Brandt asked Rosenberg to cancel the credit card he gave Sanders, "check the status of his checking and credit card accounts to determine whether [Sanders] accessed his cash funds," and "retrieve the contents of his safety deposit box because he was concerned that [Sanders] would attempt to remove the contents."

¶10 Brandt remained hospitalized on June 3, when he asked to appoint Susan by power of attorney to make his medical decisions. A hospital psychiatrist visited Brandt to assess his mental capacity. The

psychiatrist found Brandt "alert, oriented, and pleasant and cooperative." He reported that Brandt "no longer trusts his domestic partner with whom he has lived over the past 10 years," adding that Brandt "did not want to get into details, but his family is concerned that she may be trying to take advantage of him by getting him to sign paperwork about his rental properties."

¶11 Brandt was discharged from the hospital on June 5. Sanders picked him up and they returned home. Susan remained in Arizona for a week to help care for Brandt. He died less than three months later. Brandt never told Susan or Rosenberg about the 2017 deed.

This Probate Action

¶12 Rosenberg filed a probate action in Arizona and was appointed the personal representative of Brandt's estate. She then sued Sanders to void the 2017 deed, alleging that Sanders had unduly influenced Brandt to sign the deed. After oral argument, the superior court granted summary judgment for Sanders, holding that Rosenberg had "not presented evidence from which a reasonable trier of fact could conclude that [Sanders] unduly influenced Mr. Brandt into executing the Beneficiary Deed." Rosenberg timely appealed. We have jurisdiction. *See* A.R.S. § 12-2101(A)(1).

DISCUSSION

¶13 Rosenberg argues the court erroneously granted summary judgment to Sanders. We review de novo whether summary judgment was appropriate, *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 159, ¶ 9 (App. 2018), and will "affirm the judgment if it is correct for any reason," *S & S Paving & Const., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016).

¶14 Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). A moving party is entitled to summary judgment "if the facts produced in support of the [nonmovant's] claim or defense have so little probative value" that "reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). Summary judgment is not, however, "a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury's verdict, nor even when the trial judge believes the moving party *should* win

the jury's verdict." *Id.* at 310 (emphasis in original); *see also Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, 456, ¶ 23 (App. 2005).

I. Statutory Presumption of Undue Influence

¶15 Rosenberg first contends the superior court applied the wrong standard of proof, arguing it should have presumed Sanders exercised undue influence. We disagree.

¶16 Arizona law presumes that Brandt was not under undue influence when he granted the beneficiary deed to Sanders, and the deed's challenger, Rosenberg, must prove the deed is invalid by a preponderance of the evidence. *See* A.R.S. § 14-2712(B), (D). An inverse presumption that Brandt was under Sanders' undue influence was appropriate only if Sanders either (1) had a confidential relationship to Brandt, was active in procuring the beneficiary deed's creation and execution, and is a principal beneficiary of the deed, or (2) prepared the beneficiary deed and is a principal beneficiary of the deed. A.R.S. § 14-2712(E).

¶17 The record at summary judgment had no evidence to support a presumption of undue influence. There was no evidence that Sanders prepared the beneficiary deed or occupied the sort of confidential or fiduciary relationship that triggers an undue influence presumption. Not even the "marital relationship" is "one of the confidential relationships giving rise to the presumption of undue influence." *In re Vermeersch's Est.*, 109 Ariz. 125, 129 (1973).

¶18 Still, Rosenberg argues that summary judgment was inappropriate because whether "a person is a principal beneficiary of a governing instrument or the preparer of a governing instrument is a question of fact to be determined by the totality of the circumstances." A.R.S. § 14-2712(G). But again, the record had no evidence that Sanders prepared the beneficiary deed. Nor was there evidence to contest how and when Sanders first learned about the deed.

¶19 So, Rosenberg bore the burden of proof on her undue influence claim. *See In re McCauley's Est.*, 101 Ariz. 8, 10-11 (1966). To defeat summary judgment on her claim, Rosenberg had to present "specific facts" showing a genuine issue for trial, and not "mere conclusions of ultimate fact and law." *See In re Sherer's Est.*, 10 Ariz. App. 31, 34 (1969). We turn there now.

II. Undue Influence

¶20 A beneficiary deed is voidable if executed under undue influence. For an undue influence claim, the plaintiff must prove the defendant beneficiary made the grantor's "desires conform to [her] own," exercising "power over" his mind and "overmaster[ing] [his] volition." *Parrisella v. Fotopulos*, 111 Ariz. 4, 6 (1974) (citation omitted). "[T]his is not an easy burden to meet." *Sherer*, 10 Ariz. App. at 35. Because direct proof of undue influence is often unavailable, these cases often turn only on circumstantial evidence. *See In re Silva's Est.*, 105 Ariz. 243, 246 (1969). Circumstantial evidence must, however, show more than "mere opportunity and motive," *see id.*, and "[m]ere general influence is not enough," *see Sherer*, 10 Ariz. App. at 35.

¶21 Our supreme court has identified eight non-exclusive factors as "significant indicia" of undue influence: (1) whether the person benefited by the deed made any fraudulent representations to the grantor; (2) whether the deed was hastily executed; (3) whether the execution was concealed from others; (4) whether the person benefited by the deed was active in securing its drafting and execution; (5) whether the deed as drawn was consistent with prior declarations of the grantor; (6) whether the deed was reasonable rather than unnatural in view of the grantor's circumstances, attitudes and family; (7) whether the grantor was a person susceptible to undue influence; and (8) whether the grantor and the beneficiary were in a confidential relationship. *McCauley*, 101 Ariz. at 10-11. We address each of these factors below, along with a ninth factor.

¶22 Fraudulent Representations. Rosenberg insists the record at summary judgment had "abundant circumstantial evidence" to prove that Sanders "has repeatedly lied." But this first factor of undue influence is not concerned with just any lie. Rosenberg must instead prove that Sanders (as grantee) made fraudulent representations to Brandt (as grantor) to advance her plan to "acquire, alienate and dissipate" Brandt's assets. *See McCauley*, 101 Ariz. at 10-11. Rosenberg offered no such evidence. This factor does not create a material question of fact.

¶23 Hasty Action. Rosenberg argues the summary judgment record had evidence to prove that Sanders took "hasty action to procure the deed within weeks after [Brandt] had been seriously ill." She also argues the superior court relied on the wrong evidence to resolve this factor. But this factor is not concerned with just anyone's haste about anything. Brandt must have acted hastily in executing the deed. *See McCauley*, 101 Ariz. at 14 (concluding that action was "hasty" where the decedent signed a new

will while hospitalized in about 10 minutes). He did not. As the court recognized, the undisputed evidence showed that Brandt executed the deed two full months before presenting it to Sanders on her birthday. This factor does not create a material question of fact.

¶24 Concealment. Rosenberg claims this factor is satisfied because Brandt never told his extended family in Toronto, her and Susan, about the 2017 deed. This argument misses the mark. The mere fact that Brandt did not share his estate plans with Toronto relatives does not reflect concealment. *See* 95 C.J.S. Wills § 400 (2021) ("Secrecy in the execution of a will and suppression by the beneficiaries of the fact of its existence, or the fact that the beneficiary failed to inform disinherited relatives of the execution of the will, may be insufficient alone to show undue influence."). Rosenberg never asked about the deed, and she offered no evidence that Brandt's silence or inaction was unusual. Indeed, Brandt had not traditionally shared his financial affairs with Rosenberg.

¶25 Just as important, Brandt filed the beneficiary deed with the Maricopa County Recorder. It was public record. That's the opposite of concealment. *See McCauley*, 101 Ariz. at 14 (finding evidence of concealment when the challenged will was hidden inside a safe). Rosenberg even conceded that she had visited the Maricopa County Recorder's website to get information on the properties. This factor does not create a material question of fact.

¶26 Active Participation. The summary judgment record had no evidence to prove that Sanders participated in Brandt's creation or execution of the beneficiary deed, and Rosenberg fills the evidentiary void with conclusions and naked adjectives, like Sanders "isolate[d]" Brandt or "weaved" an unidentified group of lies to "conceal the deed." *See Florez v. Sargeant*, 185 Ariz. 521, 526-27 (1996) ("[A]ffidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment."). This factor does not create a material question of fact.

¶27 Inconsistency. The record shows the 2017 deed was consistent, not inconsistent, with Brandt's prior practices. He dated Sanders for several years and granted her an equity interest in his real property, changing the title to a joint tenancy with right of survivorship. They broke up and Brandt revisited his estate plan, ultimately convincing Sanders to return the equity interest. Then, Brandt dated Mishkin for several years and granted her ownership in his real property, using a beneficiary deed in 2002, signed and recorded, to leave the property to

Mishkin on his death. They broke up and Brandt revisited his estate plan, using the same beneficiary deed in 2005, signed and recorded, only changing the named beneficiary from Mishkin to Rosenberg. Several years later, Brandt reconnected with Sanders, who returned to live in Brandt's home. Brandt granted her ownership in his real property, using the same beneficiary deed in 2017, signed and recorded, only changing the named beneficiary from Rosenberg to Sanders.

¶28 The superior court aptly described the 2017 deed as in "keeping with Mr. Brandt's practice of wanting to leave the [p]roperties to his female companions after his death." Brandt used and reused the same beneficiary deed, only changing the named beneficiary from Mishkin to Rosenberg and then to Sanders. *Cf. Mullin v. Brown*, 210 Ariz. 545, 550-51, ¶ 19 (App. 2005) (undue influence supported in part when language of prior wills differed from that of disputed will); *Green v. Earnest*, 840 S.W.2d 119, 123 (Tex. App. 1992) (similarity of documents "easily allays" suspicions of undue influence). This factor does not create a material question of fact.

¶29 Reasonableness. Rosenberg characterizes the 2017 deed as "unnatural, irrational and totally out of character" for Brandt. But the summary judgment record did not support her characterization. And again, naked adjectives are not evidence. *Florez*, 185 Ariz. at 526-27. This factor does not create a material question of fact.

¶30 Susceptibility. On this factor, the parties presented conflicting evidence. Rosenberg retained a medical expert who reviewed Brandt's medical records and found Brandt was susceptible to undue influence in 2017. Sanders retained a medical expert who reviewed the same records and disagreed. This factor presents a question of fact on undue influence. *Orme Sch.*, 166 Ariz. at 309-10 (1990).

¶31 Confidential Relationship. Rosenberg offered no evidence that Sanders and Brandt shared this sort of confidential or fiduciary relationship. Not even the "marital relationship" is "one of the confidential relationships giving rise to the presumption of undue influence." *Vermeersch's Est.*, 109 Ariz. at 129.

The Ninth Factor

¶32 Pausing at this point, Rosenberg did not present enough evidence to defeat summary judgment under the *McCauley* factors alone. But the *McCauley* factors are not exclusive. Our supreme court described them only as "significant indicia of the presence or absence of [undue]

influence." *McCauley*, 101 Ariz. at 10-11. And our de novo review of this record reveals a ninth factor.

¶33 We hold that a grantor's alleged post-deed statements may provide relevant and admissible evidence of undue influence. Because it focused on the *McCauley* factors, the superior court did not consider Brandt's alleged statements from 2018, while hospitalized, fourteen months after he signed and recorded the 2017 deed. When considered, this evidence barely frames a material question of disputed fact.

¶34 Statements of Grantor. About 14 months after signing the deed, Brandt made a few statements about Sanders to Rosenberg and Susan. Brandt said he was "afraid of [Sanders]," "[Sanders] was trying to kill him and steal his assets," and he did not want Sanders to visit or call him in the hospital. Meanwhile, Brandt told Rosenberg to check his "checking and credit card accounts to determine whether [Sanders] accessed his cash funds," and to "retrieve the contents of his safety deposit box because he was concerned that [Sanders] would attempt to remove the contents."

¶35 Around the same time, Brandt told a hospital psychiatrist he "no longer trust[ed] his domestic partner with whom he has lived over the past ten years," but "did not want to get into details." The psychiatrist added that Brandt's "family is concerned that [Sanders] may be trying to take advantage of him by getting him to sign paperwork about his rental properties."

¶36 Sanders briefly contends that Brandt's statements from June 2018 could not create a factual dispute about whether Brandt's state of mind in April 2017. We disagree. A plaintiff must certainly prove the grantor signed the challenged instrument while under the grantee's undue influence. *See In re O'Connor's Est.*, 74 Ariz. 248, 257 (1952) ("It is well settled that, upon the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testatrix at the time of the execution of the will is the question to be determined."). But neither the Arizona legislature nor Arizona courts have restricted the universe of relevant evidence available to resolve that fact question. *Cf. id.* ("Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will.").

¶37 To the contrary, our supreme court has recognized that direct evidence of undue influence is rarely available, forcing the parties to rely

on circumstantial evidence. *See McCauley*, 101 Ariz. at 10 ("Since undue influence is commonly exercised in secret, it may be established by circumstantial evidence."). To that end, the court should accept a broad range of circumstantial evidence on that issue. *See Slosberg v. Giller*, 801 S.E.2d 332, 334 (Ga. App. 2017) ("[A] claim of undue influence may be supported by a wide range of testimony, since such influence can seldom be shown except by circumstantial evidence," including "evidence as to the facts and circumstances that occurred before and after the execution of the documents at issue."). The factfinder remains free to discount the weight of this evidence based on the time between signature and statement. *See generally, State v. Van Adams*, 194 Ariz. 408, 416, ¶ 24 (1999) ("Although remoteness between [] two incidents affects the weight to be given the testimony by the jury, it generally does not determine its admissibility.").

¶38 We hold that Brandt's post-deed statements were relevant and admissible evidence, and should have been considered at summary judgment. *See Matter of Est. of Phillips*, 795 S.E.2d 273, 281 (N.C. App. 2016) (grantor's post-testamentary declarations were relevant to prove undue influence over the grantor on summary judgment). When so considered, along with the conflicting medical evidence of Brandt's mental state at the time he signed the beneficiary deed, the record had just enough evidence to create a factual dispute and defeat summary judgment.

III. Attorney Fees on Appeal

¶39 Rosenberg requests her attorney fees incurred on appeal under the "common fund doctrine," and seeks an interim fee award. We decline her request. Rosenberg did not seek to preserve a common fund, nor does one exist. She asked the court to void the 2017 deed, leaving her the sole owner of real property under the 2005 deed. Nor is Rosenberg entitled to an interim fee award. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 393-94 (1985) (interim award available for "those who achieve reversal of an unfavorable interim order if that order is central to the case and if the appeal process finally determines an issue of law sufficiently significant that the appeal may be considered as a separate unit"), *superseded by statute on other grounds, as recognized in Powell v. Washington*, 211 Ariz. 553, 560, ¶ 29 (2006).

CONCLUSION

¶40 We reverse the superior court's entry of summary judgment and remand for trial. Rosenberg may recover her taxable costs incurred in this appeal once she complies with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA