No. 3--10--0432

Order filed March 2, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

JULIA A. SHANE,	)	Appeal from the Circuit Court
	)	of the Tenth Judicial Circuit
Plaintiff-Appellant,	)	Peoria County, Illinois
	)	
v.	)	No. 08--CH--615
	)	
BARBARA WYMAN,	)	Honorable
	)	Stuart P. Borden
Defendant-Appellee.	)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

Held: Trial court's finding of no undue influence by a daughter over her mother was supported by the evidence where witnesses testified that mother was competent and repeatedly expressed her desire to give her property to her daughter.

Julia Shane's granddaughter, Kristie Dutton, filed a complaint on Julia's behalf, as her attorney in fact. The complaint alleged that Julia's daughter and Kristie's mother, Barbara Wyman, asserted undue influence over Julia, causing her

to deed her real property to Barbara. Following a bench trial, the court ruled that Barbara did not assert undue influence over Julia. We affirm.

Julia Shane has three children, Barbara Wyman, Richard Shane, and Robert Shane. In April 2004, when Julia was 92 years old, she gave a power of attorney to her granddaughter, Kristie Dutton. Julia lived alone in her own home until November 2004, when she broke her leg. Following surgery, she went into rehabilitation at a nursing home.

On January 13, 2005, Jerry Shane, Julia's brother-in-law, died. Two weeks later, Julia was released from the nursing home. She went to live with Barbara and her husband, James Wyman. Soon thereafter, Julia learned that Jerry Shane's will left property to Richard and Robert, but nothing to Barbara.

On March 15, 2005, Julia executed a quitclaim deed that transferred ownership of all of her real property to Barbara. Over three years later, Kristie, as Julia's attorney in fact, filed a complaint against Barbara, alleging that the deed was obtained through Barbara's undue influence.

At trial, Barbara testified that she was "disgusted" that her uncle, Jerry Shane, did not leave her anything under his will. When she showed her mother Jerry's will, Julia said that she was going to deed her land to Barbara. Julia insisted that

Barbara make an appointment for her with her attorney, Chester Fuller. Her mother went to see attorney Fuller on approximately four occasions. Barbara only went to one of those meetings. According to Barbara, Julia's mental condition was fine until 2007, when it deteriorated dramatically.

Robert Shane, Richard Shane, Richard's wife, Linda Shane, Kristie Dutton, and Kristie's husband, Mike Dutton, all testified that Julia's attitude and demeanor changed after she broke her leg. She became very depressed, cried often, repeatedly said that she wanted to go home and also said that she wanted to die. None of them testified about Julia's mental capabilities, except that Linda described Julia as "forgetful" in 2004, and Richard described Julia as "engaged" in April 2005.

Kristie, Kristie's daughters, Julie and Ashley, and Kristie's husband, Mike, testified that Barbara repeatedly complained about Jerry's will in front of Julia. Barbara told Julia that she thought her brothers had enough and that she could use the income from Julia's land. Barbara suggested that Julia gift her land to her to "make things right."

Ashley and Robert testified that Julia was upset about Jerry's will and did not think it was fair to Barbara. According to Ashley, Julia told Richard that she gave her land to Barbara because Richard and Robert had a lot already. According to

Robert, Julia told him and Richard that they had enough property, but never told them that she planned to give all of her property to Barbara.

Julia's nieces, Marjorie Matten and Catherine Catton, her hairdresser, Peggy Harding, and her friend, Vernice Fuller, testified that Julia seemed fine mentally throughout 2005. When Julia was in the nursing home in late 2004 and early 2005, she told Marjorie and Catherine that she was going to leave her land to Barbara because Richard and Robert were too greedy.

James Miles, a friend of Barbara's, testified that Julia's mental status was good in 2005. In mid-February 2005, Julia told James that she wanted to give Barbara her property immediately. A few days later, Julia asked James and his wife to take her to Chester Fuller's office. A couple of weeks later, James' wife drove Julia to Fuller's office. Julia met with Fuller alone for several minutes and then met with Julia, James and his wife.

James Wyman, Barbara's husband, testified that Julia's mental status was fine in 2005. He did not notice that she was confused at all. He said that Julia did not cry or say she wanted to die. When Julia learned about Jerry Shane's will, she told Barbara, "[F]ight it. I'll pay for it."

Attorney Robert Potts testified that he met with Julia, Barbara and Kristie on February 4, 2005, and February 15, 2005.

Julia told him she wanted to give Barbara all of her real property. He thought her objective was "to try and even things up *** in her family." Based on his meetings with Julia, he found her to be "very articulate" and competent. Potts recommended that Julia have attorney Chester Fuller prepare the documents she requested because Fuller had a longstanding relationship with her.

Chester Fuller first represented Julia in 1993 or 1994. When Julia came to his office, she usually came with Barbara or Kristie. During each office visit, he would first talk with all of them, then to Julia by herself. On February 22, 2005, he met with Julia alone. Julia said she wanted to give her land to Barbara because her sons had received some land from a relative. She wanted to make sure "that the scales were equal and that Barbara would have something." Fuller believed that Julia was competent to convey property at that time. Nevertheless, he faxed a letter to Julia's doctor, Dr. Cohen, for a second opinion. Dr. Cohen responded that Julia was competent to manage her financial affairs. Fuller did not believe anyone was influencing Julia's decision to give her property to Barbara.

Dr. Brian Cohen, Julia's physician, first saw Julia in June 2004. At that time, he referred her to the Memory Disorders Clinic for dementia testing. Based on the results of the testing

and his own exam, he diagnosed Julia with mild dementia. He saw Julia again in October 2004 and March 2005, and saw no decline in her mental abilities. In March 2005, Chester Fuller asked him to render an opinion regarding Julia's competency. He responded that "[a]lthough Julia has mild senile dementia, she is competent enough to make decisions regarding her estate planning." Later that year, Dr. Cohen found Julia's mental condition to be stable. As time went on, Julia's dementia progressed. In August 2007, Dr. Cohen concluded that Julia was no longer able to make her own decisions.

Shanna Kurth, who has a Ph.D. in clinical neuropsychology, testified that she met with Julia on June 26, 2009, at the request of plaintiff's attorney to determine if Julia was mentally competent in 2005. Based on her interview and testing, she determined that Julia was profoundly impaired from a cognitive standpoint in 2009. She believed that Julia was "quite impaired" in 2005. She opined within a reasonable degree of neuropsychological certainty that Julia was not capable of making complex financial decisions, such as transferring property, in March 2005. She based her opinion in large part on historical information that she received from Kristie. Dr. Kurth had no opinion regarding whether Julia's transfer of her property to Barbara was the result of undue influence.

On March 17, 2010, the trial court issued its order, finding that (1) Barbara was in a fiduciary relationship with Julia, and (2) she proved by clear and convincing evidence that Julia's decision to transfer her property to Barbara was not the result of undue influence. Julia filed a motion to reconsider, which the court denied.

A fiduciary relationship exists where trust and confidence are reposed by one person in another who, as a result thereof, gains influence and superiority over the other. *Jones v. Washington*, 412 Ill. 436, 440 (1952). Factors to be considered in determining whether a fiduciary relationship exists include the degree of kinship, disparity of age, health and mental condition, and the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to and reposed faith and confidence in the dominant party. *In re Estate of Long*, 311 Ill. App. 3d 959, 964 (2000).

Where the existence of a fiduciary relationship has been established, the law presumes that any transactions between the parties in which the dominant party has profited are fraudulent. *Jones*, 412 Ill. at 441. The presumption may be rebutted by clear and convincing proof that the dominant party has exercised good faith and has not betrayed the confidence reposed in him. *Id.* The burden is on the grantee to show the fairness of the

transaction, that it was equitable and just, and that it did not proceed from a betrayal of the relationship. *Id.* Factors important in determining whether a transaction is fair and just include a showing by the fiduciary that (1) he made a free and frank disclosure of all the relevant information he had, (2) there was adequate consideration, and (3) the principal had competent and independent advice before completing the transaction. *Id.*

The fact that a deed is given to a fiduciary does not necessarily require that the transaction be set aside. *Stone v. Stone,* 407 Ill. 66, 79 (1950). A deed executed in favor of a dominant party is valid if made with full knowledge of its nature and effect and through the deliberate and voluntary desire of the grantor. *McFail v. Braden*, 19 Ill. 2d 108, 117 (1960); *Peters v. Meyers*, 408 Ill. 254, 259 (1951). There is no rule of law prohibiting a grantor from making a gift to a fiduciary, provided the gift is voluntary and not the result of undue influence. *Stone*, 407 Ill. at 79.

Undue influence will justify the setting aside of a deed only if it is of such character as to destroy the free agency of the grantor and render his act the product of the will of another instead of his own. *Schueler v. Blomstrand*, 394 Ill. 600, 615 (1946). Undue influence must be exercised and operated at the

time of the transaction to be impeached. *Valbert v. Valbert*, 282 Ill. 415, 422 (1918); see also *In re Estate of Henke*, 203 Ill. App. 3d 975, 982 (1990) (no undue influence where fiduciary did not witness signing of will but was in attorney's waiting room); *Herbolsheimer v. Herbolsheimer*, 46 Ill. App. 3d 563, 566 (1977) (no undue influence where testator went to attorney's office alone to have will prepared).

A trial court's finding that the presumption of undue influence has been overcome will be reversed only if it is contrary to the manifest weight of the evidence. See *Herbolsheimer*, 46 Ill. App. 3d at 567. Where the manifest weight of the evidence demonstrates that a deed resulted from the desire of the plaintiff-grantor, rather than from the exertion of undue influence by the defendant, the deed will not be set aside. See *Jones*, 412 Ill. at 443.

Deeds from parents to children in fiduciary relationships have been upheld in a number of cases. See *Williamson v. Williamson*, 306 Ill. 533 (1923) (deed from mother to son represented her wish and intention at time, was a voluntary act not procured by son's undue influence); *Valbert*, 282 Ill. App. 3d at 423-24 (evidence conclusively showed father of five's execution of deeds to one son was result of voluntary wish of father, not because of any undue influence exercised on him by

the son); *Burt v. Quisenberry*, 132 Ill. 385, 400 (1890) (conveyance of land to son not result of undue influence). In *Burt*, our supreme court stated:

> "[I]nfluence secured through affection is not wrongful. And therefore, although a deed be made to a child, at his solicitation and because of partiality induced by affection for him, it will not be undue influence. The influence, to render the conveyance inoperative, must be of such a nature as to deprive the grantors of this free agency." *Burt*, 132 Ill. at 399.

Here, the trial court correctly found that Barbara was Julia's fiduciary since Barbara, housed, fed and cared for Julia, who was 93 years old and had just left the nursing home following rehabilitation for a broken leg. See *Estate of Long*, 311 Ill. App. 3d at 964. Thus, the burden shifted to Barbara to prove by clear and convincing evidence that Julia's decision to deed her property to Barbara was fair and equitable and not the result of undue influence. See *Jones*, 412 Ill. at 441.

Julia argues that Barbara did not overcome the presumption of undue influence because the deed issued to Barbara was not "fair and equitable to all," particularly Robert and Richard, who received nothing. However, the law does not require that the transfer be fair and equitable to all -- only that it be fair and

equitable to Julia. See *Jones*, 412 Ill. at 441. A deed is fair and equitable to the grantor if it is made through her deliberate and voluntary desire with full knowledge of its nature and effect. See *McFail*, 19 Ill. 2d at 117; *Peters*, 408 Ill. at 259.

Here, the evidence shows that although Barbara did not provide monetary consideration for Julia's property, Julia consulted with two attorneys before executing the deed to transfer the property. According to Potts and Fuller, Julia fully communicated her desires to them. Barbara was not present for most of the meetings between Julia and Fuller and did not witness Julia's signing of the deed. Finally, Julia made it known to many family members and friends that she intended for Barbara to have the property. This evidence was sufficient to overcome the presumption that Julia's gift to Barbara was the result of undue influence.

Nevertheless, Julia contends that the trial court's decision in this case was against the manifest weight of the evidence because Dr. Kurth opined that Julia was incompetent when she executed the deed. We disagree.

Here, the vast majority of witnesses, including Julia's physician, two attorneys, and many relatives and friends testified that Julia was coherent and competent in 2005. No witness, except for Dr. Kurth, testified that Julia was not able

to manage her affairs in 2005. In light of the overwhelming testimony from witnesses who interacted with Julia in 2005 and found her to be competent, the trial court did not err in rejecting the testimony of Dr. Kurth, who met Julia over four years later when she was no longer competent.

The trial court's decision in this case is supported by the evidence and, thus, is not against the manifest weight of the evidence. The order of the Peoria County circuit court is affirmed.

Affirmed.