IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

December 22, 1998

Cecil Crowson, Jr.
Appellate Court
Clerk

FIRST TENNESSEE BANK NATIONAL ASSOCIATION, as Executor of the ESTATE OF GLENN P. WEBB, SR.,	)	C/A NO. 03A01-9801-CH-00011
Plaintiff-Appellee,	)	
v.	)	APPEAL AS OF RIGHT FROM THE HAMILTON COUNTY CHANCERY COURT
GLENN P. WEBB, JR.,	)	
Defendant-Appellant.	)	HONORABLE HOWELL N. PEOPLES, CHANCELLOR

For Appellant

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For Appellee

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O P I N I O N

AFFIRMED AND REMANDED Susano, J.

This intra-family legal dispute arose out of a real property transfer from the now-deceased Glenn P. Webb, Sr. ("Mr. Webb") to his son, the defendant Glenn P. Webb, Jr. ("Pat Webb"). One of Mr. Webb's daughters, Patty Webb, filed this action seeking to set aside a warranty deed to Pat Webb conveying Mr. Webb's interest in a nine-acre tract of property. She also sought[1] to invalidate a power of attorney that Mr. Webb had granted to Pat Webb immediately following Mr. Webb's execution of the warranty deed. Less than a month after these documents were executed, Mr. Webb died, and the executor of his estate, First Tennessee Bank, N.A. ("First Tennessee"), was substituted as plaintiff in this litigation. Following a bench trial, the court held that the execution of the power of attorney had created a confidential relationship between Mr. Webb and his son, thus giving rise to a presumption that Pat Webb had procured the conveyance of the subject property by undue influence. The trial court found that this presumption had not been rebutted by clear and convincing evidence and, consequently, set aside the warranty deed. Pat Webb appealed, raising the following two issues, as taken verbatim from his brief:

> 1. Did the Chancellor err in expanding ***Matlock v. Simpson***, 902 S.W.2d 382 (Tenn. 1995), beyond its language and intent to presume, as a matter of law, that Glenn P. Webb, Jr. unduly influenced his father, where his father first executed a warranty deed in favor of Glenn P. Webb, Jr. and later granted Glenn P. Webb, Jr. an unrestricted power of attorney?
>
> 2. Did the Chancellor err by finding no evidence that Glenn P. Webb, Sr. had independent advice available regarding the

[1]This matter is not before us on this appeal.

execution of the warranty deed in favor of Glenn P. Webb, Jr. where the evidence showed that Glenn P. Webb, Sr. had talked to his own attorney, Fred T. Hanzelik?

I. *Facts*

Mr. Webb was the father of four children - his namesake, Pat Webb, Barbara Stanfield, Patty Webb and Debbie Webb. He originally placed the fee in the subject property, which consists of approximately nine acres, into a trust for the benefit of his children. At some point, Mr. Webb allowed his daughter, Barbara, and her husband, Paul Stanfield, to move their mobile home business onto the subject property. In exchange, the Stanfields were to pay rent to Patty Webb and to First Tennessee, as trustee for Debbie Webb, who suffers from a mental disability. The Stanfields also agreed to employ Debbie at their mobile home business. Some time later, however, Mr. Webb determined that the Stanfields had not made the rental payments for Debbie's benefit. Believing that the Stanfields had also mistreated Debbie, Mr. Webb sought to reacquire the property from his children. He purchased the one-fourth interests of Pat, Patty and Debbie, but Barbara refused to sell the remaining one-fourth interest vested in her.

Mr. Webb subsequently filed a partition suit in Hamilton County Circuit Court seeking to have the property sold. Mr. Webb was represented in that action by two attorneys, Fred Hanzelik and Brian Mansfield. The Circuit Court entered an order directing the sale of the property, but that judgment was

appealed.[2] While the appeal was pending, Mr. Webb suffered a serious decline in his health. On December 24, 1994, he executed a power of attorney appointing Patty Webb as his attorney-in-fact. On January 17, 1995, Mr. Webb executed another power of attorney to Patty Webb authorizing her to make decisions regarding his health care. Shortly thereafter, however, Mr. Webb became upset with the way Patty was using the power of attorney.[3]

As his physical condition deteriorated, Mr. Webb was hospitalized at various times between January 18 and his death on March 6, 1995. On February 15, 1995, while bedridden at home, Mr. Webb executed a warranty deed transferring his three-fourths interest in the subject property to Pat Webb. Immediately thereafter, he executed a new power of attorney in favor of Pat Webb and revoked the two powers of attorney granted to Patty Webb. Although Mr. Webb was not hospitalized when he executed these documents, he returned to the hospital on February 18 and apparently remained there until his death on March 6, 1995.

On February 17, 1995, Patty Webb filed the complaint in this case, seeking an order restraining Pat Webb from interfering with her duties as Mr. Webb's attorney-in-fact, as well as an order setting aside the February 15, 1995 warranty deed. As previously indicated, First Tennessee, as executor of Mr. Webb's estate, subsequently was substituted as plaintiff.

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[2]According to the records of the Clerk of the Court of Appeals, the earlier appeal was dismissed as premature on March 27, 1995.

[3]The record indicates that Patty Webb took away her father's billfold, removed funds from a joint account with Mr. Webb and deposited them into an account in her name, and opened his safe-deposit box.

The case proceeded to trial, at which time various witnesses testified as to Mr. Webb's intentions regarding the subject property, as well as his physical and mental condition on and around February 15, 1995. Dr. Mary C. Hammock, who treated Mr. Webb, testified by deposition that Mr. Webb had suffered from congestive heart disease, obstructive pulmonary disease, and dementia, and that his mental condition had fluctuated in direct proportion to his physical state. She stated that Mr. Webb had been hospitalized from January 31, 1995 to February 9, 1995, and that he had been readmitted to the hospital on February 18, at which time he had, in her opinion, been incapable of reading or understanding documents. Dr. Hammock testified that although she did not see Mr. Webb on February 15, it is likely that he was already into his last illness at that time.

Several witnesses testified that Mr. Webb was coherent on February 15, when he executed the documents in question, and that he had been fully aware of what he was doing at the time. However, there is a conflict in the testimony regarding Mr. Webb's intentions in executing those documents. For example, Brian Mansfield testified that Mr. Webb had expressed a desire that the property be held for the benefit of his daughters, Patty and Debbie. This testimony was reinforced by Harry Mansfield, Mr. Webb's friend, who stated that Mr. Webb had told him he had placed the property in his son's name so that he could handle its sale and then give the proceeds to Patty and Debbie. Patty Webb and Barbara Stanfield each testified that Pat Webb had told them that their father had placed the property in his name so he could handle the pending appeal of the partition suit. Fred Hanzelik, one of Mr. Webb's attorneys, testified that Mr. Webb had

explained to him that he had executed the warranty deed to enable Pat Webb to use the property for his business, and to keep the Stanfields from using it. Pat Webb, for his part, testified that his father had wanted him to have the property.

At the conclusion of the trial, the trial court found that there was "overwhelming evidence in the record that the legal effect of [the warranty deed] was to actually frustrate Mr. Webb, Sr.'s intentions of providing for his daughters, Debbie and Patty." It also held that the February 15, 1995, power of attorney had created a confidential relationship between Pat Webb and his father, and that the fact that the power of attorney was executed immediately *after*, rather than before, the signing of the warranty deed was of no consequence. Thus, the trial court found that, in accordance with ***Matlock v. Simpson***, 902 S.W.2d 384 (Tenn. 1995), the confidential relationship gave rise to a presumption of undue influence on the part of Pat Webb in securing the transfer of the subject property. It went on to find that this presumption had not been rebutted by clear and convincing evidence of the fairness of the transfer of the real property. Specifically, the trial court noted an absence of any evidence to indicate that Mr. Webb had received the benefit of independent advice. Accordingly, the trial court ordered that the warranty deed be set aside, and that ownership of the three-fourths interest in the property be restored to Mr. Webb's estate.[4]

[4]The trial court also ruled on several claims not relevant to this appeal. The court's orders include the entry of a judgment in favor of First Tennessee and against Pat Webb for the balance owed on certain mobile homes purchased by Mr. Webb, as well as the dismissal of a third-party claim brought by Pat Webb against the Stanfields, the dismissal of various counterclaims brought by the parties, and the dismissal of the Estate's claim for rent against Pat Webb. No issues as to these determinations are raised on this appeal.

II. *Standard of Review*

Our review of this non-jury case is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial court's factual findings are correct. Rule 13(d), T.R.A.P. We must honor this presumption unless we find that the evidence preponderates against those findings. ***Id.; Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993); ***Old Farm Bakery, Inc. v. Maxwell Assoc.***, 872 S.W.2d 682, 684 (Tenn.App. 1993). The trial court's conclusions of law, however, are not afforded the same deference. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

We also note the well-settled principle that because the trial court is in the best position to assess the credibility of the witnesses, such determinations are entitled to great weight on appeal. ***Kellerman v. Food Lion, Inc.***, 929 S.W.2d 333, 335 (Tenn. 1996); ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn.App. 1995). In the past, we have applied this deferential standard in an action to set aside a deed conveying real property. *See* ***Brown v. Weik***, 725 S.W.2d 938, 946 (Tenn.App. 1983).

III. *Applicable Law*

The general rule applicable in this case provides that

> [where] a confidential relationship [exists], followed by a transaction wherein the

> dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction.

Matlock v. Simpson, 902 S.W.2d 384, 386 (Tenn. 1995); *see also,* ***Johnson v. Craycraft***, 914 S.W.2d 506, 510-11 (Tenn.App. 1995); ***Brown v. Weik***, 725 S.W.2d 938, 945 (Tenn.App. 1983). A "confidential relationship" has been defined in general terms as "any relationship which gives one person dominion and control over another." ***Mitchell v. Smith***, 779 S.W.2d 384, 389 (Tenn.App. 1989); ***Kelly v. Allen***, 558 S.W.2d 845, 848 (Tenn. 1977). The Supreme Court has noted that the normal parent-child relationship is not *per se* a confidential relationship. ***Matlock***, 902 S.W.2d at 385 (citing ***Kelly***, 558 S.W.2d at 848); *see also,* ***Mitchell***, 779 S.W.2d at 389. However, the Supreme Court has held that "an unrestricted power of attorney, in and of itself, creates a confidential relationship between the parties." ***Matlock***, 902 S.W.2d at 386 (citing ***Mitchell***, 779 S.W.2d at 389).

The burden of proof as to a confidential relationship rests with the party claiming the existence of such a relationship. ***Brown***, 725 S.W.2d at 945. As stated in ***Matlock***, once a confidential relationship is established and a presumption of undue influence arises, the presumption may be overcome only by clear and convincing evidence that the transaction was fair.[5] ***Id.*** at 386; *see also,* ***Johnson***, 914 S.W.2d at 510-11. One, but

[5]"Clear and convincing evidence" is defined as "'that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" ***Wiltcher v. Bradley***, 708 S.W.2d 407, 411 (Tenn.App. 1985) (quoting from ***Turner v. Lutz***, 685 S.W.2d 356 (Tex.App. 1985)).

certainly not the only, way of proving fairness so as to rebut the presumption is to establish that the donor had the benefit of independent advice prior to the transaction. ***Richmond v. Christian***, 555 S.W.2d 105, 107-08 (Tenn. 1977); ***Bills v. Lindsay***, 909 S.W.2d 434, 441 (Tenn.App. 1993). The Supreme Court has described adequate independent advice as follows:

> proper independent advice in this connection means that the donor had the preliminary benefit of conferring *fully and privately* upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefactions.

Richmond, 555 S.W.2d at 109 (quoting from ***Turner v. Leathers***, 232 S.W.2d 269, 271 (Tenn. 1950))(emphasis in ***Richmond*** opinion.)

IV. *Analysis*

We shall first address the question of whether the trial court erred in presuming undue influence based on the confidential relationship between Mr. Webb and his son. Pat Webb insists that because the power of attorney in his favor was executed *after* the warranty deed -- albeit immediately following the deed's execution -- no such confidential relationship existed at the time the property was conveyed, and that the trial court thus erred in finding that the presumption of undue influence had arisen as to that transaction. In support of his argument, Pat Webb points to the language of ***Matlock***, which states that the

presumption of undue influence arises where there is "a confidential relationship, *followed by* a transaction wherein the dominant party receives a benefit from the other party...." ***Matlock***, 902 S.W.2d at 386 (emphasis added). He also cites the ***Johnson*** case, cited above, as well as the unreported decision of this court in ***Garton v. Norman***, 1996 WL 325215 (Tenn.App., June 14, 1996). In ***Johnson***, we found that the presumption of undue influence had arisen as to transactions after, but not before, the execution of a power of attorney. ***Id.*** at 510-11. Likewise, in ***Garton***, we held that a confidential relationship did not arise until the power of attorney in question became effective. ***Id.*** at *5.

Despite these holdings, we cannot agree with Pat Webb's assertion. Although ***Matlock, Johnson*** and ***Garton*** indicate that a confidential relationship does not arise until an unrestricted power of attorney becomes effective, Pat Webb acknowledges -- and we agree -- that none of these cases address the situation where, as here, a power of attorney is executed at essentially the same time as the challenged transfer. *See* ***Matlock***, 902 S.W.2d at 385-86; ***Johnson***, 914 S.W.2d at 510-12;[6] ***Garton***, 1996 WL at *2-5. We believe that where a power of attorney is executed contemporaneously with a warranty deed conveying property to the party who is named attorney-in-fact, there is no legal significance to the order in which the two documents are executed. Whether the two events are sufficiently

[6]In ***Johnson***, one of the challenged transactions occurred on the same day the power of attorney was executed; but the opinion does not indicate whether it occurred before or after the power of attorney was granted. In any event, the issue now before us was not raised in ***Johnson***.

contemporaneous necessarily will depend on the facts of each case. In this instance, the record reflects that Mr. Webb executed the power of attorney within minutes of the execution of the warranty deed, and as a part of the same "sitting." Hence, the execution of the two documents can be fairly described as one integrated transaction. Under these circumstances, we cannot say that the trial court erred in applying the presumption of undue influence to the conveyance of the property in question.[7] Accordingly, Pat Webb's first issue is found to be without merit.

Pat Webb next contends that the trial court erred in finding that there was no evidence that Mr. Webb had received the benefit of independent advice regarding the execution of the warranty deed. Specifically, he argues that Mr. Webb did consult with his own attorney, Fred Hanzelik, regarding the transaction.

As indicated earlier, proof of independent advice sufficient to rebut the presumption of undue influence requires proof that the donor had the opportunity to confer "fully and privately" with one who was competent to advise him regarding the effect of the gift and who was "so disassociated from the interests of the donee" as to be able to advise the donor impartially. ***Richmond v. Christian***, 555 S.W.2d 105, 109 (Tenn. 1977); ***Turner v. Leathers***, 232 S.W.2d 269, 271 (Tenn. 1950).

[7]Pat Webb also insists that the presumption of undue influence should not be applied because the power of attorney and the warranty deed were unrelated to one another. However, even if true, this fact is of no consequence. The rule of ***Matlock*** is not dependent upon such circumstances, *see* ***Matlock***, 902 S.W.2d at 385-86; in this case, Pat Webb was in a confidential relationship with, and received a benefit from, his father. Thus, the presumption of undue influence was applicable to the conveyance of the subject property.

In the instant case, the trial court found that the power of attorney was prepared by Fred Hanzelik *at Pat Webb's request*, and, that Hanzelik was then acting as Pat Webb's attorney.[8] It further found that Mr. Webb had not understood the ramifications of his execution of the power of attorney, even though he had discussed it with Hanzelik. The trial court also noted that the warranty deed had been prepared by an individual -- not Hanzelik -- who had never talked to Mr. Webb. That individual had prepared the deed at the direction of an employee of Pat Webb. There is no evidence that Hanzelik or any other competent person advised Mr. Webb regarding the warranty deed prior to its execution on February 15, 1995.[9] The trial court concluded that there was "overwhelming evidence... that the legal effect of [the warranty deed] was to actually frustrate Mr. Webb, Sr.'s intentions of providing for his daughters, Debbie and Patty."

The question of whether a donor has had the benefit of the requisite independent advice necessarily turns on the facts of each case, and, obviously, the testimony of the witnesses. As we have noted, the trial court is in the best position to assess the credibility of the witnesses; thus, such determinations are afforded great deference. ***Kellerman v. Food Lion, Inc.***, 929 S.W.2d 333, 335 (Tenn. 1996); ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn.App. 1995); ***Brown v. Weik***, 725 S.W.2d 938,

[8]In the past, Hanzelik had performed legal services for both of the Webbs.

[9]The record indicates that Hanzelik met with Mr. Webb on an undisclosed date prior to February 15, 1995. While it is clear that they discussed the power of attorney, there is no evidence that Hanzelik advised Mr. Webb regarding the legal consequences of executing an unconditional warranty deed conveying the subject property to his son.

946 (Tenn.App. 1983). In the instant case, the trial judge made an assessment of the credibility of the various witnesses and determined that Mr. Webb had not received independent advice prior to conveying the subject property to his son. We cannot say that the evidence preponderates against this finding. By the same token, we do not find that the evidence preponderates against the trial court's concomitant holding that Mr. Webb did not fully comprehend that his unconditional execution of the warranty deed was at variance with his expressed intentions.

The trial court also determined, considering all of the evidence, that Pat Webb had failed to rebut the presumption of undue influence by presenting clear and convincing evidence of the transaction's fairness. *See* ***Matlock***, 902 S.W.2d at 386; ***Richmond***, 555 S.W.2d at 107-08; ***Johnson***, 914 S.W.2d at 511. After a careful review of the record, we cannot say that the evidence preponderates against the factual findings underlying this determination. Rule 13(d), T.R.A.P.

V. *Conclusion*

It therefore results that the trial court's order setting aside the warranty deed because of undue influence is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for such further proceedings as may be necessary, consistent with this opinion.

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Charles D. Susano, Jr., J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Sr.J.