



ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

TAMRA SIMMONS and SHANNON)
HARRISON,)

Plaintiffs/Appellants,)

vs.)

SUSIE MYERS, Individually and)
Trustee of the Susie Myers Living)
Trust dated August 30, 2012 and)
KAREN BLACK,)

Defendants/Appellees.)

JUL 28 2022

JOHN D. HADDEN
CLERK

Case No. 119,894

APPEAL FROM THE DISTRICT COURT OF
CADDO COUNTY, OKLAHOMA

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HONORABLE KORY KIRKLAND, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

Tamra Simmons and Shannon Harrison appeal the trial court's grant of summary judgment to Susie Myers and Karen Black on three separate bases. They first claim the trial court erred in construing the trust as revocable as opposed to irrevocable. Second, they argue that the trial court erred in giving

effect to a deed of homestead that was not executed by the spouse of the grantor. Finally, they insist the trial court erred in finding no issue of material fact on their claim that the deeds in question were the result of the undue influence and/or fraud of the appellees. On appeal, we affirm the trial court as to the first two rulings, but reverse and remand on the question of the possibility of undue influence and/or fraud.

BACKGROUND

Kenneth and Susie Myers were married in 2001. Kenneth had (at least) two daughters from a prior union, being the appellants, Tamra Simmons and Shannon Harrison. Susie had a daughter, Karen Black, who is not Kenneth's daughter.

In 2012, Kenneth Myers created the Kenneth Myers Living Trust. Within the trust instrument, Kenneth conveyed two pieces of real property, two bank accounts, and all his personal property to himself as trustee. At issue here is the W/2 SE/4 of Section 19, Township 7 North, Range 9 West of the Indian Meridian, Caddo County, Oklahoma, which was one of the tracts of real property placed into trust in 2012.¹ According to the terms of the trust, after the death of both Kenneth and Susie, this tract, along with all residual property, is to be distributed to Tamara (25%), Shannon (25%), and Karen (50%).

¹ The record does not contain the deed conveying this tract of land from Kenneth, individually, to Kenneth's trust.

Subsequently, and despite the fact there is language in the trust (further discussed below) arguably making the trust irrevocable, Kenneth and/or Susie executed the following two deeds related to this tract of land.

First, on February 8, 2016, Kenneth and Susie, individually and as Trustees of each of their respective trusts, conveyed each of their interests in the property to Susie's trust. However, that deed was not acknowledged in the presence of a notary. On April 18, 2016, Kenneth conveyed the property by quitclaim deed to Susie's trust, but that deed lacked Susie's signature in any capacity.

Kenneth died on August 27, 2016.

On November 21, 2017, Tamra and Shannon filed their petition against Susie and Karen alleging that both the February and April 2016 conveyances were invalid because the trust instrument was irrevocable, that Kenneth lacked mental capacity to make the transfer,² and that the transfer was void as a result of the fraud, coercion, and undue influence practiced by Susie. Tamra and Shannon filed a motion seeking summary judgment, which Susie and Karen countered with their own motion for summary judgment.

The court partially granted Susie and Karen's motion, finding that the Kenneth Myers Living Trust was a revocable trust because the trust was not made irrevocable by the terms of the instrument under 60 O.S. § 175.41.

² Kenneth suffered a stroke in 2001, and even after recovery required pain medication and a walker for assistance. Kenneth was diagnosed with cancer in 2016 and spent much of his remaining life in a nursing home.

However, the court denied Susie and Karen's motion for summary judgment as to the effectiveness of the deeds. The court determined that though a defective acknowledgement does not render a deed void, there was a factual dispute as to whether Kenneth was competent to make the transfer. Finally, the court reserved the question of whether the April 2016 deed was void because it lacked Susie's signature.

On February 11, 2021, Tamra and Shannon filed additional materials in support of their motion—denominated a “statement of material facts.” They attached additional evidence including the physician's plan of care for Kenneth, a durable power of attorney, a revocation of the durable power of attorney, as well as excerpts from Susie, Tamra, Shannon, and Karen's deposition testimony. Tamra and Shannon then filed a motion to reconsider the grant of partial summary judgment related to revocability.

After an argument-only hearing, the court granted summary judgment on all issues to Susie and Karen.³ The court found that Tamra and Shannon presented no admissible evidence that Kenneth lacked the requisite mental capacity to execute the 2016 deed. The court further found that Tamra and Shannon failed to produce evidence that Kenneth's conveyance of the property to Susie was the result of undue influence or coercion. Finally, the court ruled that the lack of Susie's signature did not make the April 2016 deed void because

³ We note that the notice of issues to be presented states that the court was to hear Karen and Susie's motion to reconsider. As only Tamra and Shannon filed a motion to reconsider, which the court heard, we assume the notice to be scrivener's error.

she received the deed as trustee of her estate and that Tamra and Shannon had no standing to challenge Susie's lack of signature. Tamra and Shannon appeal.

STANDARD OF REVIEW

The appellate standard of review of a summary judgment is *de novo*. *Tiger v. Verdigris Valley Elec. Cooperative*, 2016 OK 74, ¶ 13, 410 P.3d 1007. The evidentiary materials must be examined in the light most favorable to the nonmoving party to determine if there is substantial controversy as to any material fact. *Id.*

ANALYSIS

We must first determine whether the terms of the trust instrument prevented Kenneth from transferring property out of his trust, and second, whether Susie's failure to sign the April 2016 deed rendered the transfer void. Third, we must determine whether the trial court erred in ruling that, examining the record in the light most favorable to Tamra and Shannon, no genuine issue of material fact exists relating to the execution of the 2016 deeds.

Terms of the Trust

Tamra and Shannon urge that the trial court erred as a matter of law in finding that Kenneth's 2012 trust was revocable. Although the trust contains certain seemingly contradictory terms, in the end, we agree with trial court: Kenneth was free to convey the relevant tract of land out of the trust at his option.

Article V of the Trust instrument contains the following relevant clauses:

- A. I, Kenneth Myers, the Trustor, hereby waive the right to revoke and amend this instrument or the Trust hereby at any time; and it is my intent that this Trust be irrevocable.
- B. I, Kenneth Myers, the Trustor, may at any time add property, real or personal, to the trust principal held hereunder.
- C. I, Kenneth Myers, may at any time remove property, real or personal from the trust principal held hereunder.

Tamra and Shannon insist that subsection (A) renders the trust irrevocable for all purposes. They note, correctly, that property cannot simply be moved out of an irrevocable trust as Kenneth did in this case. *See Harrison v. Johnson*, 1956 OK 201, ¶ 14, 312 P.2d 951. However, this reading completely ignores subsections (B) and (C), which specifically allow the trustor to move property in and out of trust. Read together, we think it is clear that the trustor intended that the trust *instrument*, as to its terms and beneficiaries, was to be irrevocable and not subject to amendment, but that property could flow in and out of the corpus at the will of the trustor, as in a typical revocable trust. Such a construction gives life to each clause of the trust and does violence to no specific term, as is our aim. *See In re Dimick's Will*, 1975 OK 10, 531 P.2d 1027, 1030 (“[Trustor’s] intention is to be gathered from the terms of the instrument as a whole.”).⁴ *See also, In re O’Brien’s Tr. Estate*, 1946 OK 225, ¶ 6, 172 P.2d 607, 609 (holding that conveyance to trustee made “absolute at this time but

⁴ Although we do not think parol evidence need be used to reach this conclusion, we note that the attorney who drafted the trust instrument executed a declaration stating, “Based upon my conversations with Kenneth Myers at the time of drafting, he intended to have a trust whose beneficiaries could not be changed, but that would give him the authority to remove property at this sole discretion during his lifetime.”

subject to the conditions hereinafter set forth” created a revocable trust.). We affirm the trial court’s ruling that the deeds at issue were not precluded by the terms of the trust itself.⁵

Susie’s Signature

Tamra and Shannon’s next contention on appeal is that the trial court erred in granting summary judgment to Susie and Karen on whether Susie’s failure to sign the April 2016 deed left the conveyance void. The trial court determined that Tamra and Shannon lacked standing to challenge the deed on Susie’s homestead rights, and that Susie’s signature was unnecessary because she received the property as trustee of her trust.

