

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of LAVINIA
LIGHTSTEIN, Deceased.

GLENDY DOSS KLONER
AND FRANK DOSS II,

Petitioners-Appellants/Cross-Appellees,

v

UNPUBLISHED
December 30, 1996

No. 169633
LC No. 91-215199-SE

ERIC FREEDMAN, Personal Representative of the
Estate of Lavinia Lightstein, deceased,

Respondent-Appellee/Cross-Appellant.

Before: Young, P.J., and Holbrook, Jr. and J.R. Ernst,* JJ.

PER CURIAM.

Petitioners appeal as of right from the probate court's opinion and order denying their petition to set aside the residuary clause of decedent's will. Respondent cross appeals the court's denial of sanctions. We affirm.

Petitioners argue that the probate judge erred when finding that respondent did not exert undue influence over decedent. Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). 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

* Circuit judge, sitting on the Court of Appeals by assignment.

witnesses, their testimony, and other influencing factors not readily available to the reviewing court. *Id.*; MCR 2.613(C).

Petitioners are decedent's niece and nephew and her only surviving relatives. Petitioners allege that respondent gained control over decedent's business and personal affairs over a period of time. Then, when decedent executed her will, respondent allegedly exercised this influence over decedent which resulted in his designation as residual beneficiary and personal representative of the estate. According to the terms of decedent's August 7, 1988 will, petitioners would receive modest cash gifts whereas respondent, as residual beneficiary, would receive the bulk of the estate.

Before the hearing, the probate court held that the presence of a fiduciary relationship between decedent and respondent created a rebuttable presumption of undue influence. See *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). After reviewing the evidence, however, the court found the presumption was rebutted. If a court finds evidence sufficient to rebut the presumption, the mandatory inference created by the presumption is transformed into a permissible inference of undue influence. *Id.* at 542. Nevertheless, the party alleging undue influence retains the ultimate burden of persuading the trier of fact regarding its existence. *Id.*

The decedent executed three wills prior to her death in 1991. The first will was executed in 1986, the second in 1987, and the last in 1988. All three wills named defendant as the residual beneficiary of the estate. Two attorneys, Robert Essick and Homer Underwood, testified that decedent hired them to assist her in preparing her will. Mr. Essick assisted in the preparation of the 1986 will, and Mr. Underwood assisted with the preparation of the 1988 will. Both attorneys testified that decedent spoke about distributing her assets with clarity and conviction. Moreover, Mr. Underwood testified that he first met only with decedent, and while respondent accompanied decedent to subsequent meetings, either respondent was not present when Mr. Underwood and decedent discussed the terms of her will, or if present, he did not participate in the discussion. In addition, several of decedent's neighbors and friends testified that decedent was determined, independent, and opinionated.

This evidence supports the probate court's finding that when executing her wills, decedent received independent legal advice and possessed a strong mental state. Compare *Kar, supra*, 399 Mich 542-543. The evidence also supported the court's additional findings that respondent had limited involvement in decedent's personal affairs and the absence of a close relationship between petitioners and decedent. As did the trial court, we also find significant the fact that the bequests to the parties in this matter did not materially alter among the three wills. Therefore, the court properly held that petitioners failed to prove undue influence.

In affirming the trial court's holding, we find it unnecessary to address petitioners' claim that the trial court erred when ruling that proof of undue influence would invalidate the entire will as opposed to the residuary clause alone, as petitioners' advocated.

In his cross appeal, respondent argues that he was entitled to attorney's fees because petitioner brought frivolous claims to harass respondent, which had no reasonable basis in fact. See MCL 600.2591; MSA 27A.2591; MCR 2.114(E),(F). We disagree. Petitioners, as decedent's only surviving relatives and devisees, had a legitimate interest in the assets of the estate. Also, by presenting evidence of a fiduciary relationship, petitioners produced evidence which, at a minimum, created an inference sufficient to support a claim of undue influence. *Kar, supra*, 399 Mich 541. Accordingly, the trial court did not err when denying respondent's motion for sanctions.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Donald E. Holbrook, Jr.
/s/ J. Richard Ernst