IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 6, 2009 Session

BILLY DICKSON, JR. v. DANNELLA LONG, ET AL.

Appeal from the Chancery Court for Montgomery County
No. MC-CH-CV-RE-03-15 John H. Gasaway, III, Chancellor, by Interchange

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No. M2008-00279-COA-R3-CV - Filed April 8, 2009

Son brought action to set aside the conveyance of real property from his mother to her step-daughter pursuant to the powers granted in a limited power of attorney naming mother's step-son as attorney-in-fact. Son alleged that his mother did not possess the requisite mental capacity to sign the power of attorney and was unduly influenced by the step-daughter in signing the power of attorney. The trial court upheld the validity of the power of attorney and subsequent conveyance, finding mother possessed the requisite mental capacity to sign the power of attorney and step-daughter exerted no undue influence over mother to sign the power of attorney. Finding no reversible error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Thomas N. Bateman, and Robert T. Bateman, Clarksville, Tennessee, for the appellant, Billy Dickson, Jr.

Peter M. Napolitano, Clarksville, Tennessee, for the appellee, Dannella Long.

K. David Waddell, Nashville, Tennessee, for the appellee, Green Tree Servicing, LLC.

OPINION

I. Factual and Procedural Background

On October 22, 1996, Irvin Kenneth Cage executed a deed to transfer real property owned by Dorris and Dorothy Cage located at 913 Lafayette Road in Clarksville, Tennessee, ("the property") to Dannella Long, also an Appellee, using powers of attorney executed by Dorris and

Dorothy Cage on October 17, 1996.[1] The powers of attorney expressly authorized Irvin Cage to "sell the aforesaid described real estate to my only other child, my daughter, DANNELLA LONG, for any sales price or sum which he deems reasonable...." Following the transfer of the property, Dannella Long obtained a loan from Green Point Credit Corporation, the predecessor to Appellee Green Tree Servicing, in the amount of $76,031.25 secured by a Deed of Trust on the property. Of the amount borrowed, $19,329.43 was paid to First Union National Bank to pay off the existing mortgage on the property and the remainder was used to purchase a modular home that Ms. Long placed on the property.

The Appellant, Billy Dickson, Jr., who is the natural son of Dorothy Cage, filed the present action on November 21, 2003, to set aside the 1996 conveyance on the grounds that Ms. Cage was incompetent at the time she signed the power of attorney and/or because Dannella Long unduly influenced Ms. Cage to sign the power of attorney. Mr. Dickson also alleged in the Complaint that Irvin Cage "acted upon said Power of Attorney knowing it to be false." Mr. Dickson did not challenge the validity of the power of attorney executed by Dorris Cage.

At trial, the court heard the testimony of Dannella Long, Irvin Cage, Billy Dickson, Marba Dickson (Billy Dickson's wife), and James Hutchison of Green Tree Servicing. The trial court also reviewed the relevant powers of attorney, Dorothy Cage's medical records, the deposition testimony of Dr. Mark Campbell, the relevant deeds and deeds of trust for the property, an appraisal of the property, the relevant HUD statement for Dannella Long's loan, Certificate of Title and Schedule of Advances. The trial court dismissed the action finding no undue influence by Ms. Long causing Ms. Cage to create and sign the power of attorney on October 17, 1996, and that the evidence preponderated in favor of finding that Ms. Cage possessed the requisite mental capacity on October 17, 1996, to sign the power of attorney.

On appeal, Mr. Dickson contends that the trial court erred in finding that Ms. Cage was mentally competent and not unduly influenced by Ms. Long when she signed the October 17, 1996, power of attorney. Specifically, Mr. Dickson contends that the trial court drew an erroneous conclusion that the notary's certification was an indication of Ms. Cage's competence and that without such a conclusion the weight of the evidence preponderated in favor of finding that Ms. Cage was not mentally competent to sign a power of attorney. Mr. Dickson also takes issue with the trial court's finding that Mr. and Ms. Cage held the property as tenants in common and, therefore, the most Mr. Dickson could recover from the lawsuit, if he were successful, was Ms. Cage's one-half interest. Finally, Mr. Dickson asserts that the power of attorney should be invalidated because Irvin Cage breached his fiduciary duty as attorney-in-fact to Ms. Cage by executing a deed transferring the property to his sister, Ms. Long.[2]

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[1] Dorris and Dorothy Cage were married. Dannella Long and Irvin Cage were the children of Dorris Cage prior to his marriage to Dorothy Cage. Dorris Cage died in 1997 after the execution of the power of attorney and transfer of the property at issue here. Dorothy Cage died in 2003, prior to this lawsuit.

[2] Irvin Cage did not participate in this appeal.

II. Standard of Review

This case was tried without a jury, with the Chancellor making oral findings of fact and conclusions of law which were incorporated into the Judgment. Our review of the trial court's findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005). "[T]his court gives great weight to findings of fact that require the trial court to resolve 'conflicts in the proof and to decide the weight to be given witness' testimony[,]" *In re Armster*, No. M2000-00776-COA-R3-CV, 2001 WL 1285904, at *7 (Tenn. Ct. App. Oct. 25, 2001), as "[t]he trial court is in the best position to judge the credibility of the witnesses[.]" *Id.* (citations omitted); *see also Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006); *Hurst v. Labor Ready*, 197 S.W.3d 756, 760 (Tenn. 2006)). Our review of the trial court's determinations regarding questions of law is *de novo* with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); Tenn. R. App. P. 13(d).

III. Discussion

A. Mental Capacity

Mr. Dickson contends that the trial court erred in finding that the preponderance of the evidence showed that Ms. Cage had the requisite mental capacity to sign the October 17, 1996, power of attorney authorizing Irvin Cage to transfer the property to Ms. Long. Mr. Dickson argues that Ms. Cage's medical records and the testimony of Dr. Campbell coupled with the fact that the power of attorney contained untrue statements[3] was sufficient evidence to prove Ms. Cage lacked the mental capacity to sign the power of attorney. Mr. Dickson also takes issue with the trial court's inference that the notary's certification on the power of attorney was an indication of Ms. Cage's competence when there was no testimony that anyone attempted to ascertain her mental state at the time she signed the power of attorney. Mr. Dickson contends that without that inference the weight of the evidence preponderated in Mr. Dickson's favor.

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[3] Mr. Dickson asserts that the October 17, 1996, power of attorney made false statements by stating that Irvin Cage and Dannella Long were Ms. Cage's children when in fact he was her "only child" and that the existence of such false statements indicates that Ms. Cage not only did not direct the preparation of the document, but that she did not know what she was signing when she signed it. The power of attorney stated in pertinent part:

> That I, DOROTHY L. CAGE, of Clarksville, Tennessee, have made, constituted and appointed, and by these presents do make constitute and appoint *my son*, IRVIN KENNETH CAGE, of Madison, Tennessee, my true and lawful attorney . . . I further expressly authorize IRVIN KENNETH CAGE to sell the aforesaid described real estate to *my only other child, my daughter*, DANELLA LONG, for any sales price or sum which he deems reasonable....

(Emphasis added).

"The mental capacity required to execute a power of attorney equates to the mental capacity required to enter into a contract." *Estate of Dooley v. Hickman*, No. E2005-02322-COA-R3-CV, 2006 WL 2482967, at *6 (Tenn. Ct. App. Aug. 29, 2006) (citing *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 297 n.1 (Tenn. Ct. App. 2001) (explaining that "to have an agency relationship under a power of attorney, the principal must have the capacity to contract); *In re Armster*, 2001 WL 1285904, at *7). "Competency to contract does not require an ability to act with judgment and discretion[,]" only that "the contracting party reasonably knew and understood the nature, extent, character and effect of the transaction." *In re Upper Cumberland Development District v. Puckett*, No. M2002-02208-COA-CV-R3, 2004 WL 1666049, at * 7 (Tenn. Ct. App. Jul. 21, 2004) (citing *Rawlings*, 78 S.W.3d at 297). "Persons will be excused from their contractual obligations on the ground of incompetency only when (1) they are unable to understand in a reasonable manner the nature and consequences of the transaction or (2) when they are unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of their condition." *Rawlings*, 78 S.W.3d at 297 (citing *Restatement (Second) of Contracts* § 15(1) (1981)). The degree of mental capacity required to enter into a valid contract is a question of law, *In re Upper Cumberland Development District*, 2004 WL 1666049, at *7; however, whether a party possessed such required degree is a question of fact. *Waller v. Evans*, No. M2008-00312-COA-R3-CV, 2009 WL 723519, at *3 (Tenn. Ct. App. Mar. 17, 2009); *see Nashville, Chattanooga & St. Louise R.R. Co. v. Brundige*, 114 Tenn. 31, 34, 84 S.W. 805, 805 (1905).

All adults are presumed to be competent enough to enter into contracts. *In re Upper Cumberland Development District*, 2004 WL 1666049, at * 7 (citing *Uckele v. Jewett*, 642 A.2d 119, 122 (D.C. 1994); *Foltz v. Wert*, 103 Ind. 404, 2 N.E. 950, 953 (Ind. 1885)). Accordingly, "[t]he party asserting a principal's lack of capacity as grounds for invalidating a power of attorney bears the burden of proof, and '[that] proof must be clear, cogent, and convincing.'" *Waller v. Evans*, 2009 WL 723519, at *3 (citing *Estate of Dooley v. Hickman*, No. E2005-02322-COA-R3-CV, 2006 WL 2482967, at *6 (Tenn. Ct. App. Aug. 29, 2006) quoting *In re Armster*, 2001 WL 1285904, at *8); *Knight v. Lancaster*, 988 S.W.2d 172, 177-78 (Tenn. Ct. App. 1998). Evidence of senile dementia, alone, is not sufficient to prove lack of contractual capacity. *In re Upper Cumberland Development District*, 2004 WL 1666049, at * 7; *see also Street v. Waddell*, 3 S.W.3d 504, 505-506 (Tenn. Ct. App. 1999) (holding that evidence of dementia alone does not prove lack of testamentary capacity); *In the Matter of Conservatorship of Groves*, 109 S.W.3d 317, 338 (Tenn. 2003) (finding that while dementia "has historically been viewed as progressive and irreversible," the current view "is that dementia may be progressive, static, or remitting"). "To prove mental incapacity, the person with the burden of proof must establish, in light of all the surrounding facts and circumstances, [*Roberts v. Roberts*, 827 S.W.2d 788, 792 (Tenn. Ct. App. 1991),] that the cognitive impairment or disease rendered the contracting party incompetent to engage in the transaction at issue." *Id.*; *see also Woods v. Mutual of Omaha*, No. 02A01-9510-CV-00218, 1996 WL 578489, at *3 (Tenn. Ct. App. Oct. 9, 1996), perm. app. denied (Tenn. 1997) (rejecting an affidavit that did not address the party's competency regarding the specific contract at issue). Capacity involves a person's actual ability to engage in a particular activity and, accordingly, "[a] person may be incapacitated with regard to one task or activity while retaining capacity in other areas becasue the skills necessary in one situation may differ from those required in another." *In the Matter of Conservatorship of Groves*, 109 S.W.3d

at 333. Accordingly, "contractual capacity is a question to be resolved on the facts of each case and the surrounding circumstances." *Ellison v. Ellison*, No. E2007-01744-COA-R3-CV, 2008 WL 4415768, at *7 (Tenn. Ct. App. Sept. 29, 2008) (citing *Roberts*, 827 S.W.2d at 792).

The trial court found "there's evidence on both sides" on the issue of whether Ms. Cage had the mental capacity to sign the October 17, 1996, power of attorney, but that "[e]ver so slightly the court finds that the evidence preponderates in favor of Ms. Long, that her mother knew what she was doing that day." The trial court explained,

> [i]t's a balance. It's a weighing of evidence. You put on this scale all of the evidence that preponderates in favor of Mr. Dickson, she acted out, she was in a nursing home, she did things people shouldn't do and people wouldn't do unless they're suffering from some disability. Dr. Campbell talks about dementia and what it can do, anecdotal testimony about what she was like months or years beforehand. They all preponderate in Mr. Dickson's favor. On the other hand, the scales show there was Ms. Long's testimony about the condition of her mother. There was the participation by Pam Crosby in August of '96 followed by the participation of Melba Wyatt in October of '96, notaries who I say one has to conclude that they very seriously thought about affixing their names and seals if they didn't believe what they were saying. There's no allegation of fraud.

While we will review the record to determine where the preponderance of the evidence lies, the trial court's express finding that Dorothy Cage possessed the requisite mental capacity to sign the October 17, 1996, power of attorney, carries a presumption of correctness. *See Waller*, 2009 WL 723519, at *3; Tenn. R. App. P. 13(d). The record includes Ms. Cage's medical record, which contains nurses' progress notes from her residential nursing home and provides evidence concerning her mental capacity during the month of October 1996. Ms. Cage had been diagnosed with senile dementia and in the months preceding October 1996; the nurses' notes describe Ms. Cage's frequent beating of table tops and cursing and mumbling to herself. On October 4, 1996, however, the nurse's note states that Ms. Cage attended group activities and sat quietly in the front lobby. The record does not include any medical records or notes on or within a few days of October 17. The next nurse's note was on October 26 and, while it states that Ms. Cage requires "total assistance" in bathing, dressing and using the toilet, it also described her hearing and vision as "adequate" and her speech as "clear." The nurse's note also explains that Ms. Cage "grabs at people walking by" and "pulls dress up in public." The record also contains a doctor's progress note from October 22, 1996, which described Ms. Cage as "delusional but pleasant," and "alert but confused." The trial court found Ms. Cage's medical records "quite compelling," and that "[t]he nurses' notes about what Ms. Cage was doing the months preceding October of '96 indicate clearly someone who is acting out inappropriately . . . [b]ut they were all physical manifestations of her problem and not necessarily indicative of the inability to have sufficient mental capacity on the day in question."

Dr. Mark Campbell, who treated Ms. Cage in 1995, testified in his deposition that he did not recall ever seeing Ms. Cage lucid when he interacted with her and he did not believe she was capable

of making "her own business decisions" or that she would have understood the nature of the importance of a power of attorney. Dr. Campbell admitted, however, that he had not seen Ms. Cage since December 1995, and that he remembered Dorris Cage better than Ms. Cage. Dr. Campbell also agreed that persons suffering from senile dementia could be lucid one moment and not the next. He testified that it was "possible that she would not have understood a document or the contents of the document, or the contract, as you say, but if explained to her the benefit or consequences of signing or not signing that document as to the loss of her home, hypothetically speaking, it is possible she would have understood if explained to her, patiently, the significance of signing that document." The trial court found it significant that Dr. Campbell had not seen Ms. Cage for the 10 months prior to the signing of the October 1996, power of attorney and that his memory of Ms. Cage was vague. The court explained, "although he opined that he didn't remember ever seeing her when she was lucid, in another part of his testimony he testified that people suffering from dementia can be lucid at times."

Billy and Marba Dickson also testified to Ms. Cage's mental capacity. Billy Dickson testified that Ms. Cage "didn't know me half the time," and that when he visited her in the nursing home she did not recognize him. He testified that he did not believe that she would have been able to understand a power of attorney or a deed, but admitted that he was not present when Ms. Cage signed the power of attorney in October 1996; in fact, he testified that he had "very little" contact with her in the ten years prior to her death, visiting her only "four or five" times. Marba Dickson testified that she visited Ms. Cage in the nursing home, mostly alone, but that Billy Dickson went with her "a couple of times" and that Ms. Cage didn't appear to know who she was. Ms. Dickson testified that she "tried to talk to [Ms. Cage] about family members and about different things . . . and she never seemed like she understood anything." She also testified that while she was not present on the day Ms. Cage signed the power of attorney at issue, she "doubted" Ms. Cage would have understood the meaning of a power of attorney or a deed. The trial court found both Mr. and Ms. Dickson's testimony believable, but that the frequency with which Mr. Dickson visited Ms. Cage and the fact that neither Mr. nor Ms. Dickson had seen Ms. Cage around the time she signed the power of attorney in October 1996, rendered their "testimony about her mental capacity on the date in question really not very helpful to this court."

The trial court also compared Ms. Cage's signature on a 1988 deed with her signature on the October 1996 power of attorney and noted a distinct difference between the two. The trial court explained that while the 1988 signature was "just as clear as anybody can write Dorothy Cage," the 1996 power of attorney signature showed that "it had gotten to the point where [Ms. Cage] couldn't write her name." The trial court noted, however, that the apparent difference between Ms. Cage's 1988 and 1996 signature was "indicative that her physical ability to write her name" had diminished, but was not proof of her mental capacity in October 1996. *See In the Matter of the Conservatorship of Groves*, 109 S.W.3d at 334 (explaining that capacity encompasses two concepts – functional capacity, which "relates to a person's ability to take care of oneself and one's property" and decision-making capacity, which "relates to one's ability to make and communicate decisions with regard to caring for oneself and one's property.").

Dannella Long testified that she was present when Ms. Cage signed the October 17, 1996, power of attorney and that while the notary, Melba Wyatt, read the document to Ms. Cage before she signed it, neither she nor Ms. Wyatt "did anything to try to determine whether [Ms. Cage] understood." However, Ms. Long also testified that Ms. Cage listened to Ms. Wyatt read the document and that Ms. Long believed that Ms. Cage understood it. The trial court found Ms. Long's testimony credible.

The trial court found the overall evidence to weigh "ever so slightly" in favor of finding Ms. Cage possessed the requisite mental capacity to sign the October 1996 power of attorney and indicated that the evidence that tipped the scale was the notary's certification. The trial court explained "one has to conclude that they [the notaries] very seriously thought about affixing their names and seals if they didn't believe what they were saying." Specifically, the trial court stated:

> You can't just discount/disregard the significance of a notary signing a notary clause affixing their seal. The notary clause says something to the effect that this person personally appeared before me or I'm satisfied on the basis of satisfactory evidence that this person is who they say they are and that they executed the foregoing instrument for the purposes therein contained. It is not insignificant that in August of '96 Pam Crosby affixed her name and seal to an instrument signed by both Mr. and Mrs. Cage and that in October of '96, two months later, a different person, Melba Wyatt, affixed her signature and seal to the instruments executed by Mr. and Mrs. Cage.

Mr. Dickson contends that the trial court erroneously inferred Ms. Cage's mental capacity from the fact of the notary's seal and signature and that without such an inference the weight of the evidence preponderates in favor of finding that Ms. Cage did not understand the nature, extent, character, and effect of the power of attorney she signed in October 1996.

A notary public is a public official of the state of Tennessee, Tenn. Code Ann. § 8-16-102 (2008), and one of the individuals statutorily empowered to take oaths and acknowledgments. Tenn. Code Ann. §§ 66-22-102, 8-16-112 (2008). When certifying an act, a notary must affix his or her official seal. Tenn. Code Ann. §§ 8-16-112, 66-22-110 (2008). "The affixation of the notary's seal provides prima facie proof of a notary's official character or, simply stated, that the notary is a notary." *In re Marsh*, 12 S.W.3d 449, 453 (Tenn. 2000). When discharging his or her duties, a notary public does so under oath that he or she "will, without favor or partiality, honestly, faithfully, and diligently discharge the duties of notary public." Tenn. Code Ann. § 8-16-105 (2008). Accordingly, "a presumption arises that notaries perform their public duties correctly" and lawfully. *Peltz v. Peltz*, No. M1999-02299-COA-R3-CV, 2000 WL 1532996 (Tenn. Ct. App. Oct. 18, 2000); *Manis v. Farmers Bank of Sullivan County*, 98 S.W.2d 313, 314 (Tenn. 1936) (citing *Caruthers v. Harbert*, 45 Tenn. (5 Cold.) 362, 367 (1868)). "In layman's terms, a notary public's certificate means a great deal more than the 'Good Housekeeping Seal of Approval.'" *Beazley v. Turgeon*, 772 S.W.2d 53, 59 (Tenn. Ct. App. 1988); *In re Marsh*, 12 S.W.3d at 453. When a notary certifies an instrument it "says to the world that the execution of the instrument was carried out according to

law." *Id.*; *see Figuers v. Fly*, 137 Tenn. 358, 370, 193 S.W. 117, 120 (1917) ("The function[ ] of a notary public [is] not to be lightly assumed[.] A [notary's] certificate of acknowledgment is an act which must in the nature of things be relied on with confidence by [persons] of business."). The Tennessee Supreme Court has explained the significance a notary's seal thusly,

> A creditor or purchaser who examines a deed of trust should be able to assume that if it contains an acknowledgment to which a notary's seal is affixed, then it has been properly authenticated and is valid, that is, free from apparent forgery or fraud. This is a legitimate assumption given the purpose of an acknowledgment, the role of a notary, and the purpose of the notary's seal. Without a notary's seal, however, the creditor or purchaser may be unsure as to the validity of the instrument.

In re Marsh, 12 S.W.3d at 453. This presumption may be rebutted, but the burden is on the person denying its correctness. *Manis*, 98 S.W.2d at 314.

In the present case, the notary properly affixed her signature and seal to the power of attorney.[4] While a notary "is not an insurer of the truth of the recitals," *Peltz*, 2000 WL 1532996, at *2 (citing *Figuers*, 193 S.W. at 120), Ms. Wyatt, as a notary, is presumed to have executed her duties correctly and lawfully. *See Id.*; *Manis*, 98 S.W.2d at 314. This presumption allows the court to infer that by certifying the document Ms. Wyatt not only believed that Ms. Cage, as the person executing the document, was the person she purported to be, but that Ms. Cage understood that she was executing the document "for the purposes therein contained." Given the notary's certification and Ms. Long's testimony that Ms. Wyatt read the document to Ms. Cage in the presence of Ms. Long and that Ms. Long believed that Ms. Cage understood what Ms. Wyatt had read to her prior to signing the document, we do not find that the trial court erred in determining that Ms. Cage possessed the requisite mental capacity on October 17, 1996, to sign the limited power of attorney naming Irvin Cage as her attorney-in-fact. While the medical records and testimonies of Dr. Campbell, Mr. Dickson and Ms. Dickson indicate that Ms. Cage exhibited the symptoms of senile dementia in the months preceding the transaction, there was no evidence that contradicted Ms. Long's testimony as to Ms. Cage's condition on the date in question.

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[4] The notary's authenticating statement was as follows:

> State of Tennessee
> County of Montgomery
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> Personally appeared before me, the undersigned, a Notary Public in and for said County and State, Dorothy L. Cage, the within named bargainor, with whom I am personally acquainted, (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.
>
> Witness my hand and seal, at office, on this the 17th day, October, 1996.

We also do not find that the apparent errors in the power of attorney referencing Irvin Cage and Ms. Long as Ms. Cage's children prove the alleged mental incompetence of Ms. Cage. The trial court found that the power of attorney was prepared at the request of Pam Crosby of First Union National Bank and drafted by the Bank's legal counsel. Ms. Cage's power of attorney mirrored that executed by her husband on the same day. As Irvin Cage and Dannella Long were the children of Dorris Cage, the fact that the power of attorney signed by Ms. Cage identified her step-children as her children demonstrates only that the person who prepared the power was not aware of the precise family relationship of the parties. We do not find the existence of the errors or the fact that Ms. Cage signed a power of attorney referring to her step-children of more than a decade as her children, or even "only other child," is not "clear, cogent and convincing proof," *see Waller*, 2009 WL 723519, at *3, that on October 17, 1996, Ms. Cage did not understand the nature, extent, character and effect of the transaction. Accordingly, we affirm the trial court's determination that on October 17, 1996, Ms. Cage possessed the requisite mental capacity to execute the power of attorney.

B. Undue Influence

Mr. Dickson contends that the trial court erred in finding that Ms. Long did not exert undue influence over Ms. Cage in getting her to execute the October 17, 1996, power of attorney instructing Irvin Cage to convey the property to Ms. Long. Mr. Dickson asserts that Ms. Long had a confidential relationship with Ms. Cage by virtue of "at least two" powers of attorney that named Ms. Long as Ms. Cage's attorney-in-fact and that this confidential relationship raised a presumption of undue influence in the circumstances by which Ms. Long received the property. Therefore, Mr. Dickson asserts, the October 17, 1996, power of attorney and resulting conveyance of the property to Ms. Long on October 22, 1996, should be invalidated.

"The most common way of establishing the existence of undue influence is 'by proving the existence of suspicious circumstances warranting the conclusion that the [action] was not the [grantor's] free and independent act.'" *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 792 (Tenn. Ct. App. 2001) (quoting *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Ten. Ct. App. 1989)). Some of the most frequently used suspicious circumstances include (1) the existence of a confidential relationship, (2) poor physical and mental condition of the grantor, or (3) the beneficiary's involvement in the procurement of the transaction. *See Id.* (citing *Mitchell*, 779 S.W.2d at 388). There is no prescribed number of suspicious circumstances required to invalidate an action, but "the doctrine of undue influence is applicable only where there is a confidential relationship." *In re Estate of Brevard*, 213 S.W.3d 298, 302-03 (Tenn. Ct. App. 2006) (citing *Keasler v. Estate of Keasler*, 973 s.W.2d 213, 219 (Tenn. Ct. App. 1997)).

Because undue influence can only be found where a confidential relationship exists, we must first determine whether Ms. Cage and Ms. Long were in a confidential relationship. The trial court found that no fiduciary or confidential relationship existed between Ms. Long and Ms. Cage. Whether or not a fiduciary or confidential relationship existed is a question of fact. *Matlock*, 902 S.W.2d at 385; *see also Roberts v. Chase*, 25 Tenn. App. 636, 166 S.W.2d 641 (1942); *Turner v. Leathers*, 191 Tenn. 292, 232 S.W.2d 269 (1950); *Halle v. Summerfield*, 199 Tenn. 445, 287 S.W.2d

57 (1956). Therefore, we review the trial court's finding with a presumption of correctness unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. 13(d).

1. Confidential Relationship

A confidential relationship "is any relationship that gives one person the ability to exercise dominion and control over another." *Kelley v. Johns*, 96 S.W.3d 189, 197 (Tenn. Ct. App. 2002); *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002); *Mitchell*, 779 S.W.2d at 389. Confidential relationships come from two sources: "(1) 'legal confidential relationships' and (2) 'family and other relationships.'" *In re Estate of Brevard*, 213 S.W.3d at 302-03 (quoting *Matlock v. Simpson*, 902 S.W.2d 384, 385-86 (Tenn. 1995)). "A 'legal confidential relationship' is a 'fiduciary relationship . . . or any other relationship where the law prohibits gifts or dealing between the parties.'" *Id.* (quoting *Matlock*, 902 S.W.2d at 385-86). Family relationships are not confidential *per se* and thus, "the contestants must prove the elements of domination and control in order to establish the existence of a confidential relationship." *Id.* (quoting *Matlock*, 902 S.W.2d at 385-86). Proof of a family relationship "coupled with proof of dominion and control" establishes a confidential relationship. *Id.* (citing *Kelley*, 96 S.W.3d at 197). Proof of the confidential relationship alone, however, does not "make out a *prima facie* claim of undue influence unless the contestant establishes an additional suspicious circumstance[.]" *Id.*

The trial court found no fiduciary or confidential relationship existed between Ms. Long and Ms. Cage that would create a presumption of undue influence under the law, but that, if such a presumption existed, Ms. Long had sufficiently rebutted it by clear and convincing evidence of the fairness of the transaction.

a. Legal confidential relationship

The execution of a power of attorney creates a legal confidential relationship and the holder of the power, characterized as the dominant party, serves in a fiduciary relationship to the grantor of the power, but only to the extent of the powers granted. *See* Tenn. Code Ann. § 34-6-107; *Taylor v. Taylor*, No. M2007-00565-COA-R3-CV, 2008 WL 1850807, at *3 (Tenn. Ct. App. Apr. 24, 2008) *perm. app. denied; Matlock*, 902 S.W.2d at 385; *see also In the Matter of Conservatorship of Groves*, 109 S.W.3d at 351 (citing *Childress*, 74 S.W.3d at 329) (a confidential relationship arises – through a fiduciary relationship – between a principal and attorney-in-fact to a power of attorney when the power of attorney has been exercised and the attorney-in-fact was active in its procurement). A person authorized to act on behalf of another by virtue of an unrestricted power of attorney has a confidential relationship with the grantor of the power where the powers have been exercised. *Taylor*, 2008 WL 1850807, at *3 (citing *Mitchell v. Smith*, 779 S.W.2d at 388); *see also Matlock*, 902 S.W.2d at 385; *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn.1977).

Mr. Dickson contends that the two powers of attorney executed by Ms. Cage appointing Ms. Long as her attorney-in-fact created a confidential relationship that, coupled with undue influence,

invalidates the transfer of property to Ms. Long under the powers granted to Irvin Cage in the October 17, 1996, power of attorney.

The first power of attorney permitted Ms. Long to manage Ms. Cage's affairs including depositing her checks, paying her bills and making healthcare decisions such as admitting Ms. Cage to a nursing home in May 1996. Ms. Long exercised these powers under this power of attorney for "about a year" at the time of the October 1996 transaction. This power of attorney is not in the record; therefore, there is no evidence that it granted Ms. Long "unrestricted" powers. However, it is clear that Ms. Long exercised powers, such as depositing and writing checks, and making at least some healthcare decisions; there is also proof that Ms. Long was present when Ms. Cage met with bank personnel. There is nothing in the record to show that the powers granted to Ms. Long in the 1995 power of attorney were revoked or that the confidential relationship between Ms. Long and Ms. Cage arising as a result of the appointment of Ms. Long was dissolved, other than as may be inherent in Ms. Cage's execution of the October 17, 1996, power of attorney granting specific powers to Irvin Cage. Consequently, the trial court erred in determining that there was no confidential relationship between Ms. Long and Ms. Cage with respect to the October 22, 1996, property transfer to Ms. Long executed pursuant to the October 17, 1996, power of attorney.

The second was a limited power of attorney executed on August 8, 1996, for the purpose of executing documents to refinance a loan with First Union National Bank for the property at issue in this lawsuit. Ms. Long exercised this power in August 1996, and the loan was refinanced. The powers granted to Ms. Long under this instrument, and the confidential relationship created thereby, terminated when the purpose was achieved. *See Restatement (Third) of Agency* §§ 3.01, 3.06 (a power of attorney is a written instrument that authorizes an agent to perform specific acts on behalf of the principal and terminates by agreement or upon the occurrence of circumstances in which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf; as such, the agency relationship automatically terminates upon completion of the specific act or acts); *see also Elflein v. Graham*, 307 So.2d 669 (La. App. 2. Cir. 1975) (where a limited power of attorney is silent as to expiration and revocation of the power of attorney, it continued in effect only until accomplishment of its purpose); *Zaubler v. Picone*, 473 N.Y.S.2d 580 (N.Y. App. Div. 2. Dept. 1984) (As a general rule, attorney-in-fact's authority may be revoked by principal either expressly or impliedly through words or conduct which are inconsistent with continuation of authority).

b. Family confidential relationship

A confidential relationship can be found if: (1) a family relationship existed and (2) Ms. Long exercised dominion and control over Ms. Cage. *See Matlock*, 902 S.W.2d at 385-86. As the step-daughter of Ms. Cage, Ms. Long had a family relationship with Ms. Cage. Mr. Dickson, however, offered no proof that Ms. Long exercised dominion and control over Ms. Cage. The record shows that in 1996 Ms. Cage's husband, Dorris Cage, was still alive and attending to some of Ms. Cage's needs, including providing assistance to Ms. Long in getting the 1995 power of attorney drafted. While the record shows that Ms. Long had been active in taking care of Ms. Cage for many years

including paying her bills, regularly visiting her in the nursing home and speaking with her doctors, it does not show that she was in a position of "dominion and control" over Ms. Cage in 1996. There was no evidence that Ms. Long controlled access to Ms. Cage; in fact, both Billy and Marba Dickson testified that they were able to visit with Ms. Cage in the nursing home during 1996. We do not find that the trial court erred in making its determination that there was not a confidential relationship, to the extent such determination was based on a family relationship.

2. Undue Influence

The existence of a confidential relationship wherein the dominant party receives a benefit from the weaker party creates a presumption of undue influence that is only rebuttable by clear and convincing evidence of the fairness of the transaction. *Matlock*, 902 S.W.2d 385-86 (citing *Hogan v. Cooper*, 619 S.W.2d 516 (Tenn. 1981); *see Taylor*, 2008 WL 1850807, at *3; *Estate of Neely*, No. M2000-01144-COA-R3-CV, 2001 WL 1262598, at *5 (Tenn. Ct. App. Oct. 22, 2001). Where the confidential relationship exists by virtue of a power of attorney, "[a] presumption of undue influence is raised where the holder of a power of attorney receives a benefit from the grantor *under the power*[.]" *Taylor*, 2008 WL 1850807, at *3 (emphasis added); *see also Matlock v. Simpson*, 902 S.W.2d 384, 385 (Tenn. 1995).

The property transfer at issue was accomplished through the exercise of powers granted to Irvin Cage, rather than Ms. Long; consequently, the presumption of undue influence was not raised. Further, our review of the record does not show other circumstances "warranting the conclusion that the [action] was not the [grantor's] free and independent act.'" *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 792 (Tenn. Ct. App. 2001) (quoting *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989)).

a. Fairness

Mr. Dickson contends that the trial court erred in concluding that, despite its determination that no confidential relationship existed, Ms. Long successfully rebutted a presumption of undue influence by clear and convincing evidence that the transaction was fair. Mr. Dickson asserts that Ms. Long failed to prove that the transaction was fair because "there is no proof that Ms. Cage received any benefit from the transfer" and "Ms. Cage had no independent advice regarding this transaction."

Once a presumption of undue influence is raised, the dominant party must prove by clear and convincing evidence that the transaction was fair to the weaker party. *See Matlock*, *supra*. "The nature of proof of fairness necessary to overcome the presumption of undue influence is, of course, largely dependent on the particular facts of the case at issue" and courts are to "consider the totality of the evidence" to determine the fairness of the transaction. *Taylor*, 2008 WL 1850807, at *4; *Gordon*, 584 S.W.2d at 658. The most common factors considered in determining the fairness of a transaction include secrecy concerning the transaction, the grantor's poor physical and mental condition, the beneficiary's involvement in the procurement of the transaction, the lack of

independent advice in preparing and executing the transaction, the unjust or unnatural nature or terms of the transaction, or fraud or duress directed toward the grantor. *See Estate of Hamilton v. Morris*, 67 S.W.3d 786, 792 (Tenn. Ct. App. 2001) (citing *Mitchell*, 779 S.W.2d at 388); *see also Waller*, 2009 WL 723519, at *7 (citing *Hogan*, 619 S.W.2d at 519-20) (The receipt of independent advice, while not required, is one way to prove fairness.).

The trial court found that the transaction was fair because it was done openly and at the direction of First Union National Bank, not Ms. Long. The court explained that "the circumstances around the transaction that we're here about today were done in the open, there was no effort to trick or deceive, there was no suspicious circumstance, it was done in the presence of the bank employees, it was done with instruments drawn by lawyers that Ms. Long didn't even know, instruments, that were drawn at the request, I believe and find, by the bank."

The record shows that as a result of the property transfer to Ms. Long, Ms. Cage was relieved of the $19,000 indebtedness to First Union National Bank; this indebtedness was paid from proceeds of Ms. Long's loan with Green Point Credit Corporation. Ms. Long testified that First Union was threatening to foreclose on the loan to Mr. and Ms. Cage and that the threat was the driving force behind both the August 1996, refinancing and the October 1996, transfer. While Mr. Dickson contends that there was no proof that the property was facing imminent foreclosure, he failed to produce evidence contradicting Ms. Long's testimony, which the trial court found credible.

According to the proof introduced at trial, the land appraised for $19,500 on October 21, 1998. Mr. Dickson does not dispute the appraisal's value, but argues the value is unrepresentative of the true value of the property as conveyed by Mr. and Ms. Cage in October 1996, since the appraisal was completed after Ms. Long received the land and made changes to it decreasing its value, including selling a portion of the property for $2,075 to the City of Clarksville for a right of way and tearing down an old structure on the property. Mr. Dickson offered no countervailing proof of the value of the property. The payoff of the Cage's $19,000 mortgage and the appraisal support a finding that the transfer of the property to Ms. Long was fair.

Finally, the trial court found that the transaction was requested and arranged by Pam Crosby of First Union National Bank with whom Mr. and Ms. Cage had an ongoing professional relationship. The trial court also found Ms. Long's testimony credible that she did not know nor speak with the Bank's lawyers who prepared the October 17, 1996, power of attorney and the October 22, 1996, deed that was transferred to Ms. Long by Irvin Cage as Ms. Cage's attorney-in-fact.

Based on the record, we do not find that the trial court erred in concluding that the totality of the circumstances showed by clear and convincing evidence that the transaction was fair.

C. Fiduciary Duty of Attorney-in-Fact

Mr. Dickson contends on appeal that the "transfer of Ms. Cage's real estate is void because the evidence shows that the Defendant, Irvin Kenneth Cage, breached his fiduciary duty to Ms. Cage, when he used a power of attorney to make an inter vivos transfer of Ms. Cage's real estate to the Defendant, Dannella Long." The trial court did not address this issue in its oral findings of fact and conclusions of law. The Complaint did not allege that Irvin Cage breached a fiduciary duty to Ms. Cage; it only alleged, with respect to Irvin Cage, that he, "in cooperation with his sister, DannElla [sic] Long, perpetrated and filed for record in Montgomery County, Tennessee, or caused the same to be done false documents which they knew or should have known were false" and further that "Irvin Kenneth Cage acted upon said Power of Attorney knowing it to be false and the Defendant, DanElla [sic] Long, has accepted the benefits of that Power of Attorney when she knew or should have known it was false." Generally, we do not review an issue raised for the first time on appeal, but since the Appellee, Green Tree Servicing, briefed the issue without objection we will address it. *See* Rule 1(b), Rules of the Court of Appeals of Tennessee.

As explained above, the holder of a power of attorney serves in a fiduciary relationship to the grantor of the power to the extent the holder exercises the power granted. *See* Tenn. Code Ann. § 34-6-107; *Taylor*, 2008 WL 1850807, at *3. "As agent of the grantor, the dominant party is bound to exercise the utmost good faith, loyalty and honesty the grantor." *Taylor*, 2008 WL 1850807, at *3 (citing *Roberts v. Iddins*, 797 s.W.2d 615 (Tenn. Ct. App. 1990) perm. app. denied). Mr. Dickson relies upon the *Taylor* case in support of his contention that Irvin Cage breached his fiduciary duty as Ms. Cage's attorney-in-fact. *Taylor* involved a mother of five children who executed a general power of attorney naming two of her children as attorneys-in-fact. The power of attorney in *Taylor* granted broad powers "to ... sell, convey ... in any way or manner deal with all or any part of any real ... property ... that I now own ... under such terms and conditions ... as said attorney of fact [sic] shall deem proper." In that case, this Court invalidated the conveyance of 70 acres of land to one of the attorneys-in-fact finding the attorneys-in-fact violated their duties under the power of attorney by, in the one instance, acting in his own self-interest and, in the other, by failing to "preserve the assets of her mother." *Taylor*, 2008 WL 1850807, at *3. By contrast, the power of attorney executed by Ms. Cage appointing Irvin Cage as her attorney-in-fact expressly authorized him to "sell the [property]" to Ms. Long "for any sales price or sum he deems reasonable." Considering the express language of the limited power of attorney, Irvin Cage would not have exercised good faith, loyalty and honesty to Ms. Cage if he failed to execute the transaction as directed by the power of attorney; consequently, he did not breach his fiduciary duty to Ms. Cage by doing so.

Mr. Dickson also asserts that Irvin Cage breached his fiduciary duty to Ms. Cage because he was "unsure" of what he was signing and relied on the statements of Ms. Long that the documents were necessary to prevent the property from being sold at foreclosure. While Irvin Cage testified that the only thing he knew about the situation was "what they told me what was going on" and that of the documents he signed, "some of it I read, some of it I didn't;" he also testified that "I didn't feel like I had to read, you know, the fine print because my sister is not going to do anything that's wrong. And I know that. So I signed it." Whether or not Irvin Cage knew the full history of the transactions or the reasons for the October 22, 1996, property transfer is irrelevant to the question of whether he upheld his fiduciary duty as Ms. Cage's attorney-in-fact by selling the property to Ms.

Long as expressly authorized by the October 17, 1996, limited power of attorney. Accordingly, we find Irvin Cage did not breach his fiduciary duty to Ms. Cage.

D. Type of Property Ownership

Mr. Dickson contends on appeal that the trial court erred as a matter of law by finding that Ms. Cage only owned a one-half undivided interest in the real estate as a tenant in common with Dorris Cage and, therefore, only a one-half interest in the property was at issue in the suit. Mr. Dickson asserts that since Ms. Cage's source of title was a deed to her and her husband, that was silent as to the type of ownership, she and Dorris Cage owned the property in 1996 as tenants by the entirety; consequently, if the October 22, 1996, transfer to Ms. Long were invalidated by the court, Ms. Cage would have obtained full ownership of the property when Dorris Cage died in 1997, resulting in Mr. Dickson receiving ownership of the property by intestate succession when Dorothy Cage died in 2003.

Dorris and Dorothy Cage received the property at issue in 1990 by a deed that conveyed the property to "DORRIS CAGE and wife, DOROTHY L. CAGE." The trial court found that Dorris and Dorothy Cage owned the property as tenants in common, but that such a finding was irrelevant to the case because "before either one of them died, which would have triggered a survivorship right to the surviving spouse if it had been tenants by the entirety, they both executed Powers of Attorney to Mr. Irvin Cage. And he conveyed their interest by the deed to Ms. Long unless that transaction is overturned by this court." We disagree with the trial court's conclusion that a deed conveyed to a married couple that is silent as to the type of ownership means that the married couple owns the property as tenants in common; rather, such a conveyance is presumptively to the couple as tenants by the entirety. *See In re Estate of Russell*, No. 01A01-9611-PB-00516, 1997 WL 249961, at *7 (Tenn. Ct. App. May 14, 1997) (citing *Bost v. Johnson*, 175 Tenn. 232, 133 S.W.2d 491 (1939) (it will be presumed that a tenancy by the entirety is created when a husband and wife take an estate to themselves jointly unless words appear to the contrary); *Young v. Brown*, 136 Tenn. 184, 188 S.W. 1149 (1916). We agree with the trial court, however, that the issue of the type of ownership in which Dorris and Dorothy Cage held the property prior to the property's conveyance to Ms. Long in October 1996, is pretermitted by the determination that the power of attorney under which the property was transferred was valid.

E. Validity of the Lien Held by Green Tree Servicing, LLC

Green Tree Servicing contends on appeal that the validity of its lien on the property at issue was not addressed by the trial court and that the issue must be remanded before a determination by this Court can be made. Because we have upheld the trial court's dismissal of this action on all grounds, this issue is moot.

IV. Conclusion

For the foregoing reasons, we modify and affirm the judgment of the trial court. The case is remanded to the Chancery Court for Montgomery County for collection of costs accrued therein.

Costs of this appeal are taxed to the Appellant, Mr. Billy Dickson, Jr., for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE