STATE OF MICHIGAN

COURT OF APPEALS

OPAL SMITH,

Plaintiff-Appellant,

V

LEWARD SMITH and DAVID SMITH,

Defendants-Appellees.

UNPUBLISHED
December 15, 2005

No. 264442
Mecosta Circuit Court
LC No. 04-016223-NZ

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants, her stepsons, in this claim of undue influence concerning assets plaintiff transferred to defendants shortly after the death of her husband. We reverse and remand.

I

Plaintiff and Carl Smith, defendants' father, married in 1986, when plaintiff was sixty-three and Carl was seventy-one. It was the second marriage for both, and each had children from a previous marriage. Pursuant to an antenuptial agreement and the couple's practice, each spouse retained separate assets following their marriage, but they also maintained accounts with joint assets during their marriage. Plaintiff's husband became seriously ill in late 2003 and died on December 2, 2003.

A few days after Carl's funeral, defendants allegedly took plaintiff to various financial institutions and plaintiff signed papers to transfer assets in two accounts, totaling $58,167, from her name to defendant David Smith's name. Plaintiff later filed an action seeking compensation for the assets transferred on the ground of undue influence. The trial court granted defendants' motion for summary disposition, finding that plaintiff had failed to establish a presumption of undue influence absent a showing of a fiduciary relationship with defendants. The court concluded that plaintiff's transfer of the two accounts was essentially a gift, which she had not been obligated to make.

II

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id*.

"The trial court must review the record evidence, make all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists, giving the nonmoving party the benefit of reasonable doubt." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). On review, this Court likewise must make all reasonable inferences in the nonmoving party's favor. *Id*. at 618.

III

The proof required to establish a claim of undue influence is well settled:

> "'To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will.'" [*In re Peterson*, 193 Mich App 257, 259-260; 483 NW2d 624 (1991) (citations omitted).]

A presumption of undue influence 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." [*Id*. at 260.]

If a plaintiff establishes a presumption of undue influence, then the burden of producing evidence shifts to the defendant. *Kar v Hogan*, 399 Mich 529, 539-540; 251 NW2d 77 (1976); *In re Peterson*, *supra.* The 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." [*Id*. at 260.]

The trial court found that plaintiff failed to establish a presumption of undue influence because there was no fiduciary relationship between plaintiff and defendants and thus the first prong of the test was not met. Further, the court also questioned whether the third prong was met.

IV

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. Plaintiff contends that the evidence established a genuine issue of fact regarding whether there was a fiduciary or confidential relationship between plaintiff and defendants. Viewing the evidence, and all reasonable inferences therefrom, in a light most favorable to plaintiff as required, *Smith, supra*, we agree.

A fiduciary relationship is one based on confidence and trust by one person in the integrity and fidelity of another. *In re Leone Estate*, 168 Mich App 321, 325; 423 NW2d 652 (1988). Although the standard for a "confidential" relationship is less settled than that of a fiduciary relationship, this Court has stated that "[a] confidential relationship exists when a person enfeebled by poor health relies on another to conduct banking or other financial transactions." *In re Estate of Swantek*, 172 Mich App 509, 514; 432 NW2d 307 (1988); see also *Seeley v Price*, 14 Mich 541, 546 (1866) (a son, who had visited his father to assist in arranging his affairs, stood in confidential relation to his father).

The summary disposition record before us is minimal and does not provide adequate factual context to determine with any reasonable confidence the circumstances surrounding, and defendants' role in effectuating, the transfer of plaintiff's financial accounts to defendants.[1] A portion of plaintiff's deposition testimony supports a conclusion that she signed over the accounts of her own free will in a weakened emotional state, and later, in a clearer state of mind, regretted the decision. Plaintiff testified that she previously talked to her husband about signing off on the financial accounts, explaining:

> From beginning to end, Carl and the different ones of the family would tell about all their problems that they'd had through struggling, growing up, how they'd gone without. And so I thought, well, I'll just take my name off from these things, and then they will get it.

When asked further whether her husband wanted her to sign off, plaintiff stated that she did not think so, and she responded in the affirmative regarding whether she made that decision on her own. She also testified that none of her stepchildren said anything to force her to sign off on the financial accounts.

