



# ORIGINAL

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See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

SEP 26 2024

JOHN D. HADDEN  
CLERK

TERRY L. PHILLIPS, as Personal )  
 Representative of the Estate of Oliver )  
 Elmo Phillips, Deceased, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. )  
 )  
 ETTA MCLEMORE and DEBORAH S. )  
 DAVIS, )  
 )  
 Defendants/Appellees. )

Case No. 121,207

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APPEAL FROM THE DISTRICT COURT OF  
CADDO COUNTY, OKLAHOMA

HONORABLE Z. JOSEPH YOUNG, TRIAL JUDGE

**AFFIRMED**

Richard A. Williams  
PAIN AND GARLAND  
Anadarko, Oklahoma

For Plaintiff/Appellant

Jeffrey S. Coe  
JEFFREY S. COE  
ATTORNEY AT LAW PLLC  
Oklahoma City, Oklahoma

and

Tyler T. Lowe  
Chickasha, Oklahoma

For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Terry Phillips appeals the results of a summary judgment and bench trial finding no actual or constructive fraud, undue influence, conversion, or forgery by defendant Etta McLemore regarding the property of Terry's father, Oliver Phillips. On review, we affirm the decisions of the trial court.

### **BACKGROUND**

In October 2018, Terry Phillips, as personal representative of the estate of Oliver Phillips, filed suit against Etta McLemore and her daughter, Deborah Davis. The suit alleged that, by some combination of fraud and undue influence, Etta had caused Oliver to transfer twenty-six acres of mineral rights and two acres of land to her or her daughter. It further alleged that, by undue influence, Etta had obtained a power of attorney from Oliver and had taken some \$49,686 in assets that should properly belong to the estate. In January 2020, Etta filed a motion for summary judgment on all claims. The court granted summary judgment against Terry's claim of actual fraud and denied judgment on Terry's other theories. The remaining issues of conversion, constructive fraud, and undue influence were decided by a bench trial. In November 2022, the court wrote a detailed and comprehensive order making substantial factual findings that we will recount here.

Oliver began a relationship with Etta in 1985 or 1986. During the relationship the two resided together at times in Etta's residence and, at times, in Oliver's. Oliver, at times, also resided in a nursing home. The evidence reflected that, in early 2016, Oliver had a short stay in the Binger Nursing Home. Upon his release, Oliver moved into Etta's home with Etta.

Beginning in 2016, Oliver gave Etta a power of attorney. Tony Burns, an attorney from Caddo County, assisted Oliver. Mr. Burns was contacted by Oliver in February 2016. Oliver requested Mr. Burns prepare a Durable Power of Attorney giving Etta his power of attorney. Mr. Burns testified that Oliver requested such because “she was taking care of him.”

In addition, Mr. Burns testified that Oliver requested him to draft a mineral deed to give certain minerals to Deborah Davis. Deborah picked up both the mineral deed and durable power of attorney from Mr. Burns’ office and took them to have Oliver execute them. Approximately one month later, Deborah returned and informed Mr. Burns that Oliver actually desired the minerals to be given to Etta, not Deborah. Mr. Burns drafted a new mineral deed from Deborah to Etta. Mr. Burns testified that pursuant to Oliver’s direction, both mineral deeds were subject to a life estate reserved to Oliver.

Around May 2016, Oliver again contacted Mr. Burns via phone and requested Mr. Burns draft a deed to transfer certain property to Etta. Mr. Burns testified he refused to draft the deed without an in-person, private meeting because the property was Oliver’s homestead. On May 16, 2017, Etta brought Oliver to Mr. Burns’s office. Mr. Burns took Oliver into his inner office and met with him privately before drafting the deed. Mr. Burns drafted the deed, and it was signed by Oliver in Mr. Burns’s office.

Etta historically maintained her bank account at First State Bank in Gracemont, Oklahoma. Oliver historically maintained his bank account at Legacy Bank in Binger, Oklahoma. After Oliver and Etta began living together

their bank accounts were changed. Oliver made Etta a signatory on his account and ultimately changed the ownership to joint owners. Etta changed her bank account at First State to ultimately add Oliver as a co-owner of her account as well. After Oliver's death, Etta transferred the contents of his account to hers.

The court found that the couple were in a confidential relationship, but that the evidence did not show that Etta was dominant over Oliver or the "stronger party" in the relationship and that Etta had not participated in the making of either the challenged deeds or the power of attorney. Hence, no presumption of undue influence arose. The court also rejected Terry's constructive fraud claims, finding that Oliver was mentally competent to dispose of his own property according to his own intentions, and that he was not misled or tricked into any transfer or unauthorized use of his property. The court found no conversion of Oliver's property. Terry now appeals those decisions.

#### **STANDARD OF REVIEW**

On a bench trial of equitable issues such as claims that property was secured by fraud, misrepresentation and undue influence, the district court's findings will be upheld unless against the clear weight of the evidence or contrary to law or established principles of equity. *Arine v. McAmis*, 1979 OK 162, 603 P.2d 1130, 1132; *In re Estate of Holcomb*, 2002 OK 90, ¶ 1, 63 P.3d 9, 11-12. The question of actual fraud was decided by summary judgment. This is reviewed *de novo*.

## ANALYSIS

Terry's brief raises eleven assignments of error which may be regrouped as arguments involving real property and arguments involving personal property.

### *The Real Property*

Terry attempted to void both real property transfers on the grounds of undue influence. Generally, "[u]ndue influence occurs when a person in a position of confidence or authority uses that confidence or authority to obtain an unfair advantage over another." *Blair v. Richardson*, 2016 OK 96, ¶ 25, 381 P.3d 717, 724. To void a conveyance, the influence must "destroy the grantor's free agency" and "substitute the will of another for that of the grantor." *Id.* The court found that Etta had neither destroyed Oliver's free agency, nor substituted her will for his. On review of the record, we find this decision is not against the clear weight of the evidence.

Terry argues on appeal, however, that it was not his burden to show these elements because Etta held Oliver's power of attorney, and this created a fiduciary relationship, which is a confidential relationship as matter of law. In turn, this confidential relationship creates a rebuttable presumption of undue influence that shifted the burden to Etta to prove that undue influence was not exerted. Terry cites to no Oklahoma case holding that a power of attorney automatically assigns the full potential range of fiduciary duties to a holder or creates a "confidential relationship." A brief survey of Oklahoma cases indicates that a power of attorney creates a fiduciary relationship as to the *exercise of the authority granted by the power of attorney*. In *Robertson v. Robertson*, 1982 OK

108, ¶ 47, 654 P.2d 600, 606, the holder of the power of attorney used it to transfer the grantor's property to himself, a "clear violation of the terms under which the power of attorney were given and in clear breach of his fiduciary duty toward [grantor]." The deeds here were not made by Etta or in any way executed under her power of attorney.

Even assuming for the moment, however, that Terry is correct that the power of attorney established a confidential relationship for the purposes of an undue influence analysis, *Blair* states that the rebuttable presumption of undue influence arises in a real property transfer "if the contesting party can establish that (a) a confidential relationship existed between the grantor and another, stronger party; and (b) the stronger party actively assisted in the preparation of the deed." *Id.* ¶ 1. Irrespective of whether Etta was the "stronger party" (the court found she was not), we find no record that Etta "actively assisted in the preparation" of either deed.

Rather, regarding the deed to the surface property, attorney Tony Burns testified that Oliver contacted him regarding the "transfer of some property." Tr. (August 18, 2022), 233. Because the transaction involved a homestead, Mr. Burns insisted that Oliver come into his office to discuss it. Mr. Burns spoke with Oliver alone in his office. Mr. Burns testified that Oliver told him he was transferring the property because "she's taking care me, and if something happens to me, I want her to have it." *Id.* at 235. Mr. Burns testified that he had no impression that anyone other than Oliver was making the decision to transfer the property, and that he saw no diminished ability in Oliver, despite the fact

that he was taking prescription opiates at the time. *Id.* at 237-38. The only involvement of Etta was that she transported Oliver to the appointment. Mr. Burns also testified that he drafted the involved mineral deeds. No input from Etta was identified.

We find no basis under which the court should have found Mr. Burns's testimony not credible, and it clearly establishes that Etta did not actively assist in the preparation of the deeds, as *Blair v. Richardson* requires. Likewise, we find no evidence of constructive fraud or conversion in this matter.

Terry further argues that the real estate transactions were void for a lack of "independent legal advice." Similar to Terry's prior argument, the independent legal advice rule arises when a person in a confidential relationship prepares a document, such as a will, which grants some benefit to the preparer. See *In re Estate of Mowdy*, 1999 OK CIV APP 4, ¶ 3, 973 P.2d 345, 347; *Matter of Estate of Carano*, 1994 OK 15, ¶ 5, 868 P.2d 699, 702; *Anderson v. Davis*, 1952 OK 193, ¶ 14, 256 P.2d 1099, 1102. As we previously noted, there was no evidence that Etta had any role in drawing up the deeds, that she was capable of constructing such a document, or asked anyone else to do so. We find no error in the court's decisions regarding the real property.

Terry next argues that the transfers of real property are invalid because Oliver was incompetent at the time they were made. He cites the testimony of a nurse, Trena Shatts, as establishing that Oliver was "ill weak and terminal" in the fall of 2016, and not "likely capable" of understanding business transactions. *Brief-in-Chief*, pg. 13. Terry cites this testimony only to trial exhibits 1, 2, and 13,

which consist of documents relating to the durable power of attorney and a few pages of general medical records, none of which apparently relates to Oliver's capacity or lack thereof. At best, these records establish that Oliver was ill and weak towards the end of his life, but nothing more. Further, Trena Shatts' actual testimony was that she had never seen or interacted with Oliver and was testifying only as to the contents of the medical records, not from any personal knowledge. Tr. (August 14, 2022), pg. 56. At most, her testimony establishes that Oliver was sometimes "forgetful." As we previously noted, attorney Burns testified that that he saw no diminished ability in Oliver at the time he was with him. The record does not show that the court acted against the clear weight of the evidence in finding Oliver competent.

Aside the claims of fraud via a power of attorney, Terry also argues general fraud. His main claim appears to be that, if Oliver's signatures on the real estate transactions were not made using a power of attorney, they were forged by Ella. Beyond establishing that Oliver was not present when his signature was notarized on the real estate transactions, however, Terry made no evident attempt to prove the signatures were fraudulent. No comparison signature of Oliver's or any handwriting testimony was introduced. In sum, we find no error in the court's decision regarding the real estate.

#### *The Bank Accounts*

Terry's brief further argues that Etta obtained a power of attorney "by false pretenses and in violation of requirements of law" and then used that power of attorney to make herself a signatory, and then a co-owner, of two bank accounts



belonging to Oliver. Terry's brief contains no precise arguments as to these "false pretenses and violations of law" but appears to base these statements on his general claims of undue influence. His argument is that Etta directly used the power of attorney to sign Oliver's name to a bank card making her a co-signatory and allowing her to "take control of the accounts." If proven, this would invoke the rule of *Robertson* by Etta's use the power of attorney it to transfer Oliver's property to herself.

Terry cites to trial exhibits 6-7 as evidence of this claim. Exhibit 6 is a bank signature card for account 1039853 naming Oliver as account owner and Etta as a "signor." It bears signatures on the appropriate line for both Oliver and Etta. Etta adds the letters "POA" after *her* signature. The signatures appear to be in two different hands. Exhibit 7A is a bank card converting account 1039853 to a joint account. It bears signatures on the appropriate line for both Oliver and Etta. The signatures appear to be in two different hands, and no POA is mentioned. Exhibit 7B is a card signed by Oliver and Etta in apparently different hands stating that the account is in JTWROS (joint tenancy with right of survivorship). No power of attorney is noted.

The conclusion Terry apparently wishes us to draw from these exhibits is that Etta made both the signatures on these documents, signing for Oliver pursuant to the power of attorney. He cites no testimony to that effect in his brief, however. The sole relevant testimony appears to be where Terry's counsel asked Etta if she obtained "access to his bank accounts as a result of the power of attorney?" Tr. (August 18, 2022), pg. 409. Etta appears not to understand the

precise legal question, and answers as to why she obtained access, saying “I did it for him, not myself.” *Id.* We find this entirely insufficient to support Terry’s claim that the clear weight of the evidence showed that Etta somehow used the power of attorney to make herself a signatory. Likewise, we find no evidence requiring the court to find that the signatures were forged.

We further note that Terry argued at trial that Etta had no right to take the remaining funds in the account after Oliver’s death. The account was a joint tenancy account with right of survivorship, and the funds automatically vested in Etta as sole owner on Oliver’s death. The same principles apply to Terry’s proposition of error No. 7, which argues that there was no “comingling” of funds, and hence Oliver’s bank account remained separate.

#### *Cattle Sale Proceeds*

Terry states that “the Court erred in approving the division of Oliver Phillips’ Cattle sales proceeds without any proof at all that he was aware of Terry Phillips having made the payments through the sales agents.” *Brief-in-Chief*, pg. 14.<sup>1</sup> The background is apparently that Oliver and Terry both ranched cattle, and that Oliver had, at some time, merged his herd with Terry’s and, as a result, Terry owed Oliver certain payments when cattle or calves were sold. Terry testified that Oliver had been sent a check for \$1,906.63. This check was deposited in a joint account owned by Etta and Oliver at First State Bank in Gracemont, rather than in Oliver’s usual account at Legacy Bank in Binger. Tr.

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<sup>1</sup> We note that the Court was not tasked with “approving” any transaction, but with determining if the evidence showed fraud or undue influence.

(August 18, 2022), pgs. 273-78. Terry testified that a total of approximately \$7,000 from cattle sales was deposited in the First State Bank account rather than the Legacy bank account. *Id.* He also testified that he thought Oliver's signatures on the checks were forged. *Id.*

Terry's argument misplaces the burden of proof. Etta was not required to *prove*, as a threshold matter, that Oliver "was aware of Terry Phillips having made the payments through the sales agents." As the plaintiff, Terry was required to prove that Oliver did not know of the payments as evidence of his claim that the checks were deposited in the First State Bank account against Oliver's wishes. This argument is essentially a repetition of Terry's prior arguments of undue influence, arguments that the bank account cards were forged or otherwise improperly executed, and that Etta repeatedly committed fraud. We have previously dealt with these questions and find nothing in this argument that changes the outcome.

In summation, Oliver was unable to speak for himself here, and the two primary witnesses, Terry and Etta, were both self-interested. As such, the matter hinged largely on the court's decisions as to credibility. We generally defer to the trial court's credibility determinations because the trial judge is in the best position to observe the behavior and demeanor of the witnesses and to gauge their credibility. *See Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112. The district court's findings will be upheld unless against the clear weight of the

evidence or contrary to law or established principles of equity. We find that the courts' decisions and findings were not erroneous pursuant to this standard.

**AFFIRMED.**

HUBER, P.J., and HIXON, J., concur.

September 26, 2024