STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS GRONDIN,

Plaintiff-Appellant,

v

DOLORES GRONDIN and
ROBERT VAN DONGEN,

Defendants-Appellees.

UNPUBLISHED
October 17, 1997

No. 198001
Kent Probate Court
LC No. 95-160153-CD

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

This case involves the June 1994 sale of two parcels of real estate by Dolores Grondin to two of her five children, Douglas and Eugene Grondin. Plaintiff appeals as of right from an order rescinding the transactions on the ground that Dolores lacked sufficient capacity to transfer the property. We affirm.

The subject properties are both located in Milford. The parcel known as 2265 Milford Road had an appraised value of between $105,000 and $147,000, but was sold to Douglas and Eugene for $60,000. The terms of the sale required that Dolores be paid the full purchase price within ten years, with no interest for the first year, and then an interest rate of seven percent. The second parcel, known as 210 South Main Street, had an appraised value of between $59,665 and $74,000, but was sold to Eugene for $40,000 at seven percent interest, to be paid within ten years. At the time of the proceedings in this matter, Dolores had not received any payments from Douglas or Eugene.

In the fall of 1994, Dolores was officially diagnosed as suffering from Alzheimer's disease. In June 1995, Douglas filed a petition to have an individual named as conservator to handle his mother's affairs, including amending the terms of the sons' note for the purchase of the Milford Road property. Subsequently, a petition was filed by Dolores, requesting that a different person be appointed her conservator, and that the court invalidate all documents purporting to transfer the two parcels of real estate because she lacked sufficient capacity to convey the property and was unduly influenced by Douglas and Eugene.

Plaintiff argues that the probate court erred by finding that Dolores had diminished capacity when transferring the real estate in question and that she was subject to undue influence. We disagree. 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 clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* Regard shall be given to the trial court's opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

Undue influence is demonstrated by a showing that the grantor was subjected to threats, misrepresentation, 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. *Erickson, supra,* 331. "Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient." *Id.* Undue influence is presumed upon the introduction of evidence establishing (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. *Id.*

Plaintiff concedes that (1) and (2) have been established. Both Douglas and Eugene had a confidential relationship with Dolores. Eugene was close with Dolores and described himself as the favored child. Douglas was also close with Dolores. Other family members agreed that Douglas and Eugene were consistently involved in Dolores' life. In addition, it is uncontested that Douglas and Eugene benefited from the transactions. The properties were sold to them for substantially less than fair market value, and the terms of the sale were generous. At issue is whether Douglas and Eugene had an opportunity to influence Dolores' decision in the transactions. The evidence demonstrates that they did.

The majority of the witnesses indicated that after 1993, Dolores relied on her family members to handle her finances, and that she became confused and withdrawn. Although it is uncontested that Dolores wanted Douglas and Eugene to purchase the property, most likely Dolores was unable to understand the terms of the purchase, and therefore, Douglas and Eugene were able to influence her decision to agree to such favorable terms. According to Dolores' doctor, in September 1994, two months after the real estate transactions, Dolores was unable to count by seven's or count backwards from one hundred in order. In 1993, Dolores was unable to balance her checkbook, and, therefore, required the assistance of her sister-in-law, Virginia Perry. Further, in 1993, Dolores discontinued her participation in a doll-making business with her sister, Juanita Smith, because she could no longer make change when a customer purchased a doll. Additionally, and most notable, is the fact that Dolores did not have independent representation for the transactions. Marc Hallowell, the attorney who handled the real estate transactions, was contacted by Douglas or Eugene, and never discussed the transaction independently with Dolores. She was never given the opportunity to negotiate more favorable terms. It is more probable than not that Dolores relied on Douglas and Eugene to handle the terms of the transactions, and therefore, acquiesced to the generous terms. Thus, the evidence presented raised a presumption of undue influence. *Erickson, supra,* 331.

Although the ultimate burden of persuasion in demonstrating that Dolores was subjected to undue influence remained with defendant, plaintiff had a burden to offer sufficient rebuttal evidence to overcome the presumption of undue influence. MRE 301. Plaintiff, however, failed to offer such evidence. Even though Dolores wanted Douglas and Eugene to have the property, Dolores was most likely incapable of understanding the specific terms of the transactions, especially the financing, and therefore, Douglas and Eugene had the ability to influence Dolores to agree to such favorable terms. Additionally, the handwritten document executed by Dolores, Douglas, and Eugene, admitting that the sale was beneficial to Douglas and Eugene, is unpersuasive. Those closest to Dolores indicated that she avoided conflict and was easily swayed by her children.

Regarding Dolores' capacity, the test applied in determining the mental competency of a grantor at the time the grantor disposes of property is whether "she had sufficient mental capacity to understand the nature of the transactions respecting her property, to know the value and extent of such property, to reach a logical conclusion as to how she wished to dispose of it, and to keep such facts in mind for a sufficient length of time to permit the necessary planning and effectuating of her wishes without prompting or interference from others." *Potter v Chamberlin*, 344 Mich 399, 404; 73 NW2d 844 (1955). "Mere weak mindedness whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat a conveyance." *Kouri v Fassone*, 370 Mich 223, 233; 121 NW2d 432 (1963). Based on Dolores' inability to understand and handle her financial affairs, she most likely was unable to completely understand the nature and terms of the property transactions discussed above. During the June 1994 negotiations concerning transference of the two real estate parcels to two of her five children, Dolores was not given the opportunity to act upon her own free will. Thus, we are not left with a definite and firm conviction that the trial court mistakenly rescinded the real estate transactions at issue on the grounds of undue influence and/or diminished capacity.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage