[Cite as *Letson v. McCardle*, 2010-Ohio-3676.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DANIEL B. LETSON, ADMINISTRATOR, WWA OF THE ESTATE OF KATHRYN M. D'ALESSANDRO, DECEASED,	:	**O P I N I O N**
	:	**CASE NO. 2009-T-0125**
Plaintiff-Appellee,	:	
- vs -	:	
GREGORY A. MCCARDLE, SR., et al.,	:	
Defendants,	:	
KATHY M. D'ALESSANDRO, f.k.a. KATHY MCCARDLE,	:	
Defendant-Appellant.		

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 2008 CVA 0027.

Judgment: Affirmed.

Daniel B. Letson, Letson & Swader Co., L.P.A., 160 East Market Street, #250, Warren, OH 44481 (For Plaintiff-Appellee).

Gus K. Theofilos, 910 First National Tower, 11 Central Square, Youngstown, OH 44503 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Kathy M. D'Alessandro, f.k.a. Kathy McCardle, appeals from the October 23, 2009 judgment entry of the Trumbull County Court of Common Pleas, Probate Division, finding her guilty of concealing, embezzling, conveying away, or

having been in the possession of monies of the Estate of Kathryn M. D'Alessandro, deceased.

{¶2} On or about April 5, 2006, following the passing of Andrew D'Alessandro, the husband of Kathryn M. D'Alessandro ("the decedent"), Life Investors Insurance Company of America ("Life Investors") sent a letter to the decedent outlining information regarding an annuity of which she was the sole beneficiary.

{¶3} On or about August 8, 2006, a durable power of attorney was purportedly executed by the decedent in which appellant, the decedent's daughter, was designated as the decedent's attorney-in-fact, and Gregory A. McCardle, Sr. ("Mr. McCardle"), appellant's husband at the time, was designated as the decedent's successor attorney-in-fact. The decedent's signature was purportedly witnessed by Edith M. Smeltzer ("Ms. Smeltzer"), a Notary Public. However, Ms. Smeltzer later testified at a hearing that she did not witness the decedent's purported execution of the power of attorney and had never met with or spoken to the decedent at any time. According to Mr. McCardle, the power of attorney was not executed by the decedent and appellant signed the decedent's name and inserted the decedent's initials on the document.

{¶4} On or about October 25, 2006, an annuity claimant's statement and a copy of the power of attorney were submitted to Life Investors. According to Mr. McCardle, appellant completed the statement and forged the decedent's signature. Ms. Smeltzer indicated that although her signature and notary stamp appear on the statement, she did not witness the decedent sign it.

{¶5} According to appellant, she did not sign Exhibit 10, which gave Mr. McCardle full permission to execute any business and/or transactions on behalf of the

decedent. Appellant indicated that the signature appeared to have been copied from another document. She also maintained that she was unaware that Mr. McCardle was attempting to cash the annuity. In addition, appellant stated that she was physically, mentally, and emotionally abused by Mr. McCardle and that she was under duress when she placed the decedent's initials on the power of attorney document.

{¶6} On or about November 6, 2006, Life Investors issued a check in the amount of $53,654.04 made payable to the decedent as a lump sum distribution from the annuity. According to Mr. McCardle, after receiving the check, appellant forged the decedent's endorsement and he signed his name as "Gregory A. McCardle Sr. POA" below it.

{¶7} On or about November 8, 2006, Mr. McCardle, opened a checking account at The Home Savings and Loan Company of Youngstown, Ohio ("Home Savings"), deposited the check into the account, and later withdrew the money.

{¶8} On May 30, 2008, appellee, Daniel B. Letson, Administrator, WWA of the Estate of Kathryn M. D'Alessandro, deceased, filed a complaint for concealment of assets, undue influence, declaratory judgment, and breach of fiduciary duty against appellant and Mr. McCardle.[1] According to the complaint, the decedent executed a power of attorney whereby appellant was designated as the decedent's attorney-in-fact; appellant exerted undue influence over the decedent in procuring the power of attorney; by virtue of the power of attorney, a fiduciary relationship existed between the decedent and appellant; appellant committed self-dealing and initiated and/or unduly influenced

1. Mr. McCardle is not a named party to the instant appeal.

the decedent to undertake several unauthorized bank account transfers, real estate conveyances and other transactions involving life insurance and certain annuities involving the decedent's funds and interests which benefited appellant and Mr. McCardle; appellant and Mr. McCardle had a confidential relationship with the decedent and previously served as the decedent's primary caregivers; appellant and Mr. McCardle have concealed and/or conveyed away or are in possession of personal property and real estate of the decedent in an amount believed to be in excess of $80,000; and the transactions, conveyances, and transfers were consummated at a time in which the decedent lacked proper physical and/or mental capacity to form donative intent. Citations to appear were issued and properly served upon appellant and Mr. McCardle.

{¶9} A hearing was held before Trumbull County Court of Common Pleas Probate Judge Thomas A. Swift on September 16, 2008. The testimony revealed that a general power of attorney was purportedly executed by the decedent which designated appellant as the decedent's attorney-in-fact and Mr. McCardle as the successor.

{¶10} Pursuant to its September 23, 2008 judgment entry, the trial court held the following: appellant had a confidential and fiduciary relationship with the decedent; appellant failed to provide an accounting of all activities undertaken as the alleged attorney-in-fact for the decedent; the quit claim deed transferring the residential real estate from the decedent to Mr. McCardle was forged and improperly notarized; the decedent's assets had been concealed and/or carried away; and appellant was ordered to provide the trial court with an accounting of all assets which the decedent had an interest for the period of January 1, 2006 through January 19, 2007.

{¶11} On October 16, 2008, appellant filed the accounting of all assets for the requisite period.

{¶12} On January 13, 2009, after obtaining leave of court, appellee filed an amended complaint, adding Home Savings as a defendant.[2] With respect to Home Savings, the amended complaint alleged the following: on or about November 8, 2006, Mr. McCardle presented a check made payable to the order of the decedent in the amount of $53,654.04; the check represented funds to which the decedent was solely entitled; the endorsement on the check, purported to be that of the decedent, was forged by Mr. McCardle; Home Savings wrongfully and/or negligently conveyed the check to an unauthorized individual when it deposited the check into a checking account that was opened on or about November 8, 2006, solely in the name of Mr. McCardle; Home Savings wrongfully and/or negligently conveyed funds of the decedent to an unauthorized individual when it permitted Mr. McCardle to withdraw $5,000 from the account on or about November 15, 2006, as well as $15,000 and $33,645.57 on or about November 20, 2006; and the acts of appellant and Mr. McCardle were willful, wanton, malicious, oppressive, and undertaken with the intent to defraud.

{¶13} Appellant filed an answer to the amended complaint on January 20, 2009. Home Savings filed an answer on March 20, 2009.

{¶14} A hearing was held on June 30, 2009.

{¶15} Pursuant to its October 23, 2009 judgment entry, the trial court found appellant, Mr. McCardle, and Home Savings guilty of concealing, embezzling,

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2. Home Savings is not a named party to the instant appeal.

conveying away, or having been in the possession of monies of the estate of the decedent. The trial court rendered judgment in favor of appellee in the amount of $53,654.04 for monies concealed or embezzled together with a 10 percent penalty and all costs of the proceedings. The trial court found appellant, Mr. McCardle, and Home Savings jointly and severally liable. It is from that judgment that appellant filed a timely appeal, asserting the following assignment of error for our review:

{¶16} "The trial court committed error in finding that Kathy M. McCardle, (nka Kathy M. Cearfoss) had knowledge of and was a participant in the transaction whereby Gregory McCardle Sr. embezzled the proceeds of an annuity belonging to decedent, and that she was therefore jointly and severally liable to the estate for the same, due to a lack of sufficient credible evidence."

{¶17} In her sole assignment of error, appellant argues that the trial court erred, due to a lack of sufficient and credible evidence, in finding that she had knowledge of and participated in the transaction in which Mr. McCardle embezzled the proceeds of the decedent's annuity.

{¶18} "We review the probate court's decision under an abuse of discretion standard of review." *Estate of Niemi v. Niemi*, 11th Dist. No. 2008-T-0082, 2009-Ohio-2090, at ¶35, citing *Levy v. Thompson*, 2d Dist. No. 20641, 2006-Ohio-5312, at ¶18. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶19} "*** [T]he probate court has jurisdiction to hear and determine actions involving the misuse of a power of attorney, pursuant to R.C. 2101.24(B)(1)(b)." *Estate of Niemi*, supra, at ¶36.

{¶20} "The holder of a power of attorney has a fiduciary relationship with his or her principal. *Gotthardt v. Candle* (1999), 131 Ohio App.3d 831, 835, ***. Such a relationship is 'one in which special confidence and trust is reposed in the integrity and fidelity of another (***) by virtue of this special trust.' *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78, ***." *In re Estate of Anderson* (Dec. 15, 2000), 11th Dist. No. 99-T-0160, 2000 Ohio App. LEXIS 5928, at 4. (Parallel citations omitted.)

{¶21} "Where a confidential or fiduciary relationship exists between a donor and donee, such as between a principal and an attorney-in-fact, the transfer is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. In such circumstances, a presumption arises that the transfer is invalid and the burden of going forward with the evidence shifts to the transferee to demonstrate the absence of undue influence. However, the party attacking the transfer retains the ultimate burden of proving undue influence by clear and convincing evidence. *Ament v. Reassure Am. Life Ins. Co*., 8th Dist. No. 91185, 180 Ohio App.3d 440, 2009-Ohio-36, at ¶38, ***." *Estate of Niemi*, supra, at ¶38. (Parallel citation omitted.)

{¶22} Sufficiency is a legal term of art describing the legal standard which is applied to determine whether the evidence is legally sufficient to support the judgment as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. We will not reverse a civil judgment as against the manifest weight of the evidence if it is supported

by any competent credible evidence that goes to each element of the case. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. See, also, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶23} As an appellate court, we evaluate the findings of the trial court under a presumption that those findings are correct. *Seasons Coal*, supra, at 80. This is because the trier of fact is in the best position "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id.

{¶24} While "[a] finding of an error in law is a legitimate ground for reversal, *** a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal*, supra, at 81. As a reviewing court, we are unwilling to second guess the trial court's determination where there is competent, credible evidence to support it, nor are we willing to weigh the credibility of the witnesses. *Karnofel v. Girard Police Dept*., 11th Dist. No. 2004-T-0145, 2005-Ohio-6154, at ¶19.

{¶25} In a civil manifest weight of the evidence analysis, a reviewing court may not simply reweigh the evidence and substitute its judgment for that of the trier of fact. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶40. Cf. *Thompkins*, supra, at 387 (in the criminal context, a reviewing court's role in analyzing a criminal manifest weight of the evidence argument is that of the """thirteenth juror""").

{¶26} In the case at bar, the trial court properly held that a confidential relationship existed between the decedent, appellant, and Mr. McCardle. As such, the burden shifts to the donee to show by clear and convincing evidence the donor's intention to make a gift. Here, that presumption was never rebutted by appellant. There

is no evidence in the record to establish that the decedent intended to gift the proceeds from the annuity to appellant and/or to Mr. McCardle.

{¶27} The trial court relied upon competent and credible evidence by holding that appellant knowingly participated with Mr. McCardle in the transaction at issue. Appellant utilized the power of attorney in order to benefit herself as well as Mr. McCardle. Also, appellant admitted that she took it upon herself to insert the decedent's initials. Furthermore, Mr. McCardle testified that appellant forged the decedent's signature on the power of attorney, which was used for purposes of liquidating the annuity.

{¶28} In addition, the record establishes that the check at issue was mailed to an address that appellant shared with Mr. McCardle. Again, Mr. McCardle testified that appellant forged the decedent's endorsement. Also, appellant's sister, Deborah Heffner, testified that appellant called her in November or December of 2006, and informed her that she had cashed in the annuity.

{¶29} Although appellant stresses that she was in an alleged abusive relationship with Mr. McCardle, we note that she herself testified that the decedent's illness was the reason she was distraught when she forged her mother's initials onto the power of attorney document.

{¶30} There exists relevant, competent and credible evidence upon which the trial court could have based its judgment that appellant had knowledge of and participated in the conversion of the annuity proceeds. We determine that there is nothing to suggest that any of the evidence is legally insufficient to support the trial court's judgment or that the trial court's judgment is based on an irrational view of the

evidence. The trial court evaluated competent and credible testimony and documents from both sides and drew a conclusion. As such, we sustain its judgment.

{¶31} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.