

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BARRY PASTOR, Personal Representative of the  
ESTATE OF FRANK J. PASTOR,

UNPUBLISHED  
February 10, 2004

Plaintiff-Appellee,

v

MARLA J. VANDERLAAN,

No. 243349  
Muskegon Probate Court  
LC No. 01-077610-DE

Defendant-Appellant.

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

PER CURIAM.

Respondent appeals as of right from an order granting petitioner's motion for summary disposition and directing respondent to do an accounting of the decedent's assets and to turn over assets under her control to the Estate. We reverse and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

Before his death, the decedent moved in with respondent, to whom he had executed a durable power of attorney. She maintained that he did not want his estate dissipated by court costs and attorney fees, that he therefore had her transfer his assets to her, and that he requested that she distribute the assets consistent with the dictates of his will. After his death, the personal representative of the estate commenced a lawsuit against respondent seeking to have these assets returned on grounds that she had breached her fiduciary duty to the decedent. The trial court held that once a personal representative was appointed, all estate assets needed to be turned over to the personal representative. The court stated that arguments about undue influence, the decedent's true wishes, whether this money was supposed to go into the estate, or whether the assets should be distributed in a different way were issues that could be decided after the assets were marshaled and the estate was in its proper form.

Whether the assets belonged to the estate or respondent depends upon resolution of the question regarding breach of fiduciary duty. Under MCL 700.3709, "[t]he personal representative may maintain an action to recover possession of, or to determine the title to, property." Under MCL 700.3711, "a personal representative has the same power over the title to estate property that an absolute owner would have, in trust, however, for the benefit of creditors or others interested in the estate." There was no question that the assets had been transferred and were no longer assets of the estate. The only question was whether the personal representative,

exercising the rights of the decedent, could reclaim the moneys based on a breach of fiduciary duty.

In *In re Peterson Estate*, 193 Mich App 257, 259-260; 483 NW2d 624 (1991) (internal citations omitted), quoting *In re Mikeska Estate*, 140 Mich App 116, 120-121; 362 NW2d 906 (1985), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), this Court stated:

[T]here is a presumption of undue influence which attaches to a transaction where the evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. The establishment of this presumption creates a "mandatory inference" of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion.

In this case, there was a mandatory inference of undue influence. Respondent was in a fiduciary relationship with her father, she benefited when the assets were transferred, and given that her father, who was suffering from Alzheimer's, was living with her, she had opportunity. She therefore had to present contrary evidence of undue influence. She presented the deposition of a physician's assistant who had seen the decedent on March 27, 2001 and stated, in essence, that he was of sound mind. She also presented affidavits from two relatives and a hospice worker indicating the same. She presented her husband's and her own affidavit, attesting that her father requested that she transfer his assets to herself so that probate court costs and attorney expenses could be avoided. Thus, whether she sufficiently rebutted the presumption of undue influence was a question of fact. This issue had to be resolved by the trier of fact before the trial court could mandate that the assets transferred to respondent be returned.

To avoid confusion on remand, we will address the issue of revocation. Respondent asserts that the will was revoked by the transfer of assets, which respondent claims was a decisive revocatory act under MCL 700.2507(1)(b). However, this statute indicates that a will can be revoked by a revocatory act "on the will", and goes on to identify "burning, tearing, canceling, obliterating, or destroying the will or part of the will" as revocatory acts on the will. Here, there was no claim that anything was done to the will itself. In fact, after the estate was opened, respondent filed the will with the court. The father may have given away the assets before they could be passed pursuant to the will, but this did not constitute a revocatory act "on the will."

We acknowledge that the probate court may have wanted to safeguard the assets from dissipation during the pendency of this matter. However, unless and until the personal representative prevails on the breach of fiduciary duty lawsuit, there is no basis for returning them to the estate. If dissipation is a concern, petitioner can seek an appropriate order.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

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