STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of DONNA MAE KURRLE, Deceased.

JEFFREY S. KAMIDOI, Personal Representative of the Estate of DONNA MAE KURRLE, Deceased,

Petitioner-Appellee,

v

BRIAN KAMIDOI,

Respondent-Appellant.

UNPUBLISHED
March 31, 2011

No. 295841
Genesee Probate Court
LC No. 09-185038-DE

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Respondent appeals by right the probate court's order setting aside a quitclaim deed and corresponding will executed by his mother, the decedent, on November 21, 2008. The executed documents purported to transfer the decedent's home and the entirety of her estate to respondent, effectively disinheriting the decedent's other two sons. Petitioner, one of the decedent's other sons, filed a petition to set aside the documents, in part, on the ground of undue influence. We affirm.

We review the probate court's factual findings for clear error, and its conclusions of law de novo. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

Respondent first challenges the probate court's finding that he, as the decedent's son, tenant, and joint account holder, had a fiduciary relationship with the decedent. Respondent correctly notes that a parent-child relationship, in and of itself, does not establish a fiduciary relationship or its corresponding presumption of undue influence. *Mannausa v Mannausa*, 370 Mich 180, 184; 121 NW2d 423 (1963). "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." *Id*. In general, "[a] fiduciary relationship . . . exists when there is a reposing of faith,

confidence, and trust and the placing of reliance by one on the judgment and advice of another." *Farm Credit Services, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998).

In support of his position that no fiduciary relationship existed, respondent relies heavily on *Salvner v Salvner*, 349 Mich 375, 383-384; 84 NW2d 871 (1957), in which the plaintiff sought to have set aside certain conveyances to his children, the defendants, on the basis of undue influence. Our Supreme Court held in relevant part that no fiduciary relationship existed between the plaintiff and the defendants even though the defendants "unquestionably did many things to assist their father, a perfectly natural course of conduct in view of his physical condition." *Id*. at 384. Instead, the critical issue in that case was whether the plaintiff was governed by the defendants' advice or dependent on them to make decisions. *Id*. According to the *Salvner* Court, the plaintiff was not so governed; he capably made decisions on his own behalf and refused to act against his own inclinations. *Id*. Accordingly, no fiduciary relationship existed because the defendants' assistance "amounted to no more than would be prompted normally by the existing relationship." *Id*.

We note that the evidence tending to indicate the existence of a fiduciary relationship in the present case extends far beyond a child's friendly assistance to a parent. Unlike in *Salvner*, the evidence in this case strongly suggests that the decedent could not make sound decisions at the time that she executed the quitclaim deed and corresponding will, and that there existed a reposing of faith, confidence, and trust in respondent such that the decedent relied on his judgment and advice.

The decedent made respondent her joint bank account holder, trusting him to make financial decisions on her behalf should she become unable. Respondent also resided with the decedent, indicating a certain level of trust, and the decedent relied on respondent's presence so that she would not be alone. Moreover, although not apparently taken into consideration by the probate court, we note that the authority attendant a power of attorney creates a fiduciary relationship between the agent and the principal. *In re Estate of Susser*, 254 Mich App 232, 236; 657 NW2d 147 (2002). As the holder of the decedent's financial power of attorney, respondent agreed to act only for the decedent's benefit, and a fiduciary relationship arose as a matter of law. *Id*. The probate court did not err by determining that a fiduciary relationship existed between respondent and the decedent in this case.

As our Supreme Court explained in *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), the existence of a fiduciary relationship is only the first element necessary to give rise to a presumption of undue influence:

> 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.

As indicated previously, the probate court properly determined that there existed a fiduciary relationship between the decedent and respondent in this matter. In addition, although not contested on appeal, we note that the other two elements are also established in this case. First,

respondent clearly benefited from the transactions at issue, which transferred the decedent's home and the entirety of her estate to him, effectively disinheriting the decedent's other two sons. Respondent also had an opportunity to influence the decedent's decision to execute the disputed documents. Despite the decedent's compromised mental state, respondent admits that he obtained a notary and a witness and stood by as the decedent, suffering from confusion, transferred her home and the entirety of her estate to him. In addition, respondent had resided with the decedent for more than 13 years preceding her death. Based on the totality of the circumstances, we hold that sufficient facts existed to give rise to a rebuttable presumption of undue influence, and the probate court did not clearly err in this regard.

The parties also dispute the appropriate burdens of proof in this case. Citing *Kar*, 399 Mich at 542, respondent argues that the presumption of undue influence shifts only the burden of production to the proponent of the contested transaction, leaving the ultimate burden of persuasion at all times with the contestant. We agree with this characterization, but wish to emphasize that "the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence." *Id*. The question, then, is whether respondent presented sufficient rebuttal evidence.

The establishment of a presumption of undue influence "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." *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985). "However, the burden of persuasion remains with the party asserting [undue influence]. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion." *Id*.

Petitioner argues that, to overcome the presumption of undue influence, respondent was required to prove that he (1) was not a fiduciary, (2) did not benefit from the transaction, or (3) did not have an opportunity to influence the decedent's decision in the transactions. In essence, petitioner argues that the only way to rebut the presumption of undue influence is to show that the presumption has not arisen in the first instance. But petitioner misinterprets the law of presumptions. A presumption is a fact that is presumed true if certain other facts are first established. See Black's Law Dictionary (7th ed) (defining the term "presumption"); see also *Gadigian v City of Taylor*, 282 Mich App 179, 186-187; 774 NW2d 352 (2008), vacated on other grounds 486 Mich 869 (2010). To rebut a presumption, the party against whom the presumption applies must introduce evidence that the presumed fact is false—*not* that the facts forming the basis of the presumption are false. Thus, we must determine whether respondent offered sufficient evidence to overcome the presumed fact of undue influence.

As stated in *Kouri v Fassone*, 370 Mich 223, 233; 121 NW2d 432 (1963):

> [I]t is not possible to formulate a single definition embracing all forms of undue influence. The law is settled that we view each case largely upon its own circumstances. Particularly in search of undue influence, we look at the whole spectrum of circumstances, not at [one] facet. The ultimate question is whether the disposition was voluntary.

Another useful definition is provided in *In re Estate of Willey*, 9 Mich App 245, 255; 156 NW2d 631 (1967):

> Undue influence is the overpowering of the volition of the testator by another person whereby what purports to be the testator's will is in reality the will of the other person. While there need be no violence or threat of physical force, there must be unreasonable pressure upon the mind of the testator, amounting to psychological or moral coercion, compulsion, or constraint, so great that his free agency is destroyed and the volition of the person applying the pressure is substituted. To be actionable, the unreasonable and improper pressure must result in a will which the testator would not otherwise have made. Such a testament does not represent the testator's true will at all, but, in reality, represents the will of the person who influenced him. [Citations omitted.]

To support his argument that the presumption of undue influence has been overcome in this case, respondent simply argues that there is no evidence that he exerted pressure upon the decedent through psychological or moral coercion, compulsion, or constraint such that she lacked free will. However, the mere absence of evidence supporting a presumed fact does not rebut that fact. Instead, rebuttal evidence requires some affirmative showing. Rather than merely assert a lack of evidence of undue influence, respondent was required to produce affirmative evidence proving the presumed fact to be false. See *Kar*, 399 Mich at 542. Because defendant offered no proof in this regard, petitioner carried his ultimate burden of persuasion on the issue of undue influence as a matter of law, *id.*, and the "'mandatory inference' of undue influence" remained intact, *Mikeska Estate*, 140 Mich App at 121.

Respondent's failure to rebut the presumption of undue influence aside, the evidence presented at trial fully supports the probate court's conclusion that the executed documents were the product of undue influence. The testimony suggested that respondent purposely concealed the execution of the documents from his family members and thereafter entered into an agreement to keep the executed documents a secret. Numerous witnesses testified regarding their belief that the executed documents were the result of respondent's manipulation of the decedent, and respondent's apparent remorse—hanging his head and stating, "it's too late now"—tended to support this testimony. The evidence plainly established that, rather than desiring to transfer all of her property to respondent, the decedent wished to divide her estate equally among her three sons. We must defer to the probate court's special opportunity to assess the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); see also MCR 2.613(C).

The probate court did not clearly err by finding that a fiduciary relationship existed between respondent and the decedent. Nor did the probate court err by determining that a presumption of undue influence arose on the facts of this case or that respondent failed to present sufficient rebuttal evidence. Given the "'mandatory inference' of undue influence" that arose here, *Mikeska Estate*, 140 Mich App at 121, we cannot say that the probate court erred by setting aside the quitclaim deed and corresponding will dated November 21, 2008, on the ground that they were the product of undue influence.

Affirmed. As the prevailing party, petitioner may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto