2013 IL App (3d) 120495-U

Order filed August 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re Estate of GERALD E. ALLING,	) Appeal from the Circuit Court) of the 12th Judicial Circuit,) Will County, Illinois,
Deceased,	)
(Sharyl Mathews, Administrator to collect,	)
Petitioner-Appellant,	) Appeal No. 3-12-0495) Circuit No. 10-P-471
v.	)
Charlene Alling,	) Honorable) Paula Gomora,
Respondent-Appellee).	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Wright concurred in the judgment.
Justice Carter dissented.

ORDER

¶ 1 *Held*: A directed finding in favor of a decedent's wife on the administrator's citation to recover assets for the decedent's estate was reversed because the trial court erred in concluding that the administrator failed to present sufficient evidence to state a *prima facie* case that the wife had exercised undue influence over the decedent.

¶ 2 The petitioner, Sharyl Mathews, as the administrator to collect for the estate of Gerald E. Alling, the decedent, filed a citation to recover assets under section 16-1 of the Probate Act of 1975 (755 ILCS 5/16-1 (West 2010)). Sharyl sought to recover assets from the decedent's spouse, the respondent, Charlene Alling. At the close of Sharyl's case-in-chief, the trial court granted Charlene's motion for a directed finding. Sharyl appealed.

¶ 3 FACTS

¶ 4 Sharyl, who was Gerald's daughter from a prior marriage, alleged that Charlene exerted undue influence over Gerald and compelled him to transfer assets to joint tenancy prior to his death. The trial court granted the petition to recover assets, and held a hearing on the petition.

¶ 5 Gerald divorced his first wife, the mother of Sharyl, in 1984. In that divorce decree, Gerald was granted the sole ownership of the home in Joliet he shared with his first wife. Gerald held the title to that home as the sole owner until May 2010, when he signed a quitclaim deed prepared by Charlene, his second wife. Gerald had originally married Charlene in 1987. They divorced in 1989, but remarried in 1990. Thereafter, until 2006, Charlene and Gerald lived together in the same home in Joliet. According to Charlene, Gerald was a very private person, and she did not know what accounts he had. In 2006, Charlene moved to Arizona to live with her son. In 2007, Gerald filed for a divorce from Charlene, which was granted by default. Then, in late 2008, Charlene moved back in with Gerald, but she was not aware of the divorce.

¶ 6 On February 11, 2010, Gerald was diagnosed with terminal cancer, and he had an

emergency hip replacement. At this point, Gerald and Charlene had no joint bank accounts, and Gerald was still the sole owner of the house that they lived in together. In fact, Gerald's tax preparer testified that, in the approximately 20 years that she had been preparing his tax returns, she never saw any indication of any assets co-owned with Charlene.

¶ 7 On April 29, 2010, during a subsequent hospitalization, Gerald executed a durable power of attorney for healthcare, naming Charlene as his agent. On May 12, 2010, Charlene learned of the divorce decree, and she immediately drove Gerald to meet with two different attorneys. Gerald did not drive after his hip replacement. The next day, Charlene drove them both to the county clerk's office to obtain a marriage license, and then the Will County courthouse, where they were married. The day after that (May 14, 2010), Charlene drove Gerald to First Midwest Bank, where Gerald had all of his accounts converted to joint tenancy with Charlene. Then, she drove them to First Community Bank, where he converted another account to joint tenancy with Charlene.

¶ 8 On or about May 20, 2010, Attorney Michelle Rowe visited the Joliet house because she had a message that a new client wanted to speak to an attorney about the preparation of a will and powers of attorney. Charlene let Rowe into the house, but Rowe spoke to Gerald alone in the upstairs bedroom where Gerald was lying in bed. According to Rowe, Gerald said that he wanted to leave his property to his children, but they did not discuss any specifics of his estate. Rowe testified that Gerald looked sick and weak, but he was mentally capable of signing a will. Rowe did not agree to represent Gerald, and she never saw him again.

¶ 9 Later that same day, Gerald was readmitted to the hospital. While in the hospital, on May 21, Gerald signed a quitclaim deed that was prepared by Charlene, conveying the Joliet home to Gerald and Charlene in joint tenancy. Gerald was discharged from the hospital on May 25, 2010, to hospice, and he died intestate on June 11, 2010. He was survived by his wife, Charlene, and his children, Sharyl and Mark Alling. At the time of his death, all of his assets, totaling $101,110.96, were transferred to Charlene by virtue of the joint tenancies.

¶ 10 At the conclusion of Sharyl's case-in-chief, Charlene moved for a directed finding under section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2010)), arguing that Sharyl had failed to establish a *prima facie* case by clear and convincing evidence that Charlene had exercised undue influence on Gerald. The trial court found that Sharyl failed to present sufficient evidence to raise the presumption of undue influence, and discharged the citation.

¶ 11 ANALYSIS

¶ 12 Sharyl contends that Charlene received gifts from Gerald when he added Charlene's name as a joint tenant to his bank accounts and house deed. Sharyl argues that she established a *prima facie* case that these gifts were the result of undue influence exerted on Gerald by Charlene, even though Charlene was Gerald's spouse. Also, Sharyl argues that Charlene was in a fiduciary relationship with Gerald at the time of the transfers, raising a presumption of undue influence because Charlene profited from the transfers. This presumption of undue influence, contends Sharyl, overcame any presumption of donative intent, and shifted the burden of persuasion of Charlene to rebut

the evidence of undue influence by clear and convincing evidence.

¶ 13 Under the Probate Act of 1975, to recover property of an estate in the possession of others, the representative of the estate must initially establish a *prima facie* case that the property belongs to the decedent's estate, and if shown, the burden shifts to the property holder to prove her right to possession by clear and convincing evidence. *In re Estate of Elias*, 408 Ill. App. 3d 301 (2011). Property transferred from one spouse to another is presumed to be a gift, although that presumption can be overcome by clear and convincing evidence that no gift was intended. *Grandon v. Amcore Trust Co.*, 225 Ill. App. 3d 630 (1992). The person seeking to overcome this presumption carries the burden of proof. *Grandon*, 225 Ill. App. 3d at 635. The presumption of gift may be rebutted when it appears that there was an obligation on the part of the wife to hold the property in trust for the husband. *Miethe v. Miethe,* 410 Ill. 226 (1951).

¶ 14 A presumption of undue influence arises, *inter alia*, when: (1) there is a fiduciary relationship between the donee and a person who receives a substantial benefit from the gift, (2) the donee is the dependent and the beneficiary the dominant party, (3) the donee trusts the beneficiary, and (4) the gift is procured by the donee. See *DeHart v. DeHart*, 2013 IL 114137 (2013). While the presumption of undue influence can be applied to spouses, it must be applied with caution. *DeHart,* 2013 IL 114137. Undue influence means influence that is excessive, improper, or illegal; it means a wrongful influence. *In re Estate of Glogovsek*, 248 Ill. App. 3d 784 (1993).

¶ 15 Despite the dissent's protestations, clearly the trial court discharged the citation at the close of Sharyl's case-in-chief, stating that Sharyl failed to present sufficient evidence

to raise the presumption of undue influence. Thus, our review is *de novo*. See *Barnes v. Michalski*, 399 Ill. App. 3d 254 (2010) (an order granting a motion for a directed finding as a matter of law because the plaintiff did not present at least some evidence on each element of the *prima facie* case is reviewed *de novo*). The dissent claims that we have omitted relevant facts, but the omitted facts either were not relevant to the disposition or do not advance the dissent's argument as suggested. We find that Sharyl did present clear and convincing evidence sufficient to raise a presumption of undue influence.

