

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of FLORENCE H. ROHN, Deceased.

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ISABELLA BANK & TRUST COMPANY,  
Personal Representative of the Estate of  
FLORENCE H. ROHN, Deceased,

UNPUBLISHED  
April 17, 2003

Petitioner-Appellant,

v

DOROTHY BYNUM and BARBARA D. ROHN,

No. 233017  
Clare Probate Court  
LC No. 99-013127-SE

Respondents-Appellees.

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Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Petitioner, the personal representative of the decedent's estate, appeals as of right from a probate court order upholding several transactions by respondent Dorothy Bynum while acting under a power of attorney executed by the decedent. We affirm.

This case arises from the decedent's decision to confer a power of attorney upon her niece, Bynum, in 1997, and Bynum's subsequent transfers of the decedent's assets into nonprobate assets with interests to Bynum and Bynum's sister, Barbara Rohn. The assets included bank accounts and shares of stock in General Electric. After the decedent died in January 1999, petitioner filed this action to set aside the transfers on the ground that Bynum abused her fiduciary relationship with the decedent. The trial court set aside only two transactions. At issue is the trial court's decision to uphold the remaining transactions because it found no evidence of undue influence.

I

Petitioner first argues that the trial court failed to recognize that respondents bore the burden of overcoming the presumption that Bynum exercised undue influence over the decedent because she personally benefited from the fiduciary relationship. We disagree.

"When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered."

*LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). “Where parties are involved in a confidential or fiduciary relationship and trust and confidence is reposed by one in the integrity and fidelity of another, and where the latter receives benefits as a result of such relationship, there arises a presumption that such benefits were procured by the exercise of undue influence.” *Habersack v Rabaut*, 93 Mich App 300, 305; 287 NW2d 213 (1979).

Funds placed in joint bank accounts with rights of survivorship are presumed to be the property of the survivor. MCL 487.703. However, the burden is on the fiduciary to show, by a preponderance of the evidence, that there was no undue influence. *Habersack, supra*. Where the presumption of undue influence is in operation, “[i]f the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the ‘mandatory inference’ [of undue influence] remains unscathed.” *Kar v Hogan*, 399 Mich 529, 542; 251 NW2d 77 (1976). This does not mean that the burden of proof shifts from the plaintiff to the defendant. Rather, “plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.” *Id.*

The trial court’s remarks concerning the evidentiary burdens are as follows:

A position of trust or confidence is one founded on the trust or confidence of one person and the honesty, integrity, and loyalty of another. I do conclude—there is very little doubt and there is nothing to be ashamed of—that [respondent] Bynum was, in fact, a person in a position of trust or confidence with the decedent, and she had the opportunity or the occasion, if you want to say it, to unduly influence the decedent. The question is did she . . . derive . . . a substantial benefit? Yes, but I don’t believe the testimony in this case has come close to, on most of these factors, proving that she did, in fact, unduly influence the decedent. . . . Undue influence has really not been pled here. It’s just this fiduciary relationship, and she took advantage of it, and, of course, friendship is okay. That’s not undue influence, and advice isn’t undue influence. Persuasion isn’t. Argument isn’t. Flattery isn’t. Solicitation isn’t. Even imploring an individual is not, so I didn’t hear any testimony that indicated that.

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. . . I just . . . don’t find that this is any kind of circumstance that arises sufficiently to establish that, because of this fiduciary relationship, this person was taken advantage of.

. . . [Y]ou’ve got to judge credibility of witnesses, and sometimes you don’t have much time to do that because they’re not in front of you very long, and . . . the testimony of [respondent] Bynum is self-serving. It . . . is, because it establishes why she did much of what she did, and it is not necessarily helpful to the plaintiff’s case, but I didn’t find her to be a person of bad character. I didn’t find her to be a person that was lying. I didn’t find her to have credibility problems. I found her testimony compelling and believable, and . . . there was a small part of it that . . . was detrimental to her . . . .

