

STATE OF MICHIGAN
COURT OF APPEALS

In Re the Estate of LEE H. MARTIN, Deceased.

THELMA PUNCHES, MAXINE KELSEY and
BESS MARTIN,

UNPUBLISHED
November 17, 1998

Petitioners-Appellees,

v

No. 204854
Allegan Probate Court
LC No. 94-048507 IE

CINDY MARTIN, as Personal Representative of the
Estate of LEE H. MARTIN, Deceased,

Respondent-Appellant.

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Respondent, as personal representative of the estate of Lee Martin, appeals as of right an order of the probate court invalidating a quitclaim deed based on fraud and determining that three-fourths of the proceeds from a land contract sale, referring to the same parcel of land as the invalidated deed, should be given to petitioners. We affirm.

I. Basic Facts And Procedural History

After the death of her husband, Nellie Martin was the sole owner of a parcel of land and a home located at 416 E. Franklin St. in Otsego. Nellie Martin had four children who survived into adulthood: Lee Martin, Thelma (Martin) Punches, Robert Martin, and Maxine (Martin) Kelsey. Although Robert Martin reached adulthood and married Bess Martin, he predeceased Nellie Martin.

As Nellie Martin became older, she became increasingly afraid of living alone and her granddaughter, Betty Jo Anway, and her husband moved back from Arizona to live with her in June 1990. In the spring of 1991, the Anways approached Nellie Martin with the proposition that if she gave them the house, they would take care of her and all the household expenses for the rest of her life. Nellie Martin refused and told Betty Anway that the house was her children's inheritance and that it was

to be divided among them. In response, the Anways offered to purchase the home from Nellie and, on August 17, 1991, Nellie Martin sold the house to the Anways for \$32,000. The Anways agreed to pay all taxes and insurance on the property in addition to \$200 monthly payments to Nellie Martin. However, the Anways did not make the \$200 monthly payments until after Nellie Martin passed away. Instead, the Anways were credited with providing Nellie \$200 worth of service each month.

On August 1, 1991, before the August 17, 1991 land contract was signed, Nellie Martin completed her will. The will contained a provision that if any of Nellie Martin's children were to predecease her, their share of her estate would be given to their spouses. After the August 17, 1991 land contract was signed, Lee Martin had his lawyer prepare a second land contract. Lee Martin told the family that something was wrong with the first land contract and that they needed to complete another land contract;¹ on October 21, 1991, Nellie Martin signed a second land contract. On the same day that the second land contract was signed, Nellie Martin also signed a quitclaim deed granting herself and Lee Martin joint ownership with rights of survivorship in her home.

Nellie Martin died on January 25, 1994, at the age of one hundred. One day earlier, the quitclaim deed naming both Nellie Martin and Lee Martin as joint owners of the house was recorded. In October 1994, Lee Martin's wife, Sue Martin, died after being ill for several months and Lee Martin died the following month.

In February, 1996, petitioners filed the instant action in the probate court against Lee Martin's estate seeking to establish a constructive trust over the proceeds of the land contract. According to petitioners, Nellie Martin did not comprehend the legal consequences of her execution of the quitclaim deed. Petitioners further claimed that it was Nellie Martin's intention that the land contract proceeds were to be divided equally among her children.

After trial, the probate court determined that Nellie Martin had been consistent with her desire that all her children should share equally and that the quitclaim deed was inconsistent with this desire. Further, the probate court found that the fact that Nellie Martin did not discuss the quitclaim deed to Lee Martin and herself with any of the other children was inconsistent with the manner in which Nellie Martin conducted her affairs. The probate court stated:

But when you get behind how this paperwork developed, the manner in which it was developed, the secrecy of the paper worker, the non-recording of that which you have to eventually record, it all leads to the inescapable conclusion that it was done so that no one would know what was going on and that it was -- and especially Grandma, so that nobody could tell Grandma. Hey, Grandma, did you know that you gave your property to Lee and he owns it and he's going to get it all? What would she have said? I don't think that anybody would have any argument that she would have been totally surprised and shocked. Which means that the deed was obtained by fraudulent means. [Tr III, p 14.]

Although the probate court believed that Nellie Martin was competent to sign the deed, the court did not believe that Nellie Martin knew what she was signing and the legal effect of the quitclaim deed. The

probate court therefore found the quitclaim deed invalid and set it aside. In addition, the probate court gave the personal representative of Nellie Martin's estate the option to set aside the second land contract if he or she so desired. With regard to respondent's objection that the case should have been dismissed because it was not filed by a proper party, such as Nellie Martin's personal representative, the probate court allowed the petitioners to amend their pleadings to conform to the proofs. According to the probate court, "the proofs show that the real estate never left Nellie Martin's chain of title, at least while she was alive, and that you may, and obviously will have to, start an estate . . . - so [in]clude him as a party of this action."

II. The Accountant-Client Privilege

Respondent argues that the probate court erred by admitting into evidence testimony that should have been protected under the accountant-client privilege pursuant to the former MCL 339.713; MSA 18.425(713).² Whether a privilege may be asserted is a legal question that this Court reviews de novo. After a privilege is determined to be applicable to the facts, this Court must then decide whether the trial court's order was proper or an abuse of discretion. See *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998).

"The purpose behind the accountant-client privilege, MCL 339.713; MSA 18.425(713), [was] to protect from disclosure the substance of the information conveyed by the client to the accountant." *People v Paasche*, 207 Mich App 698, 706; 525 NW2d 914 (1994). The statute at the time of trial provided:

Except by written permission of the client, individual, firm, or corporation or the heir, successor, or personal representative of the employer, a certified public accountant, or a person employed by a certified public accountant, shall not disclose or divulge, nor be required to disclose or divulge information relative to and in connection with an examination or audit of, or report on, any books, records, or accounts which the certified public accountant or a person employed by the certified public accountant was employed to make. The information derived from or as the result of professional service shall be considered confidential and privileged. This section shall not be construed as prohibiting a certified public accountant whose professional competence has been challenged in a court of law or before an administrative agency from disclosing information otherwise privileged as part of a defense to the court action or administrative hearing. [MCL 339.713; MSA 18.425(713).]

The accountant-client privilege allows otherwise relevant information to be withheld from the factfinder. *Paasche*, *supra* at 706.

Respondent claims that the probate court erred by allowing the accountant-witness to divulge the substance of the information conveyed to him by Lee Martin, without her consent as Lee Martin's personal representative. We agree. The accountant testified at trial that he met with Lee Martin in March 1994. The probate court allowed petitioners, as Nellie Martin's heirs, to waive the privilege because the court believed that Lee Martin was acting as an agent for Nellie Martin. The probate court

erred in this respect. Nellie Martin died before Lee Martin visited the accountant; indeed, the accountant testified that he had never met Nellie Martin and had no prior dealings with her. Because Nellie Martin's estate was not offered for probate at that time, there was no personal representative with the authority to appoint an agent to act on behalf of her estate. Even if we agreed that Lee Martin was acting as an agent for Nellie Martin, the probate court did not obtain a waiver of the privilege from Lee Martin or Lee Martin's estate, as an heir of Nellie Martin's estate. In fact, respondent, as personal representative of Lee Martin's estate, asserted the privilege. Therefore, the accountant should not have been allowed to testify regarding the substance of the information conveyed to him by Lee Martin.

Although petitioners introduced the accountant's testimony concerning statements made by Lee Martin as an admission against interest, such a determination relates only to the issue whether the statements are admissible over a hearsay objection. While the statements may have been admissible, this did not automatically overcome the accountant-client privilege. As in the case of other privileges recognized by law, the accountant-client privilege allows otherwise relevant information to be withheld from the factfinder. *Paasche, supra* at 706.

However, the statute applies only to confidential information passed from client to accountant. While the probate court did deny any inquiries into Lee Martin's personal financial matters, statements relating to the land contracts were personal to Lee Martin since he was the vendor in the October 21, 1991, land contract after Nellie Martin's death as a result of the quitclaim deed. Because a portion of the accountant's testimony related to the subject matter of work that he was requested to complete, i.e., an amortization schedule and 1099s, and not to the substance of the information conveyed by Lee Martin, this portion of the accountant's testimony was not protected by the accountant-client privilege. However, the accountant also testified regarding the reasons that Lee Martin gave him for requesting the amortization schedule and the 1099s. Because the accountant testified to the substance of the information conveyed to him by Lee Martin, this portion of the accountant's testimony should have been protected by the accountant-client privilege.

Although the probate court erred in allowing this portion of the accountant's testimony, it is unlikely that the testimony affected the outcome in the instant case. There was substantial evidence on the record, apart from the accountant's testimony, to establish Nellie Martin's intention that all her children would share equally in her estate, including the proceeds from the sale of her home, upon her death. Therefore, the probate court did not commit reversible error. MCR 2.613 (error in admitting evidence is not a ground for reversal "unless refusal to take this action appears to the court inconsistent with substantial justice").

III. The Motion For Directed Verdict

Respondent asserts that the probate court erred in denying her motion for a directed verdict. We disagree.

"A vendor's interest in the land contract is personal property. Upon the death of the land contract vendor, his interest goes to his administrator as personalty and does not descend to his heirs as real property. In contrast, the vendee's interest in the land contract is real property which descends to

his heirs upon his death.” *Darr v First Federal Savings & Loan Ass’n of Detroit*, 426 Mich 11, 19; 393 NW2d 152 (1986) (citation omitted).

Respondent argues that the probate court erred by failing to grant her motion for a directed verdict as the petitioners did not have a right to bring the claim without opening Nellie Martin’s estate. As only the personal representative may have jurisdiction over a decedent’s personal property, respondent asserts that Nellie Martin’s heirs or issue had no right to make a claim regarding her personal property.

Nellie Martin was the vendor in a land contract agreement with her granddaughter and her granddaughter’s husband, and none of the witnesses disputed Nellie Martin’s intention to enter into that land contract. As a vendor in a land contract, Nellie Martin had a personal property interest in the monetary proceeds resulting from the contract. Therefore, upon her death, Nellie Martin’s interest in the land contract should have gone to the personal representative of her estate and not to her heirs as real property. Because Nellie Martin’s estate was not offered for probate at that time, a personal representative was not appointed. Petitioners were *claiming* an interest in Nellie Martin’s personal property; in fact, however, petitioners had no interest in Nellie Martin’s personal property without first interpreting certain provisions in her will.

Even though petitioners may not have been the proper parties to maintain the action at the outset, we do not agree with respondent that she was entitled to a directed verdict. According to the court rules, the probate court had the authority to substitute Nellie Martin’s representative as a party in the action at any stage in the proceeding. MCR 2.202(D) states:

Substitution at Any Stage. Substitution of parties under this rule may be ordered by the court either before or after judgment or by the Court of Appeals or Supreme Court pending appeal. If substitution is ordered, the court may require additional security to be given.

Because Nellie Martin’s personal representative, Thelma Punches, was included as a petitioner following trial, the probate court did not err by denying respondent’s motion for a directed verdict. Although respondent argues that she is entitled to a new trial, any subsequent trial would be repetitive and contrary to the goal of judicial economy.

IV. The Amendment To The Complaint

Respondent contends that the probate court erred by allowing petitioners the opportunity to amend their complaint to add an additional theory of recovery that justified setting aside the quitclaim deed. We again disagree.

“A trial court is empowered to allow a post trial amendment of the pleadings to conform to the proofs, absent a showing of surprise or prejudice.” *McManus v St. Joseph Hospital Corp*, 167 Mich App 432, 437; 423 NW2d 217 (1987). A deed may be set aside on the basis of insufficient consideration, *Gerycz v Zagalski*, 230 Mich 381; 203 NW 65 (1925), fraud in procuring the grantor’s

signature on the deed which constitutes constructive forgery, *Felcher v Dutton*, 265 Mich 231; 251 NW 332 (1933), a false representation of an existing fact, *Brender v Stratton*, 216 Mich 166, 170; 184 NW 486 (1921), duress, *Beznos v Martin*, 22 Mich App 376; 177 NW2d 226 (1970), and undue influence, *Potter v Chamberlin*, 344 Mich 399, 404-405; 73 NW2d 844 (1955).

Here, the probate court set aside the quitclaim deed issued from Nellie Martin to herself and Lee Martin as joint owners with rights of survivorship. The probate court determined that Nellie Martin did not understand the significance of the quitclaim deed and that the quitclaim deed was obtained by “fraudulent means.” While the quitclaim deed should have been set aside, we hold that it should have been set aside because of Lee Martin’s undue influence and not on a fraud theory.

We first note that there was no testimony regarding what transpired between Nellie Martin and Lee Martin, as they were both deceased at the time of trial and as there were no witnesses to the quitclaim transaction. There was no testimony regarding how Lee Martin explained the quitclaim transaction to Nellie Martin or what promises he may have made to her. Without any evidence of a material misrepresentation or promises that Lee Martin may have made to Nellie Martin to induce her to sign the quitclaim deed, there was no evidence to set aside the quitclaim deed based on fraud in the execution, fraudulent inducement or a false representation of an existing fact. The fact that Nellie Martin may not have read or understood the document is insufficient, by itself, to set aside the quitclaim deed.

However, there was sufficient evidence on the record to set aside the quitclaim deed based upon the theory of undue influence. The presumption of undue influence arises when evidence is introduced which 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.” *Daane v Lovell*, 83 Mich App 282, 289; 268 NW2d 377 (1978). A fiduciary relationship exists only when one rests faith, confidence, trust and reliance upon the judgment and advice of another. *Totorean v Samuels*, 52 Mich App 14, 17; 216 NW2d 429 (1974).

Here, Nellie Martin shared a confidential or fiduciary relationship with Lee Martin. There was testimony that due to Nellie Martin’s poor vision, documents had to be read to her. Nellie Martin apparently trusted all her children and believed that what they read to her was what was contained in the document. In an effort to help her establish a selling price for her home, Nellie Martin called a meeting of her children, including Lee Martin, to give her advice. According to the testimony of her granddaughter, Nellie Martin would never make a decision without the assistance of one of her children. Further, there was testimony that Nellie Martin relied upon Lee Martin to handle some of her financial matters because he was the oldest, not because he was favored over the other children.

Clearly, Lee Martin benefited from the quitclaim deed. After Nellie Martin’s death, Lee Martin was the sole owner of the premises, subject to the land contract. Based on the quitclaim deed, only Lee Martin was entitled to the land contract proceeds. Finally, Lee Martin had an opportunity to influence Nellie Martin’s decision regarding the quitclaim deed. No one testified that they witnessed Nellie Martin sign the quitclaim deed; in fact, the rest of the family seemed to be unaware that Nellie Martin was planning on signing such a document and it was out of character for Nellie Martin not to inform the

rest of her children about such an important decision. Furthermore, Nellie Martin was taken to Lee Martin's attorney, who prepared all the documents. Thus, there was ample opportunity for Lee Martin to influence his mother outside the presence of his siblings.

Once petitioners established a presumption of undue influence, respondent was required to offer evidence in rebuttal. Although Lee Martin continued to divide the proceeds from the land contract sale among his siblings after Nellie Martin's death, respondent testified that Lee Martin told her that he was not required to make any payments to petitioners, but that he did so in order to maintain family harmony. Similarly, another witness testified that Lee Martin told him that he was not obligated to make the payments, but that he did so to keep the peace.

Respondent argues that Nellie Martin was a competent individual, who merely changed her mind with regard to the disposition of her home. However, Nellie Martin's competency was never in question. Rather, respondent simply failed to offer *any* evidence that Nellie Martin had changed her mind and wanted Lee Martin to inherit the bulk of her estate.³

The quitclaim deed was signed on the same day as the second land contract. The close proximity of the signing of the documents certainly raises questions concerning Nellie Martin's intent. Furthermore, the secrecy surrounding the transaction calls into suspicion the validity of the quitclaim deed. Lee Martin did not record the quitclaim deed until the day before Nellie Martin died, over two years later. Because respondent failed to offer any evidence to rebut the presumption of undue influence, the probate court did not err in allowing petitioners the opportunity to amend their complaint to conform with the proofs or by invalidating the deed based on the theory of undue influence.

Although the probate court granted petitioners the opportunity to amend their complaint to include an allegation of fraud, we see no reason to reverse that ruling. Instead of invalidating the quitclaim deed based on fraud, the probate court should have invalidated the deed because of undue influence. Because the probate court reached the correct result for the wrong reason, we decline to reverse the probate court's decision. See *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Although respondent argued that she was prejudiced by the probate court's decision allowing a post-trial amendment of the pleadings to conform to the proofs, we do not agree. From its inception, this case has concerned the validity of the quitclaim deed. If the quitclaim deed were to have been deemed valid, petitioners would have had no legal right to the proceeds of the land contract. Therefore, respondent should have been aware that the validity of the quitclaim deed would be called into question at trial and she should have been prepared to present any possible evidence in support of her case.

V. The Admission Of The Will Into Evidence

Respondent argues that the probate court erred in admitting Nellie Martin's will into evidence. We disagree.

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow the use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995); *In re Flury Estate*, 218 Mich App 211, 217; 554 NW2d 39 (1996).

Here, petitioners did not introduce Nellie Martin's will in an effort to probate the will. Rather, the will was one more piece of evidence regarding Nellie Martin's intention that her estate was to be divided equally among her children after her death. During trial, numerous witnesses testified that Nellie Martin expressed to them her desire that all her children would receive equal inheritances upon her death; the will simply supported their testimony. Petitioners did not argue that based on the will they were entitled to three-fourths of the land contract proceeds. Instead, petitioners used the will as one more piece of evidence that the quitclaim deed granting Lee Martin joint ownership in the house was inconsistent with Nellie Martin's expressed intentions. Only three months had passed between the time that Nellie Martin completed her will and the date that she signed the second land contract. Therefore, the will supported petitioners' theory that the quitclaim deed was improperly obtained.

While relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, respondent was not unfairly prejudiced by the admission of the will into evidence. There is no evidence that the will was given undue weight by the probate court.

Respondent's argument that the probate court erred by admitting the will into evidence because it was not certified pursuant to MCL 700.161; MSA 27.5161 lacks merit. Respondent would simply misapply the statute. The statute relates to certifying a will for future evidentiary uses in other courts. Because petitioners did not offer the will for probate and were simply using it as a document to show her intentions, there was no need to certify it as a valid final disposition of Nellie Martin's assets.

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

¹ The probate court noted in its findings of fact that there was some expansion of the terminology used in the first land contract. For instance, a provision was put in place that the buyers had inspected the place and agreed to take it "as is." However, the provision concerning Nellie Martin's right to live on the premises was changed. In the first land contract, Nellie Martin had the right to live on the premises and to receive \$200 a month. In the second land contract, Nellie Martin had the right to live on the premises, but the contract provided that as long as Nellie Martin lived on the premises the \$200 payment was deemed to have been paid. While the probate court questioned the fact that the second

land contract was executed to benefit Nellie Martin, the court recognized that the second contract clarified what would happen if the buyers lived in a different place or if they became deceased.

² MCL 339.713; MSA 18.425(713) was repealed effective May 16, 1997. A similar provision, MCL 339.732; MSA 18.425(732), providing for the general confidentiality of information provided to an accountant was added, also effective May 16, 1997.

³ Indeed, there was testimony that Nellie Martin did not want to sign any more papers when Lee Martin told her that the second land contract needed to be completed.