

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of Ann M. Ortoleva, Deceased.

STEPHANIE ORTOLEVA,

Petitioner-Appellee,

v

PETER J. ORTOLEVA,

Respondent-Appellant.

UNPUBLISHED

February 5, 2004

No. 243762

Wayne Probate Court

LC No. 2001-632002-DE

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

MEMORANDUM.

Respondent appeals as of right the order determining title to bank account funds. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, respondent argues that the probate court erred in finding that he failed to raise a material question of fact to rebut the statutory presumption that upon her death decedent intended title to joint accounts to vest with petitioner, and that he failed to raise a question of fact regarding whether petitioner exerted undue influence over decedent.

MCL 487.703 provides that the making of a deposit in a joint bank account is, in the absence of fraud or undue influence, prima facie evidence of the depositor's intent to vest title in the survivor. *In re Cullmann Estate*, 169 Mich App 778, 782-783; 426 NW2d 811 (1988). "Reasonably clear and persuasive proof" is required to overcome the statutory presumption. *In re Wright Estate*, 430 Mich 465, 467; 424 NW2d 268 (1988), quoting *Lau v Lau*, 304 Mich 218, 224; 7 NW2d 278 (1943). The joint accounts passed outside decedent's estate, so decedent's expression in her will of the intent to divide her estate equally is not relevant. Because respondent failed to show that decedent expressed any intent to divide the joint account equally at the time she created the account, the testimony regarding her later state of mind was not admissible. *Cullmann, supra* at 788; *Serkaian v Ozar*, 49 Mich App 20, 23; 211 NW2d 237 (1973).

Regarding respondent's undue influence arguments, *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), states, "A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary

relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." A fiduciary relationship requires "a reposing of faith, confidence, and trust, and the placing of reliance by one upon the judgment of another." *In re Jennings Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952).

In her deposition, petitioner denied having any input into decedent's decision to open the joint accounts. The fact that she was an attorney does not automatically make her a fiduciary. The fact that she was named personal representative had no consequences until after decedent died, and does not form the basis for finding a relationship that affected the joint accounts. Respondent failed to offer any additional evidence that would show that a fiduciary relationship was established.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood