[Cite as *LeMar v. Ickes*, 2009-Ohio-3650.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

DOYLE LEMAR, et al.	C.A. No. 08CA0036
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RODNEY L. ICKES, SR.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellee	CASE No. V-68541-07

DECISION AND JOURNAL ENTRY

Dated: July 27, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Donald LeMar died testate. He left his entire estate to his friend Rodney Ickes. Mr. LeMar's close family members contested the will, alleging Mr. Ickes exercised undue influence over Mr. LeMar. A jury found there was no undue influence. Mr. LeMar's family members have appealed, arguing that the trial court should have instructed the jury that, because Mr. Ickes had a fiduciary relationship with Mr. LeMar, there is a presumption of undue influence. Because Mr. Ickes did not have power of attorney for Mr. LeMar before Mr. LeMar executed the will, this Court affirms.

FACTS

{¶2} Mr. LeMar and Mr. Ickes became friends and lovers in the mid-1970s. They lived together and, when Mr. LeMar's health began to fail, Mr. Ickes drove him to all of his appointments. On July 6, 2006, Mr. Ickes drove Mr. LeMar to a lawyer so that he could revise

his will. Mr. LeMar also asked the lawyer to prepare a power of attorney, to be held by Mr. Ickes. Mr. Ickes was present and contributed some of his thoughts during the meeting.

{¶3} On July 11, 2006, Mr. Ickes drove Mr. LeMar back to the lawyer so that he could sign the will and power of attorney. According to the lawyer, she brought Mr. LeMar into her office alone and went over the will with him. Mr. Ickes either remained in the lawyer's waiting room or went outside. When the lawyer was satisfied that Mr. LeMar understood the will and that it reflected his intentions, she asked her secretary to enter the room to serve as a second witness. Mr. LeMar executed the will and power of attorney in front of the lawyer and her secretary. The lawyer could not remember which document he signed first. When Mr. LeMar was finished, he left the lawyer's office and handed the power of attorney to Mr. Ickes.

{¶4} After Mr. LeMar died, the July 2006 will was admitted to probate. Several of Mr. LeMar's family members contested the will, alleging that Mr. LeMar did not have testamentary capacity and that Mr. Ickes had exercised undue influence. At trial, the court directed a verdict in favor of Mr. Ickes on the issue of testamentary capacity. Mr. LeMar's family members requested a jury instruction that "there is a presumption that the July 11, 2006, will was the result of undue influence because [Mr.] LeMar granted [Mr.] Ickes a power of attorney." The court did not give the instruction, and the jury found that the will was not invalid because of undue influence. Mr. LeMar's family members have appealed, assigning two errors.

UNDUE INFLUENCE

{¶5} The family members' first assignment of error is that the trial court incorrectly failed to instruct the jury that, because Mr. Ickes had a fiduciary relationship with Mr. LeMar, there should be a presumption of undue influence. They have argued that a fiduciary relationship existed between the two men because Mr. Ickes was Mr. LeMar's attorney-in-fact.

{¶6} "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591 (1991) (quoting Markus & Palmer, Trial Handbook for Ohio Lawyers § 36:2 (3d ed. 1991)). "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] . . . instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner*, 28 Ohio St. 2d 54, syllabus (1971).

{¶7} "The holder of a power of attorney has a fiduciary relationship with his . . . principal." *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶29 (quoting *In re Scott*, 111 Ohio App. 3d 273, 276 (1996)). "[He] owes the utmost loyalty and honesty to his principal." *Id.* "The law is zealous in guarding against abuse of such a relationship." *Id.* at ¶30. "Any transfer of property from a principal to his attorney-in-fact is viewed with some suspicion." Accordingly, "[s]elf-dealing transactions by a fiduciary are presumptively invalid." *Id.*

{¶8} The family members' argument fails because there was no evidence that Mr. Ickes was Mr. LeMar's attorney-in-fact at the time Mr. LeMar signed the will. It is undisputed that Mr. Ickes did not have power of attorney before he drove Mr. LeMar to the lawyer's office the second time. The lawyer could not remember whether Mr. LeMar signed the power of attorney or the will first. If the will was signed first, then there was no fiduciary relationship between Mr. LeMar and Mr. Ickes at the time he signed it.

{¶9} Even if Mr. LeMar signed the power of attorney first, it was not effective until Mr. LeMar delivered it to Mr. Ickes and Mr. Ickes accepted the responsibility. "A power of attorney is a written instrument authorizing an agent to perform specific acts on behalf of his

principal." *Testa v. Roberts*, 44 Ohio App. 3d 161, 164 (1988). Agency law, therefore, applies to such instruments. "The relationship between an agent and a principal is a contractual one, and the extent of the rights and duties of each is to be found in the express or implied terms of the agency contract. As between the parties to the relationship, there must be a meeting of the minds in establishing the agency, and the consent of both the principal and the agent is necessary to create the agency . . . . The principal must intend that the agent act for him or her, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." 3 Am. Jur. 2d *Agency* § 15 (2002); see also Restatement (Third) of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf . . . and the agent manifests assent or otherwise consents so to act."). Mr. Ickes could not assent to being Mr. LeMar's attorney-in-fact until Mr. LeMar signed the power of attorney. Mr. Ickes did not know that the power of attorney had been signed until Mr. LeMar exited the lawyer's office and returned to the waiting room. By that time, the will had been executed.

{¶10} Furthermore, even if Mr. Ickes became Mr. LeMar's fiduciary at the moment Mr. LeMar signed the power of attorney, Mr. Ickes did not have the opportunity to exercise undue influence over him before he signed the will. Mr. Ickes did not have access to Mr. LeMar between the signing of the power of attorney and the will. Accordingly, there was no evidence to support the family members' requested instruction.

{¶11} Mr. LeMar's family members have also argued that a fiduciary relationship existed between Mr. LeMar and Mr. Ickes because there was a special trust or confidence between them. The Ohio Supreme Court has held that "[a] fiduciary relationship need not be

created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed." *Stone v. Davis*, 66 Ohio St. 2d 74, 78 (1981).

{¶12} The family members' argument fails because they did not make it at trial. See *Holman v. Grandview Hosp. & Med. Ctr.*, 37 Ohio App. 3d 151, 157 (1987) ("Issues not raised . . . in the trial court cannot be raised for the first time on appeal."). While the question of whether an informal fiduciary relationship exists is a question of fact, the family members did not ask for the jury to determine whether there was a special trust or confidence between Mr. LeMar and Mr. Ickes. See *Lippy v. Soc'y Nat'l Bank*, 100 Ohio App. 3d 37, 45 (1995) (concluding that whether an informal fiduciary relationship existed would be for the jury's determination if it was supported by evidence). They only requested a presumption of undue influence instruction based on their allegation that Mr. Ickes had power of attorney for Mr. LeMar. They did not ask for the jury to determine whether an informal fiduciary relationship existed. Accordingly, they have forfeited that argument. The family members' first assignment of error is overruled.

BURDEN OF PROOF

{¶13} The family members' second assignment of error is that the trial court incorrectly instructed the jury that they had the burden of proof. The family members, however, have merely repeated their argument that Mr. Ickes should have had the burden of proof regarding undue influence because, according to them, he was Mr. LeMar's fiduciary at the time he executed the will. As noted previously, there was no evidence that Mr. Ickes was Mr. LeMar's fiduciary at the time Mr. LeMar executed the will. Accordingly, the trial court correctly told the jury that the family members had the burden of proof. The family members' second assignment of error is overruled.

CONCLUSION

{¶14} Because Mr. Ickes did not have power of attorney for Mr. LeMar at the time Mr. LeMar executed his will, the trial court correctly declined to instruct the jury that it should presume undue influence. It properly instructed the jury that the family members had the burden of proving that issue. The judgment of the Wayne County Common Pleas Court, Probate Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

CHARLES A. KENNEDY, attorney at law, for appellants.

DON L. REYNOLDS, and CRAIG R. REYNOLDS, attorneys at law, for appellee.