The relevant provision at issue is 16 O.S. § 4, which reads:

No deed, mortgage, or contract affecting the homestead exempt by law, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law.

We agree with Division III of this Court, which has determined that the Oklahoma Supreme Court’s interpretation of this provision has never required a spouse to execute a deed as grantor when she is receiving the property as grantee. *Matter of Estate of Hyer*, 2020 OK CIV APP 31, ¶ 8, 470 P.3d 350. As Kenneth never

⁵ The trial court applied 60 O.S. § 175.41 to find that the trust was revocable because the trust was not explicitly made irrevocable by its terms. We need not reach this conclusion because the conveyance was consistent with the terms of the trust.

sought to transfer homestead property to a third party, Susie's failure to sign the April 2016 deed did not void the transaction.⁶

Capacity, Fraud, Coercion, and Undue Influence

Tamra and Shannon finally allege that the trial court erred in ruling that there was no genuine dispute of material fact as to Kenneth's mental capacity as well as their claims of undue influence, fraud, and coercion.⁷ After the trial court granted partial summary judgment in favor of Susie and Karen, Tamra and Shannon submitted a number of documents to the court in an effort to raise the issue of Kenneth's mental capacity to convey either of the 2016 deeds. These same documents, the appellants argue, also show that Kenneth may have been the victim of undue influence.

In actions to contest deed conveyances based on lack of mental capacity, the presumption is that the maker of the deed had mental capacity to execute the deed. *Matter of Woodward*, 1976 OK 55, ¶ 20, 549 P.2d 1207. Further, evidence of isolated instances of failing memory is insufficient to overcome evidence that the grantor was competent at the time of executing the deed. *Id.* ¶ 27. To void a conveyance for undue influence, moreover, the influence must destroy the grantor's free agency and substitute the will of another grantor. *Blair v. Richardson*, 2016 OK 96, ¶ 25, 381 P.3d 717 (quoting *Tate v. Murphy*, 1949

⁶ We note that in the instant case, Kenneth transferred the property from his trust into Susie's trust. As Kenneth was both trustee and beneficiary of the Kenneth Myers trust, and Susie is trustee and beneficiary of the Susie Myers trust, we view these conveyances as between spouses.

⁷ Appellants allege distinct and separate theories of fraud, coercion, and undue influence. As appellants rely on the same corpus of evidence to contest summary judgment on these theories, we consolidate these theories for purposes of evidentiary analysis.

OK 228, ¶ 42, 217 P.2d 177). Mere suspicion or the possibility of undue influence cannot defeat an otherwise valid conveyance. *Id.* Though the burden generally rests with the party contesting the deed to show that the deed was procured by undue influence, that burden shifts if the deed contestant can show that (1) a confidential relationship existed between the grantor and another, stronger party; and (2) the stronger party actively assisted in the preparation of the deed. *Id.* This presumption can then be rebutted if the party defending the deed can show that the transaction was fair. *See Owens v. Musselman*, 1942 OK 52, ¶ 13, 121 P.2d 998.

To support their claim that Kenneth was incompetent to execute the deed, Tamra and Shannon submit evidentiary materials including Kenneth's physician's plan of care, the durable power of attorney, as well as depositions from relevant parties. Shannon noted that her father's mental state was affected by both the lingering effects of his stroke and the pain medication prescribed after his cancer diagnosis. Indeed, Shannon recounts an instance where Kenneth was unable to recognize her. Likewise, Tamra confirms that her father was on large amounts of medication to cope with pain, and that his competency began fading in 2016.

In those same depositions, however, Shannon stated that Kenneth often recognized her immediately when she visited. Similarly, Tamra noted that Kenneth regularly recognized her, including a week before his death. Though Kenneth may have suffered from memory loss as a result of his illness and medication, it is clear that he was lucid enough, at times, to recognize parties

and discuss his motivations for making changes to his trust. The signing of the April 2016 deed was recorded, and the record includes a transcript of that recording. Mr. Glidwell, Kenneth's attorney, specifically asked Kenneth if he was under the influence of medications that would affect his ability to understand his actions, and Kenneth responded "no."⁸ Kenneth was able to express his purpose for the conveyance, saying that Susie "spent going on 16 years of taking care" of Kenneth, and that he gave his children two farms⁹ which the children were supposed to appraise and divide.

The transcript also includes evidence of Kenneth's potentially diminished capacity. Mr. Glidwell often appeared to lead Kenneth to desired answers, and Kenneth also appeared not to register one of Mr. Glidwell's questions, which had to be repeated. Tamra and Shannon's remaining evidence that Kenneth was not mentally competent to execute the 2016 transactions primarily rests on their perceived change in Kenneth's behavior.¹⁰

Shannon's basis for her belief that Kenneth's conveyance of trust property was the result of fraud, coercion, and undue influence shares many premises

⁸ Additionally, Mr. Glidwell asked Kenneth if he was making decisions of his own free will, to which Kenneth assented. Mr. Glidwell also described the contents of the quitclaim deed, and Kenneth confirmed that he wanted to sign the deed.

⁹ Both Shannon and Tamra testified in their depositions that they did not receive the two farms but they understood the farms went to their two brothers, Mark and Perry, and they received no payment.

¹⁰ Harrison expressed concerns about Kenneth's memory, and that his signature on the April 2016 deed looked messy. Tamra was concerned that her father changed the beneficiary (of his will) after agreeing to make her a beneficiary of the trust.

with her claim that Kenneth was not mentally competent to make the transfer.¹¹ Tamra, likewise, opined that she thought Susie “slipped some papers in under my dad and he signed them.” Tamra went on to imply that Kenneth signed the deed in exchange for being allowed to return home. However, Tamra and Shannon both struggled to provide factual bases for their undue influence, fraud, and coercion claims. When Tamra was asked whether she had specific information to support her allegation of undue influence, she responded “I cannot say I do, no.”

In summary judgment review, all evidentiary materials are reviewed in the light most favorable to the non-moving party. *Verdigris Valley Elec. Cooperative*, 2016 OK 74 at ¶ 13. When reviewing the evidentiary materials in the light most favorable to the nonmoving party—the appellants—there exists a genuine dispute of material fact on their theories of lack of capacity and undue influence. Kenneth’s laundry list of medications, and Tamra and Shannon’s testimony about Kenneth’s overall change in mood and demeanor, puts Kenneth’s mental capacity at issue. Shannon, after seeing the video of the deed conveyance, said that Kenneth “seemed very agitated like something had went on before ...”, and that he was “not thinking straight” and that Kenneth was answering “yeah” without understanding what he was agreeing to.”

¹¹ Shannon states in her deposition that Kenneth was signing documents “without him fully understanding what he was signing,” and that none of the children were made aware of changes to the trust. After watching April 2016 deed signing video, Shannon said that Kenneth seemed “agitated” and implied that that her father may have been coerced into signing the deed.

Finally, there is Appellants' belief that Kenneth transferred the property into Susie's trust in exchange for leaving the nursing home and returning to his house. Appellants point us to Kenneth saying "[b]ut if I get out of here, I'm coming home," immediately after answering that he wanted the property transferred to Susie. Reading this statement in the light most favorable to appellants places Kenneth's intentions for signing the second deed in controversy, as he explicitly stated his intention to return home as he was transferring property into Susie's trust. This statement coupled with Kenneth's apparent agitation during the conveyance puts his mental state and motivations for signing the deed in controversy, and thus precludes summary judgment. The question of whose version of the story is more believable must remain with the trier of fact.

We affirm the trial court's two legal rulings that the trust in question did not preclude Kenneth from conveying trust property and that the operative deed was not void for want of Susie's signature. However, we reverse the trial court's decision finding that there was no substantial controversy as to any material fact related to capacity, coercion, undue influence, or similar theories. We remand to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WISEMAN, P.J., and BARNES, J. (sitting by designation), concur.

July 28, 2022