STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of VERNICE M. TRAINOR.

PATRICIA ANDERSON, Personal Representative of the Estate of VERNICE M. TRAINOR,

Plaintiff-Appellant,

v

BRYAN ORLOWSKI, BRETT ORLOWSKI and CAROL ORLOWSKI,

Defendants-Appellees.

UNPUBLISHED
December 17, 2009

No. 286602
St. Clair Probate Court
LC No. 2006-000395-CZ

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a bench trial, plaintiff appeals as of right from a verdict of no cause for action. We affirm.

This case concerns the conveyance of John and Vernice Trainor's home (the "Property"), to their grandson, Bryan Orlowski. There was a 1999 agreement to sell the Property. Thereafter, Vernice executed two quitclaim deeds in 2001 and 2003. The probate court found that Vernice was capable of entering into the 1999 agreement, and she was capable of conveying the Property at the time she executed the 2001 and 2003 deeds. Further, the court found that Vernice was not unduly influenced. The probate court found that the purchase price was $50,000, payable at $500 per month.

In Michigan, the "form" of a contract for the sale of land is dictated by the statute of frauds, which generally requires that the contract be in writing and signed by the party against whom enforcement is sought.[1] *Zurcher v Herveat*, 238 Mich App 267, 276-277; 605 NW2d 329 (1999). The "substance" of a binding contract for the sale of land is independent of its

[1] The probate court ruled that the partial-performance exception to the statute of frauds applied. Plaintiff has not disputed this decision on appeal.

sufficiency under the statute of frauds. *Id.* at 282. General contract law governs the "essential elements" of such a transaction. *Id.* Under general contract principles, there must be a "meeting of the minds" regarding identification of (1) the property, (2) the parties, and (3) the consideration. *Id.*

In the present case, plaintiff argues that the probate court committed clear error in finding that there was a meeting of the minds regarding identification of the parties and the consideration. Factual questions regarding the validity of a contract's formation are reviewed for clear error. *Wright v Wright*, 279 Mich App 291, 297; 761 NW2d 443 (2008). Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake was made, even if there is evidence to support the finding. *In re Hill*, 221 Mich App 683, 692; 562 NW2d 254 (1997). This Court defers to the probate court on matters of credibility and gives broad deference to findings of fact made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily ascertainable to the reviewing court. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993); see also MCR 2.613(C).

A contract meets the identification of the parties requirement "by designating 'the names of the buyer and the seller with sufficient certainty so as to identify them.' " *Zurcher*, *supra*, 238 Mich App at 283, quoting 77 Am Jur 2d, Vendor and Purchaser, § 5, p 127. Bryan testified that he and John reached an agreement on the Property while Vernice was sitting with them at the kitchen table. John and Vernice's daughter, Patricia Anderson, testified that John showed her a handwritten note detailing the terms of the agreement. Nathaniel Anderson, Patricia's son, testified that he saw a handwritten agreement to buy the Property, which was signed by John and Bryan, but not signed by Vernice. Carol testified that her mother and father "did everything together" and that she believed her mother agreed to the sale. Based on this evidence, the probate court found that the primary negotiations may have been between Bryan and John, but Vernice was aware that she had moved residences and that Bryan was living in her former home. The court also found that because Vernice failed to raise the issue with any of her family members, it was clear that she knew about and was satisfied with the terms of the transaction or was willing to follow her husband's lead in that regard. We note that Vernice had an opportunity to object to the agreement when she was sitting at the kitchen table with Bryan and John during their initial discussion, and when she signed the first quitclaim deed. Based on the record, and deferring to the probate court on matters of credibility, we are not left with a definite and firm conviction that the probate court made a mistake in finding that Vernice concurred in the sale. *In re Hill*, *supra* at 692; *In re Erickson Estate*, *supra* at 331; see also MCR 2.613(C). Thus, the requirement that the parties be identified was satisfied.

The next issue is whether the probate court clearly erred in finding that there was a meeting of the minds regarding identification of the consideration when there was contradictory and conflicting testimony as to the amount of consideration. A contract meets the identification of the consideration requirement when the contract:

> either set[s] forth the price to be paid by the purchaser or furnish[es] a basis from which the price may be ascertained. Under this rule, indefiniteness as to the method of payment of the purchase price, such as where a contract provides that the terms of payment are to be left for future negotiation, renders such a contract

> unenforceable and precludes the recovery of damages in an action for breach of the alleged contract. [*Zurcher*, *supra* at 282.]

Bryan testified that the consideration was $50,000. Patricia testified that the consideration on the handwritten note she saw was either $50,000 or $60,000. Nathaniel could not recall a purchase price on the agreement he saw. Carol stated, "all I know is $50,000 for the house … that's all I know." The second quitclaim deed Vernice executed listed the amount of consideration as one dollar. Based on this evidence, the probate court found that the Trainors and Bryan agreed that Bryan would purchase the Property for $50,000. The court stated that "[t]his finding is based upon the undisputed testimony of Bryan, and is buttressed at least in part by testimony from Patricia and Nathaniel, relating to the content of the writing both saw and the fact that the purchase price was acceptable to Mr. Trainor and, by implication or tacit agreement, [Vernice]." Based on the record, and again deferring to the probate court on matters of credibility, we are not left with a definite and firm conviction that the probate court made a mistake in finding that the consideration was $50,000. *In re Hill*, *supra* at 692; *In re Erickson Estate*, *supra* at 331; see also MCR 2.613(C). Thus, the contractual law requirement that the consideration be identified was satisfied.

Next, plaintiff argues that the probate court erred in finding that Vernice had the mental capacity to convey the property in 1999, when she agreed to sell the Property to Bryan, in 2001, when she executed the first quitclaim deed, and in 2003, when she executed the second quitclaim deed. We disagree.

I. The 1999 Agreement

In *In re Erickson Estate*, *supra* at 332, this Court set forth the test of mental capacity to contract:

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract.

If there is evidence pro and con on the issue of mental capacity, the conclusion reached by the probate court should ordinarily be given much weight because of the probate court's opportunity to see and hear the witnesses. *Id.* at 333. Where mental incompetency is claimed, it should be proved by a preponderance of the evidence. *Id*.

There was very little testimony presented as to Vernice's mental competency at the time she entered into the 1999 agreement. By that time, she had had two seizures, one in 1972 and one in 1973. After the seizures, Vernice was seeing "ghosts" of relatives who were deceased. At times Vernice would not know where she was or who she was. On June 23, 1998, Vernice

scored a 21/30[2] on a mini mental status exam. Vernice's physician indicated that she "continues to [probably] have trouble . . . with dementia." Based on these facts, it is clear that Vernice suffered from medical problems; however, plaintiff presented no evidence that Vernice failed to understand in a reasonable manner the nature and effect of the 1999 agreement. On the contrary, Bryan testified that Vernice appeared to know what was happening, and had not exhibited any forgetfulness or signs of dementia, throughout the time the agreement was reached. Based on the record, and deferring to the probate court on matters of credibility, we are not left with a definite and firm conviction that the probate court made a mistake in finding that Vernice was mentally competent at the time she entered into the 1999 agreement to sell the Property to Bryan. *In re Hill*, *supra* at 691; *In re Erickson Estate*, *supra* at 331; see also MCR 2.613(C).

II. The 2001 and 2003 Deeds

Persons executing deeds must have:

> sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others. [*Persinger v Holst*, 248 Mich App 499, 503-504; 639 NW2d 594 (2001).]

It is Vernice's competence at the time the deed was executed that is important, not her competence before or after the deed was executed. *Wroblewski v Wroblewski*, 329 Mich 61, 66; 44 NW2d 869 (1950) (stating that the test is "whether at the time he executed the deeds in question he had sufficient mental capacity . . . .").

In this case, the probate court relied on testimony from William McGrail, an attorney with significant experience, and Wendy Bovee, the branch manager at Chirco Title, to find that Vernice was competent to execute the 2001 and 2003 deeds. They were present at the time the respective deeds were executed.

McGrail prepared the first deed and testified that he discussed the deed with the Trainors before they signed it. He determined that they understood the nature of the transaction, that it could not be reversed, and that they wanted to add Bryan to the deed. He did not notice anything unusual about either of the Trainors, and it was his impression that they knew what they were doing. However, he did not ask any specific questions to determine if Vernice was mentally competent. Based on this testimony, and deferring to the probate court on matters of credibility, we are not left with a definite and firm conviction that the probate court made a mistake in finding that Vernice was mentally competent at the time she executed the 2001 deed. *In re Hill*, *supra* at 692; *In re Erickson Estate*, *supra* at 331; see also MCR 2.613(C).

[2] A score between 18 and 24 denotes mild to moderate impairment. Gary J. Kennedy, *Geriatric Mental Health Care: A Treatment Guide for Health Professionals* (New York: The Guilford Press, 2000), ch 3, p 53.

As to the second deed, Bovee testified that she discussed the effects of the deed with Vernice before Vernice executed the deed. She testified that because she was a notary and escrow officer, she had an obligation to make sure that deeds were signed without "undue duress" and that the person signing was "reasonably competent" to do so. She remembered this particular situation well because her "mother had recently . . . been diagnosed with Alzheimer's and I was aware of how actually incompetent she was, even though she kind of looked like she was able to get around." Bovee testified that she spoke with Vernice in private and asked a number of questions, aimed at discerning orientation that she heard the doctor ask her mother. She also asked Vernice to explain what she was doing in her own words. Based on Vernice's response, Bovee felt that Vernice "most definitely" understood what she was doing. Based on her testimony, and deferring to the probate court on matters of credibility, we are not left with a definite and firm conviction that the probate court made a mistake in finding that Vernice was mentally competent at the time she executed the 2003 deed. *In re Hill*, *supra* at 692; *In re Erickson Estate*, *supra* at 331; see also MCR 2.613(C).

Plaintiff's final argument is that the probate court erred in finding that Vernice's execution of the April 28, 2003, deed was not the product of undue influence. We disagree. Undue influence is an equitable claim. *Adams v Adams*, 276 Mich App 704, 714 n 5; 742 NW2d 399 (2007). "Equitable decisions are reviewed de novo," but the standard of review of findings of fact made by a probate court is whether those findings are clearly erroneous. *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009); *In re Hill*, *supra* at 692.

To establish a claim of undue influence, the charging party must demonstrate

> 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. [*In re Estate of Mikeska*, 140 Mich App 116, 120; 362 NW2d 906 (1985); see also *In re Peterson Estate*, 193 Mich App 257, 259, 483 NW2d 624 (1991) .]

A presumption of undue influence attaches to a transaction where the evidence establishes:

> (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*Estate of Mikeska*, *supra* at 121.]

In this case, the facts supported a presumption of undue influence. Carol was in a fiduciary relationship with her mother because at the time Vernice signed the 2003 deed, Vernice depended on Carol for care and medical treatment. Carol benefited when the Property was transferred because it was transferred to her son.[3] Carol had an opportunity to influence her

[3] Before the 2003 deed was executed, Bryan was a joint tenant with Vernice. After the deed was (continued…)

mother's decision because her mother was living with her. Additionally, Carol scheduled the appointment with Chirco Title and drove her mother to the appointment.

If a charging party establishes a presumption of undue influence, as plaintiff did in this case, a "mandatory inference" is created

> shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion. [*Id*.]

Despite the presumption of undue influence, which shifted the burden of going forward with contrary evidence to defendant, the probate court correctly determined that the presumption had been rebutted and that the April 28, 2003, deed was not the product of undue influence. The probate court relied on the testimony from Bovee, discussed above. She testified that she had an obligation to make sure that deeds were signed without "undue duress," and that Vernice "most definitely" understood what she was doing. Her independent, disinterested testimony established that Vernice was able to relate her understanding of the transaction and that it was her desire to convey the Property to Bryan. Because the presumption of undue influence was rebutted, plaintiff's burden of persuasion remained. *Id.* at 121. The only evidence showing any kind of pressure on Vernice was the fact that Vernice was living with Carol and was driven by Carol to Chirco Title. That evidence does not present a situation where Vernice was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel Vernice to act against her inclination and free will. *Id.* at 120. In fact, Carol testified that her mother was not easily influenced and made decisions on her own until the time she died. Based on the record, and deferring to the probate court on matters of credibility, we are not left with a definite and firm conviction that the probate court made a mistake in concluding that the April 28, 2003, deed was not the product of undue influence. *In re Hill*, *supra* at 692. Hence, there was no error by the probate court.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens

(…continued)

executed, he was the sole owner.