Considered in isolation, the above testimony supports a general conclusion that plaintiff decided of her own free will to sign off the financial accounts. However, considered in context,

[1] The sole evidence for consideration consists of brief excerpts from plaintiff's deposition testimony and even briefer testimony from the deposition of defendant David Smith.

we do not find these statements conclusive of the issue whether there was undue influence by defendants to effect the sign-off immediately following Carl's death because (1) the record lacks any facts concerning how or why defendants became involved in taking plaintiff to sign-off on the accounts,[2] and (2) plaintiff's deposition testimony also supports a conclusion that she thought she had no choice but to sign off on the accounts and that she was coerced in some fashion to do so.

According to David's deposition testimony, when he took plaintiff to the Farm Bureau office to sign off on the annuity, valued at $28,850.02, he had called ahead, presumably to arrange for the transaction, and he was the one who had the death certificate. Significantly, David was given a power of attorney by his father and he acted in this capacity to undertake legal transactions concerning his father's assets.

Viewing the evidence and all reasonable inferences in a light most favorable to plaintiff, there exists an issue of fact whether a fiduciary or confidential relationship existed between plaintiff and defendants based on their involvement in plaintiff and her husband's legal and financial affairs. It is undisputed that the night before his father died, David went with plaintiff to a safe in plaintiff's home and obtained the vehicle title to the van used by plaintiff and her husband and transferred the title into plaintiff's name as desired by her husband. Further, when plaintiff went to the safe in her home with David, they retrieved a folder of financial and legal documents. Plaintiff revealed the contents to those present, including defendants. Among the documents in the folder were financial account records for plaintiff as well as her husband, their marriage license, deeds and other legal and financial documents, which were taken by defendants or others with them that night. Some of the documents were never returned.

In a case in which there is independent testimony or evidence that an individual acted based on free will, such as that of an independent observer to the transfer of assets, testimony of the individual's own attorney, or other supporting documentation of intent, we are more readily persuaded that any claim of undue influence is without merit. See *Kar, supra* at 543 (testimony from attorney who drafted will and deeds); In *re Erickson*, 202 Mich App 329, 333; 508 NW2d 181 (1993) (testimony from insurance agent who effected beneficiary change in annuities); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 273-274; 289 NW2d 898 (1980) (the absence of independent counsel at the time of execution of the trust is a primary factor in determining whether the grantor was subjected to undue influence).

In this case, plaintiff testified in her deposition that the night before her husband's death, either David or his wife asked about the certificates of deposit. Plaintiff brought out the folder with the financial information and shared it with her stepchildren. Some of that information later came up missing. In response to defense counsel's questioning, plaintiff denied that she wanted help straightening out the CD's and annuities or that she wanted the CD's changed so that Carl's

[2] Although defendants assert that plaintiff called David on December 8, 2003, and asked him to pick her up to take care of the paperwork, and defendants provide a different account of the events, defendants provide no citation to the record for these assertions, and we do not find this testimony in the limited transcript excerpts provided on appeal.

went to his children and hers went to her children. She stated that she knew that someday the assets would have to be divided up, but that she thought that it was improper to do that the night before Carl died. She stated: "I was so nervous, and I was just trembling all over. I could have cried . . . ." Plaintiff stated that she was "dumbfounded" that they took the legal and financial records the night before Carl's death. She also stated that on Monday following Carl's funeral on Saturday, defendants contacted her again about the CD's and annuities. On Monday, Leward came and picked up plaintiff and took her to Mt. Pleasant to the Isabella Community Credit Union, where there was a CD for more than $29,317.13. Plaintiff did not remember any details about signing off on the CD. When asked by counsel whether she wanted to sign the paper, she testified, "I guess I thought I had to."[3]

The record provides no countervailing facts or circumstances to support a conclusion that plaintiff merely changed her mind concerning the transfers. Without such evidence, all reasonable inferences regarding intent must be drawn in favor of plaintiff. Because we are bound to view the evidence in a light most favorable to plaintiff, the nonmoving party, we are compelled to conclude that the grant of summary disposition was improper on the record before us.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis

[3] We recognize that when later asked if she signed over the funds "of her own free will," plaintiff answered in the affirmative. It is clear that plaintiff had difficulty following and responding to counsel's questioning at certain points in her deposition.