

2015ADV207277

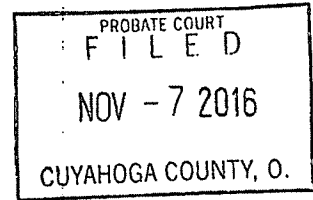


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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
PROBATE DIVISION



GREG DZURINDA,

CASE NO. 2015ADV207277

Plaintiff

vs.

DONNA CURTICE, et al.

Defendants

JUDGMENT ENTRY

This matter came on for Trial on September 26, 27, 28 and 29, 2016 upon the Verified Complaint filed May 26, 2015 and the Intervening Complaint filed by Plaintiff Linda Jadwisiak on April 8, 2016 alleging that Defendant Donna Curtice exerted undue influence upon decedent James E. Lilly causing him to name Defendant as beneficiary on a Third Federal account, a Symetra Financial life insurance policy, two Protective Life Insurance policies and a Metlife insurance policy.

Having heard the arguments, testimony and having considered the documentary evidence the Court finds as follows:

James Lilly died on April 16, 2015 at age 87. Lilly's wife of 68 years, Elizabeth, had died a year earlier, on March 7, 2014. Near the end of February of 2014 Defendant Curtice was hired to assist Lilly after Elizabeth was hospitalized. Plaintiff Jadwisiak, Lilly's daughter, was providing care for her father but brought in Curtice to assist on weekends so that Jadwisiak could return home to Port Clinton. Initially Curtice spent about four hours a day with Lilly to keep him company and "turn down his bed". At that time a neighbor, Robert Pittman, was assisting Lilly

by bringing him food and giving him rides to the bank. Lilly was hospitalized in June for malnutrition. Curtice visited Lilly in the hospital and charged for her time.

Although Plaintiff Jadwisiak attempted to provide care for Lilly after Elizabeth's death, she became overwhelmed with the responsibility and wanted to return to her home and her husband in Port Clinton, Ohio.

Defendant Curtice took over Lilly's care full time in June of 2014. Curtice testified that Lilly was not taking care of himself and was a fall risk. Further, Curtice testified that Plaintiff Jadwisiak was concerned that Lilly was being financially exploited by the neighbor, Pittman. Curtice testified that Lilly would give money if asked and that "he did not say no". Curtice also learned that Pittman was named on one of Lilly's bank accounts. Curtice further testified that she knew Lilly needed protection. Curtice documented in her "progress notes" the concerns about the potential for Lilly to be financially exploited.

Curtice testified that she was hired to manage Lilly's finances and medications and that her job was to keep Lilly's family informed. By agreement of Jadwisiak and Plaintiff Dzurinda (Lilly's grandson) Curtice became Lilly's health care power of attorney on July 24, 2014. Curtice regularly accompanied Lilly to doctor appointments as well as frequent trips to the bank. Curtice administered memory tests to Lilly on a daily basis and documented results in her progress notes. Curtice also communicated directly with Lilly's medical providers and communicated directly as well with various attorneys regarding Lilly's estate plan.

Approximately one month after Curtice took over Lilly's care she contacted Attorney Sarah Lukwinski Shemo in July, 2014 indicating that Lilly wanted to discuss his estate planning. Shemo testified that she met with Lilly alone at his house for about forty five minutes. He talked about his poor relationship with his daughter, Plaintiff Jadwisiak as well as his affinity for

his grandson, Plaintiff Dzurinda. Lilly told Shemo that he wanted to leave his house to Curtice and everything else to Dzurinda. Shemo discussed with Lilly the fact that Curtice was a paid caregiver and as such, it would be inappropriate to leave the house to her. After being reminded that Curtice was paid for her services Lilly agreed that the house should go to Dzurinda and that Curtice should receive a smaller gift. Shemo returned to Lilly's home on July 24, 2014 for execution of numerous documents including the HCPOA designating Curtice, a financial POA designating Dzurinda, and a Last Will and Testament that left all of Lilly's assets to Dzurinda. Shemo testified that she found it odd that both Curtice and Priscilla were at Lilly's home when she returned on July 24. Priscilla was sleeping on the couch and awakened at one point to ask "did we get the house?"

In the same month that Shemo met with Lilly, July of 2014, Witness Alice Walsh testified that she declined to allow Lilly to sign advance directives while Lilly was at Fairview Hospital. Walsh was uncomfortable with Lilly's apparent dependence on Curtice and his lack of understanding about the nature of the advance directives. According to Walsh's testimony, supported by Plaintiff's Exhibit 28, Lilly told her he had a grandson (Dzurinda) that he trusted but that he could not make a decision without consulting Curtice. Walsh was concerned enough about this encounter to consult with the hospital bioethicist and declined to take any further action with Lilly.

Lilly made multiple trips to the bank accompanied by defendant Curtice. On several occasions, including August 18, 2014 and September 14, 2014, routine visits to the bank resulted in changes in account designations to name Curtice as beneficiary. On August 18, 2014 Lilly and Curtice met with Martha Flow, a Third Federal employee. Flow testified that Lilly wanted to name Curtice as a beneficiary of his account but did not have his account number until Flow

looked it up. She testified that Curtice was assisting Lilly and was a part of the conversation regarding Lilly's accounts. Curtice provided her identification and otherwise cooperated with the necessary requirements for changing an account designation. Flow testified that she explained to Lilly that the form that he signed naming Curtice as a beneficiary applied the change to all of his Third Federal Accounts. She did not discuss each account individually however. The same accounts had been changed to name Dzurinda as beneficiary one month earlier however Flow testified that she was not aware of that fact. Flow testified that it was clear to her that Lilly relied on Curtice. She also testified that Lilly and Curtice returned on October 18, 2014 to open new accounts that designated Curtice as beneficiary.

In August of 2014 Lilly and Curtice went to Humenic Funeral Home to pre plan Lilly's funeral. The funeral director, Joseph Humenic testified that he met with Lilly and Curtice and found their relationship to be unusual. Humenic testified that Lilly and Curtice seemed too close for a caregiver relationship. He also found it unusual that during their meeting Lilly ranted about financial issues, his distrust of his daughter, and his desire that all of his assets go to his grandson, Dzurinda, upon his death. Humenic found it so unusual that Lilly was talking about his estate plan that he actually made written notes about the encounter.

On October 28, 2014 Lilly met with Aaron Lewis, a financial advisor, about the beneficiary designations on the Protective Life annuities and Allstate policies. Lewis testified that he was uncomfortable with Lilly's request to designate Curtice as beneficiary of his accounts until Lilly "ranted" for about twenty minutes about how disappointed he was with his family and then raved about Curtice and how she was looking out for his best interest. Lewis recalled that Lilly was distressed about his family because they had not been in contact. He relayed that due to the lack of contact they were no longer close. On cross examination Lewis admitted that he

was unaware that Dzurinda had just called Lilly the day before. He was also unaware that Lilly had recently been hospitalized. Lewis also testified that Curtice was objecting to being designated as beneficiary on the accounts stating that she did not want to go to prison. Despite her protests Curtice provided Lewis with her personal information that was required to add her as beneficiary.

On February 11, 2015 Lilly met with Ramon Aponte at Third Federal Bank to sign a Symetra Beneficiary Change Request form for the Symetra fixed deferred annuity contact number ending in 4877. Curtice and Lilly appeared at the bank and Curtice told Aponte that they needed a notary to sign the Symetra forms. The forms had been filled out prior to meeting with Aponte and not in his presence. Aponte testified that Lilly wanted Curtice to be the named beneficiary because "he had no one else" and she was "good" to him. Aponte was unsure whether someone at the bank had told him that Lilly had no family or if, as he testified in his deposition, that Lilly told him he had no family.

In March of 2015 when Lilly was released from the hospital on hospice care and gravely ill Curtice again contacted an attorney on Lilly's behalf. Initially she called Shemo to indicate that Lilly wanted to change the transfer designation for the house. Shemo testified that she was uncomfortable with Curtice's request, met with the senior attorney at her firm, and declined to return a call to Curtice. Curtice then contacted Christopher Murray and told him that Lilly wanted to make changes to his estate plan. When Murray met with Lilly he was told that Lilly wanted to transfer his house and automobile to Curtice and wanted to change his will to leave everything to Curtice. Murray recalled Lilly saying that Curtice was the one taking care of him and without her he would be in a nursing home. Murry went to Lilly's home on April 14, 2015

to execute the TOD documents. He testified that Curtice photographed Lilly signing the documents, which he found odd.

The Court finds that Curtice quickly endeared herself to Lilly by providing entertainment and adventure that appeared to have been lacking while Elizabeth was living. Curtice's testimony was that Lilly consistently referred to her as "sweetheart". Curtice, along with her daughter Priscilla, took Lilly on numerous outings and trips. Either Curtice or Priscilla or both were with Lilly constantly. Curtice used Lilly's funds to purchase Cleveland Cavalier season passes. Curtice did not dress in scrubs or uniform or in any manner to distinguish that she was a caregiver. She posted photographs of herself with Lilly on social media and opened Lilly's home to her own friends and family. Most importantly, she provided what Lilly's daughter and grandson could not; constant care and companionship. There was testimony from more than one witness that Lilly had to be told, or reminded, that Curtice was paid to be Lilly's companion. There was also testimony from several witnesses that Lilly believed that Curtice and Priscilla were the only ones that cared for him and that if not for them he would be in a nursing home.

The Court heard testimony about the frequency of Dzurinda's visits with Lilly including an explanation of a period of time in which he was unable to travel to Ohio as planned due to his employment and the fact that he had several small children. According to Curtice's testimony Lilly became increasingly distrustful of his daughter, Jadwisiak and then became paranoid that Dzurinda was "in cahoots" with Jadwisiak. Curtice's testimony and progress notes kept for Lilly indicate that he was obsessed with his money and became convinced that his plan to leave his assets to Dzurinda would result in money being given to Jadwisiak. Lilly became frequently agitated when discussing his assets and visited the bank frequently (driven by and accompanied by Curtice) and made frequent changes to his accounts.

The Court also heard testimony about the frequent communications between Curtice and Dzurinda which was primarily through text messaging. There was no testimony as to whether Curtice made Lilly aware that Dzurinda was following and involved in his care.

Curtice also testified that she made Dzurinda aware of the fact that Lilly was changing beneficiary designations and signing documents to transfer his house and automobile to her. She claims that she begged Dzurinda to intervene. Dzurinda in turn testified that he did not utilize his power of attorney to protect Lilly's accounts because he did not want Lilly to become distrustful of him in the way that he distrusted Jadwisiak. Curtice's assertion that she knew that she could not receive gifts from Lilly and that she tried to stop the transfers is belied by much of the evidence but most blatantly by the fact that she attempted to get the TOD designation for the house recorded on the day of Lilly's death.

In her testimony Curtice expresses her concerns about Lilly's care, indicating that Dzurinda and Jadwisiak didn't properly care for him. Further, she testified that both had told her that they were prepared to put Lilly in a nursing home if Curtice no longer wanted to care for him. Curtice also testified about her frustration about the lack of visits and calls from Dzurinda. Clearly these are the sentiments that Curtice shared with Lilly as reflected in his comments as reported by the witnesses.

That Curtice appeared to be more companion than paid caregiver becomes more apparent in Priscilla's testimony. Priscilla testified about going to Lilly's house after school and sleeping on his couch. Lilly insisted on giving Priscilla \$20.00 per day for gas money to drive to school even though she was already paid from his funds for her caregiving. Other relatives of Curtice and Priscilla frequented Lilly's home and were invited to the birthday party that Curtice planned for Lilly.

Robert Willis, another neighbor of Lilly's testified about his distrust of Curtice and Priscilla, and Lilly's vulnerability. Willis testified that when Elizabeth was living she took care of the household and finances and that Lilly did not often leave the house. Willis assisted him with doctor visits, banking and grocery shopping. Willis testified that Lilly didn't know how to do his banking and manage money. Willis would take him to the bank and insure that he didn't bring home too much cash. Willis testified that after Elizabeth's death Robert Pittman and others started coming around to ask Lilly for money. Willis testified that Lilly didn't know any better than to let Pittman put his name on Lilly's accounts. Willis testified that he wasn't able to talk to Lilly without either Curtice or Priscilla around. He was frustrated to the point of asking Curtice what her intentions were with regard to Lilly. Willis offered the assistance of his daughter, a licensed caregiver but Curtice declined the offer.

Bonnie Harris, a home health care worker who worked for Curtice while Curtice cared for Lilly also testified. Harris testified that although she and most health care workers wore scrubs or uniforms, Curtice consistently wore heels and always looked like she was going out. Harris testified that Curtice told her that Lilly wanted to leave his assets to her and that she told her absolutely not, that such a gift would be contrary to the ethical rules that home health workers are required to adhere to. Harris subsequently resigned from Curtice's employment.

Christine Jacobs, a longtime friend of Lilly's also testified. Jacobs testified that Lilly and his wife had been quiet, stay at home people. Lilly had suffered a stroke and "wasn't the same guy" After Elizabeth's death he appeared to decline more and displayed short term memory issues such as repeating himself in conversation. Jacob's testified that it was her idea that Curtice be hired to assist Lilly but was surprised when Curtice "practically moved in" with Lilly. When Jacobs tried to visit Lilly in September of 2014 she wasn't sure that he even recognized

her and Curtice prevented her and others from having any “one on one” time with Lilly. At some point Jacobs was told by Curtice not to visit because Lilly was afraid that she was talking to Jadwisiak.

Ohio courts have generally held that where an individual’s influence restrains a testator from disposing of his property in accordance with the testator’s own wishes and judgment and substitutes the wishes or judgments of another, such influence is undue. *West v. Henry* (1962), 173 Ohio St. 498.

Undue influence is “any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely”. *Ross v. Barker* (1995), 101 Ohio App 3d 611, 618, 656 N.E. 2d 363, quoting *Marich v. Knox Cty. Dept. of Human Servs.* (1989), 45 Ohio St. 3d 163, 166, 543 N.E. 2d 776.

The elements of undue influence include the following: (1) a susceptible party; (2) another’s opportunity to exert influence; (3) the fact of improper influence exerted or attempted; and (4) the result showing the effect of such improper influence. *Krischbaum v. Dillon* (1991), 58 Ohio St. 3d 58, 65, 567 N. E. 2d 1291, 1298.

Undue influence must be proven by clear and convincing evidence. *Ament v. Reassare Am. Life Ins. Co.*, 180 Ohio App. 3d 440, 2009-Ohio-36, 905 N.E. 2d 1246.

When a confidential or fiduciary relationship exists between a donor and a donee the transfer is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. *Willis v. Baker* (1906), 75 Ohio St. 291, 79 N.E. 466. “In such cases, a presumption of undue influence arises and the burden of going forward with evidence shifts to the donee to show that his conduct was free of undue influence or fraud and that the donor acted

voluntarily and with a full understanding of his act and its consequences. ***The donee may rebut the presumption of undue influence by a preponderance of the evidence***. *Wallbrown v. Kent State Univ.*, 143 Ohio App. 3d 762, 768 (11th Dist. 2001), citing *Studniewski v. Krzyzanowski*, 65 Ohio App. 3d 628, 632 (6th Dist. 1989).

The Court finds that based upon the fact that Defendant Curtice was the designated Health Care Power of Attorney and further based upon the evidence that Curtice was Lilly's full time paid caregiver who assisted him in every aspect of his daily life that Curtice was in a fiduciary relationship with Lilly. The Court further finds that a presumption of undue influence arises in this matter because of the fiduciary relationship. The Court further finds that Curtice has the burden of demonstrating that Lilly's conduct was free of undue influence or fraud and that Lilly acted voluntarily with a full understanding of his actions and their consequences.

The Court finds that Lilly was susceptible to undue influence. He had been exploited by Robert Pittman which was explained to Curtice as a reason for hiring her to look out for Lilly. He was completely physically dependent upon Curtice and sadly, he quickly became emotionally dependent on her following the death of his wife and the fallout with his daughter. The progress notes compiled by Curtice regarding Lilly's care clearly demonstrate that Lilly not only had memory issues but that he also was obsessed with his assets and his fear that they would be shared with his daughter. Lilly also expressed fear that he would end up in a nursing home if not for the care provided by Curtice.

The Court further finds that Curtice was in a prime position to exert undue influence. By all accounts, within a few short months she was providing full time care for him and had made his home a place where she and her family were also at home. Curtice had complete control over Lilly's daily activities including retrieving and sending his mail and answering and placing his

phone calls. Curtice provided transportation and accompanied Lilly every time he left his home. She controlled who could visit and whether or not he was left alone with visitors. She managed his medications and communicated directly with his medical providers.

The Court finds that within a very short time undue influence was exerted. Lilly told witnesses that he was no longer close to his family with whom he had lost contact. Lilly believed this despite the fact that Curtice was in constant contact with Dzurinda, and to a lesser extent, Jadwisiak. Lilly believed that if not for Curtice he would be in a nursing home. Although Jadwisiak and Dzurinda were the parties responsible for hiring Curtice and making sure she was paid and despite Dzurinda's continued involvement, Lilly was led to believe that he had been abandoned by his family. It was Curtice herself who testified that both Jadwisiak and Dzurinda were willing to place Lilly into a nursing home and that Lilly was deserving of better care and attention than they were giving him. It was this sentiment that was conveyed and reflected by Lilly and that resulted in the ultimate transfer of all of his assets to Curtice. This influence was exhibited by the rapid and complete transfer of all of Lilly's assets, which had been designated primarily for his grandson and to a smaller extent for his daughter, to Curtice, even after he was advised by and agreed with Attorney Shemo that such transfers would be improper.

The Court finds that Curtice is unable to rebut the presumption of undue influence. Her case consisted of her own self-serving testimony as well as the testimony of several witnesses as to Lilly's capacity to sign legal and financial documents. With regard to the attorneys and bankers the Court finds that upon cross examination it became clear that each was operating without full disclosure as to Lilly's mental and physical health, the fact of prior exploitation, the

true nature of his family's involvement, the totality of his assets and the multiple changes he made to his accounts in a short time.

The Court finds that the decision of the 8th District Court of Appeals in *Schwartz v. Tedrick*, 2016- Ohio-1218 supports this Court's finding of undue influence. As in this case, the decedent in *Schwartz* was in failing health, completely dependent upon his spouse for care and was terrified of ending up in a nursing home. Under these conditions the decedent changed his estate plan from what he had recently and publicly declared to be his intention to favor his spouse. In this case, in failing health and in fear of nursing home care the decedent, who had made known to at least Attorney Shemo and Funeral Director Humenik that Dzurinda would be the recipient of his assets, made changes to his planning to benefit his paid care giver. This Court is convinced that but for the actions and words of Defendant Curtice, Lilly would not have spent the last year of his life obsessing about and changing the designees of his assets.

The Court finds by clear and convincing evidence that the following transactions were the result of undue influence and **Orders** that these financial transactions be returned to the Plaintiffs:

- The Protective annuities worth a total of \$44,692.52
- Five Third Federal Bank Accounts/IRAs worth a total of \$53,503.80
- The All State Annuities worth a total of \$144,918.39
- The Symetra Annuity worth \$189, 730
- The ML GM Policy worth \$16,882.01
- Title to the 2006 Chevy Uplander worth approximately \$2000.00.

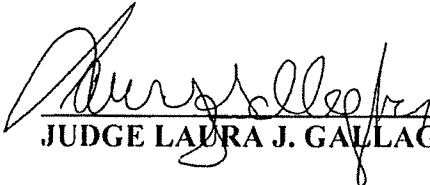
The Court further finds that with regard to the \$39,663.79 that is allegedly unaccounted for from Lilly's KeyBank and Chase Bank accounts there is insufficient evidence to determine what amounts were used for Lilly's benefit and what amounts, if any, were improperly diverted to uses other than Lilly's benefit.

The Court further finds that the Plaintiffs have failed to adequately set forth their claim for punitive damages. While the Court understands the desire to “send a message” to caretakers that financial exploitation will not be tolerated, the Court does not find that Plaintiffs have proved that Curtice acted with actual or express malice.

The Court further finds that Plaintiffs are entitled to their attorney fees. The Court agrees with the Plaintiffs that Defendant Curtice acted in bad faith in both acquiescing in and accommodating Lilly’s belief that she should benefit from his estate due to her care of him and also in her outright refusal to disavow Lilly’s “gifts” after his death. Curtice maintained throughout this trial that she did not want to be named beneficiary of Lilly’s accounts or to receive transfer of his house and car. By her own admission and statements regarding going to jail she knew it was wrong for her to receive Lilly’s assets. She testified that she allowed Lilly to make the transfers because it made him happy to do so and lessened his aggravation and lowered his blood pressure. Even so, she was on the phone to Attorney Murray shortly after Lilly’s death in an attempt to have the transfer on death deed for the house filed and she refused to return any of Lilly’s assets back to his family. In fact, Curtice attempted to bar Lilly’s own daughter, Plaintiff Jadwisiak, from entering Lilly’s home on the day of his death. The Court finds and Orders that Defendant Curtice is hereby **Ordered** to pay the Plaintiffs’ attorney fees incurred herein.

It is further **ORDERED** that the Clerk of Court shall serve upon all parties notice of this judgment and date of entry pursuant to Civ. R. 58(B).

IT IS SO ORDERED.



JUDGE LAURA J. GALLAGHER