STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ALFRED M. OSTROWSKI, Deceased.

KIMBERLY LOCKE, Personal Representative of the Estate of ALFRED M. OSTROWSKI,

Appellee,

v

MELISSA OSTROWSKI and SUSAN OSTEN-ABNEY,

Appellants.

UNPUBLISHED
December 28, 2010

No. 292941
Oakland Probate Court
LC No. 2008-318475-DE

In re Estate of ALFRED MITCHELL OSTROWSKI, Deceased.

KIMBERLY LOCKE, Personal Representative of the Estate of ALFRED M. OSTROWSKI,

Appellee,

v

MELISSA OSTROWSKI and SUSAN OSTEN-ABNEY,

Appellants.

No. 293931
Oakland Circuit Court
LC No. 2009-100857-AV

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

In Docket No. 292941, appellants Melissa Ostrowski and Susan Osten-Abney appeal by right the probate court's order admitting the will of Alfred M. Ostrowski (the decedent) to

probate. In Docket No. 293931, appellants appeal by leave granted[1] from a circuit court order dismissing appellants' circuit court appeal of the probate court's order granting appellee Kimberly Locke for summary disposition. We affirm in Docket No. 292941 and dismiss appellants' appeal in Docket No. 293931.

I. BASIC FACTS

The decedent died on June 20, 2008, at the age of 84. His only living heirs were his two nieces, appellants. On November 16, 2007, the decedent executed a will and trust leaving his estate to Kimberly Locke, who had helped care for the decedent during the last few years of his life. In the will, the decedent acknowledged that he is "aware of two nieces living at the time I am preparing this Will and have intentionally made no provision for them at this time in either this Will or as beneficiaries of a Trust which I am creating on this same day." The trust contains a provision explaining that the decedent was naming Locke as the successor trustee and beneficiary of his trust because she had been his caretaker and he valued "her integrity, her service . . . , her honesty, and her friendship." The trust further provides:

> My decision to name [Locke] as my successor Trustee is entirely my own and is not influenced by anything she has said or done. At the time this document is being created she was not told of and we had not discussed my decisions to name her as my Trustee or to benefit her from my estate, both of which I will adviser [sic] her of at a later date.

After the decedent's death, Locke petitioned the probate court to admit the decedent's will to probate. Appellants filed a separate petition challenging the validity of the decedent's will and trust alleging, in relevant part, that (1) the documents were the product of Locke's undue influence and (2) the decedent lacked the mental capacity to execute the documents.

Subsequently, Locke moved for summary disposition under MCR 2.116(C)(10). She submitted evidence that the decedent's treating physician, Dr. Gary Renard, had examined the decedent approximately three months before and after the decedent executed his will and trust. Dr. Renard testified that although the decedent suffered from some physical disabilities, he was oriented and alert, and did not show any signs of memory deficits, dementia, or mental illness. Dr. Renard also stated that the decedent's medications would not cause the decedent to be confused or disoriented.

Locke also presented the deposition testimony of John Makris, the attorney who prepared the decedent's will and trust. Makris stated that the decedent contacted him on his own to prepare a will and trust. The decedent explained to Makris that although he had two living nieces, "they never came around enough for [the decedent] to know [them] very well." Instead, the decedent told Makris that he wanted to leave his estate to Locke, because she had taken care

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[1] *In re Ostrowski*, unpublished order of the Court of Appeals, entered December 23, 2009 (Docket No. 293931).

of him and he considered her to be part of his family. According to Makris, the decedent did not want Locke to know that he had named her beneficiary of his estate. Makris stated that when he met with the decedent to have him execute the will and trust, the decedent was "quite sharp [and] mentally aware." Makris testified that the decedent was aware of his assets and the world around him, he had an understanding of his physical condition, and he knew what he wanted done with his assets and why. Andrea Hodges, a notary who was also present, similarly stated that the decedent appeared alert and oriented and that she did not notice any "dementia."

Appellant Susan Osten-Abney stated in her deposition that the decedent seemed mentally sharp when she had conversations with him. She stated that Locke told her on more than one occasion that Locke had broken the rules as a home health care provider because "she got too close to [the decedent], he's family." However, Osten-Abney admitted that she did not have any direct evidence to support her claim that Locke had been named beneficiary because she exerted undue influence on the decedent. Similarly, appellant Melissa Ostrowski's deposition testimony did not establish any direct undue influence or lack of capacity. She stated that she was close to the decedent, but admitted that she had not seen him in his later years due to his deteriorating health. Melissa claimed that the decedent once told her that he had made a will and was leaving everything to her because she was special to him, but she never saw the will. According to Melissa, the decedent had become totally dependent on Locke for all of his physical needs. Melissa claimed that during telephone conversations with the decedent, he would suddenly become quiet when Locke apparently entered the room, as if he did not want Locke to know he was speaking to Melissa.

The probate court found appellants failed to establish a genuine issue of material fact concerning Locke's alleged exertion of undue influence or the decedent's testamentary capacity. Accordingly, it granted Locke summary disposition. Appellants appealed that order to the circuit court. On June 17, 2009, the circuit court dismissed the appeal for lack of jurisdiction, reasoning that the appeal was required to be filed in this Court pursuant to MCR 5.801(B)(1)(c), as an appeal from an order construing a testamentary instrument or trust. On June 19, 2009, the probate court entered an order admitting the decedent's November 2007 will to probate. Appellants now appeal by right in Docket No. 292941. Appellants filed a separate application for leave to appeal the circuit court's order dismissing their circuit court appeal. This Court granted leave and ordered that the appeals be consolidated.[2]

II. DOCKET NO. 292941

In Docket No. 292941, appellants raise numerous alleged procedural and substantive errors related to the probate court's grant of summary disposition. We review a lower court's decision on a motion for summary disposition de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Summary disposition under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a

[2] *In re Ostrowski*, unpublished order of the Court of Appeals, entered December 23, 2009 (Docket No. 293931).

matter of law. *Woodman v Kera, LLC*, 280 Mich App 125, 134; 760 NW2d 641 (2008). "When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 135. "A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record." *Curry v Meijer, Inc*, 286 Mich App 586, 590; 780 NW2d 603 (2009). In deciding this motion, the court is prohibited from resolving factual disputes or determining credibility. *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). "The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence." *Dextrom v Wexford Co*, 287 Mich App 406, 415; ___ NW2d ___ (2010). If the burden of proof is on the nonmoving party, then it must respond with documentary evidence to demonstrate that a genuine issue of material fact exists. *Curry*, 286 Mich App at 591. Failure to do so will result in the entry of judgment for the moving party. *Id*.

A. IMPERMISSIBLE FACTUAL FINDINGS

At the outset, appellants claim that the probate court made improper factual findings with regard to (1) Locke's financial involvement in the decedent's financial affairs and (2) handwriting in the decedent's checking account registry.

i. FINANCIAL INVOLVEMENT

With regard to Locke's financial involvement, appellants assert that the probate court made inherently inconsistent statements in its opinion and, thus, wrongly concluded that no factual dispute existed. Specifically, appellants take issue with the probate court's statement that Locke did not have any involvement in the decedent's financial affairs until he was hospitalized in late May 2008. In appellants' view, this statement conflicts with the court's statement that Locke, beginning in March 2007, was cashing checks for the decedent and then giving the money back to him in order to assist him. We disagree. When these statements are read in context it is readily apparent that no innate conflict exists and that the trial court did not make an impermissible finding of fact. Regarding the latter statement, the probate court was merely recounting the arrangement between Locke and the decedent, wherein Locke, acting as a caregiver, would receive funds from decedent to purchase groceries, medication, or other necessities for the decedent's benefit, as needed and at the decedent's direction. The probate court's former statement refers to evidence on the record showing that Locke first assumed authority over the decedent's bank accounts in late May or early June of 2008. Notably, appellants did not submit any evidence to create a contrary inference, i.e., that Locke assumed control of the decedent's finances before May 2008. Accordingly, the probate court did not make an erroneous, or otherwise impermissible, factual finding regarding Locke's involvement in the decedent's financial affair. Appellants are simply attempting to create a question of fact where none exists.

ii. CHECKBOOK REGISTRY

Appellants next contend that the probate court made an improper finding of fact by concluding that the handwriting in the checkbook register before May 2008 belonged to the

decedent, and that the writing that appeared after that time belonged to Locke. Apparently, the probate court viewed the change in handwriting as corroborating Locke's testimony that she assumed authority over the decedent's finances in late May or early June of 2008. Again, we disagree. Appellants' failed to bring forth any documentary evidence establishing a conflict in the evidence. Appellants concede that there was no evidence to support the conclusion that the handwriting before May 2008 belonged to Locke. Again, appellants failed to meet their burden of establishing a genuine issue of material fact in regard to the checkbook registry. Further, even if it could be said that a question of fact existed as to whose handwriting was in the checkbook, it would not create an inference by which a reasonable trier of fact could presume any undue influence in light of the other evidence on the record, discussed *infra*.

In sum, the trial court did not engage in impermissible fact finding with regard to Locke's financial involvement or with regard to the checkbook registry. Appellants simply failed to proffer any conflicting evidence.

B. PREMATURE SUMMARY DISPOSITION

We also disagree with appellants' argument that summary disposition was premature because they were not permitted to cross-examine Makris at his deposition. Appellants complain that they were denied the right to cross-examine Makris because appellants' attorney was unable to attend the deposition and, thus, the probate court should not have considered Makris' deposition testimony. It is generally true that summary disposition is inappropriate before the completion of discovery on a disputed issue. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich App 410, 421; 526 NW2d 15 (1994). However, as appellants do not dispute, appellants specifically stipulated the admissibility of Makris' deposition testimony at trial. Appellants cannot now assign error to this stipulation that they deemed proper below; "[t]o do so would allow [appellants] to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Accordingly, we reject appellants' argument that summary disposition was premature.

C. UNDUE INFLUENCE

Appellants next argue that the probate court erred by ruling that there was no genuine issue of material fact to support their undue influence claim. Specifically, appellants contend that a genuine issue of material fact existed whether Locke and decedent had a confidential or fiduciary relationship and whether Locke had the opportunity to influence decedent. We disagree. Appellants' claim is premised on the presumption of undue influence that arises when a fiduciary to a grantor benefits from a transaction involving the grantor's assets. A presumption of undue influence can arise upon the production of evidence that establishes

> (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993).]

Where the presumption is established, it creates an inference of undue influence and the burden shifts to the opposing party to present evidence rebutting the presumption. *In re Peterson Estate*, 193 Mich App 257, 261; 483 NW2d 624 (1991). With regard to the first element, our Supreme Court has noted, the term "confidential or fiduciary relationship" is used to broadly describe relationships of inequality. *In re Karmey Estate*, 468 Mich 68, 74 n 3; 658 NW2d 796 (2003). Thus, a fiduciary relationship may exist where one party exercises complete dominion over the other party or where 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. *Id*. at 74-75 nn 2-3; see also *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 515; 309 NW2d 645 (1981) ("A fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice.").

We have found nothing in the record to show that the decedent relied on Locke's judgment and advice at the time that he created his will and trust in November 2007. While it is apparent that Locke cashed checks for the decedent and brought him the money, Locke spent this money for the decedent's necessities at the decedent's direction. Certainly decedent showed trust in Locke by giving her checks, but she was not required to exercise any independent judgment or control, or even provide advice, to the decedent on how to manage his money. She was merely performing household tasks under the decedent's direction. Nothing in the record demonstrates that Locke exercised dominion or control over the decedent in any way. Appellants have failed to come forward with any evidence showing the same and have therefore failed to create a genuine issue of material fact to avoid summary disposition.

Further, we reject appellants' contention that the bank records alone, which show that Locke withdrew sums from the decedent's accounts, support an inference that a fiduciary relationship existed. This argument fails to recognize that Locke withdrew these funds and spent the funds at the decedent's behest. A person's mere assistance with banking activities and other physical tasks alone is insufficient to establish a fiduciary, confidential relationship. Rather, there must also be evidence that one party exercises complete control over the other party or that one party has placed complete trust in the other party to control the subject matter at issue. See *In re Karmey Estate*, 468 Mich at 74-75 nn 2-3.[3]

Accordingly, because appellants failed to establish a genuine issue of material fact regarding the existence of a fiduciary relationship, the trial court did not err by granting summary disposition for Locke as to appellants' claim of undue influence. Further, because a party must establish all three elements to establish the presumption of undue influence, our decision regarding the existence of a fiduciary relationship is dispositive and we need not consider appellants' other arguments related to this claim.

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[3] Appellants rely on *In re Swantek Estate*, 172 Mich App 509; 432 NW2d 307 (1988), to suggest that mere assistance in the handling of financial matters of someone who is suffering from health problems is sufficient to establish a fiduciary or confidential relationship. However, we decline to follow that decision because that opinion is not precedentially binding. See MCR 7.215(J)(1).

D. TESTAMENTARY CAPACITY

Appellants further posit that the probate court erred by finding that there was no genuine issue of material fact concerning the decedent's testamentary capacity to make the will and trust in November 2007. We disagree. This Court explained the requirements of testamentary capacity in *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953) :

> To have testamentary capacity, an individual must be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make. The burden is upon the person questioning the competency of the deceased to establish that incompetency existed at the time the will was drawn.
>
> Illiteracy or lack of education has little, if any, bearing upon mental capacity to make a will and the appointment of a guardian to protect the property of a person does not constitute probative evidence of mental incompetency. Nor should the lack of wisdom in the disposition of the property nor the fairness of the provisions of the will influence the court in a determination of mental competency. Weakness of mind and forgetfulness are likewise insufficient of themselves to invalidate a will. [Citations omitted.]

In the present matter, the decedent suffered from severe physical limitations. However, no evidence showed that he had any mental deficits that prevented him from comprehending the nature and extent of his property, from recalling the natural objects of his bounty, or from determining and understanding how he wanted to dispose of his property. Makris, the attorney who was present when decedent executed the will and trust, stated that the decedent was aware of his assets and his physical condition, and was aware that he was not leaving anything to appellants. Hodges, the notary who was also present, similarly testified that the decedent appeared to be mentally sound. In addition, Dr. Renard, the decedent's treating physician, stated that the decedent was oriented and alert, and did not show any signs of memory deficits, dementia, or mental illness during examinations that were conducted approximately three months before and after the decedent executed his will and trust.

Appellants contend that the probate court improperly relied on these testimonies because Dr. Renard did not examine the decedent at the time he executed the will and trust and because Makris and Hodges were biased. These arguments implicate only the weight of the testimony, not its admissibility. See *McPeak v McPeak*, 233 Mich App 483, 492-493; 593 NW2d 180 (1999). And, contrary to what appellants argue, the probate court was not required to decide issues of credibility or resolve factual questions related to decedent's testamentary capacity because appellants did not present any contrary evidence.

Accordingly, we conclude that the probate court did not err by finding that no genuine factual dispute existed as to the decedent's testamentary capacity. Consequently, the probate court did not err by granting Locke summary disposition and by admitting the decedent's will to probate.

III. DOCKET NO. 293931

In Docket No. 293931, appellants argue that the circuit court erroneously dismissed their circuit court appeal of the probate court's order granting Locke's motion for summary disposition. However, because appellants separately challenged the probate court's summary disposition order in their appeal in Docket No. 292941, and we addressed the merits of appellants' claims in that appeal, we conclude that appellants' appeal in Docket No. 293931 is now moot. See *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010). Accordingly, we dismiss appellants' appeal in Docket No. 293931.

Affirmed in Docket No. 292941. The appeal in Docket No. 293931 is dismissed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello