# STATE OF MICHIGAN

# COURT OF APPEALS

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ROY W. ROSS, II, ROBIN J. ROSS, and JANET E. KLOOSTRA, f/k/a JANET E. ROSS,

Plaintiffs-Appellees,

v

DAVID B. ROSS and ALISA ROSS,

Defendants-Appellants.

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UNPUBLISHED
December 19, 1997

No. 202232
Kent Probate Court
LC No. 96-161950

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Defendants, the son and daughter-in-law of Margaret and Walter Ross, appeal as of right the probate court's rescission of a conveyance of real property from Margaret to defendants on grounds of mental incapacity and undue influence. We affirm.

Margaret and Walter Ross acquired cottage property near Pigeon Lake in Holland Township approximately forty years ago. Over the years the couple developed and expanded this property, leaving it as the major asset of their estate. This resort property was a favorite retreat for the couple, their two sons, and their sons' families. One of the couple's sons died in 1988, leaving a widow and two children.

In 1990 the couple executed essentially identical wills, each leaving the entire estate to the other and providing that upon death of the survivor nearly the entire estate would pass in equal shares to their surviving son, David, and their deceased son's widow. On the same day, the couple also executed durable powers of attorney appointing defendant as their attorney-in-fact, expressly giving him authority to give their property to any of the children or grandchildren.

Walter Ross died later in 1990. Margaret had relied heavily on her husband to manage their finances, as well as to help her make decisions and come to understandings regarding her health care and other important concerns. When Walter died, defendant, at Margaret's request, assumed complete responsibility for managing Margaret's finances.

According to defendant,[1] he had for several years taken primary responsibility for the upkeep of the cottage property, that Walter had expressed the intention to leave that property to defendant as compensation and in gratitude, and that after Walter's death Margaret had asked defendant to make arrangements to give effect to this plan. In 1991 defendant, acting with the help of legal counsel, arranged for a conveyance of the cottage property from Margaret to herself and defendant in joint tenancy with rights of survivorship, and also for the Ross Family Trust, which was structured as a repository of Margaret's property with defendant as essentially the sole beneficiary. Defendant conceded at trial that the trust was devised as an alternative to amending Margaret's will. Defendant's attorney also drafted a letter in Margaret's name purporting to state clearly Margaret's agreement with these actions. Margaret signed the deed and the letter.

Witnesses testified to Margaret's pleasant disposition as she signed these documents, and even to her practicing her signature in anticipation of the ceremony. However, other testimony raised doubts as to whether Margaret fully understood the nature and effect of her actions.

Over defendants' objection, Margaret's physician of over a decade testified to the negative effects that Margaret's two strokes had had on her mental faculties, concluding that while she may have been able to make a simple gift, she was unable to understand a major revision of her estate plan. Nurses' notes presented at trial indicated that Margaret was prone to confusion, anger, depression, and irrational outbursts at the time in question. Further, plaintiffs, over defendants' objections, testified to Margaret's statements of her wish that all of her grandchildren continue to share in the cottage property.

The probate court found that defendant had exerted undue influence over Margaret, and that Margaret had been legally incompetent to effect the conveyance. The court rescinded the conveyance and the Ross Family Trust, leaving Margaret's will, the validity of which no party has contested, as the vehicle for the disposal of Margaret's property.

Defendants now contend that the probate court erred with regard to three evidentiary rulings. First, defendants argue that the deposition testimony of Margaret's physician should not have been admitted because there is no indication in the record that the physician knew the applicable legal standards for competence and because the physician was not specifically asked whether Margaret was competent to convey real property. However, the physician was not presented as an expert to testify regarding whether Margaret met the legal standard for competence. Cf. *In re Powers Estate*, 375 Mich 150, 169; 134 NW2d 148 (1965) (a party presenting an expert witness to testify to whether a person meets a legal standard for competence must elicit testimony from that witness establishing that the witness understands the legal standard). Hence, it is of no consequence whether the physician was cognizant of the legal standard. Margaret's physician's testimony was offered not for an opinion as to whether Margaret was legally competent to convey real property, but rather to assist the court in making that determination. Hence, the evidence was relevant. MRE 401. The frequency, duration, and scope of the physician's meetings with Margaret, and his reliance on nurses' notes and other indirect forms of information, are questions of weight, not relevance. We find no error in the trial court's admission of the evidence.

Second, defendants contend that the court erred by refusing to admit the testimony of one of Margaret's aides. The erroneous exclusion of evidence at trial is not grounds for reversal unless the

substance of the evidence was made known to the court by offer of proof or was apparent from the context within which questions were asked. MRE 103(a)(2). The court sustained plaintiffs' objection to the aide's testimony on the ground that the witness did not become acquainted with Margaret until sixteen months after the transaction at issue, but invited defendants to make an offer of proof. Defendants asserted that the witness would testify that Margaret was upset with the widow of her deceased son over the widow's remarriage. The court noted that it recognized that Margaret was upset with her daughter-in-law and that it would take that into consideration.

On appeal, defendants contend that the witness would have testified regarding Margaret's improved mental and physical condition subsequent to the time that her physician's testimony suggested that Margaret's condition was steadily declining. However, defendants made no offer of proof to this effect. To the extent that defendants made a precise offer of proof, the court did not err by excluding the testimony on the ground that the court had already accepted the point sought to be made.

Third, defendants argue that the probate court erred in allowing testimony regarding statements made by Margaret in violation of the "deadman's statute," MCL 600.2166; MSA 27A.2166. While that statute does cover testimony of the sort to which defendants objected, that statute has been overridden by our Supreme Court's promulgation of MCR 601, which establishes a broad presumption of any witness' competence to testify, and the Court's contemporaneous abolition of GCR 1963, 608, which had incorporated the provisions of the deadman's statute. *Dahn v Sheets*, 104 Mich App 584, 588; 305 NW2d 547 (1981), citing *James v Dixon*, 95 Mich App 527; 291 NW2d 106 (1980). The Michigan Constitution empowers our Supreme Court to "modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5. Thus, the Michigan Supreme Court's rules of evidence take precedence over conflicting state statutes. *McDougal v Eliuk*, 218 Mich App 501, 503; 554 NW2d 56 (1996), lv pending. Defendants neither acknowledge MRE 601 nor make any effort to reconcile their argument with developments in the law since that rule came into force. For these reasons, defendants' claim that the court below improperly admitted testimony regarding statements made by Margaret must fail.

Defendants next argue that the trial court erroneously found Margaret to be mentally incompetent to convey real property. A person is presumed mentally competent unless proved otherwise, and the party alleging incompetence bears the burden of proof. *In re Skoog's Estate*, 373 Mich 27, 30; 127 NW2d 888 (1964). A person has the mental capacity to make a valid conveyance of real property if that person comprehends the nature and effect of the act, understands the extent and value of the property, knowingly plans to dispose of the property, and bears these facts in mind sufficiently to effect the conveyance without prompting or interference from others. *Wroblewski v Wroblewski*, 329 Mich 61; 44 NW2d 869 (1951); *Barrett v Swisher*, 324 Mich 638; 37 NW2d 655 (1949). Further,

> [m]ere weak mindedness whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat a conveyance. [*Kouri v Fassone*, 370 Mich 223, 233; 121 NW2d 432 (1963).]

Here, the court found that "Margaret, on her own, would have had no ability to understand all of the ramifications of what she was signing." Testimony from Margaret's physician regarding the brain damage that Margaret suffered as the result of her two strokes, impairing her judgment and her ability to understand the proposed changes in her estate plan, along with testimony from Margaret's relatives and attendants that at the time of the conveyance in question Margaret was frequently confused, forgetful, disoriented, depressed, angry, and verbally and even physically abusive, supports the court's finding that Margaret did not understand the significance of her conveyance of her cottage property. This finding is underscored by the court's additional finding that Margaret would not have acted without the undue influence of her surviving son.

Defendants argue, however, that the court below should not have reached the issue of undue influence because plaintiffs did not raise the issue at trial and the record lacks any such assertion. However, plaintiffs included an allegation of undue influence in their complaint, defendants conceded during opening statements that undue influence was at issue, and a great deal of the evidence presented had obvious bearing on that issue. Further,

> in some transactions the law presumes undue influence. The presumption of undue influence is brought to life upon the introduction of evidence which would establish (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. [*Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).]

The establishment of this presumption creates a "mandatory inference" of undue influence, shifting the burden of going forward with the evidence to the defendant. However, the burden of persuasion remains with the party asserting undue influence. If the defending party fails to present evidence to rebut the presumption the plaintiff has satisfied the burden of persuasion. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983).

Defendants do not dispute that David Ross had a fiduciary relationship with Margaret, that he benefited from the transaction in question, and that he had an opportunity to influence Margaret. Defendants rely only on evidence that Margaret retained her free will in support of their argument that they rebutted the presumption of undue influence. Defendants fail to point to evidence in the record rebutting a presumption that defendant manipulated Margaret's much-evidenced lack of understanding for his own benefit. Consequently, this Court will not disturb the probate court's finding that defendant exerted undue influence over Margaret.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] Use of the singular term "defendant" refers to David Ross.