STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of EMERY C. KAUFMANN, Deceased.

SHIRLEY J. KIRBY and JACK L. LINTNER, personal representative,

Petitioners-Appellants,

v

ROGER KAUFMANN,

Respondent-Appellee.

UNPUBLISHED
April 18, 1997

No. 188359
Branch Probate Court
LC No. 92-029426

Before: Reilly, P.J., and Wahls and N.O. Holowka,* J.

PER CURIAM.

Petitioners appeal as of right an order dismissing the petition to determine title to real property and for an accounting of profits from real property and for an accounting of assets from February 15, 1990 to January 30, 1991, and an order granting the petition to amend and denying relief requested. We affirm.

On February 15, 1990, decedent, a Michigan resident, executed a power of attorney in Indiana nominating his son, the respondent, as his attorney-in-fact. On January 29, 1991, a day before decedent's death, respondent transferred decedent's real estate to himself.

Petitioners first argue that the probate court erred in finding that petitioners had not sustained their burden of proof of showing that decedent was incompetent when he executed the power of attorney nominating respondent as his attorney-in-fact. A probate court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C); *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." *Id.*

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

Here, even though the evidence presented indicates that decedent was confused on the day the power of attorney at issue was executed, petitioners failed to demonstrate that decedent did not have the capacity to execute such a document. Petitioners must demonstrate that decedent was of unsound mind when the power of attorney was executed and that because of the unsoundness he had no reasonable understanding of the nature or terms of the contract. *Erickson, supra* at 332. "Where there is evidence pro and con, much weight should be given to the conclusion reached by the probate judge, who had the opportunity of seeing and hearing the witnesses." *Id*. at 333. This Court is not left with a definite and firm conviction that the probate court's finding was erroneous.

Petitioners next argue that the probate court erred in finding that the power of attorney was validly executed. In Indiana, to be valid, a power of attorney must be signed by the principal in the presence of a notary public. Ind Code Ann § 30-5-4-1. Petitioners rely on the testimony of the notary public listed on the power of attorney at issue that she did not recall witnessing decedent sign the document, and the testimony of respondent that he did not recall who was present when decedent signed the power of attorney form. However, the notary public also testified that she requires that a document be signed in her presence before she notarizes the signature. The probate court concluded that the petitioners had not sustained their burden of proof of showing that the power of attorney was invalid. This Court is not left with a definite and firm conviction that the probate court's finding was erroneous.

Petitioners also argue that the probate court erred in finding that respondent's transfer of assets to himself was not a misuse of the power of attorney. This Court, in *VanderWall v Midkiff,* 166 Mich App 668, 677; 421 NW2d 263 (1988), stated:

> It is well established, though, that powers of attorney are to be construed in accordance with the principles governing the law of agency. One of the principles is that a person who undertakes to act as agent for another may not pervert his powers to his own personal ends and purposes without the consent of the principal after a full disclosure of the details of the transaction.

Based on the evidence presented, one could reasonably conclude that the power of attorney was executed so that respondent could handle decedent's real estate. Moreover, decedent clearly intended that respondent receive the real estate. In his will, decedent included the following provision:

> I have either prior to the execution of this will, simultaneously herewith, or will hereafter make various conveyances of real estate to my son either outright or subject to a life estate in me. I instruct my executor to make no claim to said properties.

Thus, this Court is not left with a definite and firm conviction that the probate court's determination that petitioners failed to establish that respondent misused the power of attorney was erroneous.

Affirmed. Respondent being the prevailing party, he may tax costs pursuant to MCR 7.219.

/s/ Maureen Pulte Reilly
/s/ Myron H. Wahls
/s/ Nick O. Holowka