[Cite as *Burchfield v. McMillian-Ferguson*, 2011-Ohio-2486.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

J. Randolph Burchfield, Administrator of the Estate of John McMillian,	:	
Plaintiff-Appellee,	:	No. 10AP-623 (Prob. No. 530663A)
v.	:	
Inez P. McMillian-Ferguson, aka Pamela Ferguson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 24, 2011

J. Randolph Burchfield, pro se.

Tricia A. Sprankle, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Probate Division.

BROWN, J.

{¶1} Inez P. McMillian-Ferguson, aka Pamela Ferguson, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, in which the court granted relief to plaintiff-appellee, J. Randolph Burchfield, Administrator of the Estate of John McMillian, decedent, pursuant to appellee's complaint for concealing assets.

{¶2} John McMillian ("McMillian") had seven adult children, including Steve McMillian ("Steve"), Brenda Scott ("Brenda"), and appellant. Appellant prepared a

general power of attorney ("POA") naming appellant as McMillian's attorney-in-fact. The POA indicates it was executed on January 8, 2005, although appellant testified that it should have indicated 2006, and it was recorded on January 10, 2006. McMillian's signature appears on the document, as well as appellant's as attorney-in-fact.

{¶3} Appellant also prepared a survivorship deed that deeded her father's interest in his house on Marina Drive, Columbus, Ohio, to him and appellant jointly. McMillian's signature appears on the document, and it was executed on January 8, 2006. The survivorship deed was recorded on January 10, 2006.

{¶4} Appellant prepared a quit claim deed for her father ("first Marina Drive quit claim deed"). The quit claim deed transferred McMillian's interest in the Marina Drive house to "Steven B. McMillian." This first Marina Drive quit claim deed was executed on October 1, 2006, and recorded on October 20, 2006. McMillian's and Steve's signatures appear on the document. Appellant signed the document as a witness.

{¶5} At trial, appellant claimed that the first Marina Drive quit claim deed was executed in error. Appellant asserted the first Marina Drive quit claim deed should have, instead, deeded her father's interest in property located on Toni Street, Columbus, Ohio, to Steve. Appellant then prepared a quit claim deed that transferred McMillian's interest in the Toni Street property to "Steven B. McMillian." The Toni Street quit claim deed was executed on November 2, 2006, and recorded on November 3, 2006. McMillian's and Steve's signatures appear on the document, and appellant signed it as a witness.

{¶6} Appellant also prepared a quit claim deed ("second Marina Drive quit claim deed") transferring the Marina Drive property from "Steven B. McMillian" back to McMillian. The second Marina Drive quit claim deed was executed November 3, 2006,

and recorded November 3, 2006. McMillian's and Steve's signatures appear on the document, and appellant signed it as a witness.

{¶7} On October 17, 2007, appellant filed a bankruptcy petition. The petition did not indicate that appellant held any interest in the Marina Drive property pursuant to the January 2006 survivorship deed.

{¶8} Appellant prepared a quit claim deed ("third Marina Drive quit claim deed") that transferred her father's interest in the Marina Drive property to her. The third Marina Drive quit claim deed was executed July 1, 2008, and recorded on July 8, 2008. McMillian's and appellant's signatures appear on the document, and Brenda signed it as a witness. At trial, appellant testified she signed her father's name to this deed as POA, although no designation thereof appears on the document.

{¶9} On July 20, 2008, McMillian died intestate with no surviving spouse. Application to administer the estate was filed on August 22, 2008.

{¶10} On April 7, 2009, a check was issued to McMillian and his deceased wife, Ruth, for the return of home insurance premium in the amount of $189.50. Appellant signed the names of McMillian and his deceased wife, cashed the check, and retained the proceeds.

{¶11} An administrator was appointed to McMillian's estate on August 21, 2009. On January 15, 2010, appellee filed a complaint for concealing assets against appellant. Appellee claimed appellant, by use of fraud or undue influence, obtained title to the Marina Drive property. A hearing on appellee's complaint was held June 1, 2010. On June 2, 2010, the trial court issued a judgment, finding that title to the Marina Drive property should be restored to McMillian; appellant fraudulently collected the $189.50 from the insurance company, which appellant must repay to the estate with a ten percent

penalty; and appellant must pay the costs of the proceedings and have her share of the inheritance reduced by the amount of attorney fees charged to the estate. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] THE PROBATE COURT ERRORED [SIC] AS A MATTER OF LAW IN ITS APPLICATION OF THE BURDEN OF PROOF IN THE ACTION REGARDING CONCEALMENT OF ASSETS.
>
> [II.] THE JUDGMENT FINDING OF FACTS DOES NOT SUPPORT THE CONCLUSIONS OF LAW.
>
> [III.] THE JUDGMENT FINDING OF A CONFLICT OF INTEREST USE BY A POWER OF ATTORNEY IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [IV.] THE JUDGMENT FINDING THE DEED DATED JANUARY 8, 2006 INVALID IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [V.] THE JUDGMENT FINDING THE DEED DATED JULY 1, 2008 INVALID IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [VI.] THE PROBATE COURT ABUSED ITS DISCRETION IN DENYING THE ADMISSION OF AN AFFIDAVIT FROM THE NOTARY PUBLIC AND DECEDENT'S PHYSICIAN.
>
> [VII.] THE JUDGMENT FINDING THE INSURANCE CHECK WAS NOT PROPERLY PAYABLE TO APPELLANT IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} Appellant argues her first and third assignments of error together. Appellant argues in her first assignment of error that the trial court erred in its application of the burden of proof in the action regarding concealment of assets. Appellant argues in her third assignment of error that the trial court's finding a conflict of interest in appellant's use of the POA was against the manifest weight of the evidence. Initially, we note that appellant argues at length that the trial court erred when it found she had exerted undue influence upon McMillian in executing the POA and the January 8, 2006 survivorship

deed, yet the trial court never made any finding appellant exerted undue influence in its judgment. The trial court's finding was that appellant, fraudulently and through the use of the POA under circumstances that constituted a conflict of interest, transferred the Marina Drive property to herself. Thus, appellant's argument concerning undue influence is immaterial to the matters before us.

{¶13} Appellant next argues that her actions regarding the Marina Drive property did not constitute a conflict of interest. A conflict of interest is defined as " 'a real or seeming incompatibility between one's private interests and one's public or fiduciary duties.' " *In re Trust of Bernard*, 9th Dist. No. 24025, 2008-Ohio-4338, ¶16, quoting Black's Law Dictionary (8th ed.rev.2004) 319. "The holder of a power of attorney has a fiduciary relationship with his or her principal." *In re Scott* (1996), 111 Ohio App.3d 273, 276. "A 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78, quoting *In re Termination of Employment of Pratt* (1974), 40 Ohio St.2d 107, 115. A fiduciary owes the utmost loyalty and honesty to his principal. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 165.

{¶14} The law is zealous in guarding against abuse in a fiduciary-principal relationship. *In re Termination of Employment of Pratt* at 115. Any transfer of property from a principal to his attorney-in-fact is viewed with some suspicion. *Studniewski v. Krzyzanowski* (1989), 65 Ohio App.3d 628, 632. Self-dealing transactions by a fiduciary are presumptively invalid. *In re Estate of Cunningham* (Oct. 25, 1989), 5th Dist. No. 89-CA-10. See also *In re Estate of Harmon* (June 5, 1996), 9th Dist. No. 95CA0066 (stating

it is a most egregious violation of a fiduciary's duty to abuse the relationship through acts of self-dealing).

{¶15} Appellant contends her actions with regard to the transfer of the Marina Drive property to herself did not constitute a conflict of interest with her fiduciary duties as McMillian's POA. Appellant asserts the evidence demonstrated that, at the request of McMillian, she undertook the responsibilities of maintaining the Marina Drive property beginning January 8, 2006. Appellant also points out that Brenda testified McMillian told her that he did not want the Marina Drive home sold, and appellant's actions were consistent with McMillian's wishes.

{¶16} Appellant prepared the third Marina Drive quit claim deed that transferred her father's interest in the Marina Drive property to herself. McMillian's, Brenda's, and appellant's signatures appear on the document. Appellant testified at trial that she signed McMillian's signature on this document as POA. Thus, the document that ultimately transferred McMillian's interest in the Marina Drive property to appellant, as well as divested any interest McMillian's estate had in the property, was not signed by McMillian but signed by appellant herself as McMillian's POA. Brenda also testified at the hearing that her witness signature on this document was not her own. The circumstances surrounding the quit claim deed are suspicious enough on their own, given the lack of any designation on the document that McMillian's signature was anyone's other than his own, appellant was the preparer of the document, and Brenda's testimony that the witness signature was not hers. But when one also considers the well-established tenets that any transfer of property from a principal to his attorney-in-fact is viewed with some suspicion, and self-dealing transactions by a fiduciary are presumptively invalid, it is clear why the trial court found the transfer of the Marina Drive property to appellant invalid.

{¶17} Although appellant argues that she undertook the responsibilities of maintaining the Marina Drive property in January 2006, this fact does not obviate the presumptive impropriety of an attorney-in-fact using her POA to transfer property from the principal to the attorney-in-fact. Regardless, whether appellant maintained the property has no bearing on whether it was her father's wishes that she become sole owner thereof. Likewise, that Brenda testified McMillian told her that he did not want the Marina Drive home sold does not equate with it being McMillian's wish that appellant become the sole owner thereof upon his death, to the exclusion of his other six children. Therefore, considering all of these circumstances, we find the trial court did not err when it found appellant had used her POA in a situation raising a conflict of interest. For these reasons, appellant's first and third assignments of error are overruled.

{¶18} Appellant addresses her second and fifth assignments of error together, and we will do the same. In these assignments of error, appellant claims the trial court erred in finding the third Marina Drive quit claim deed was invalid. Appellant asserts that the trial court did not specifically address the validity of the POA under which the third Marina Drive quit claim deed was prepared. Appellant points out that the court found only that the signature of Brenda was invalid, and in order to convey real estate, witnesses are unnecessary under R.C. 5301.01(B)(1)(a). However, although the trial court did not specifically refer to the third Marina Drive quit claim deed in invalidating the transfer of property from McMillian to appellant, as explained above, the trial court concluded it was a conflict of interest for appellant to use her POA to transfer McMillian's interest in the Marina Drive property to herself. Therefore, the trial court did, in fact, address the validity of the POA under which the third Marina Drive quit claim deed was prepared.

{¶19} Alternatively, appellant argues if the third Marina Drive quit claim deed is found invalid, the survivorship deed would become the controlling instrument, and the property would be held in joint ownership between McMillian and appellant thereunder. We reject this argument, for the reasons explained more fully in our discussion of appellant's fourth assignment of error below. Therefore, for the foregoing reasons, appellant's second and fifth assignments of error are overruled.

{¶20} Appellant argues in her fourth assignment of error that the trial court's finding that the January 8, 2006 survivorship deed was invalid was against the manifest weight of the evidence. In a civil case, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence and must be affirmed by a reviewing court. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. The applicable standard requires the appellate court to give "the trial court's decision a presumption of correctness" and we may not substitute our judgment for that of the trial court. Id. This presumption arises in part because the fact finder occupies the best position to observe the witnesses' demeanor, gestures, and voice inflections and to utilize these observations in weighing credibility. Id. at 80.

{¶21} Appellant argues that the survivorship deed was a valid conveyance of the Marina Drive property; thus, appellant should have gained full interest in the property

upon McMillian's death. Although the trial court did not explicitly state so, it is apparent that the trial court believed appellant fraudulently prepared the survivorship deed by forging McMillian's signature, when considering together the trial court's explicit finding that Steve testified it was not McMillian's signature on the survivorship deed and its conclusion that appellant fraudulently transferred the Marina Drive property to herself. Appellant asserts that there was no expert testimony that she forged McMillian's signature. She points out that the only testimony to support such came from Steve, who was a beneficiary of the estate and had a financial stake in the outcome. Appellant also points out that Brenda, who also was a beneficiary of the estate, testified that the signature on the survivorship deed was that of her father, and appellant herself testified it was McMillian's signature.

{¶22} Appellant cites no authority for the proposition that the probate court was prohibited from considering Steve's testimony as to his lay opinion of the authenticity of his father's signature because he was not an expert in handwriting analysis. Thus, what appellant essentially asks this court to do is re-weigh the credibility of the witnesses. Although this court may consider the credibility of witnesses upon a manifest weight of the evidence review, as indicated above, a difference of opinion on credibility of witnesses is generally not a legitimate ground for reversal. Here, Steve testified that he had known his father his whole life, had seen his father sign his name "numerous times," and would know his father's signature if he saw it. Steve also identified his father's signature on many other documents in the record. Brenda testified that she was familiar with McMillian's signature, had witnessed him signing documents, and would be able to recognize his signature. Brenda testified that it was McMillian's signature on the survivorship deed. Although appellant is correct that Steve obviously had a financial stake

in invalidating the survivorship deed, the trial court apparently chose to believe his testimony over appellant's and Brenda's despite this issue. The trial court was better able to judge Steve's and Brenda's credibility in person than this court can do based upon the transcript alone. Therefore, as appellant has given us no sound reason to question the trial court's credibility determination, we find the trial court did not err when it found the survivorship deed did not convey the Marina Drive property to appellant upon McMillian's death based upon appellant's forgery of McMillian's signature on the deed. Accordingly, appellant's fourth assignment of error is overruled.

{¶23} Appellant argues in her sixth assignment of error that the trial court erred when it denied admission of three affidavits. Appellant asserts that notary public Azeez Akbar certified the survivorship deed at the time McMillian signed the document, and Akbar completed an affidavit in which he stated McMillian signed the document voluntarily and under no duress. Appellant also asserts that the affidavit of McMillian's doctor, Dr. H. Craig Sleesman, confirmed that McMillian was under no duress when he signed the POA and survivorship deed. Dr. Sleesman averred that McMillian was under his care for over 20 years, and he last saw McMillian on March 21, 2008. Dr. Sleesman also averred that McMillian was always of sound mind, was able to make informed decisions, had excellent judgment, was not susceptible to the undue influence of others, and never exhibited any signs of dementia. Finally, appellant asserts that the trial court should have accepted the correspondence from McMillian's personal advisor, Stephanie Ofoe. In the letter, Ofoe stated that she was asked by McMillian to explain to appellant the process of how to have her name added to the deed, and she met with appellant at McMillian's home and explained the process. Ofoe also stated that the next time she met appellant and McMillian, they both confirmed they had done so.

{¶24} A trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion. *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶25} Here, the trial court denied the admission of these affidavits, finding that the best evidence was the testimony of the affiants themselves. We agree. Ohio courts have held that "[a]ffidavits are not generally admissible over objection at the trial to establish facts material to the issue being tried." *Natl. City Bank v. Natl. City Window Cleaning Co.* (1963), 174 Ohio St. 510, 516. Because an affidavit is not subject to cross-examination, standing alone, it is inadmissible at trial. *Midstate Educators Credit Union, Inc. v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641. Also, a trial court is unable to adjudge the credibility of an affiant as it would a live witness. In the case at bar, the three affidavits went to the very heart of the issue – whether appellant committed fraud in forging McMillian's name on some of the instruments. Appellant presented no reason for why she could not procure the live testimony of the affiants at the hearing and subject them to cross-examination and credibility determinations. To have admitted the affidavits without allowing appellee to cross-examine the affiants and permit the trial court to view the demeanor and gestures of the affiants during live testimony would have been grossly unfair to appellee. Therefore, because appellee objected to the affidavits, which were material to the issue being tried, the trial court did not abuse its discretion when it refused to admit the affidavits. Accordingly, appellant's sixth assignment of error is overruled.

{¶26} Appellant argues in her seventh assignment of error that the trial court erred when it found the $189.50 insurance check was not properly payable to appellant.

Appellant asserts that, from July 2008 until the date of the probate court's decision, she undertook payment of the Marina Drive homeowner's insurance premium using her own funds, although she did not establish a new policy in her name. Thus, appellant contends she was the proper recipient of the insurance premium refund. However, we find the trial court properly found appellant committed fraud in collecting the $189.50. It is undisputed the check was made out to McMillian and his deceased wife. Appellant had no authority to sign the names of McMillian and his wife and keep the proceeds. The proceeds properly belonged to the estate. If appellant believed she was entitled to the proceeds and/or reimbursement for the premiums she had paid for homeowner's insurance on the house after McMillian's death, appellant could have sought reimbursement for those monies from the estate. Although appellant claims she undertook common sense actions to achieve the same result that would have occurred if she had filed a creditor's claim against the estate, her acts, nonetheless, constituted fraudulent behavior that deprived McMillian's estate of proceeds that should have been properly included therein.

{¶27} Appellant also argues under this assignment of error that the trial court unfairly required her to forego an additional share of her inheritance to pay all attorney fees to the estate. Appellant contends attorney fees for the entire administration of the estate are not properly payable by appellant. Appellant asserts any award of attorney fees should be limited to activities directly related to the current litigation if she is found to have concealed estate assets. The trial court found that "[appellant] shall pay the costs of these proceedings and have her share of inheritance reduced by the amount of attorney fees charged to the estate by Mr. Burchfield." We believe the trial court meant to order appellant to pay only those attorney fees incurred by the estate that were expended in pursuing the concealment of assets action against her, and we find that would be the only

order reasonable under the circumstances. However, because the trial court's order is somewhat unclear, we clarify the trial court's decision in this regard. Therefore, we overrule appellant's seventh assignment of error in part and sustain it in part, insofar as the trial court's attorney fees award is limited to those fees incurred by the administrator related to the present concealment of assets action against appellant.

{¶28} Accordingly, appellant's first, second, third, fourth, fifth, and sixth assignments of error are overruled, and appellant's seventh assignment of error is sustained in part and overruled in part. The judgment of the Franklin County Court of Common Pleas, Probate Division is affirmed in part and reversed in part, and this matter is remanded to that court for the limited purpose of issuing a judgment clarifying the award of attorney fees consistent with this decision.

Judgment affirmed in part and reversed in part; cause remanded with instructions.

KLATT and SADLER, JJ., concur.

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