¶ 16 A fiduciary relationship is one where a person is under a duty to act for the benefit of another. *In re Estate of Baumgarten*, 2012 IL App (1st) 112155 (2012). A fiduciary relationship is not presumed just from the fact of marriage; there must be specific facts alleged that give rise to the relationship. *Id.* Sharyl presented evidence that, during the time that Gerald's assets were transferred, Gerald did not drive. He was dependent on Charlene for medical care and treatment, and the activities of daily living. Charlene drove Gerald to two attorneys' offices, the clerk's office, the courthouse, and two different banks, all within the span of a few days. That was a remarkable and unusual amount of activity for a man who had a recent hip replacement following a terminal cancer diagnosis and was very weak. Then, Charlene obtained a deed form from the Recorder of Deeds, prepared the quitclaim deed transferring the home to herself in joint tenancy, and had Gerald sign it while he was in the hospital. She was already his power of attorney for healthcare. Although Gerald had been intensely private regarding his finances for more than 20 years, Charlene managed to make a lot of changes in just a few days.

¶ 17 Sharyl established by clear and convincing evidence the first element to raise the presumption of undue influence, namely, a fiduciary relationship. As for the second and third elements, that Gerald was dependent on and trusted Charlene, there was again sufficient evidence to establish a *prima facie* case of undue influence. Gerald had a terminal illness, and he no longer drove. He relied on Charlene for care, medical and otherwise. But perhaps the most telling evidence to establish undue influence relates to the amount of information shared, the time frame in which it was shared and the event that triggered this frenzied series of events. Specifically, Charlene obtained more information from Gerald about his finances in three days than she had during the more than twenty years they had known each other. Throughout two marriages, at least two reconciliations and cancer treatment, Gerald had chosen not to share this information with Charlene. He had also chosen not to put Charlene's name on his bank accounts or on the deed to his home. Gerald told his brother his estate was taken care of at a time when that would have meant Charlene would have received nothing. As late as a day or two prior their last remarriage, Gerald told attorney Rowe he wanted to leave his property to his children. Everything changed as soon as Charlene found out Gerald had divorced her a second time. The evidence presented makes clear that learning of the divorce was the catalyst for the subsequent efforts of Charlene to influence Gerald to remarry and change the ownership interest in all his property. Charlene's position of sole caretaker for Gerald put her in a position to be able to accomplish the various trips to lawyers, the courthouse, the bank, etc. in a very short time span.

¶ 18 Finally, there was sufficient evidence that the transfers were procured by Charlene,

after she drove him to several places in the span of a few days, and she filled out the form for the quitclaim deed.

¶ 19 We find that the trial court's conclusion that Sharyl's evidence failed to raise the presumption of undue influence was in error. Sharyl did present sufficient evidence to raise the presumption of undue influence. Since we find that trial court should have denied Charlene's motion for a directed finding, and Charlene now has the burden to rebut the presumption, we reverse and remand for further proceedings consistent with this order.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Will County is reversed and remanded.

¶ 22 Reversed and remanded.

¶ 23 JUSTICE CARTER, dissenting.

¶ 24 I respectfully dissent from the majority's holding that the circuit court erred when it granted Charlene's motion for judgment pursuant to section 2-1110 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (West 2010)). I submit that the majority has failed to consider relevant facts. I also submit that the majority applies the incorrect standard of review in holding that Sharyl presented sufficient evidence to raise a presumption of undue influence–a holding that is not supported by the facts of this case under the appropriate standard of review.

¶ 25 I. FACTUAL ISSUES

¶ 26 Initially, I take issue with the majority's recitation of the facts, as it has omitted portions of relevant facts in its decision that I would deem important to the resolution of

this appeal. Significantly, the majority omits the substantial testimony regarding the fact that Gerald was a very private person who controlled his own finances and did not reveal much personal information to his family or friends. A coworker and friend of Gerald indicated that Gerald was a quiet man who did not talk about his finances. A woman who prepared Gerald's taxes for over 20 years testified that he always filed as single, with the exception of 2006, when he filed as married filing separately. In his deposition, which was admitted into evidence, Gerald's brother, Richard, also stated that Gerald was a very private person. Richard said he could not recall any discussion with Gerald about the 2007 divorce. Richard also stated that Gerald talked about Sharyl a lot, but would not talk about his assets or whether he had a will. Richard stated, "I asked him if he had a will, and he said it has been taken care of." Also, although the exact date was unclear from the deposition, Richard stated that on one day when he was with Gerald at a restaurant, Gerald told him about the divorce from Charlene, gave him two life insurance policies, and told him to use the money from the policies for Gerald's funeral expenses. Richard never cashed in the policies; someone else did.

¶ 27 Richard also stated that he called Gerald daily after Gerald was released from the rehabilitation center. On one occasion, Charlene answered the phone and said Gerald was not feeling well. Gerald called Richard back about 15 minutes later and told Richard not to call him anymore. The majority also omits similar portions of Charlene's testimony. On May 21, 2010, while at the hospital, Gerald signed a do-not-resuscitate form, blood transfusion consent, and no-visitor restriction form. Charlene stated, "[h]e didn't want anybody to visit him, just his wife." Charlene also testified that Gerald did not want

anyone coming to see him at home. Charlene testified that in fact, after Gerald was released from the rehabilitation center in April 2010, his brother called and wanted to come visit him. Charlene said that would be fine, but Gerald called him back and said no.

¶ 28 Other facts omitted by the majority include: (1) on May 12, 2010, after Gerald told Charlene about the divorce by default that he obtained in 2007, they contacted two attorneys because *he* wanted legal consultation; (2) Charlene called Rowe because Gerald requested that she call an attorney for him; (3) the hospital's notary public notarized the quitclaim deed and testified that she would not have notarized it if she believed Gerald was incompetent; and (4) significant animosity existed between Charlene and Sharyl, and that there was testimony to suggest that Charlene tried to keep family members from seeing Gerald after he had been diagnosed with cancer and until he died.

¶ 29 As I will explain below, the majority also omits from its recitation of the facts any discussion of the details of the circuit court's oral ruling. These factual issues are significant because they impact the determinations of both the proper standard of review on appeal and the propriety of the circuit court's ruling.

¶ 30 II. THE PROPER STANDARD OF REVIEW ON APPEAL

¶ 31 It is also problematic that the majority fails to include details on the circuit court's decision in its recitation of the facts because those details are highly relevant to the determination of what the proper standard of review is on appeal. In fact, I believe those details reveal that the proper standard of review for this appeal is whether the circuit

court's ruling was against the manifest weight of the evidence, and not *de novo* review as the majority believes.

¶ 32 Section 2-1110 of the Code provides that after a plaintiff has rested its case in a bench trial, a defendant may move for a finding or judgment in his or her favor. When ruling on a section 2-1110 motion, the circuit court engages in a two-step analysis. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 52 (2010). The first step is to determine whether the plaintiff has established a *prima facie* case by presenting evidence on every element of the cause of action. *527 S. Clinton*, 403 Ill. App. 3d at 52. If so, then the court should proceed to the second step, which is to consider and weigh all of the evidence presented, including any evidence favorable to the defendant. *527 S. Clinton*, 403 Ill. App. 3d at 52. The court should then apply the appropriate standard of proof to the cause of action and determine whether sufficient evidence exists to establish a *prima facie* case. *527 S. Clinton*, 403 Ill. App. 3d at 52.

¶ 33 If the circuit court determines that the plaintiff has failed to satisfy the first step, then the reviewing court considers the issue on appeal under the *de novo* standard. *527 S. Clinton*, 403 Ill. App. 3d at 52. If the court proceeds to the second step but finds that the plaintiff has failed to satisfy the second step, then the reviewing court considers the issue on appeal under the manifest weight of the evidence standard. *527 S. Clinton*, 403 Ill. App. 3d at 53.

¶ 34 In this case, a review of the details of the circuit court's oral ruling that the majority has omitted reveals that the court proceeded to the second step of the section 2-1110 analysis.

¶ 35 At the outset of its oral ruling, the circuit court stated that, "[t]he first thing that actually comes to my mind when I think about all of the evidence in the case is, I think it is kind of my personal motto, which is nothing is ever the way it appears." The court then noted the "peculiar" nature of the marriage between Gerald and Charlene, citing Gerald's decision not to tell Charlene about the 2007 divorce and the fact that they had an on-again, off-again relationship at times during their 20-year relationship. The court also noted that under applicable case law, no presumption of undue influence arose simply from their marriage by itself.

¶ 36 Next, the court stated, "[t]here has been, and as I reviewed the testimony, I kept looking for what were the facts and circumstances? What did she do, what did she do to unduly influence him?" The court then indicated it felt that Gerald was the one who had influence over Charlene, noting that he convinced her to move back in after the 2007 divorce "and then using her and not telling her for his own personal gain and having her care for him."

¶ 37 The court also commented extensively on its finding that Gerald was "very, very secretive about his affairs. He didn't want anyone knowing what was going on in his life, financially or personally." In this regard, the court discussed Richard Alling's deposition in which he said that Gerald did not tell him about the divorce or financial matters. The court also found it significant that Gerald filed his taxes as single with the exception of one year, and that the accountant did not know that Gerald was married. The court stated, "[h]e had his own independent idea of himself, and for 20 years, he was in control of everything."

¶ 38 In assessing the evidence, the court stated:

"The set of facts can be interpreted one way from an outsider's point of view, especially if you are hostile. It may appear to be one way that there has been some sort of undue influence when you stack the deck a certain way. I don't see that. I don't see undue influence, undue as the Supreme Court has defined it through the Black's Law Dictionary, excessive, improper or illegal, I haven't heard anything that she has done that has been excessive, improper or illegal. She was his wife for 20 years. And dare I say, she probably put up with quite a bit.

Here is a man who did not share his home by joint tenancy or quit claim deed with her, although she cared for him, she lived in the house, nor gave her access to his bank accounts as a married person. I mean that is private. That is the way they chose to do it. And that is what they lived with.

But he saw her fit for his own purposes when she came back, and they reconciled before he knew he was sick and had no remorse for not telling her that they were divorced. And only upon his illness did he let her know, oh, by the way, we are divorced."

¶ 39 Further, after noting that both the notary at the hospital and Rowe both thought Gerald was mentally competent during their interactions with him, the court stated:

"And again, there hasn't been any evidence that [Charlene] did anything that controlled what his actions were. There is no evidence that he did not do exactly what he did to make up maybe for the wrongs that he had committed. The unfortunate part is that he didn't tell [Charlene].

> There was no medical evidence that told me he was not of sound mind, that he could not exert whatever control it was over his own property or that to do in joint tenancy what he did or to deed the property to Ms. Alling was not what his intent was.
>
> I don't have -- I have actions of what happened that are stacked, but I don't really see, I don't see any evidence that his intent was anything other than to do what he did."

Accordingly, the court granted Charlene's motion for judgment pursuant to section 2-1110.

¶ 40 In light of these omissions, the majority's bare description of the ruling as a finding "that Sharyl failed to present sufficient evidence to raise the presumption of undue influence" (*supra* ¶ 10) is problematic because it provides no support for its decision to apply *de novo* review to this appeal. In my opinion, there is absolutely no indication from the record that the circuit court in this case simply determined whether Sharyl presented evidence on every element of her cause of action, as the majority suggests. The circuit court in fact considered and weighed all of the evidence that was presented and then determined that the evidence was insufficient to establish a *prima facie* case. Thus, under the relevant case law, the appropriate standard of review in this case is not *de novo* review, as the majority claims. See *527 S. Clinton*, 403 Ill. App. 3d at 52. Rather, the appropriate standard of review in this case is the manifest weight of the evidence standard. See *527 S. Clinton*, 403 Ill. App. 3d at 52-53.

¶ 41 III. THE PROPRIETY OF THE CIRCUIT COURT'S RULING

¶ 42 I believe that applying the correct standard of review to the totality of the circumstances of this case leads to conclusion that the circuit court's judgment should be affirmed.

¶ 43 "Undue influence" has been defined as "[p]ersuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party." Black's Law Dictionary 1528 (6th ed. 1990); see also *In re Estate of Glogovsek*, 248 Ill. App. 3d 784, 792 (1993). Generally, a presumption of fraud or undue influence arises if a fiduciary relationship exists between the two parties and the fiduciary has benefitted because of that status. *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997). A fiduciary relationship can arise as a matter of law or of fact. *DeJarnette*, 286 Ill. App. 3d at 1088. One way in which a fiduciary relationship can exist as a matter of law is through the appointment of a power of attorney. *DeJarnette*, 286 Ill. App. 3d at 1088. However, "where a conveyance arises outside the scope of a fiduciary relation shown to exist only as a matter of law, there is no presumption that the transaction resulted from undue influence." *McDonald v. McDonald*, 408 Ill. 388, 394 (1951); see also *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶¶ 16, 23-26 (answering a certified question in the negative regarding "whether a health care power of attorney creates a fiduciary relationship which, as a matter of law, raises a presumption of undue influence in the execution of a deed").

¶ 44 My review of the record in this case reveals that the circuit court did not err when it granted Charlene's section 2-1110 motion. Despite the fact that Charlene was given

health care power of attorney over Gerald, the conveyances in this case were given *outside* the scope of that fiduciary relation. Thus, the grant of health care power of attorney to Charlene did not create a fiduciary relationship as a matter of law, nor does it provide any support for the majority's holding. See *McDonald*, 408 Ill. at 394; see also *Stahling*, 2013 IL App (4th) 120271, ¶ 26.

¶ 45 Furthermore, my review of the record reveals nothing to indicate that a fiduciary relationship arose as a matter of fact in this case. The testimony indicated that Gerald was a very private individual who kept his finances to himself, and that he was of sound mind when the conveyances at issue occurred. While, tragically, there was clear animosity between Charlene and other family members–especially Sharyl–this evidence by itself does not establish that Charlene exerted any undue influence on Gerald. In fact, the testimony indicated that Gerald was responsible at least in part for his isolation from his family members.

¶ 46 Additionally, as the circuit court noted, the history of the family's interactions suggested that the family was not particularly close, and the court's characterization of the late stages of Gerald and Charlene's relationship as essentially one of convenience for Gerald was supported by the evidence. It is true that Gerald and Charlene remarried shortly before the conveyances occurred and his death, but they had been together for the vast majority of the previous 23 years. This was not a new relationship and in fact was their third time getting married to each other. The fact that the conveyances at issue took place shortly after Gerald and Charlene's third marriage does not support any suggestion that the conveyances were tainted by undue influence, especially considering the

abundance of evidence indicating that Gerald had always controlled his own finances.

¶ 47 Moreover, the record simply does not support the majority's claims that "Charlene managed to make a lot of changes in just a few days" (*Supra* ¶ 16) and that "there was sufficient evidence that the transfers were procured by Charlene, after she drove him to several places in the span of a few days, and she filled out the form for the quitclaim deed" (*supra* ¶ 18). It takes more than just driving someone to several places within a few days and filling out a form to create an inference of undue influence. While Gerald did allegedly tell Rowe on May 20 that he wanted to leave his property to his children, he took no steps toward implementing that plan. In fact, the evidence showed that the only steps he took toward implementing any kind of plan was to give Charlene joint tenancy with survivorship rights on all of his assets. Contrary to the majority, I do not believe this was a "frenzied series of events" (*supra* ¶ 17) or a "remarkable and unusual amount of activity for a man who had a recent hip replacement following a terminal cancer diagnosis" (*supra* ¶ 16). In fact, given that Gerald controlled his finances closely, it seems natural that he would take steps to implement a plan after he was faced with his mortality and with the consequences of his decision to keep Charlene in the dark about their 2007 divorce for several years.

¶ 48 Under the circumstances of this case, I believe the manifest weight of the evidence supports the circuit court's ruling that, after considering and weighing all of the evidence, Sharyl failed to present a *prima facie* case of undue influence. Accordingly, I would hold that the circuit court properly granted Charlene's section 2-1110 motion.

¶ 49 For the foregoing reasons, I respectfully dissent.