The above statements do not imply any failure on the part of the trial court to recognize the presumption. As the court recognized, there is no dispute that a fiduciary relationship existed between respondent Bynum and the decedent, and that Bynum benefited from some of the financial arrangements in whose execution she was involved in that capacity. Petitioner's initial burden of establishing the presumption of undue influence is satisfied. From the above, it is clear that the court found no evidence of undue influence beyond the presumption, but found sufficient evidence against the allegation of undue influence to rebut the presumption. Therefore, petitioner's claim fails.

## II

Petitioner next argues that the trial court erred by relying exclusively on respondent's testimony in arriving at its factual findings. We disagree.

Petitioner asserts that testimony from an interested witness concerning the statements of a decedent is so inherently unreliable as to be insufficient, without corroboration, to prove a fact. However, we conclude that the cases upon which petitioner relies do not take this concern to the extreme of declaring such testimony inherently insufficient. See *Mallery v Van Hoeven*, 332 Mich 561, 567-568; 52 NW2d 341 (1952); *Hope v Detroit Trust Co*, 275 Mich 213, 224; 266 NW 326 (1936).

Because petitioner fails to show that the testimony of an interested witness is presumptively invalid, and because the trial court had other evidence to corroborate respondents' testimony that the decedent intended to grant them survivorship interests in her financial assets, we reject petitioner's argument that the court erred by deciding the issue solely on the basis of the testimony of interested witnesses.

## III

Petitioner argues that the trial court erred where it concluded that Bynum managed the decedent's financial affairs with the decedent's knowledge and consent. We disagree.

Petitioner predicates this issue on the following finding of the trial court:

I believe the defendant, through the testimony, although it is self-serving, . . . was . . . truthful. I found her to be credible and that she was simply carrying out the wishes of her . . . relative in this instance who wanted to have these things set up in that capacity.

The court then reiterated that two transfers had occurred where the decedent had not intended to make a gift, then concluded, "[e]verything else was pretty much a gift."

Petitioner first makes issue of the transfer of \$50,000 from the decedent's savings account into a Chemical Bank certificate of deposit issued to respondents only, and points to Bynum's admission that she did not think that she had told the decedent that the latter's name was not on that CD. This matter is of no avail to petitioner because the trial court ruled that this transfer was improper and imposed a constructive trust in favor of the decedent's estate on

respondents' interests in that instrument. The court ruled in petitioner's favor, and that ruling is not at issue on appeal.

Petitioner effectively requests this Court to reinterpret the evidence. However, "[a]n appellate court recognizes the . . . judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Put even more emphatically, "if the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

Despite petitioner's attempt to impugn the pertinence of Bynum's testimony, that testimony was a valid factor for the trial court's consideration. Aside from the two transfers that the court ruled improper, Bynum's testimony, along with the decedent's signature on the various financial instruments, provides a sufficient evidentiary basis for the court's conclusion that the decedent acted knowingly, and without undue influence, in sharing ownership interests in her assets at issue.

In arguing that Bynum did not apprise the decedent of her activities, petitioner points to Bynum's testimony that she had not rendered any formal accounting to the decedent. Bynum explained, however, that she "[a]lways discussed what was happening with her." Petitioner cites no authority for the proposition that the lack of a formal accounting renders the power-of-attorney arrangement suspect. We are satisfied that Bynum's report of keeping the decedent informed through informal discussions provided the trial court with competent evidence to support its finding that no breach of fiduciary duty occurred, despite the lack of a formal accounting.

Petitioner additionally points to Bynum's testimony that "banking was not a priority" while the decedent was in the hospital, when asked about fifteen checks over a three-month period that were not deposited into the decedent's account in a timely fashion. Because petitioner suggests that the delay in depositing the decedent's checks resulted in neither a significant loss of interest or opportunity on the decedent's part, nor any underserved benefit on Bynum's part, this evidentiary particular offers but scanty support for petitioner's position. Petitioner further points out that twelve of those checks had been sent to Bynum's address. However, petitioner does not explain why it is pernicious for a person holding a power of attorney over another to have that other's checks sent to her own address. This provides little support for petitioner's argument that Bynum managed the decedent's finances without the latter's knowledge and consent.

Petitioner argues that Bynum's handling of the transfer of the General Electric stock benefited respondents only, not the decedent. However, this is a circular argument, because if the decedent wished to have respondents acquire her stock after she died, then Bynum was acting in the decedent's interests in helping to arrange the transfer. The exhibits admitted at trial by stipulation include a copy of a letter signed by the decedent, dated January 31, 1997, to Raymond James & Associates asking to amend her stock certificate registration to add respondents. Petitioner does not challenge the authenticity of that signature.

Petitioner claims that Bynum operated through her own broker who never had to communicate with the decedent, and also points out that Bynum arranged to have the attendant

correspondence sent to her own personal residence. However, if these actions comport with a theory of improper self-dealing and of failing to keep the principal informed, they do not necessarily indicate such mischief. It is not this Court's purpose to entertain plausible alternative interpretations of the evidence presented; the test is whether the trial court's finding was clearly erroneous. MCR 2.613(C); *Beason, supra*; *Zeeland Farm Services, supra*. That Bynum presented her power of attorney while making these transactions on behalf of the decedent is only logical; she should not have had to conceal her status as the person to whom the decedent granted that power in order to repel a charge of self-dealing. Bynum's handling of the decedent's General Electric stock does not compel the conclusion that the trial court erred in finding that it comported with the decedent's wishes.

Petitioner summarizes the testimony of four of the decedent's friends, and urges this Court to credit indications that the decedent did not entirely approve of Bynum's actions, as opposed to the trial court's conclusion that Bynum herself was credible. We are not persuaded by this argument. Although various statements from these witnesses indicate that the decedent at times expressed displeasure at how her finances were being managed, they nonetheless do not compel reversal. First, the reports of various complaints on the decedent's part, if taken at face value, do not necessarily indicate that respondent Bynum generally failed to keep the decedent properly informed about the financial matters. Further, and more importantly, the trial court was not obliged to believe any of that testimony at all. *Beason, supra*; *Zeeland Farm Services, supra*. For these reasons, we reject this claim of error.

#### IV

Petitioner challenges the trial court's finding that most of the transfers of ownership interests at issue took place without Bynum's use of the decedent's power of attorney. We conclude that the court overstated the extent to which the transfers in dispute took place without the use of the power of attorney, but that any error is harmless.

Petitioner predicates this issue on the trial court's finding that "[t]he vast majority of the numerous accounts and certificates of deposits were transferred without a power of attorney." The court further stated, "[t]he power of attorney was not used in any way, shape, or form in that General Electric stock. It was not employed, and the decedent's own hand is on those requests."

Petitioner observes that Bynum signaled her status as holder of the decedent's power of attorney in connection with most of the financial instruments in question, including by adding the initials "P.A." to her signature, and by providing the various financial operators with copies of the pertinent documentation, and argues that Bynum thus used the power of attorney according to the dictionary definition of "use." Indeed, Bynum's routine and unhesitating referrals to her authorization to exercise the decedent's power of attorney constitutes a "use" in that broad sense. However, it would be pedantic to conclude for that reason that the trial court clearly erred in finding that Bynum did not "use" that power in most instances. We read the court's remarks as describing use of the power of attorney in the sense of invoking it as the primary, if not the sole, basis for executing transactions involving the decedent's assets. The question, then, is not the extent to which Bynum signaled her status as holder of the decedent's power of attorney in any way at all, but rather the extent to which she specifically invoked that power to transfer the decedent's accounts where she could not otherwise have made the transfers.

The exhibits present many financial instruments, including checks, endorsements, deposit slips, and certificates of deposit, several of which do bring to light instances of Bynum effecting important transfers of the decedent's financial assets by invoking her power of attorney over the decedent. However, neither party has counted the total number of transfers in dispute, or offered tallies of how many were and were not valid even without recourse to the power of attorney. We likewise decline to compile such statistics, because no such exercise is necessary.

Because we conclude that the trial court did not err in finding that, for all transactions in dispute, Bynum acted with the decedent's knowledge and consent, the number of transfers taking place through Bynum's necessary invocation of the decedent's power of attorney, versus the number of transfers whose validity did not depend on that power, does not bear on the result below. Merely exercising a power of attorney granted does not itself create evidence of undue influence. Accordingly, any error on the trial court's part in distinguishing between transactions that required exercise of the power of attorney from those that did not was harmless.

## V

Finally, petitioner presents the alternative argument that if the transfers of the decedent's General Electric stock to reflect the names of the decedent and respondents as owners was otherwise valid, the trial court erred in upholding the provisions for rights of survivorship in the reissued certificates. We disagree.

“[I]n the absence of proof sufficient to establish either a gift *inter vivos* or *causa mortis*, the survivor in case of joint title in personal property does not take the entire title by such survivorship.” *Ludwig v Brunner*, 203 Mich 556, 559; 169 NW 890 (1918). Absent any statutory prohibition, parties may create a joint tenancy in personal property with rights of survivorship by express contract. *Lober v Dorgan*, 215 Mich 62, 66; 183 NW 942 (1921). In this case, the trial court acknowledged that “the law indicates unless there is a specific intent that all of these types of transfers are . . . not survivorship type circumstances. They are, in fact, presumed to be otherwise . . .” The court, nonetheless, continued:

[B]ut it is clear to me that from the little bit I have learned about the decedent in this case, and the testimony has established that and has led to this conclusion, some of it direct, some of it circumstantial, that when she was talking about accounts and adding names, she, obviously, wanted to [avoid] Probate Court . . . . I think that's what her intent was, so she wanted joint ownership. She did it with all these series of \$1,000 CD's, and she wanted to do it with these two ladies.

Returning to the General Electric stock later in its commentary, the court added the following:

I think the general public, when you talk about accounts any more, . . . think automatically joint. They don't think what the law presumes. . . . I know it. I've been around long enough, and I've heard enough cases to come to the conclusion that that's what people expect to happen, and, so, when these directives were made by . . . this decedent. . . . she wanted these accounts to be joint. She didn't want things to come through probate. She didn't want the

government involved. You know, she didn't want the . . . cost of probate associated with these matters, so that's why she went ahead and did this.

In addition to a copy of the decedent's letter to Raymond James & Associates asking to amend her stock certificate registration to add respondents, the exhibits include a copy of an irrevocable stock or bond power, signed by the decedent and naming "Rohn Bynum," and copies of stock certificates issued in the names of the decedent and respondents, with the indication "JT TEN."

"The primary incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor." Black's Law Dictionary (6th ed, 1990), p 1465. This presumption that survivorship rights inhere in the designation "joint tenancy" is reflected in this state's case law. See, e.g., *Snover v Snover*, 199 Mich App 627, 629-630; 502 NW2d 370 (1993). In this case, there is no dispute that the reissued stock certificates include rights of survivorship for all three joint owners.

Reminded that, on deposition, she had testified that the decedent had "coyishly" said that the stock would be hers, and advised her to refrain from liquidating it, respondent Bynum replied that she remembered the discussion, and that the decedent wanted the stock to be security for her as it had been for the decedent. In later testimony, Bynum agreed that she had asked for the decedent's stock to be reissued in the decedent's name with respondents as joint tenants with rights of survivorship, and added, "[i]t was [decedent's] intention that that be done." Bynum agreed that the documents bearing the decedent's signature said nothing about including survivorship rights with the jointly held stock, but that the certificates came back that way, and reiterated, "that was [the decedent's] wishes."

The notations indicating joint tenancy on the stock certificates, plus Bynum's testimony concerning the decedent's wishes, well support the trial court's conclusion that the decedent intended to grant respondents rights of survivorship in the stock.

Petitioner argues that the decedent's inaction between the issuance of those certificates in 1997 and her death in early 1999, indicates that she never saw the certificates. This argument is without merit. The decedent herself had signed documents to authorize an adjustment of ownership interests, and she certainly had at least constructive notice of the new status. Further, a "[m]istake as to the legal effect of a written instrument, deliberately executed and adopted, constitutes no ground for relief in equity." *Schmalzriedt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943) (citation omitted); *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). The documents on their face indicate a joint tenancy; because nothing in the record suggests that the decedent had intended otherwise, they should be respected.

Affirmed.

/s/ Michael J. Talbot  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell