STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF MARGARET J. KRUM.

DIANE M. BLAND,

Appellant,

v

KAREN DEBROSKE, personal representative of the ESTATE OF MARGARET J. KRUM,

Appellee.

UNPUBLISHED
November 27, 2018

No. 340382
Kalamazoo Probate Court
LC No. 2016-001436-DE

In re MARGARET J. KRUM TRUST.

DIANE M. BLAND,

Appellant,

v

KAREN DEBROSKE, trustee of the MARGARET J. KRUM TRUST,

Appellee.

No. 340383
Kalamazoo Probate Court
LC No. 2016-001437-TV

Before: MURPHY, P.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

In this consolidated case,[1] appellant, Diane Bland (Bland), and her sister, Lori Krum (Lori), collectively, petitioners, challenged the will and trust of their mother, Margaret Krum (Krum). Krum had five children, Stephen Krum (Stephen), Karen DeBroske (DeBroske), Bland, Lori, and Pamela Krum (Pamela). In 2002, shortly after Krum's husband died, Krum made a will equally dividing her estate among her five children. In 2011, Krum changed her will and created a trust that left her assets to DeBroske, Stephen, and Pamela and excluded Bland and Lori.[2] After Krum died in April 2016, Bland and Lori challenged Krum's will and trust, arguing that DeBroske exerted undue influence over Krum when she changed her will in 2011. The trial court disagreed and granted summary disposition in favor of DeBroske under MCR 2.116(C)(10) (no genuine issue of material fact). Bland and Lori then filed a motion for reconsideration, arguing that a newly discovered power of attorney executed in 2002 established a fiduciary relationship between Krum and DeBroske that gave rise to a presumption of undue influence and created a genuine issue of material fact. The trial court denied the motion and granted DeBroske's request for sanctions in response to the motion. On appeal, Bland challenges the trial court's grant of DeBroske's motion for summary disposition, the denial of petitioners' motion for reconsideration, and the grant of sanctions. We affirm.

I. SUMMARY DISPOSITION

Bland first challenges the trial court's grant of summary disposition in favor of DeBroske on the issue of undue influence, contending that petitioners demonstrated a confidential or fiduciary relationship between DeBroske and Krum, which gave rise to a presumption of undue influence and a genuine issue of material fact. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Braverman v Granger*, 303 Mich App 587, 595; 844 NW2d 485 (2014). Summary disposition is proper "when there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact remains. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006). "A genuine issue of material fact exists when reasonable minds could differ on a material issue." *Braverman*, 303 Mich App at 596. A trial court "may not make factual findings or weigh credibility in deciding a motion for summary disposition." *Manning v City of Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute," summary disposition is proper. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999) (quotation marks and citation omitted). Mere speculation by a plaintiff does not create a genuine issue of material fact. *Id*. at 457.

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[1] *In re Krum Estate*, unpublished order of the Court of Appeals, issued October 11, 2017 (Docket Nos. 340382 and 340383). Additionally, only Bland was listed as an appellant.

[2] Stephen died a few weeks after Krum died. Ultimately, only DeBroske and Pamela divided Krum's assets.

A party asserting undue influence must show 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 his inclination and free will." *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). "Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A presumption of undue influences arises from evidence of "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *Kar*, 399 Mich at 537. Once the presumption of undue influence has been established, the trial court may not weigh the evidence to determine that the presumption has been rebutted and to grant summary disposition. *In re Peterson Estate*, 193 Mich App 257, 261-262; 483 NW2d 624 (1991). Even if the presumption of undue influence has been established, summary disposition is proper if the evidence, "giving the benefit of reasonable doubt to [the moving party], does not leave open a question of undue influence on which reasonable minds might differ" because the will contestant bears the ultimate burden of proving undue influence. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 703-704; 880 NW2d 269 (2015).

Black's Law Dictionary (10th ed) defines a "fiduciary relationship" as follows:

> A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. . . . Fiduciary relationships usu. arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties[.]

Our Supreme Court separately noted the definition of a "confidential and fiduciary relationship":

> Although a broad term, "confidential or fiduciary relationship" has a focused view toward relationships of inequality. This Court recognized in *In re Wood Estate*, 374 Mich 278, 287; 132 NW2d 35 (1965), that the concept had its English origins in situations in which dominion may be exercised by one person over another. Quoting 3 Pomeroy, *Equity Jurisprudence* (5th ed, 1941), § 956a, this Court said a fiduciary relationship exists as fact when " 'there is confidence reposed on one side, and the resulting superiority and influence on the other.' "
>
> Common examples this Court has recognized include where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser. In these situations, complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power, or moral authority to control the subject matter at issue. [*In re Karmey Estate*, 468 Mich 68, 74 n 3; 658 NW2d 796 (2003) (citations omitted).]

Bland argues that the trial court improperly weighed the evidence regarding DeBroske's close relationship with Krum when it granted summary disposition in favor of DeBroske. Bland cites the fact that DeBroske recommended Danielle Streed, the attorney who drafted Krum's 2011 will and trust, and that DeBroske filled out the estate planning questionnaire that omitted petitioners. DeBroske admitted both facts. Even if DeBroske handpicked Streed for her own reasons and omitted petitioners' names intentionally, we agree with the trial court that Bland's argument implies that Streed took directions from DeBroske, an assertion unsupported by the record. Petitioners' names were written on the questionnaire completed two weeks before the will. Streed stated that she had no doubt about Krum's testamentary capacity or intent and that she discussed with Krum why she wanted to disinherit petitioners. This uncontested evidence shows that Streed was aware of petitioners when she drafted the will. Petitioners testified that they had their doubts about Krum's intent, but they produced no evidence to support their belief that DeBroske unduly influenced Streed's preparation of the 2011 will and trust.

Bland further contends that DeBroske's close relationship with Krum, particularly DeBroske's participation in Krum's financial affairs, demonstrated that they had a confidential or fiduciary relationship triggering a presumption of undue influence. Bland believed that DeBroske controlled Krum's finances as early as 2003. No evidence in the record supports that opinion. DeBroske admitted that she had joint bank accounts with Krum. Although it is not clear when Krum first added DeBroske to her bank account, Bland testified that Krum wanted DeBroske to be able to pay bills in case Krum was in the hospital. DeBroske testified about checks she wrote on Krum's behalf and at Krum's direction starting in 2013 when Krum's vision was worsening. In addition, although the responsive documents to petitioners' discovery requests about Krum's financial accounts were not placed in the record, petitioners' second discovery request and their questions at DeBroske's deposition show that DeBroske produced bank statements showing that she had joint accounts with Krum and wrote checks on Krum's behalf starting in 2013. DeBroske maintained that Krum handled her own finances and continued to manage her financial affairs after 2013 with DeBroske's help. Petitioners produced no evidence to the contrary, and Bland's testimony that Krum wanted DeBroske's help in case of hospitalization coincides with DeBroske's statement that Krum generally managed her own finances. Petitioners also maintained that Krum complained about DeBroske's investment decisions in 2014 on Krum's behalf. Even if Krum did not like how DeBroske was investing Krum's money, petitioners did not identify how complaints about investment decisions nearly three years after Krum made her will demonstrate undue influence. "[S]ubsequent acts may be circumstantial evidence regarding earlier events[.]" *Bill & Dena Brown Trust*, 312 Mich App at 701. However, petitioners did not show how DeBroske's assistance with Krum's financial matters starting in 2013 affected Krum's decision to change her will nearly two years earlier. DeBroske's assistance may reflect her close relationship with her mother, but the relationship between a child and an aging parent does not establish a confidential or fiduciary relationship or undue influence.

Petitioners also testified about several disagreements, largely with DeBroske rather than Krum. Even assuming that DeBroske inserted herself into disagreements between petitioners and Krum and took Krum's side, petitioners have not shown that these incidents showed that DeBroske overpowered Krum's will and caused her to change her estate plan in 2011. One of these disagreements was the catalyst for Krum's decision to exclude petitioners from her will. Petitioners both testified that other witnesses, and Krum herself, exaggerated the significance of

the argument or misperceived it. An e-mail exchange between Bland and Pamela about the incident shows otherwise. Bland blamed Krum, not DeBroske, for creating the conflict and causing a rift among the sisters. Bland has not shown how the evidence about the disagreement shows that DeBroske caused Krum to change her will. In short, petitioners produced nothing more than their own opinions and speculation to argue that DeBroske exerted undue influence, and the trial court did not err by granting summary disposition in favor of DeBroske on this issue.

II. RECONSIDERATION

Bland argues that the trial court abused its discretion by denying reconsideration because the 2002 power of attorney established a confidential or fiduciary relationship between DeBroske and Krum that gave rise to a presumption of undue influence and a genuine issue of material fact. This Court reviews a trial court's denial of a motion for reconsideration "for an abuse of discretion, which occurs when the court's decision falls outside the range of principled outcomes." *Bill & Dena Brown Trust*, 312 Mich App at 699. This Court also reviews a motion for a new trial for an abuse of discretion. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 550; 493 NW2d 492 (1992).

The parties agreed that MCR 2.611(A)(1)(f) governed petitioners' motion for reconsideration premised on newly discovered evidence.[3] A trial court may grant a new trial if the moving party produced newly discovered, material evidence that could not have been discovered sooner with reasonable diligence. MCR 2.611(A)(1)(f). To obtain a new trial on the basis of newly discovered evidence, the moving party must show the following:

> First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence be not cumulative merely; third, that it be such as to render a different result probable on the retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at trial. [*Murchie v Std Oil Co*, 355 Mich 550, 561-562; 94 NW2d 799 (1959) (quotation marks and citation omitted).]

In this case, the trial court determined that petitioners could have discovered the 2002 power of attorney sooner using reasonable diligence, and petitioners did not demonstrate that the document altered the result. We agree. Regarding the discovery of the document, the attorney who prepared the 2002 will died sometime between 2002 and 2011. Petitioners had apparently requested documents from the successor to that attorney who had the first attorney's files. DeBroske testified that she remembered going to the first attorney with Krum in 2002 for estate planning purposes, but she did not remember any other details or whether Krum signed powers of attorney that predated the 2011 powers of attorney made along with the 2011 will.

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[3] Bland argues that the trial court should have applied MCR 2.611(A)(1)(g). "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). Accordingly, Bland has waived this argument, and we apply MCR 2.611(A)(1)(f).

DeBroske's testimony about events in 2002 was so vague that it is not clear how it led petitioners to realize that a power of attorney executed in 2002 existed. It is further unclear why petitioners were able to obtain the 2002 will from the successor attorney during discovery but not the 2002 power of attorney executed the same day as the will. Therefore, we agree with the trial court that petitioners should have been able to obtain the document sooner.

Additionally, the trial court did not abuse its discretion by concluding that the 2002 power of attorney did not alter the result. The existence of a power of attorney reflects a fiduciary relationship even if the power of attorney was not used by the agent. *In re Susser Estate*, 254 Mich App 232, 234-235; 657 NW2d 147 (2002). Accordingly, the trial court erred by determining that the 2002 power of attorney did not demonstrate a fiduciary relationship because DeBroske did not use it. Nonetheless, the trial court determined that even if the document established a fiduciary relationship, triggering a presumption of undue influence, that presumption was rebutted. For the same reasons the evidence did not create a genuine issue of material fact on the issue of undue influence at the summary disposition stage, that evidence rebutted the presumption of undue influence arising from the fiduciary relationship established by the 2002 power of attorney. Therefore, the trial court did not abuse its discretion when it denied petitioners' motion for reconsideration.

III. SANCTIONS

Lastly, Bland challenges the trial court's grant of sanctions. This Court generally reviews a trial court's finding that a claim is frivolous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Petitioners did not oppose DeBroske's request for sanctions. Accordingly, this issue is not preserved, and we review it "for plain error affecting substantial rights." *King v Oakland Co Prosecutor*, 303 Mich App 202, 239; 842 NW2d 403 (2013).

A trial court may award fees and costs to the prevailing party in a civil case if the trial court finds that an action is frivolous. MCL 600.2591(1); MCR 2.114(F); MCR 2.625(A)(2). An action is frivolous if "[t]he party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true." MCL 500.2591(3)(a)(*ii*). A claim should be evaluated when it was made to determine whether it was frivolous. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). When the trial court denied petitioners' motion for reconsideration, it granted DeBroske's request for sanctions. The trial court reasoned that petitioners produced no credible evidence to support their claim of undue influence. After the trial court's grant of summary disposition on this claim, the trial court did not plainly err by granting sanctions in response to petitioners' continued pursuit of an unsubstantiated claim.

We affirm.

/s/ William B. Murphy
/s/ Peter D. O'Connell