STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ILENE JENNINGS.

CRAIG WRIGHT, Personal Representative of the Estate of ILENE JENNINGS,

Appellee,

and

ROSE LABARGE, a/k/a ROSE YARRINGTON,

Appellant,

v

JOHN JENNINGS,

Appellee.

UNPUBLISHED
July 28, 2011

No. 298063
Genesee Probate Court
LC No. 10-187640-DE

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

Because I believe that the probate court abused its discretion in denying the motion to adjourn where there were allegations of fraud and undue influence and appellant Rose LaBarge had not been afforded reasonable time for discovery, I respectfully dissent.

I. BACKGROUND

Decedent, Ilene Jennings, executed a will in 1980 naming her husband as personal representative and sole heir. In the event her husband predeceased her, decedent's will provided that her estate was to be shared equally between her son, John Jennings, appellee, and her step-daughter, LaBarge, and that LaBarge was to serve as personal representative.

Decedent died on December 26, 2009, her husband having predeceased her. On January 10, 2010, LaBarge filed the 1980 will and petitioned for appointment as personal representative. No objections to the petition were filed, but about two weeks later, on January 27, 2010, Jennings filed a petition asking that he be appointed personal representative and attached a will

dated April 24, 2008, which devised the entire estate to Jennings. Also executed on April 24, 2008 was a power of attorney granting Jennings broad authority to manage his mother's affairs, including her finances.

On February 5, 2010, LaBarge filed objections to Jennings' petition, asserting that decedent was "not mentally competent" to execute the 2008 will and that decedent was "under duress and was coerced" by Jennings to sign it. LaBarge's pleadings requested that the probate court deny Jennings' petition and "schedule an evidentiary hearing to determine if [decedent] was coerced to change her will."

On February 9, 2010, LaBarge served a deposition notice on Jennings, directing that he appear for deposition on February 18, 2010. Also served on February 9 was a deposition notice for the deposition of Lucille Preston[1] on February 16, 2010. Neither appeared at the appointed times for their respective depositions. On February 16, 2010, LaBarge served subpoenas on several financial institutions for decedent's banking records. The records were to be produced on March 1, 2010.

On February 23, 2010, Jennings, LaBarge, and LaBarge's attorney appeared before the probate court regarding the competing petitions. At that time, the probate court did not determine which will to admit or which person to appoint as personal representative. Instead, it set a hearing for March 23, 2010 on the issues of competency and undue influence and advised LaBarge that medical evidence would be necessary on the issue of competency. However, the probate court did not state that the hearing would constitute a full trial on the matter. It issued an "order of adjournment" for the February 23, 2010 hearing. The order contained two boxed as to the nature of the adjourned proceedings: one box for "trial" and one for "hearing." The box labeled "hearing" was checked and the order stated that "this hearing is adjourned to March 23, 2010 at 2:00 p.m. for a Nonjury trial for the following reasons: Matter is contested."

On March 11, 2010, LaBarge served a subpoena on the Department of Human Services for all adult protective services records relating to decedent. On March 12, 2010, LaBarge served a subpoena directing decedent's medical providers to produce copies of all decedent's medical records to LaBarge's counsel on or before Friday, March 19, 2010. On March 16, 2010, LaBarge served subpoenas on several individuals to appear at trial.

On March 22, 2010, LaBarge filed "Objections to Admission of Will and Motion to Support a Special Fiduciary," which states, inter alia, that "there are too many outstanding issues to be presented to the Court in such a short period of time" and cited, by way of example, copies of checks from decedent's bank account made payable to three individuals that LaBarge claimed did not bear decedent's signature, but were, instead, forgeries. Also attached were checks that LaBarge asserted were made out for items and expenses that were not for the benefit of decedent. LaBarge also attached bank records purporting to show withdrawals of checks or transfers

[1] Preston is purportedly decedent's sister.

totaling nearly $14,000 from decedent's bank account from December 3, 2009 through January 6, 2010.

The parties appeared on March 23, 2010 at 9:30 a.m.[2] At that time, LaBarge's counsel stated that he had provided the court with evidence of forgery and requested appointment of a special fiduciary. The probate court repeatedly cut counsel off and directed him to call his first witness. Counsel responded that the case was complex, that the opposing party had failed to appear for a noticed deposition, and that he was still awaiting receipt of many documents for which subpoenas had been served. The probate court asked whether petitioner had a physician present ready to testify. Counsel responded that they had medical records, but "we don't have any live testimony. Doctors won't drop everything they are doing to come in and testify on a couple of weeks['] notice." Counsel further stated that he had thought that there would be an opportunity for discovery and issuance of a scheduling order.

The probate court again directed counsel to call his first witness, to which counsel stated, "I'm a little bit frustrated because of the fact that I was under the impression this was a contested will—" The probate court again cut off counsel and asked, "You have no witnesses to proceed at this time, is that correct?" The following discussion took place:

> *Mr. Goulet (attorney for LaBarge)*: Your Honor, I – I – there's no way I could get witnesses.
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> *The Court*: All right.
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> *Mr. Goulet*: I couldn't subpoena them in time. I wouldn't have the time to do that.
>
> *The Court*: And I am gonna deny –
>
> *Mr. Goulet*: An' 30 days is not –
>
> *The Court*: I'm gonna deny the obj – . . . I'm gonna deny the objection to the admission of the Will. I am going to admit the Will as proffered by Mr. Jennings. I am going to remove Ms. LaBarge as personal representative . . . .

The trial court entered an order of formal proceedings appointing Craig Wright as personal representative and holding that the 2008 will was valid and admitted to probate.

On April 14, 2010, LaBarge filed a motion for new trial. She alleged that the probate court's sua sponte entry of the order violated her substantive and procedural due process right to a meaningful hearing because she was not permitted to adequately prepare for trial, have meaningful discovery, confront witnesses, or call her own witnesses. She argued that the probate

[2] The record does not indicate why the parties arrived at 9:30 a.m. rather than at 2:00 p.m., the time indicated for the hearing in the order.

court essentially rendered summary disposition in favor of Jennings without Jennings ever having provided any viable evidence. She pointed out to the court that it had only provided her 30 days to prepare for trial and that, although she had attempted discovery, Jennings, Lucille Preston and Marcy Preston had all failed to appear for their depositions, and although she had sent subpoenas for bank, medical, and insurance records, the 30 days hampered her efforts to obtain those records and obtain witnesses on such short notice. She noted that the probate court had failed to permit her to present what evidence or testimony she did have during the hearing. She requested the probate court set aside its previous order and provide time for meaningful discovery as well as a scheduling order, before making new findings of fact and conclusions of law. She attached to her motion copies of multiple document subpoenas and deposition notices as evidence of her diligence in attempting to get the discovery necessary to prove her claims.

On April 28, 2010, the trial court issued its order denying LaBarge's motion for a new trial. It noted that "neither Rose LaBarge nor her attorneys objected to a 30 day trial date" and that they filed no objection to the March 23 trial date until March 22 at 2:53 p.m.

> Due to the late date and time of the filing of that pleading relative to the trial date and that the title of the pleading in no way indicated it was requesting an emergency adjournment of the trial date the Court did not review that pleading on an emergency basis or believe an adjournment was being requested. Further, the Court never agreed to hear an objection or motion with respect to that pleading on March 23, 2010, with there being only one day of notice on the Court and the parties in violation of MCR 2.119(C) and no request was made to hear it on an emergency basis or on short notice. The Court did review that pleading on the date of trial in preparation of trial and the Court noted that under the relief requested the pleading requests "That the Court place this action on the general trial docket . . ." However, March 23, 2010, is a date that is representative of the Court's general trial docket and except for that statement no request was ever made asking for an adjournment or for an extension of time by the parties. At the commencement of trial on March 23, 2010, the proponent of the Will dated April 24, 2008, appeared ready to proceed and with no anticipation that an adjournment was being requested. The Court had set aside an entire afternoon with no other matters scheduled to conduct a trial in this matter. Rose LaBarge, along with her Attorneys, appeared unprepared to do anything except argue their Motion dated March 22, 2010 which for the reasons previously stated was not scheduled to be heard and to request an adjournment because they were unprepared to begin trial. The Court was unwilling to grant the adjournment based solely on one party being unprepared and denied the request for an adjournment and ordered Rose LaBarge, through her attorneys, to present her evidence. She presented no evidence. Based on the fact that no evidence was presented by the party objecting to the Will dated April 24, 2010 [sic], the Court made the appropriate findings and admitted it to probate; and,
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> **THE COURT FINDS FURTHER** that any irregularities in the proceedings were not the result of the Court's action but the result of Rose LaBarge and her Attorneys appearing unprepared for trial; therefore,

IT IS HEREBY ORDERED that the Motion for a New Trial is DENIED.

On May 7, 2010, LaBarge filed a motion for reconsideration of the denial of the motion for new trial. She argued that the probate court violated MCR 2.401 in failing to give her the opportunity to conduct meaningful discovery and that the failure to provide a scheduling order prevented her from timely filing a witness list, exhibit list, interrogatories, requests for admissions, requests for documents, or any other discovery with which her could support her position. She noted that the trial court took no action against Jennings even after being advised that he had failed to show up for his deposition. She reiterated her argument that providing only 30 days until trial deprived her of procedural and substantive due process. She contended that the trial court erred in ruling that her "objections to the admission of the will did not constitute a motion for more time to prepare." She also noted that, although the probate court held that Jennings was ready to proceed, "the record clearly indicate[s] that the proponent was in pro per and had no testimony to offer and indeed in this case no testimony was ever taken under oath by any one much less all of the parties." Without elaboration, the probate court denied the motion by order dated May 10, 2010. LaBarge now appeals.

II. ANALYSIS

The probate court's frustration at LaBarge for requesting her adjournment on the eve of trial was certainly understandable, particularly given that nothing in the caption of the document gave any indication that an adjournment was being requested, let alone any type of motion being made. The probate court is certainly within its right to sanction litigants for being dilatory, but even when parties directly violate court orders, we require courts to consider the least sanction possible to address the violation and only permit dismissal of a case in the most extreme circumstances. See *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995) (requiring the court to consider "whether a lesser sanction would better serve the interests of justice"). Here, the probate court's actions were analogous to dismissal of LaBarge's action for actions that do not even remotely approach those necessary to warrant such an extreme sanction.

Furthermore, I conclude that the probate court abused its discretion in this case by essentially granting a directed verdict to Jennings when, on the record before it, LaBarge had presented evidence sufficient to create the presumption of undue influence, which was never rebutted. When combined with the evidence of potential fraud also presented to the probate court, there was no basis upon which the probate court could have concluded that the 2008 will was valid.

> 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 the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient. [*In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).]
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> "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." [*In re Karmey Estate*, 468 Mich 68, 73; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).]

Here, Jennings is decedent's son. "In cases involving conveyances from parent to child there is a rebuttable presumption of undue influence only where a fiduciary relationship is found to exist." *Mannausa v Mannausa*, 370 Mich 180, 184; 121 NW2d 423 (1963). Here, LaBarge provided to the probate court a copy of a durable power of attorney that appointed Jennings as decedent's attorney in fact with respect to all financial transactions, thereby establishing a fiduciary relationship between Jennings and decedent. Thus, LaBarge presented evidence establishing the existence of a confidential or fiduciary relationship between the grantor (decedent) and a fiduciary (Jennings), thereby meeting the first element.

The second element is that the fiduciary or an interest he represents benefits from the transaction. As the sole beneficiary under decedent's will, Jennings clearly benefitted from the changing of decedent's will. Thus, LaBarge established the second element creating the presumption of undue influence.

The third element is that the fiduciary had an opportunity to influence the grantor's decision in the transaction. LaBarge has asserted that decedent was afraid of Jennings and that witnesses had heard Jennings "say that he made his mother change her will."[3] Thus, there was some evidence that Jennings not only had the opportunity, but did, in fact, influence decedent's decision in the transaction.

Having met all three elements, LaBarge was entitled to the presumption of undue influence, contrary to the probate court's determination. Moreover, defendant offered no evidence into the record to rebut this presumption, meaning that there no evidence in the record to support the probate court's determination that the 2008 will was free of undue influence. Consequently, the probate court erred in admitting the 2008 will because "the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence." *Kar*, 399 Mich at 542.

Under these circumstances, it would permissible for this Court to remand this case to the probate court with an order to enter a directed verdict in favor of LaBarge, given the lack of evidence to the contrary. However, I believe that such a result would be as unfair to Jennings, who also never received an opportunity to present evidence at the hearing, as the present ruling is to LaBarge.

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[3] I concede that these statements were not presented in affidavit or testimonial form. Nevertheless, given the nature of how these proceedings played out, this assertion is sufficient to create the presumption of undue influence sufficient to at least permit further discovery.

The crux of the matter is that neither party is without fault. Jennings improperly hampered LaBarge's attempts to obtain discovery, but LaBarge did herself no favors by not objecting to the 30-day discovery period before trial before the eve of trial. Nevertheless, the point of the probate system is to provide a venue to determine the intent of the testator when multiple wills are presented that are alleged to be the last will of a decedent. This Court does little to advance those objectives, let alone the interests of justice, by allowing the probate court to simply accept one will over another without providing either side a reasonable opportunity to investigate and present their evidence. Accordingly, I would reverse the probate court's order and remand for the probate court to enter a discovery order permitting the parties, at the minimum, several months to finish their investigations, and schedule a new trial date, after which, the probate court should make appropriate findings of fact and conclusions of law based on the record evidence at that time.

/s/ Douglas B. Shapiro