

STATE OF MICHIGAN
COURT OF APPEALS

CLAUDIA MAEDEL, as Guardian/Conservator
for the ESTATE OF THELMA FORD,

UNPUBLISHED
February 23, 2010

Plaintiff-Appellee,

v

RALPH E. FORD,

No. 288042
Sanilac Circuit Court
LC No. 07-031589-CZ

Defendant-Appellant.

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant, Ralph E. Ford, appeals as of right the trial court's judgment setting aside two quit claim deeds dated June 8, 2006, as well as removing the payable on death (POD) designation on seven certificate of deposit accounts (CDs) thereby returning them to the ownership of defendant's mother, Thelma Ford, individually, for the reason that Thelma Ford did not have the requisite mental capacity to execute either the conveyances of the real estate or the transfers of the CDs on the dates in question. Based on the record, and deferring to the trial court on matters of credibility, we are not left with a definite and firm conviction that the trial court made a mistake in finding that Thelma Ford did not have the requisite mental capacity at the time she executed the deeds transferring her real property to defendant and in directing the bank to transfer the CDs from individual designation to POD to defendant and, we affirm.

I. Introduction

Plaintiff, Claudia Maedel, is the guardian of Thelma Ford who is 79 years old (born June 26, 1930) and suffering from Alzheimer's disease and/or dementia. Plaintiff, in her capacity as the guardian and conservator of Thelma Ford's estate brought this action in the circuit court alleging that two conveyances of real estate to defendant, Thelma Ford's son, dated June 8, 2006, should be set aside based on incapacity, undue influence, unconscionable bargain, and conversion in a complaint dated February 27, 2007. On October 15, 2007, defendant brought a motion for summary disposition seeking to dismiss all counts of plaintiff's complaint arguing that on June 8, 2006, Thelma Ford possessed the necessary legal capacity to execute the two deeds conveying the real property to defendant. In an order dated December 26, 2007, the trial court granted defendant's motion in part by dismissing plaintiff's conversion claim with

prejudice but denied the remainder of defendant's motion with regard to plaintiff's remaining claims of incapacity, undue influence, and unconscionable bargain.

On April 10, 2008, plaintiff filed a petition with the probate court contesting the transfer of seven certificates of deposit at J.P. Morgan Chase Bank from the individual ownership of Thelma Ford to the designation of "Payable on Death" to defendant Ralph Ford. Plaintiff again alleged incapacity, undue influence, and unconscionable bargain. On May 13, 2008, the probate court entered an order transferring plaintiff's petition to the circuit court to be joined for trial with the already pending circuit court action.

The trial court held a two-day bench trial on June 24, 2008 and June 25, 2008. The parties submitted written closing arguments. Thereafter, the trial court issued its opinion on September 8, 2008 setting forth an extensive fact-finding section and ultimately holding in favor of plaintiff on the lack of capacity claim. Due to its ruling on the lack of capacity issue, the trial court declined to decide plaintiff's undue influence and unconscionable bargain claims. On September 19, 2008, the trial court entered a written judgment in favor of plaintiff ordering that the quit claim deeds dated June 8, 2006 were "void, cancelled and set aside." The judgment also ordered that the June 7, 2006, "POD Ralph E. Ford" designation on the seven J.P. Morgan Chase bank accounts/certificates of deposit was "void, cancelled and set aside" thereby returning the accounts to the individual ownership of Thelma Ford. Defendant appeals as of right.

II. Facts

A. Chronology

Thelma and her late husband Dale Ford married on March 5, 1949. The Fords had six children, Colleen, Judy, defendant, Diane, Elaine, and one child who passed away, Bruce.¹ The Fords were farmers and spent all but the first four years of their marriage living on and farming a 120 acre parcel on Boyne Road in Marlette Township. The Fords also owned and farmed an 80 acre parcel off Mayville Road in Marlette Township. In 2003, Dale Ford was diagnosed with colon cancer and despite treatment he died March 19, 2006. During the progression of Dale's illness, family members began to notice a difference in Thelma's mental acuity. Family members believed that Thelma's deteriorating mental condition became more noticeable because, apparently, Dale had been covering for Thelma.

Colleen testified that she noticed her mother's behavior changing in August 2005 when her father had surgery requiring resection of his colon and a colostomy. Colleen testified that her mother did not comprehend what was happening with her husband's medical procedures. Colleen stated that her father's doctor, Dr. Saib Isterabadi, called the Ford children to come to his office to discuss their parents' health because he was concerned that they did not understand his instructions about medications. They met with Dr. Isterabadi twice, once on August 22, 2005 and on September 23, 2005. In the mean time, on September 15, 2005, Colleen, Elaine, Diane, and Ralph attended an Alzheimer's class at Marlette Hospital because of what was happening to

¹ Bruce had children that survived him.

their mother. The children began taking turns visiting their parents' house to assist with administering medications. Dr. Isterabadi had prescribed Aricept to slow the progression of Thelma's Alzheimer's disease as well as blood pressure medication. Colleen testified that Thelma tried to avoid taking her medications and would hide her medicine in various locations like the cookie jar or the bread box. Diane testified that she would find Thelma's pills under the placemats. Thelma also failed to follow through with doctor-prescribed tests, such as an "MRA." Colleen stated that her mother began to have difficulty preparing meals and would leave old food in the refrigerator when it needed to be thrown away so the children took turns making meals. Thelma could not handle Dale's colostomy bag so defendant took on that duty.

Oliver Wood was a friend and neighbor to Thelma and Dale. Wood had plowed snow from the Ford's driveway for fifteen to twenty years. Beginning in December 2005, Wood noticed that Thelma was having serious memory problems. After plowing their driveway, Wood would go into the house to get paid and chat. Wood testified that although Dale had paid him, Thelma would try to pay him again and again until he eventually left the house.

By March 2006, Dale's condition became progressively worse and was being cared for at home through the children and hospice. Dale passed away at home on March 19, 2006. When hospice came that night to dispose of Dale's remaining medication, Colleen helped the hospice representative flush the pills down the toilet. Thelma became very upset and rude because she said that the pills would go right out into the pasture and their cattle would die. Colleen said that there were no cattle on the farmland and Diane stated that there had not been any for five years. Marsh's Funeral Home came to take Dale's body and they explained that the family would have to come the next day to make arrangements and Thelma said she might have something better to do. Then, about 45 minutes after Marsh's Funeral Home came to take Dale's body, Thelma told Colleen that, "Marsh's should have him buried by now, don't you think[?]"

At the viewing for Dale at the funeral home, Thelma told Colleen that Dale had winked at her and that she and Dale had gone out to lunch that day. Thelma was also asking how to get Dale out of the casket. Thelma had told other neighbors and friends that Dale was just napping and would get up soon. Wood testified that Thelma walked up to the casket and asked him to help her wake Dale up because Dale was going to take her to supper. Wood tried to explain to Thelma that Dale had died and that they were at the funeral home.

Dale's funeral was held on March 23, 2006. Thelma and all the children were present. But, four days later, when Colleen went to visit her mother, her mother stated she was getting dressed for the funeral. When Colleen explained that Dale was already buried, Thelma got very upset stating that none of her six children had the decency to tell her that her husband had died. During this time period Thelma made comments that Colleen had drugged her and that she was going to burn the house down with herself in it.

After Dale's death, Colleen discovered Dale's life insurance and made a claim for the annuity as well as two other small policies. She also canceled Dale's health insurance and got a refund of the premium. She also cancelled his pension and Social Security payments. Colleen took Thelma to the Social Security office on April 14, 2006 to increase her own benefits and had the amount directly deposited into Thelma's checking account. Colleen and the other children began writing Thelma's bills because that had been her father's job and her mother could not process her mail or write out her bills. Colleen testified that Thelma did not understand her

checkbook, that there were no balances in it, and that she had no idea how much money she had in her checking or savings accounts.

At this time, defendant, Colleen, Diane, and Elaine began helping Thelma handle her financial affairs. They had received a \$63,000 check from Dale's annuity. On April 14, 2006, defendant, Colleen, Diane, and Thelma went to Chase Bank to negotiate the annuity check. They met with Jennifer Steinman at the bank. According to Colleen, it was defendant's idea to have the money put into CDs rather than Thelma's savings account because the CDs paid a higher rate of interest. They split the annuity into six CDs and also had another CD that was in Dale's name retitled to Thelma's name. Colleen testified that they decided to have the CDs titled in Thelma's name and not name beneficiaries because there could only be four beneficiaries per CD and that would not work with the number of children and Bruce's children. Believing that they would have to go through probate because of the real estate in Thelma's name, they chose not to list any beneficiaries at that time. Colleen testified that Thelma was only very minimally participating during the meeting at the bank and that they arranged for Colleen to be the bank's contact person. Diane testified that Thelma was not capable of making financial decisions at that time.

On April 22, 2006, Elaine was driving into town and saw Thelma's car parked in town and thought it was odd. Elaine pulled over to determine if something was wrong and Thelma told her that someone had stolen all her money and closed her bank account. Apparently Thelma had transferred \$22,000 out of her savings account and put it into her checking account. Thelma did not remember transferring the money and closing out her savings account. On questioning from Colleen, Thelma did not know why she had transferred the money into her checking account and did not know that she already had \$18,000 in her checking account.

Colleen, Diane, and Thelma's sister Helen Sefton believed that Thelma's behavior and memory were getting worse over time. The children continued to go to Thelma's house regularly to cook, make sure that Thelma ate, and to take care of the house. At that time, defendant was for the most part staying with Thelma and working the farm. Colleen testified that on June 4, 2006, defendant stated that he and Thelma had been arguing and informed Colleen, "She's all yours." Elaine testified that defendant had called her on June 4, 2006 complaining that while Thelma could not remember anything, she could remember how to use the phone because she was constantly calling him, and then at another time she could not remember how to use the phone or make a call. According to Colleen and Elaine, defendant left Thelma's home and no one saw or heard from defendant for several days. Elaine testified that defendant left because Thelma had made him mad in some way.

On June 5, 2006, Thelma stopped into Diane's office to chat as she sometimes did on her way into town. The next day, June 6, 2006, Thelma stopped by Diane's office twice, once in the morning and once in the afternoon. Thelma was very confused in the morning. She said that she had not seen defendant for three days and she did not know Dale's whereabouts. Thelma complained that the floors in the office needed to be mopped. Diane asked her if she wanted to mop the floors and she said that she did. Diane got her a mop and Thelma mopped the office floors as people walked in and out. In the afternoon, Thelma returned crying. According to Diane, Thelma told her that she had received a call from the bank and that she had an appointment and was confused and wanted help. Diane did not know what Thelma was talking

about so she called Colleen. Colleen called the bank and canceled the appointment. Thelma again stated that she had not heard from defendant and did not know his location.

On June 7, 2006, defendant and Thelma went to Chase Bank and met with Donna Kardell. Kardell testified that Thelma directed her to designate defendant as her beneficiary on the seven CDs. Defendant sat next to Thelma in Kardell's office for the entirety of the meeting. Kardell testified that defendant did not suggest anything to, instruct, or coerce Thelma during the meeting. Kardell did not notice Thelma exhibiting any unusual behavior during the meeting and seemed to understand the transactions. Kardell did not discuss Thelma's other assets with her including her real estate and did not discuss any estate planning.

Also on June 7, 2006, defendant and Thelma went to the Sykora Law Office as walk-in clients. They dealt with Gloria Sykora, a legal secretary at the law office and secretary for her attorney husband, Anthony. Heather Surbrook, another legal secretary at the law office was also present. Gloria testified that Thelma and defendant came in together and that Thelma directed the conversation. Thelma explained to them that she wanted to pass on her farm to her son and wanted a deed prepared. Gloria stated, "we usually interview a little bit, informal conversation and in particular she wanted to give this to her son because he worked the land and took care of her, and we had asked if she had – if there were other siblings that she wanted to put on a deed, a quit claim deed, and she said no, her daughters were not going to be happy about – about this, but this is what she wanted." They explained to Thelma that her decision would exclude any other children from receiving any portion of the farmland.

The two legal secretaries spoke with Thelma in the public lobby area of the office. Surbrook indicated that the meeting lasted approximately ten to fifteen minutes. Defendant was present for the conversation except for when he went outside to take a phone call or smoke a cigarette. Gloria did not observe defendant making any suggestions to Thelma or coercing her in any way during the interview. They did not observe Thelma to be confused. Gloria testified that they posed no specific questions to understand Thelma's mental status. Instead, it was "just general conversation." Gloria did not notice any unusual behaviors on the part of Thelma. Gloria testified that they never asked Thelma if she had any other assets other than the real estate. They did not discuss with her how the deeds could have an effect on her eligibility for Medicaid or long-term care. They did not do any kind of inquiry into Thelma's memory, did not ask her whether she was on any medication or was treating with a doctor, did not ask defendant about her memory, and did not speak to any of Thelma's other relatives.

Thelma and defendant came back to the office the following day, June 8, 2006, to have Thelma sign the deeds and have them notarized. Surbrook believed that Thelma had the necessary competence for her to witness and notarize the deeds. Thelma did not meet with Attorney Sykora at any point, and never received independent advice from an attorney. Gloria testified that if she would have known that Thelma was diagnosed with dementia in September 2005 and had memory issues, she would have been concerned, would have investigated further, and would have alerted the attorney in the office and would have had more questions about whether Thelma was competent to sign the deeds.

Later in the day on June 8, 2006, defendant and Thelma stopped by Thelma's neighbor's home, Leland and Jean Fischer. The Ford farm and the Fischer farm abutted for over 50 years. Leland and Jean were outside when defendant and Thelma pulled up to their house and spoke for

about 20 minutes. They testified that Thelma told them that she had the papers taken care of to sign the farm over to defendant. They stated that Thelma seemed happy and in fact relieved that it was taken care of because she had mentioned to them back in April 2006 that she wanted the farm to go to defendant. According to the Fischer's, they had spent the late fall and winter in Florida and missed Dale's funeral. They both indicated that after they returned Thelma asked Leland what to do about her farm, meaning how to get her papers drawn up for the farm so that defendant could be placed on the farm. Leland told Thelma to see a lawyer. Leland indicated that he still farmed his land and that he had witnessed defendant farming with Dale for over 30 years and that defendant took care of most of the farming for the last five to seven years. According to Jean, Thelma was very opinionated and strong-willed and indicated that Thelma was not happy with her daughters. The Fischer's did not notice any changes in Thelma from before they went to Florida in the fall to when they returned the following spring.

On the morning of July 9, 2006, Randy Marsh, the owner of Marsh's Funeral Home in Marlette received a call that Thelma was at the funeral home. Marsh was at home and went straight to the funeral home where Thelma was waiting. Thelma asked Marsh if Dale had died and if there had been a funeral for him there. Marsh explained that Dale had died and they had a nice service for him and Thelma was there for it and so was her family. Thelma was very upset that no one had told her that Dale had died and exclaimed that "you're gonna have me next . . . I'm gonna go home and slit my throat[.]" Marsh said he was going to get a copy of Dale's obituary for Thelma, but instead he called Diane's husband, Don Adamczyk. When Marsh returned, Thelma left the funeral home.

Adamczyk called Stanley Prusinski, Colleen's husband. Colleen and Diane were away visiting family in New Jersey. Prusinski called defendant. Defendant, Adamczyk, and Prusinski went to Thelma's house. Defendant found a good-bye note written by Thelma. Thelma was in bed and would not speak with anyone. According to Prusinski, when Adamczyk left, Thelma said that she wanted to see defendant and Prusinski in the house. When they went inside, Thelma threatened them with a knife. Defendant called 911 stating that Thelma was making suicidal statements and that Thelma had pulled a knife. Bethany Craig, a trooper with the Michigan State Police responded to the call. When she arrived at Thelma's residence she spoke with defendant and Thelma. Thelma was very upset and confused about Dale's death. Defendant explained to Craig that Thelma had Alzheimer's and that she had trouble with her memory. Craig filled out a petition for hospitalization for Thelma because she believed Thelma was a danger to herself. Both Craig and defendant signed the petition.

When Colleen and Diane returned, they immediately had a family meeting to discuss what had happened to Thelma. Colleen testified that defendant stated, Thelma, "should be allowed to commit suicide because it would be better then [sic] spending her assets to keep care of herself." Colleen testified that when she, defendant, and Elaine visited Thelma at Port Huron Hospital, Thelma explained that she was in a time share vacation home and that while it was a nice place she was not coming back next year and was ready to go home. After Thelma was released from the hospital on July 14, 2006, both defendant and Colleen spent every night at the house. Colleen testified that Thelma would wander around the house and play with the locks. Colleen filed for a guardian and conservator to be appointed for Thelma. According to Colleen, defendant did not want Colleen to file the papers because it had been Dale's wish to attempt to allow Thelma to live independently for as long as possible.

The family had a meeting to discuss possible residential placement for Thelma on July 16, 2006. Thelma, defendant, Colleen, Diane, and Elaine were there. Helen Sefton, Thelma's sister, also attended the meeting. During the meeting, Thelma was agitated and believed that her sister was actually her aunt. According to Sefton, Thelma swore at her and accused her of visiting just so she could have a free meal which was totally out of character for Thelma. At trial, Sefton testified that she and Thelma were close and that she had noticed Thelma's memory loss and personality changes over the course of the previous year. Sefton testified that she remembers making a comment to Elaine about Thelma's forgetfulness and repeating herself as early as April 15, 2005, which was Sefton's birthday.

Thelma also began wandering off from her house. On both July 23, 2006 and July 28, 2006 Thelma walked long distances away from her home and was very difficult with family members who wanted to pick her up and take her home. The first time Thelma tumbled into a ditch trying to pick up a beer bottle. The second time she wandered into the tall grass in a hayfield after dark and Colleen had to call her husband to help her find Thelma. Eventually they found her, cut up by hay stubble and covered in mosquito bites, and were able to get her into the car and return her home. At the end of the month, Thelma left messages on Colleen's answering machine saying that she wanted to tell her "goodbye" and asking if Colleen knew where Dale was and thinking that Dale had left her because all of his clothes were gone.

On August 4, 2006, Colleen was visiting with Thelma when Colleen decided to mow the lawn. As Colleen was mowing the lawn, Thelma came at her swearing and angry. Thelma was pounding on the hood of Colleen's car and then threw grass clippings in her face and slapped her. Colleen called 911 and the police came to the house. Thelma was involuntarily committed at the hospital from August 21, 2006 to August 31, 2006. When Thelma was discharged she did not go home and instead went directly to Longevity Care in Sandusky.

A hearing was held in the probate court on September 12, 2006. After the hearing, the probate court found Thelma incapacitated as of that date. The probate court appointed plaintiff Claudia Maedel, the Public Guardian for Sanilac County, as the guardian of Thelma Ford and conservator of the estate of Thelma Ford. Plaintiff went to talk to Thelma about her affairs and observed that she was confused and had difficulty functioning. Thelma could not tell plaintiff where her checkbook was and could not locate her bills. It also appeared to plaintiff that Thelma was not taking her medication and had placed it under her dresser scarf. As part of her duties in inventorying Thelma's assets, plaintiff learned about the two deeds that Thelma had executed on June 8, 2006 when she did a search at the Register of Deeds. Plaintiff also learned about the POD designations on the CDs when she was researching the bank assets belonging to Thelma. Neither Thelma, nor defendant told plaintiff about the deeds or the POD designations on the CDs.

B. Medical Testimony

Dr. Donald Robbins, a family practitioner in Marlette, testified that he was Thelma's doctor for about 15 years. He noticed Thelma showed initially gradual signs of forgetfulness prior to 2004 that he believed were compatible with her age. However, during Dale's illness, Dr. Robbins noticed that Thelma was "terribly confused" and witnessed a "dramatic change" in Thelma's memory and mental acuity. Dr. Robbins was concerned about the origin of the change in Thelma and considered dementia, Alzheimer's disease, and vascular occlusive disease. Dr. Robbins engaged in a "concerted effort" to get Thelma evaluated to determine the source of the

problems. Some tests Dr. Robbins ordered were completed but some were not. In Dr. Robbins' opinion the tests that were completed substantiated both dementia and Alzheimer's. Dr. Robbins recalled that Thelma was at times, totally confused, lost, not in control, unable to follow simple instructions, frightened, and incapable of living on her own. Dr. Robbins prescribed Aricept for Thelma in an attempt to slow the progression of the dementia symptoms. The last documented time Dr. Robbins saw Thelma was May 9, 2005.

Dr. Saib Isterabadi, a family practitioner and general surgeon in Marlette, treated Thelma during August and September 2005. Dr. Isterabadi had been Dale Ford's doctor for over 15 years and was treating his colon cancer. According to Dr. Isterabadi, Dale brought Thelma to see him because Dale was very concerned about Thelma's memory, and that she was feeling fatigued. Dr. Isterabadi examined Thelma and found that she did not know the answers to simple questions. He ordered several tests that showed brain atrophy, enlargement of the ventricles in her brain, and a 50% blockage in her carotid artery indicating the presence of Alzheimer's disease. At this time, Dale Ford was scheduled for surgery and required a power of attorney. Dr. Isterabadi recommended against Thelma functioning in that capacity due to her forgetfulness and Alzheimer's symptoms and also advised against Thelma driving. Dr. Isterabadi suggested that Thelma get more tests and follow up with a neurologist but according to him, Thelma failed to see the specialist. It was Dr. Isterabadi's opinion that when he saw her in September 2005, Thelma was not competent to make decisions relative to her care, her husband's care, or legal decisions. Dr. Isterabadi also testified that Alzheimer's is a progressive disease and does not get better with time, but patients have both good and bad days and can have periods of lucidity.

Dr. Geoffrey Mills, an emergency medicine practitioner at Port Huron Hospital, testified that he saw Thelma in the emergency room at the hospital on July 9, 2006. Apparently, Thelma had an episode where she believed that her family members were trying to harm her and she waived a knife threatening to harm her family members. Police were called and Sanilac County EMS brought Thelma to the hospital for evaluation. Dr. Mills observed Thelma and also performed a physical examination. Dr. Mill's observed that Thelma was agitated, angry, uncooperative, very suspicious, out of touch with reality, had delusional thoughts, and hallucinations. It was Dr. Mills' impression that Thelma was suffering from acute dementia and a secondary diagnosis of psychosis. Dr. Mills stated that psychosis typically runs hand in hand with late onset dementia.

Dr. Thomas Brozovich, a staff psychiatrist at Port Huron Hospital, saw Thelma during two separate hospitalizations. Dr. Brozovich saw Thelma the first time on July 10, 2006. Because Thelma was brought in involuntarily, Dr. Brozovich interviewed Thelma, performed an examination, and took a history to determine if Thelma required psychiatric hospitalization. Dr. Brozovich's diagnosis was dementia with depression and delusions as well as bereavement over the loss of her husband. In his training and experience, Dr. Brozovich stated that typically, delusions and hallucinations are associated with the advanced stages of dementia because the cognitive impairment is more severe. Dr. Brozovich prescribed Lexapro for the depressive component of the dementia and Seroquel for the psychosis element. Thelma had an inpatient stay at the hospital until July 14, 2006. During this time she received both group and activities therapy. When Dr. Brozovich discharged Thelma he instructed that she required 24-hour care because of the risk of dangerous situations as well as outpatient follow-up care.

Thelma had a second inpatient stay at the Port Huron Hospital from August 22, 2006 to August 31, 2006 where Dr. Brozovich again treated her. Dr. Brozovich reported that Thelma continued to have significant cognitive impairment. He started Thelma on Lexapro and Seoquel again as well as group and activities therapy. A colleague of Dr. Brozovich discharged Thelma. The discharge instructions were stepped up a level from the 24-hour family care instruction after Thelma's July 2006 hospitalization to release to adult foster care for another level of supervision.

Dr. Christine Cucchi, a psychiatrist, saw Thelma on September 14, 2006 at Sanilac County Community Mental Health for a psychiatric evaluation. After interviewing Thelma, Dr. Cucchi, stated that Thelma presented with significant cognitive decline including difficulties with memory, significant mood lability, paranoid delusions, and agitated behaviors. Dr. Cucchi diagnosed Thelma with dementia with delusions and dementia with depressed mood. Dr. Cucchi also noted that Thelma had experienced some behavioral disturbance. Dr. Cucchi characterized Thelma as in the later stages of dementia suffering from "a significant or severe case of dementia." Dr. Cucchi saw Thelma again on October 3, 2006 after Thelma became agitated and physically aggressive at her living facility. Thelma was not oriented and was experiencing paranoid delusions. To Dr. Cucchi, these symptoms indicated that Thelma was in the later stages of dementia. Dr. Cucchi continued to see Thelma on a monthly basis between September 14, 2006 and October 15, 2007. Dr. Cucchi testified that dementia is a progressive disease and opined that, "it was almost a certainty that this was not a new onset at the time of their first appointment in September 14, 2006 and would have been present previously." Based on Thelma's presentation, course of treatment, medical history documenting that Thelma had exhibited behaviors associated with dementia as far back as 2005, and the science of the progression of dementia, Dr. Cucchi testified that Thelma "would have presented with similar mental status and cognitive function back in June of 2006."

Dr. William Weiner, an internal medicine, geriatric, and pediatric specialist, testified that he treated Thelma on a monthly basis from September 2006 to October 2007 when Thelma was a patient at the Longevity Adult Foster Care Home. On his first routine monthly visit on September 13, 2006, Dr. Weiner examined Thelma and attempted to take a medical history of Thelma. It was Dr. Weiner's impression that Thelma was confused, did not know where she was, could not give a medical history, did not understand her treatment, did not know who he was or who other people were, and was not at all oriented. Dr. Weiner concurred with the diagnoses of Alzheimer's disease and depression. Dr. Weiner saw Thelma on a monthly basis thereafter and continued to observe that Thelma was not capable of understanding her care and treatment. Dr. Weiner's diagnosis of Thelma did not change over time. He stated that during his treatment of Thelma he thought she was in the advanced stages of Alzheimer's disease and would have characterized the state of the disease in stage six or seven of the seven stages of Alzheimer's. Based on his observations of Thelma he believed that her disease had progressed such that "it would have had to have been months if not a couple of years to where she could really have been expected to be oriented."

III. Standard of Review

Following a bench trial, we review a trial court's conclusions of law de novo and its findings of fact for clear error. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Clear error exists if we are left with a definite and firm conviction that a mistake has been made. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). We must give deference

to the trial court's ability to judge the credibility of the witnesses. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

IV. Analysis

A. Mental Incapacity

Defendant argues that the trial court committed clear error when it rejected credible, unimpeached, direct evidence regarding Thelma's mental capacity on the dates she executed the instruments in favor of circumstantial evidence regarding her condition before and after the relevant dates. Plaintiff responds that there was no clear error in the trial court's determination that defendant did not present convincing or credible evidence that Thelma had the legal capacity to convey her real estate or the interests in her certificates of deposit on June 7 and 8, 2006, and therefore the trial court correctly considered evidence of her mental capacity before and after the dates in question, and correctly concluded that Thelma lacked the requisite mental capacity. The trial court held that "based upon all such evidence, that Thelma Ford did not have the requisite mental capacity to execute either the conveyance of the real estate or the transfer of the certificates of deposit on the dates in question."

The parties seem to agree on the legal standard applicable in this case. 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).

In *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993), this Court set forth a similar test for the mental capacity to contract:

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.

The *In re Erickson Estate* 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. [*Id.* at 333 (citations omitted).]

If there is evidence pro and con on the issue of mental capacity, the conclusion reached by the probate court should ordinarily be given much weight because of the probate court's opportunity to see and hear the witnesses. *Id.* at 333. Where mental incompetency is claimed, it should be proved by a preponderance of the evidence. *Id.*

“[C]apacity is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution.” *In re Estate of Powers*, 375 Mich 150, 158; 134 NW2d 148 (1965). Indeed, “[l]ack of capacity to execute a deed at a particular time may be proved by the grantor's condition before and after that time, and that prior or subsequent condition may be presumed to exist at the time the deed was made.” *Beattie v Bower*, 290 Mich 517, 525; 287 NW 900 (1939). However, this presumption is not applicable where there is credible evidence of the grantor's physical and mental condition at the time of the execution of the deed. *Burmeister v Russell*, 362 Mich 287, 290; 106 NW2d 752 (1961). Our Supreme Court directed in *Fish v Stilson*, 352 Mich 437, 440-441; 90 NW2d 509 (1958) that “where convincing, disinterested and unimpeached testimony shows adequate capacity at the time of execution” the rule that capacity is judged as of the time of the execution of the instrument is applied as a matter of law. *Id.*

Clearly, there is a vast amount of purely medical evidence in the record that Thelma was and is suffering from severe memory and mental acuity problems as a result of her diagnosed Alzheimer's disease and/or dementia. The medically documented evidence relates as far back as August 2005 when both her husband and Dr. Isterabadi became very concerned about Thelma's memory problems. Dr. Isterabadi's opinion in September 2005 was that Thelma was not competent to make decisions relative to her care, her husband's care, or legal decisions. All of the treating physicians offered testimony that Thelma's condition was, unfortunately, progressive, and as a matter of science, would not improve over time. The record also contains detailed descriptions of a series of events occurring over a course of months demonstrating the progressive nature of the disease. The record displays that the disease began with Thelma simply repeating herself to her sister or forgetting things like the fact that Dale had already paid Wood for plowing the driveway. But over time her symptoms increased and she began to have difficulty making meals, taking her own medications, paying bills, and caring for Dale. After Dale passed away, Thelma became especially distraught both emotionally and mentally. The stressful event and her bereavement triggered delusions about Dale being alive even though he had passed away. This continued for months after Dale died and culminated with Thelma's discussion with Marsh at the funeral home in July 2006 and then threatening to commit suicide and threatening other family members with a knife. Thelma also at times believed that her daughters were trying to poison her and began wandering aimlessly away from her home. And she refused to be picked up by family members even though she was lost in the dark in an open field covered with insects. After reviewing the record, we conclude that plaintiff has sustained her burden under the rule of *Beattie*, *supra* at 525. Also see, *In re Vollbrecht Estate*, 26 Mich App 430, 434; 182 NW2d 609 (1970) (Courts presume capacity and the burden is on a challenger to prove otherwise.)

But our analysis must not stop there. Defendant may overcome the presumption that plaintiff has sustained by presenting “credible evidence of the grantor's physical and mental condition at the time of the execution of the deed.” *Burmeister*, *supra* at 290. For this purpose, defendant relies on the testimony of Gloria Sykora and Heather Surbrook with regard to the

deeds. But their testimony only shows that Thelma spoke with two legal secretaries in the public lobby of the law office for approximately ten to 15 minutes with defendant, who stood to benefit from the transfer, present the majority of the time. While Thelma appeared on task to have her property transferred to defendant that day, Thelma never spoke to anyone independently and importantly, never received counsel from an attorney. The extent of the interview consisted of “informal conversation” with two legal secretaries after which neither secretary noted anything “unusual.” Significantly, however, neither secretary had any history with Thelma and would not have been able to gauge whether Thelma’s answers to their questions were actually substantively correct. In other words, while Thelma may have appeared alert or “on task” based on a ten to 15 minute informal conversation, the topical nature of the “interview” would not have been sufficient to determine whether Thelma, was in fact, coherent or competent. Furthermore, there was never any discussion about whether Thelma had any other assets, and whether the transfer would have an effect on her estate plan or long-term care plan. Without pointed and extensive questioning of Thelma—we would hope and expect—by a qualified attorney, regarding her history, her well-being, her assets, and her intentions regarding not only her real property but her entire estate plan, we cannot be satisfied that Thelma understood the import of her actions or even what she was signing. Regarding the deeds in question, defendant has not presented sufficient credible evidence of Thelma’s physical and mental condition at the time of the execution of the deeds to avoid the presumption of lack of capacity in this case. *Burmeister, supra* at 290.

With regard to the transfer of the CDs at Chase Bank, the analysis is exactly the same. While defendant presents evidence in the form of testimony from a bank employee, Kardell, she merely testified that she performed the transactions as directed by Thelma. She did not seem to remember anything specific about the meeting other than simply performing the transactions, that defendant was with Thelma the entire time, and that nothing unusual occurred. Again, while Thelma may have appeared alert or “on task” to Kardell because she was able to state that she wanted the CDs to designate defendant as beneficiary, without any conversation or interview whatsoever, there would have been no way to determine whether Thelma was coherent or competent at the time. And, there was no discussion about Thelma’s other assets or how these CD designations might affect the disposition of her estate or long-term care plan. Regarding the seven CD designations in question, defendant has not presented sufficient credible evidence of Thelma’s physical and mental condition at the time of the execution of the designations to avoid the presumption of lack of capacity in this case. *Burmeister, supra* at 290.

We do not forget the testimony of the Fischer’s who saw Thelma on the date in question and testified that she was “happy” and “relieved” to have transferred the property to defendant. But we do not consider it convincing or credible evidence that Thelma had legal capacity to convey the real estate or the interest in her certificates of deposit. Although the Fischer’s knew the Ford’s for years, the Fischer’s had been out of state for the entire winter and did not know about Thelma’s medical condition or that it had been progressing for months. The extent of their conversations was generally brief and neighborly. They simply could have no idea if Thelma comprehended the nature and extent of her property and understood and approved of the manner in which she chose to transfer that property to defendant to the exclusion of her other children. While Thelma did make comments that she did not like her daughters, at this time Thelma would not take her medication and sometimes believed that her daughters were poisoning her when in reality, they were attempting to care for their mother. There was also testimony that defendant

had left Thelma alone for several days before the transactions occurred and did not tell her where he was going or when he would be back.

Based on the record, and deferring to the trial court on matters of credibility, we are not left with a definite and firm conviction that the court made a mistake in finding that Thelma Ford did not have the requisite mental capacity at the time she executed the deeds transferring her real property to defendant and directed the bank to transfer the CDs from individual designation to POD to defendant. *Hayman, supra* at 365; *In re Erickson Estate, supra* at 331; see also MCR 2.613(C).

B. Motion for Involuntary Dismissal

Defendant also argues that the trial court clearly erred when it denied defendant's motion for involuntary dismissal under MCR 2.504(B)(2) of both plaintiff's undue influence claim as well as her unconscionable bargain claim. MCR 2.504(B)(2) states as follows:

In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

At the close of plaintiff's case, defendant brought his motion to dismiss both plaintiff's undue influence claim as well as her unconscionable bargain claim. The trial court denied the motion, ruling as follows from the bench:

This is actually a motion for involuntary dismissal pursuant to 2.504(B), when there's no jury involved, and there's a little difference in the standard the Court is to use and that is that the Court does not view the testimony – does not view all of the evidence in light most favorable to the non-moving party at a hearing such as this because it's a non-jury case. In viewing it in that standard and pursuant to 2.504(B), the undue influence issues, the – we have had a great deal of indirect – testimony of indirect facts in this matter about this issue. First of all we've had a lot of testimony about the mental impairment of Mrs. Ford and that – what she was not able to do and what she did not understand prior to the time of execution of these documents and her not understanding the nature of her – of the documents, that nature of her business affairs in general, the nature of the fact that her husband was dead or alive, the nature of whether her husband could be awakened from the casket to get out and go for lunch, those things certainly – that testimony and those facts certainly go to whether she was mentally impaired prior to this signing having occurred. So I think that the issue of undue influence can be shown by indirect evidence by other issues, so I find that enough evidence has been presented to proceed forward on the undue influence count. As to the unconscionable bargain, many of the same factors are involved, disparity and bargaining position, whether a person actually knows the nature and the value of

their property, whether this person has the ability to stand up for their rights and to stand up to require a fair transaction. I think all those have been shown at least indirectly by the evidence that has been presented this far. Also I have evidence in the record of the value of the property which is substantial together with the value of the bank accounts which is substantial and evidence that when the mother was taken along to the bank on the sixty-some thousand dollars in CDs, that they were put in one in each person's name when she was there earlier on, and then some time not [too] much later they were changed to Payable on Death to only one party. So I think all these things go as to the unconscionable bargain and I think enough evidence has been presented thus far to keep that claim alive, so the motion is denied as to those two counts as well.

In reviewing a motion for involuntary dismissal pursuant to MCR 2.504(B)(2) after a bench trial, we review issues of law de novo, and we review the trial court's findings of fact for clear error. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235-236 n 2, 238; 615 NW2d 241 (2000). A plaintiff is not afforded the advantage of the most favorable interpretation of the evidence, but rather the trial court is called upon to act as a trier of fact. *Marderosian v The Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983).

"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 Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1991) quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). 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. [*In re Peterson Estate, supra* at 260; *In re Estate of Mikeska*, 140 Mich App 116, 121; 362 NW2d 906 (1985).]

A confidential or fiduciary relationship exists when one party has placed complete trust in the other party who has the requisite knowledge, resources, power, or moral authority to control the subject matter at issue. *In re Karmey Estate*, 468 Mich 68, 74-75; 658 NW2d 796 (2003). Moreover, a fiduciary relationship is a broad term that focuses on relationships involving inequality. *Id.* at 74 n 3.

In this case, the facts support a claim for undue influence. Defendant was in a fiduciary relationship with Thelma because at the time Thelma signed deeds and executed the CD transfers, Thelma depended on defendant for care and assistance with daily activities. After Thelma's illness progressed and Dale passed away, defendant began spending almost every night at Thelma's and there was testimony that he ate most meals there with Thelma. He also was present at most of her doctor's appointments. Defendant benefited when the real property was transferred to him and the CD beneficiary designation benefited him solely to the exclusion of his siblings. Defendant had an opportunity to influence his mother's decision because she was mentally ill and not competent to take care of herself or her affairs. Defendant was staying with his mother most of the time, and importantly, working the farm by himself. There was testimony

that only days before the transfers, defendant stopped coming over and Thelma was very upset that she did not know his whereabouts or how to get in touch with defendant. Additionally, defendant drove Thelma to the attorney's office and the bank and stayed with her during the appointments. Defendant never told his siblings about the transfers. Under the circumstances surrounding this case, the trial court's decision not to dismiss plaintiff's claim of undue influence was not error. *Sands, supra* at 235-236 n 2.

With regard to the unconscionable bargain claim, plaintiff seems to be arguing that defendant had an unconscionable advantage over Thelma. The unconscionable advantage that warrants relief from a contract is "unconscionable advantage taken by one party over the other." *Jackson v Wayne Circuit Judge*, 341 Mich 55, 60; 67 NW2d 471 (1954). Considering Thelma's advanced stages of Alzheimer's disease/dementia and her inability to care for herself or her affairs, together with testimony that Thelma depended on defendant to assist in her care and farm the land, there was testimony supporting this claim. Clearly the parties were not in fair bargaining positions considering Thelma's mental frailty and reliance on defendant. In fact it could be argued based on the record evidence that defendant engaged in suspicious or even deceptive methods by disappearing and abandoning Thelma for two days before she affected the transfers to defendant. Under the circumstances surrounding this case, the trial court's decision not to dismiss plaintiff's claim of unconscionable bargain was not error. *Sands, supra* at 235-236 n 2.

V. Conclusion

We affirm the trial court's holding that Thelma Ford did not have the requisite mental capacity to execute either the conveyance of the real estate or the transfer of the certificates of deposit on the dates in question.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray