STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of CHARLES HENRY SHOURDS, a/k/a Charles H. Shourds, a/k/a Charles Shourds, Deceased.

MILDRED A. ALLSHOUSE, MARGARET H. STITES, and DONALD C. SHOURDS,

Petitioners - Appellees,

v

RONALD J. SHOURDS, Personal Representative,

Respondent - Appellant.

UNPUBLISHED

January 21, 1997

No. 171328

Lenawee Circuit Court
LC No. 00038981

Before: Reilly, P.J. and White and P.D. Schaefer,* JJ.

PER CURIAM.

Respondent appeals as of right a probate order requiring him to pay $66,211.15 to the Estate of Charles Henry Shourds. The jury found that respondent had unduly influenced Shourds with respect to three transactions, but found no undue influence by respondent with respect to a fourth transaction in the amount of $55,908.29. We affirm.

Respondent argues that the trial court erred in denying his motion for a directed verdict on the claim of undue influence. He also argues that the trial court erred in submitting the matter of the $55,908.29 to the jury. We disagree.

When reviewing the denial of a motion for a directed verdict, we examine the testimony presented up to the time the motion was made and all legitimate inferences that may be drawn therefrom in the light most favorable to the nonmoving party and determine whether there was a material issue of

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

fact. *In re Leone*, 168 Mich App 321, 324; 423 NW2d 652 (1988). If there are material issues of fact upon which reasonable minds could differ, the matter is one properly submitted to the jury, and neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. *Id.*

Respondent argues that petitioners failed to establish a prima facie case of fraud or undue influence. Undue influence may be shown where the grantor was subjected to threats, misrepresentations, 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 Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). Proof of motive, opportunity, or ability to control, in the absence of evidence that it was exercised, is not sufficient. *Id.* A presumption of undue influence attaches to a transaction were the evidence establishes: (1) the existence of a confidential or fiduciary relationship between the testator and the fiduciary; (2) that the fiduciary, or an interest represented by the fiduciary, benefits from the transaction; and (3) that the fiduciary had an opportunity to influence the testator's decision in that transaction. *In re Peterson Estate,* 193 Mich App 257, 260; 483 NW2d 624 (1992).

On August 12, 1986, a money market account in the amount of $93,166.85 was opened in Shourds' and respondent's names, as joint tenants. Another account, in the amount of approximately $36,000 was opened in Shourds' and Allshouses' names. Allshouse testified that she paid some of her father's bills out of this account, although more often he provided her with money orders or checks to pay his bills, and that she never used the account for personal purposes.

Shourds' will, dated August 21, 1986, equally divided his estate among his children, (petitioners, respondent and another son who is not a party to this action).[1]

On January 25, 1988, Shourds transferred $50,000 from the money market account in his and respondent's names to a certificate of deposit in Shourds' name, in trust for respondent.

From the summer of 1986 until about April 1988, petitioners Allshouse and Stites, and Allshouse's daughter, assisted Shourds with the cleaning and upkeep of his apartment. Around April 1988, a rift developed between Allshouse and respondent, apparently because respondent told Shourds that Allshouse would have him placed in a nursing home. Allshouse testified that respondent unilaterally decided to assume all responsibility for Shourds, changed Shourds' phone number, and subsequently impeded attempts by petitioners to communicate with Shourds, by phone, mail, and in person. Allshouse testified that respondent had Shourds' phone number changed to an unlisted number. Allshouse's daughter, who lived in the same apartment building as Shourds, testified that respondent intercepted Shourds' mail and that Shourds did not know his own phone number because respondent would not let him see the phone bill. Allshouse tried to contact Shourds by mail, but her letters were returned marked "address unknown." Allshouse testified that respondent led Shourds to believe that petitioners intended to place him in a nursing home. Several of the petitioners testified that Shourds would not let them visit him because he feared respondent's reaction, or that if he would let them in his apartment he would ask them not to let respondent know they had been there.

On April 1, 1988, the account in Shourds' and Allshouse's names was closed and the balance was transferred to an account in Shourds' and respondent's names. Respondent signed and cashed a check from this account prior to Shourds' death in the amount of $5,000, and, after Shourds' death, signed a second check in the amount of $4,791.97, closing the account. Both of these transactions were at issue in this case. Respondent claimed at trial that the $5,000 was used to pay his father's bills. He was cross-examined regarding the lack of documentation as to these payments.

The $50,000 certificate of deposit matured on July 25, 1989, and two days later Shourds obtained a check in the amount of $55,908.28, and cashed the check on the same day. This transaction is one of the four at issue. Respondent testified he took Shourds to the bank and was aware that Shourds left the bank with that amount in cash. Respondent testified that he was aware that Shourds squirreled away money, and that when his father died and he cleaned out the apartment, he found only $300.00.

On December 2, 1989, Shourds was hospitalized. Prior to his death, respondent closed the money market account and transferred the balance of $56,419.18 to an account in his and his wife's names. This transaction was also at issue in this case. Shourds died on January 5, 1990.

From the time of the rift between the parties in 1988, when respondent assumed responsibility for his father, respondent and his wife drove Shourds to the doctor, to the grocery, to the bank, and to his friends' houses. Respondent alone handled Shourds' financial matters.

Viewing the evidence in the light most favorable to petitioners, and drawing all legitimate inferences therefrom, we conclude there was a material factual dispute whether respondent unduly influenced Shourds with respect to the transactions at issue. Accordingly, the trial court did not err in denying respondent's motion for a directed verdict.

Respondent also argues that the trial court erred in submitting the matter of the $55,908.28 withdrawal to the jury. We disagree. Given the testimony regarding respondent's control of Shourds' affairs, there was sufficient evidence to submit the issue to the jury. Further, respondent is not an aggrieved party because the jury found in his favor with respect to the $55,908.28, see MCR 7.203(A) and *Ford Motor Co v Jackson (On Rehearing),* 399 Mich 213, 226; 249 NW2d 29 (1976), and there is no reason to believe that the verdict was a compromise tainted by any unfair submission of the matter of the missing funds to the jury.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Helene N. White
/s/ Philip D. Schaefer

[1] The attorney who drafted the will testified that he discussed Shourds' assets with him, that at the time he was working under the assumption that the bank accounts were in Shourds' name alone, although he would not be surprised to learn that the accounts were in joint names, and that he was working under the impression that the bank accounts were a part of the estate and would be divided between the children.