STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ROBERT J. SWIECICKI.

CYNTHIA A. CARSON and RACHELLE M. BOROUGH,

Petitioners-Appellees,

v

FRANK C. SWIECICKI, ROSE M. SWIECICKI, and SHARON A. SWIECICKI-FAY,

Respondents-Appellants.

UNPUBLISHED
October 21, 2008

No. 278065
Kent Probate Court
LC No. 00-170299-DE

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Respondents appeal as of right from the trial court's order granting petitioners' amended petition for return of real estate. We affirm.

During his lifetime, Robert J. Swiecicki, deceased, twice conveyed by deed his property on Silver Lake in Michigan to respondents. Respondents are Frank Swiecicki, Rose Swiecicki, and Sharon Swiecicki-Fay, who are Robert's paternal uncle, aunt, and cousin respectively. The two deeds were dated April 11, 1994, and April 20, 1995. On April 11, 1994, which was one day after Robert's mother Eleanor died and the property became his, Robert executed a deed to Frank Swiecicki, Estelle Lyman (Eleanor's sister), and himself, with rights of survivorship, reserving a life estate for himself. The April 20, 1995, deed subsequently transferred Robert's remaining interest in the Silver Lake property to Frank, Rose, Sharon, and himself, with rights of survivorship. Robert, again, reserved a life estate for himself.

Petitioners, Rachelle Borough and Cynthia Carson, who are Robert's daughters, filed a petition to have the two deeds set aside alleging that Robert was incompetent when he executed the two deeds. Further, petitioners alleged that the two deeds were the product of undue influence. Respondents argued that Robert was not incompetent when he executed the deeds nor were they the product of undue influence. The trial court agreed with petitioners and granted their amended petition for return of real estate.

Findings of fact made by a probate court sitting without a jury are reviewed for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We defer to the probate court on matters of credibility, and will give broad deference to findings of fact made by the probate court because the probate court's unique vantage point regarding witnesses, their testimony, and other influencing factors not readily ascertainable to the reviewing court. *Id.*; MCR 2.613(C).

The Court articulated the general test for mental capacity in *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993).

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract. [*Id*.]

The Court further indicated that:

> A mentally incompetent person is one who is so affected mentally as to be deprived of sane and normal action. A person may be incapable of conducting his business successfully and still not be mentally incompetent. Where there is evidence pro and con, much weight should ordinarily be given to the conclusion reached by the probate judge, who has had the opportunity of seeing and hearing the witnesses. Where insanity or mental incompetency is claimed, it should be proved by a preponderance of the evidence. [*Id*. at 333 (citations omitted).]

More specifically, the test of mental capacity of a grantor of a deed is

> whether, at the time he executed the deeds in question, he had sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others. [*Hayman v Wakeham*, 133 Mich 363, 365; 94 NW 1002 (1903).]

See also *Wroblewski v Wroblewski*, 329 Mich 61, 66; 44 NW2d 869 (1950).

It is the grantor's competence at the time the deed was executed, which is important, not the grantor's competence before or after the deed was executed. *Id.*; *Potter v Chamberlin*, 344 Mich 399, 405; 73 NW2d 844 (1955). Proof of alcohol addiction and old age standing alone do not constitute proof of incompetence. *Boerema v Johnson*, 357 Mich 433, 438; 98 NW2d 596 (1959). The evidence must show that when the deed was executed, the grantor's reason was overthrown. *Id*. The general rule is:

> A drunkard is not an incompetent, like an idiot, or one generally insane. He is simply incompetent upon proof that, at the time of the act, his understanding was clouded, or his reason dethroned, by actual intoxication. [*Wright v Fisher*, 65 Mich 275, 284; 32 NW 605 (1887).]

On appeal, respondents specifically argue that the probate court did not adhere to the aforementioned law on incompetence based on alcoholism. We disagree. Although the trial court referred to the four or five hundred pages of medical documents that it reviewed, which reveal the depth of Robert's alcohol addiction over the years, the trial court clearly stated that "[t]o understand the question of capacity, we have to look at the time frame." The trial court then focused on Robert's alcohol addiction in the months and days leading up to the execution of the first deed on April 11, 1994, the observation that Robert appeared intoxicated on the day of his mother's funeral, just two days after he executed the first deed, and the medical records that indicate that he exhibited significant signs of withdrawal just two weeks after he signed the first deed, indicating that Robert had not had a recent period of sobriety. In reaching a conclusion, the trial court noted that Dr. John Campbell, an expert in the areas of alcoholism, addiction medicine, and detoxification, testified at trial and indicated that it was his opinion, after reviewing Robert's medical records that he did not see any indication that would lead him to believe that Robert had the capacity to execute the April 20, 1995, deed either. On review, we find that the trial court was mindful of the significant dates in question, April 11, 1994, and April 20, 1995, and did not ignore the applicable law, requiring incompetence to be determined at the time of the signing of the deeds.

Respondents also argue that the probate court clearly erred when it found Robert incompetent when he executed the April 11, 1994, deed. We again disagree. On April 11, 1994, Robert executed a deed and a nonrevocable power of attorney[1] at the funeral home, two days before his mother's funeral. Both Rose and the funeral home's owner witnessed the signing of both documents. Frank was also there for the signing of the documents. Rose testified that Robert was "good" on that day and as normal as anyone else. Rose indicated that he appeared to know what he was doing. Frank testified that Robert knew that he was signing the property over to Frank.

Because the owner of the funeral home did not testify, Rose and Frank are the only two people who testified as to whether Robert seemed competent on that day. And, Rose and Frank would significantly benefit from Robert being deemed competent on that day. The trial court discredited their testimony, as was its prerogative. It is necessary then to review the evidence of the days and months surrounding the signing of the April 11, 1994, deed in order to determine whether the preponderance of the evidence in the record supports the conclusion that Robert was incompetent when he signed the deed. We find adequate record support.

[1] The nonrevocable power of attorney gave Frank and Estelle the power to act on Robert's behalf in business matters and with regard to his health, medical care, and the administration of Robert's brother's estate.

Robert consumed approximately one-fifth of liquor per day plus beer beginning in December, 1993, until the time of his admission to the Ann Arbor Veterans Administration Medical Clinic on April 24, 1994. In the two months leading up to the time when Robert executed the April 11, 1994, deed, Estelle lived with Robert and his mother, Eleanor, in order to take care of Eleanor. Estelle was able to have the opportunity to witness Robert's constant drinking first-hand during this time. She testified that Robert always had a bottle of vodka on the kitchen counter and that she saw Robert drinking liquor. She indicated that he drank quite a bit. He consumed a drink when he woke up, he drank all through the day, and he consumed a drink before he went to bed. Estelle reported that Eleanor's doctor told Estelle that Robert was not responsible enough to take care of Eleanor. Robert was not even responsible enough to remember to let the dog out, and sometimes the dog would defecate in the breezeway.

On either April 7, 8, or 9, 1994, Rachelle visited Eleanor at her Silver Lake home. Rachelle testified that she did not talk to Robert very much that day because he was intoxicated. She could tell that he was intoxicated by his walk, speech, and appearance. She indicated that it was obvious that he was intoxicated by just looking at him. Eleanor died on April 10, 1994. Estelle testified that she made Eleanor's funeral arrangements because Robert was not responsible enough to do it. Based on the record, the arrangements were likely made on April 11, 1994, the same day the deed was executed. The funeral home director was one of the witnesses. Rachelle testified that Robert's appearance on April 13, 1994, the day of Eleanor's funeral, was not good. She recalled that he could not stand up straight and he appeared to be "weaving" and "swaying."

On April 24, 1994, less than two weeks after the funeral, Frank drove Robert to the Ann Arbor Veterans Administration Medical Clinic where Robert was admitted for cataract surgery. The medical records indicate that Frank complained at the clinic that Robert vomited in his car on the drive there, and Frank requested that Robert be treated for alcohol abuse.

On April 26, 1994, while still at the clinic, the medical records indicate that Robert became disoriented and exhibited signs of alcohol withdrawal. Dr. Campbell testified that, it was his opinion, after reviewing Robert's medical records at the clinic, that Robert's withdrawal symptoms could only have resulted from Robert's consumption of large quantities of alcohol, on a regular and consistent basis, for many weeks, at least three or four. Robert was an alcoholic, and although he could have periods of sobriety that lasted a few months at a time, that does not appear to be the case during the relevant time frame, according to Dr. Campbell's opinion. Dr. Campbell further opined that dealing with the loss of his mother could have worsened Robert's underlying problem with alcoholism. While Dr. Campbell opined that although he could not definitively testify as to whether Robert was incompetent on the day he executed the April 11, 1994, deed because there was no way to do that without specific medical records indicating his impairment on that day, all alcoholics are impaired. More importantly, Dr. Campbell opined that Robert's capacity to execute a deed just two weeks prior, before suffering the symptoms of alcohol withdrawal displayed at the clinic, was highly questionable.

There is some competing evidence, in addition to the testimony of Frank and Rose, which suggests that Robert may have been competent when he executed the April 11, 1994, deed. Estelle testified that Robert did not need Estelle's help to do his banking. She testified that when Robert was sober, he was a very smart man and that he was not impaired when he was sober. Robert did a lot of things around the house. John Mitus, an attorney who had contact with

Robert during this time, testified that on April 6, 1994, he accompanied Robert to his bankruptcy examination. Mitus had no recollection of Robert being incompetent or intoxicated on that day. On April 13, 1994, Eleanor's funeral took place. Estelle testified that Robert's appearance was okay, and she did not remember whether Robert was acting intoxicated that day, but she did not think so. On April 14, 1994, Robert and Estelle returned to Mitus' office and Robert executed his first will.[2] Mitus testified that Robert was sober and competent to execute his will on that day. Mitus never thought that Robert was incompetent at any time even though he was aware of his alcohol problem. Further, Mitus never thought that Robert ever came to his office intoxicated. He also had no concern about Robert's ability to be the personal representative for the estate of John Swiecicki, Robert's brother. According to Dr. Campbell, however, a person who is actually impaired may not appear impaired to the untrained eye.

Although there was contrary evidence, the preponderance of the evidence supported the trial court's finding, and this Court is not left with a definite and firm conviction that a mistake was made. The evidence supports that Robert was likely unable to plan and effect any conveyances, at the relevant time, without prompting and interference from others. The evidence supports that Robert's understanding was likely clouded and his reason dethroned by actual intoxication.

Respondents also argue that the probate court clearly erred when it found Robert incompetent when he executed the April 20, 1995, deed. Even though Robert previously deeded the property to Frank, Estelle, and himself by virtue of the April 11, 1994, deed, one year later, according to respondents, Robert allegedly felt compelled to redeed the remainder of his interest in the property to Frank, Rose and Sharon. The will that was also executed on this day named Frank and Sharon as the personal representatives for Robert's estate. Frank denied being present when the documents were signed, preparing the documents for Robert, or even being aware of the deed until Robert gave him the signed deed. Frank then recorded the deed one day later.

The witnesses to the execution of the deed were two Farmers & Merchants Bank (FMB Bank) employees. These are the only two people who could testify as to Robert's competency on this day. Neither could recall the day in question, but did not have any particular memory about Robert being incompetent. Because the only eyewitness testimony as to Robert's competence on that day was not decisive, it was necessary to look at evidence of his competence in the days and months surrounding the signing of the April 20, 1995, deed.

We find that the preponderance of the evidence supports the trial court's conclusion that Robert was incompetent on April 20, 1995. The medical records indicate that Robert had a history of severe alcoholism. He significantly drank every day, although he could have periods of sobriety. Dr. Campbell opined that Robert was likely always impaired to some extent. Dr. Campbell concluded based on the medical records and Robert's history of alcoholism, that

[2] Robert executed two wills. On April 11, 1994, Robert executed his first will, which devised 20 percent of his estate to Cynthia, 20 percent to Rachelle, and 60 percent to Estelle. On April 20, 1995, Robert executed his second will, which devised his estate in equal shares to Rachelle, Cynthia, and Sharon. Frank and Sharon were named the personal representatives of Robert's estate in Robert's second will.

Robert was probably impaired on April 20, 2005. Dr. Campbell did not know to what extent. However, on review of the medical records, it was clear that Robert continued to drink during the relevant time frame, and there were no changes in Robert's alcoholism, or specific treatment, which would have led to a period of sobriety. Moreover, Rose testified that she and Frank checked in on Robert two or three times per week. Robert was a grown man and regardless of respondent's testimony to the contrary, a reasonable inference from Rose's testimony is that Robert needed to be looked after. And, Robert called Frank and Rose each morning at 8:00 a.m. Further, on the same day Robert executed the deed in question, he executed a will, giving Rachelle and Cynthia one-third each of his estate. The property was the primary part of the estate. Based on the foregoing, we find that the preponderance of the evidence supports that Robert was likely unable to plan and effect any conveyances, at this time, without prompting and interference from others. The evidence supports that Robert's understanding was likely clouded and his reason dethroned by actual intoxication. We are not left with a definite and firm conviction that a mistake was made in the trial court's conclusion that Robert was incompetent to execute the deed on April 20, 1995.

Respondents next argue on appeal that the probate court's conclusion that the April 11, 1994, and April 20, 1995, deeds were the product of undue influence is clearly erroneous. Respondents specifically argue that they sufficiently rebutted the presumption of undue influence. Undue influence is an equitable matter. *Adams v Adams*, 276 Mich App 704, 714 n 5; 742 NW2d 399 (2007). Michigan appellate courts review dispositional rulings on equitable matters de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). The standard of review of findings of fact made by a probate court sitting without a jury is whether those findings are clearly erroneous. *In re Bennett Estate*, *supra* at 549. A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. *In re Miller*, *supra* at 337. We defer to the probate court on matters of credibility, and give broad deference to findings of fact made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily ascertainable to the reviewing court. *Id.*; MCR 2.613(C).

The Court in *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1970), set forth the basic principles underlying the concept of undue influence. The Court indicated that:

> 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. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient. [*Id.*]

A three-factor test must be met to be entitled to the presumption of 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. [*Id.*]

A plaintiff may meet the criteria, which results in there being a presumption of undue influence. *Id. at* 538. The burden of persuasion will not then shift to the defendant, but will remain with the plaintiff throughout the trial. *Id*. If the defendant presents evidence to rebut the presumption and that evidence is equally opposed to the presumption, defendant has not overcome his duty to rebut the presumption and the mandatory presumption remains unscathed. *Id*. at 542.

> This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence. [*Id*.]

A presumption of undue influence existed in this case. This Court has recognized that a fiduciary relationship exists as a matter of law from the grant of a power of attorney. *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002). In this case, Frank was given a nonrevocable power of attorney. Therefore, a fiduciary relationship existed between Robert and Frank. Additionally, Frank was to significantly benefit from Robert's execution of the April 11, 1994, and April 20, 1995, deeds. And, Frank, who had a so-called father-son relationship with Robert and saw Robert frequently and spoke to him on the telephone almost every day, had an opportunity to influence Robert's decision to execute the April 11, 1994, and April 20, 1995, deeds.

There is also abundant record evidence to demonstrate that Frank exercised undue influence over Robert. The first indication in the record that this may have occurred was sometime during 1993 or early 1994, when Frank took Robert to visit the Grand Rapids Veterans Home in order to tour the facility and explore the idea of Robert living there for the remainder of his life. Frank testified that he showed Robert the facility and explained to him how the facility would have significant control over him and how he conducted his life. Frank also explained to Robert how he would lose his Silver Lake home because the state of Michigan would take his property. Frank even testified that this was the reason why Robert wanted to deed Frank the property, so Frank could help Robert stay in his home. A reasonable inference is that the trip, prompted by Frank, likely left Robert feeling threatened that his home and his lifestyle, including the ability to drink alcohol at his leisure, would be greatly jeopardized.

The timing of the execution of the April 11, 1994, deed further supports the finding of undue influence. This deed was executed one day after Robert's mother died and before his mother's funeral even occurred. Robert had already met with Mitus to draft his first will and had not yet signed it, yet he allegedly prepared a deed to his property and signed it without his attorney and while at a funeral home preparing for his mother's funeral. Respondents wish for this Court to believe that Frank did not prepare the deed, but Frank admittedly prepared the nonrevocable power of attorney, which was also signed on the same day and witnessed by the same people as the deed. The trial court found Frank lacking in credibility, and we defer to that finding.

An equally peculiar event took place on April 20, 1994, nine days later, when Estelle allegedly executed a quitclaim deed for her interest in the Silver Lake property to Robert, Frank, and Rose. Rose witnessed the deed and testified that she accompanied Estelle, Frank, and Robert to the funeral home, where a notary was present, for the signing of the deed. Estelle denied ever

signing a document deeding interests away. Additionally, Frank testified at trial that "we" did not want Estelle claiming an interest in the Silver Lake property. He noted that "they" were protecting the original deed that Frank was given. He later testified that "we had her sign--sign the deed because we did not want her involved in the property." When asked to clarify who he meant by "we," he then indicated himself and Robert. Again, it is absolutely incongruous that Robert would not want Estelle involved in the property nine days after initially deeding her an interest in it.

The evidence further supported that the April 20, 1995, deed was the product of undue influence. Even though Robert had already deeded the property to Frank, Estelle, and himself, by virtue of the April 11, 1994, deed, Robert allegedly felt compelled to redeed the remainder of his interest in the property to Frank, Rose and Sharon, which, of course, is Frank's whole family. A will executed on the same day, April 20, 1995, named Frank and Sharon as the personal representatives for Robert's estate. Frank denied being present when these documents were signed, denied preparing the documents for Robert, and denied even being aware of the deed until Robert gave him the signed deed. Yet, he immediately recorded the deed the following day.

We note that Frank had the knowledge to prepare deeds based on the fact that he worked in the real estate arena for years. The trial court found that "[t]here is no doubt in my mind that Frank Swiecicki prepared those deeds." The trial court concluded that Frank was not truthful when he stated that he did not prepare those deeds and did not know who did. Deferring to the trial court's credibility determination, we do not find the trial court's finding that Frank prepared the April 11, 1994, and April 20, 1995, deeds clearly erroneous, and we further affirm the trial court's finding that the deeds were the product of undue influence.

Respondents were not able to successfully rebut the presumption of undue influence. They argue that Robert's close relationship with Frank, the assistance they rendered to Robert before and after the execution of deeds, the alleged weak relationship between Robert and his daughters, Robert's desire to have Frank help him stay on his property and Robert's desire to disinherit his daughters with respect to the property rebut the presumption. However, issues of credibility are for the probate court, *In re Miller, supra* at 337, and at best, the self-serving testimony establishing the above points, equally opposed the presumption of undue influence. As such, respondents did not overcome their duty to rebut the presumption, and the presumption remains unscathed. *Kar, supra* at 542. On de novo review, we affirm the trial court's decision based on its finding of fact of undue influence.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly