

STATE OF MICHIGAN
COURT OF APPEALS

In re JENNIE F. JOHNSON TRUST.

BRUCE E. COOK, GARY E. COOK, and
SYLVIA COOK MCCLAIN,

UNPUBLISHED
October 16, 2007

Petitioners-Appellants,

v

No. 265938
Cheboygan Probate Court
LC No. 04-012435-TV

TERESA SCHEPPERLEY, Trustee, DAVID
SCHEPPERLEY, Successor Trustee, CURTIS E.
COOK, and E. J. CHANEY,

Respondents-Appellees.

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

This case involves the validity of several 2002 amendments to the Jennie F. Johnson Trust. The amendments altered the manner in which Jennie Johnson's estate was to be distributed after her death, primarily to the benefit of respondents Curtis Cook and E. J. Chaney, and to the detriment of petitioner Bruce Cook. The amendments also involved the naming of respondents Teresa and David Schepperley as successor trustees, in place of Bruce Cook. Petitioners also challenge Johnson's 2002 conveyance of a parcel of real property to the Schepperleys after they were named as successor trustees. Following a bench trial, the trial court issued a thorough opinion rejecting petitioners' claim that the trust amendments and conveyance were invalid because of undue influence or misrepresentations by respondents. Petitioners appeal as of right, and we affirm.

Jennie Johnson died on December 20, 2003, at the age of 100 years. Johnson had held her assets in a trust since 1986. For many years her nephew, Bruce Cook, was named as successor trustee to succeed Johnson once she was no longer able to serve as trustee. Bruce and his wife Kim lived near Johnson in the Cheboygan area and helped care for her in her later years. Until 2002, Bruce was to receive a substantial portion of the trust estate upon Johnson's death. Petitioners Gary Cook and Sylvia Cook McClain are Bruce's siblings.

In 2000 or 2001, Curtis Cook, another nephew of Johnson and petitioners' cousin, retired and began spending more time in the Cheboygan area. As a result, he was able to spend more

time with Johnson and assumed some of the personal duties that Bruce and his wife formerly performed for Johnson. During a seven-month period from February to August 2002, Johnson made a series of amendments to her trust, shortly before entering hospice care due to her declining health. The changes were prepared by Johnson's long-time attorney, John Clark, who was also experiencing health problems during this period. As a result of the amendments, Bruce was removed as Johnson's successor trustee and replaced with the Schepperleys, who were long-time neighbors and friends of Johnson. Additionally, although the terms of Johnson's trust previously provided that Bruce would receive a substantial portion of the trust estate, after the last amendment Bruce was to receive only \$1,250, and the majority of the estate was to be distributed instead to Curtis and Johnson's stepson, respondent E. J. Chaney. During this seven-month period, Johnson also conveyed a parcel of real property to the Schepperleys for only \$50.

Petitioners challenged the last four amendments to Johnson's trust and the transfer of property to the Schepperleys on the grounds that Curtis and Teresa exerted undue influence over Johnson, and also engaged in fraud or misrepresentation, to affect the changes to the trust. However, as we previously noted, after conducting a bench trial and making extensive findings of fact, the trial court rejected petitioners' claims.

I. Standard of Review

This Court reviews a trial court's findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Erickson, supra* at 351. "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *Id.*

Before we dive headfirst into the specific challenges raised by appellants to the trial court's decision, we first recognize that in this fact intensive case the trial court reviewed all pertinent exhibits, and listened to and watched all of the live witnesses. The trial court's opinion reveals that it was cognizant of all the arguments made, and addressed those through a detailed analysis of the law and facts as it found them. In light of all of this, and noting the deferential standard of review, appellants have a difficult (though not impossible) hurdle to overcome in convincing us that the trial court's findings were clearly erroneous. See, for example, *Ward v State*, 274 Ga App 511, 512; 618 SE2d 154 (2005), *United States v Proffit*, 304 F3d 1001, 1009 (CA 10, 2002) and *Clark v Golden Rule Ins. Co.*, 887 F2d 1276, 1278 (CA 5, 1989), each of which recognize, in differing contexts, how difficult it is to overcome the clearly erroneous standard of review. With this standard in mind, we now turn to appellants' arguments.

II. Undue Influence

Petitioners first argue that the trial court erred in finding that Johnson's trust amendments and conveyance of real property to the Schepperleys was not the result of undue influence. We disagree.

Undue influence is established by showing "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." *In re Erickson, supra* at 331. However, "[m]otive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient." *Id.* See also *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003). A presumption of undue influence arises when the evidence 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, supra* at 331.]

The benefit received by the fiduciary must arise from the specific transaction claimed to have been the subject of undue influence. *Id.* at 332. Where the presumption is established,

it creates a 'mandatory inference' of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion. [*In re Peterson Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1992).]

Important to this case is the proposition that the fact that a testator was advised, persuaded, or solicited does not prove undue influence so long as she was capable of acting on her own motives and so long as she remains free to make her own decision. *In re Hannan's Estate*, 315 Mich 102, 123; 23 NW2d 222 (1946). Undue influence will only vitiate a will where the testator's free agency is overcome so that the will represents not the testator's desires, but those of someone else. *Id.*

In this case, the trial court found that the presumption of undue influence applied because Teresa and Curtis assisted Johnson in her personal and business affairs later in her life and had confidential relationships with Johnson. Teresa and Curtis also obviously benefited from the transactions. However, the court also found that the evidence rebutted the presumption of undue influence because (1) Johnson sought out independent legal advice, (2) Teresa and Curtis were only involved in assisting Johnson with minor tasks in her estate planning, such as delivering documents, and they had no discretion in handling Johnson's affairs, as they were only acting as directed by Johnson, (3) Johnson was strong willed and mentally competent to handle her own affairs, and (4) Johnson did not completely disinherit Bruce, but left him a sum of money similar to what she left to Bruce's siblings.

Each of these findings has more than adequate support in the record. In rendering its decision, the trial court articulated specific facts supporting its findings, such as Johnson's reliance on her attorney, John Clark, for advice; the 2002 video which clearly revealed Johnson's sound mind, strong will, and actual intentions, and the ultimate gift granted to Bruce. Although petitioners raise some evidence that if accepted could have resulted in a different outcome, we need more than conflicting evidence to be left with a definite and firm conviction that the trial

court clearly erred. *Scott v Allen Bradley Co*, 139 Mich App 665, 668-669; 362 NW2d 734 (1984).¹ Consequently, the trial court's decision must be affirmed.

Although we have no hesitation in affirming the trial court's thorough and thoughtful opinion, we briefly address some of the specific arguments raised by petitioners. In the end, however, we must affirm each of the trial court's findings because, as we have repeatedly noted, there was record support for its findings, which we cannot overturn by reviewing the "dry records" on appeal. *Morriss v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998).

For example, petitioners contend that Johnson's declining mental and physical health made her susceptible to being unduly influenced. In support, petitioners cite many diary entries made between 1998 and 2001. This evidence certainly exists, but so does the evidence accepted by the trial court of her overall sound mental and physical health, evidence which came through the testimony of Dr. Drogowski and numerous medical assistants and caregivers that were responsible for Johnson's well-being up to her death. The 2002 video of Johnson – made after all of the trust amendments – also persuaded the trial court that not only was Johnson's overall health satisfactory, but most especially was her mind. And with this record evidence supporting the trial court's findings, we cannot say that it clearly erred.

This finding is also crucial to the remainder of petitioners' arguments. No matter whether it is Teresa and Curtis' actions towards Johnson that petitioners claim resulted in the 10th - 13th amendments, or the transfer of the lot to the Schepperleys, the simple fact is that the trial court found that although Johnson was influenced by Curtis and Teresa, it also found that she was not unduly influenced. And, under *In re Hannan's Estate* and its progeny, evidence of persuasion is not enough to establish that the amendments were the result of undue influence. *In re Hannan's Estate, supra*; *In re McIntyre*, 355 Mich 238, 248; 94 NW2d 208 (1959).

Rather than undue influence, the trial court found that the primary reason for Bruce's limited share was that Johnson was very upset that Bruce had questioned Johnson's mental competency in the past, and as recently as 2002 in an email that Bruce sent to the Schepperleys.²

¹ We also note that petitioners have not argued that the trial court applied an incorrect legal standard to this case.

² Petitioners assert that the 2002 email from Bruce to the Schepperleys does not refer to Johnson's competency, and that Johnson appeared to be confused about the role Bruce had assumed for her over the years when she decided to appoint Teresa as her trustee. But even though Bruce did not directly refer to Johnson's competency in the email, it was not unreasonable for Johnson to conclude from the e-mail's content that Bruce was questioning her decision to name the Schepperleys as successor trustees and allowing them to assume other fiduciary responsibilities for Johnson, particularly considering Bruce's previous attempt to question Johnson's competency in 1999. The trial court did not clearly err in finding that Johnson reasonably could have concluded on her own, based on Bruce's actions in the past and his email, that he was again questioning her competency. Indeed, this was later borne out when Bruce filed a petition later in 2002, requesting appointment of a guardian and conservator for Johnson.

Although Bruce and his family had a good relationship with Johnson before 2002, we find no clear error in the trial court's finding that it was Bruce's own conduct in 2002 (visiting less frequently and questioning Johnson's competency) that led to Johnson amending her trust to award less property to Bruce, rather than because of any undue influence by Curtis or the Schepperleys.

With respect to petitioners' argument that Curtis bad-mouthed Bruce and his wife, the trial court agreed that Curtis probably played a role in influencing Johnson about her feelings toward Bruce because Curtis often disparaged Bruce. However, the trial court found that Johnson made the changes to the trust after exercising her own independent judgment and making her own decision, and that any input by Curtis or the Schepperleys did not arise to a level of influence sufficient to overcome Johnson's own will. Moreover, the court specifically found that Johnson did not tell either Bruce or Curtis about changing trustees before this change was made, but did it on her own so that someone outside the family would be in control. Indeed, there was evidence that Johnson first asked her accountant to serve as trustee, but he declined.

Petitioners alternatively argue that Teresa and Curtis made misrepresentations to Johnson about Bruce's character and intentions, which caused Johnson to make the amendments and property transaction in question. See *In re Spillette Estate*, 352 Mich 12, 17; 88 NW2d 300 (1958); *In re Hannan's Estate*, *supra* at 126; and *In re Barth's Estate*, 298 Mich 388, 411-412; 299 NW 118 (1941).

During trial, petitioners claimed that Curtis, in particular, and Teresa, to a lesser degree, made false statements to Johnson regarding Bruce's drinking, sale of drugs, greed, misuse of the house in Mullett Township and future plans for the property, whether he discouraged people from visiting Johnson, and whether he had plans for contesting Johnson's competency. In its decision, the trial court found no proof of fraud or misrepresentation with regard to Bruce's plans to contest Johnson's competency because Johnson came to that conclusion based on Bruce's own conduct. The court also did not find that statements regarding what Bruce and his wife planned to do with Johnson's property after her death influenced any of Johnson's decisions. Any statements that Curtis or Teresa may have made may have reinforced Johnson's own beliefs, but were not sufficient alone to influence her decision to change her estate. The trial court found that Johnson made the various changes to her trust based on her own judgment, for other valid reasons, often after discussing the changes with her attorney, and that Curtis' and Teresa's statements were not the reason that Johnson eventually reduced Bruce's share of the estate. Rather, Johnson decided to reduce Bruce's share because she believed that Bruce was questioning her mental competency, a conclusion she reached on her own based on Bruce's prior conduct in 1999 and his 2002 email to the Schepperleys. Accordingly, the trial court did not clearly err in rejecting petitioners' claim of misrepresentation. See *In re Hannan's Estate*, *supra* at 126-127.

In sum, after our review of the “dry record,” we do not have a definite and firm conviction that a mistake was made in this case. *Morris, supra* at 271. The trial court fulfilled its obligation in this case, deciding all the issues presented in a thorough manner.

Affirmed.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Christopher M. Murray