STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CECILIA H. HESSELL,
Deceased.

CAROLYN BIBBINS, Personal Representative,

Petitioner-Appellee,

v

ELLEN JONES, J. DALE COX, ELIZABETH J. LADZINSKI, GAY M. HILL, JAMES D. HILL and GRACE A. DEVELBISS,

Respondents-Appellants,

and

JANET L. BENDOR, ELAINE M. FISHER and LAWRENCE E. HESSELL,

Respondents.

UNPUBLISHED
June 6, 1997

No. 195188
Jackson Probate Court
LC No. 95-311 SE

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Cecilia H. Hessell (decedent) died on September 12, 1994, at the age of eighty-four, leaving an estate valued at approximately $400,000. Respondents petitioned the court to submit to probate decedent's will dated July 31, 1990, which left her estate in equal shares to seven of her nieces and nephews. Petitioner Carolyn Bibbins, one of the nieces named in the 1990 will, objected on the basis that the July 31, 1990, will was nullified by decedent's execution on December 2, 1991, of two wills (one dated and one undated), which left her entire estate to petitioner. The probate court admitted to probate the will dated December 2, 1991. We affirm.

I

Respondents first claim on appeal that the trial court erred in finding that decedent was not unduly influenced by petitioner in the execution of the December 2, 1991, wills. Undue influence on a testator may be established by a showing that the testator was subjected to threats, misrepresentation, undue flattery, fraud, physical or moral coercion sufficient to overpower volition, destroy free agency, and compel the grantor to act against her inclination and free will. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988). A mandatory presumption of undue influence is created where the evidence establishes: (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary; (2) that the fiduciary (or an interest which he represents) benefits from the transaction; and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. *In re Peterson Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1992); *In re Mikeska*, 140 Mich App 116, 120-121; 362 NW2d 906 (1985).

Once these three elements are shown, a "mandatory inference" of undue influence is created, shifting the burden of going forward with the evidence to the person contesting the claim of undue influence; however, the burden of persuasion remains with the party asserting undue influence. *In re Patterson, supra* at 260. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion. *Id*. Whether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact. *Id.* at 261.

With respect to the first element of undue influence, the evidence indicated that there was a confidential or fiduciary relationship between decedent and petitioner. A fiduciary relationship is defined as one founded on trust and confidence by one person in the integrity and fidelity of another. *In re Leone, supra* at 325. In July 1990, petitioner and Elizabeth Ladzinski were named in decedent's power of attorney, and petitioner clearly exercised a considerable control over decedent's finances. Second, petitioner clearly stood to benefit from the transaction because she was named as the sole heir in the 1991 wills. Finally, the evidence presented at trial demonstrated that petitioner had the opportunity to influence decedent because decedent lived with petitioner and was dependent upon petitioner's care. Because respondents presented prima facie evidence of all three elements, there is a mandatory inference of undue influence, and the burden of going forward with the evidence shifts to petitioner. *In re Patterson, supra* at 260.

In addition to the facts presented above, the evidence shows that decedent was very shy and somewhat reclusive, but very good-hearted. Petitioner testified that they always had a good relationship, but they did not become close until decedent came to live with petitioner and her family in July 1990, when she was eighty-one years old. Decedent became ill and had to be hospitalized in late 1990. When she returned to petitioner's home, she initially required full-time care from petitioner because she was bedridden with a feeding tube and catheter. Decedent gradually improved, and was fully recovered by March or April 1991. When decedent was well, she was more self-sufficient and could assist in some household chores, but she could not drive, prepare meals, or independently manage her finances. Decedent also suffered from depression and was treated with medication throughout the

time she lived with petitioner. Decedent was usually with petitioner, and never the left the house outside the company of an immediate family member.

According to petitioner, decedent began talking about changing her will to make petitioner her sole heir after she recovered from her illness. Petitioner believed that the decedent was disenchanted with the other relatives named in the 1990 will because they did not come to visit her frequently. Decedent's other relatives testified that they visited her regularly in 1990 and 1991, but conceded that their visits became less frequent over time. According to those relatives, petitioner alienated them from herself and decedent, without provocation, by failing to return their calls and "making-up excuses" for why they could not visit decedent. However, petitioner maintains that she only became upset with them when they stopped coming to visit decedent. Finally, both of the witnesses to the 1991 wills testified that they did not notice any attempts by petitioner to influence decedent to sign the wills at or around the time of their execution. The witnesses also testified that decedent clearly intended for petitioner to inherit her entire estate.

The trial court's finding that there was no undue influence was not clearly erroneous. *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992). Petitioner clearly had the opportunity to influence decedent and benefited significantly from the new will, but opportunity and motive are not sufficient for a finding of undue influence. See *In re Kenealy's Estate*, 336 Mich 657, 663; 59 NW2d 38 (1953). There were instances in which petitioner's testimony appeared to conflict with other evidence presented at trial; however, determining the credibility of witnesses is a matter for the trier of fact. *Morrison v Richerson*, 198 Mich App 202, 209; 497 NW2d 506 (1993). Moreover, respondents did not present any evidence that petitioner threatened, misled, unduly flattered or physically or morally coerced decedent to execute a will making petitioner the sole heir. *In re Leone, supra* at 324. Nor is there evidence that decedent's free agency was destroyed or that she acted against her fee will. *Id.* Therefore, respondents failed to meet their ultimate burden of proving undue influence.

II

Respondents also claim on appeal that the trial court erred in denying their motion for a new trial in light of newly discovered evidence. Before newly discovered evidence warrants a new trial, the movant must show that he or she could not with reasonable diligence have discovered the evidence and produced it at trial. MCR 2.611(A)(1)(f); *Gillispie v Bd of Tenant Affairs of the Detroit Housing Comm*, 122 Mich App 699, 702; 332 NW2d 474 (1983). A motion for a new trial based on newly discovered evidence is not regarded with favor. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985).

Respondents filed a motion for a new trial on the basis of newly discovered evidence claiming that they did not learn until the time of trial that petitioner's testimony regarding the execution of the December 2, 1991, wills appeared inconsistent with the explanation given in her objection to the initial petition. In the objection, petitioner claimed that two wills had been executed because decedent signed the first one in the wrong place and dated it; she then realized her error and signed a second copy, but

did not date it. However, at the time of trial, petitioner testified that two wills were executed so that there would be one to file with the court and one for decedent to retain. Petitioner further claimed that she did not look at either of the wills after they were signed by decedent. According to petitioner, she did not learn until after decedent's death that the copy filed with the probate court was undated; thereafter, she discovered the dated copy among decedent's belongings. Following the trial, respondents retained a handwriting expert who concluded that there was sufficient evidence to believe that decedent's signatures were forged. An affidavit to that effect was attached to respondents' motion.

The trial court did not abuse its discretion in denying respondent's motion for a new trial. *Id.* First, respondents' motion was not based on newly discovered evidence. Petitioner's testimony at deposition regarding the execution of the wills was consistent with her testimony at trial. Because respondents were put on notice at petitioner's deposition that her testimony appeared to be inconsistent with the explanation given in the objection, the evidence was not newly discovered. Even if respondents were unaware of the alleged inconsistency before petitioner testified at trial, respondents could have easily argued the following day at closing argument that the 1991 wills were not properly executed, and/or asked the court for a continuance in order to permit further investigation. Instead, respondents remained silent until after the outcome of the trial. In addition, the mere fact that the copy of the will filed with the probate court was not dated, and petitioner subsequently produced a second copy that was dated, should have raised a red flag to respondents.

Therefore, respondents had no valid reason not to challenge the validity of the execution of the wills at trial along with their claim of undue influence. Moreover, there was evidence that the wills were signed by decedent. Both Meyers and Vanover testified that they witnessed decedent sign both of the wills. Meyers and Vanover were not certain whether decedent dated the wills, but they testified that they witnessed her signatures on or about December 2, 1991. In addition, the handwriting evidence produced by respondents was rebutted by the handwriting expert retained by petitioner, who concluded that the signatures on the December 2, 1991, wills were written by decedent.

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

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor