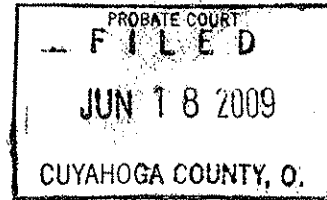


IN THE PROBATE COURT
DIVISION OF THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE:)
)
GREGORY THOMPSON,)
Plaintiff)
)
vs)
)
PAUL RADIS, et al.)
Defendants)

CASE NO. 2007 ADV 129205



MAGISTRATE'S DECISION

This matter came on to be heard on February 2, 2009, on a Complaint for Declaratory Judgment and Other Relief. Present at the hearing was the Plaintiff, Gregory Thompson, guardian for Louise Hankins. The guardian was represented by attorney, Adam Fried. Also present was the Defendant, Paul Radis, represented by Jeffrey Embleton, Esquire; Defendant, Judy Radis (Barnes), pro se. Service was perfected according to law. A transcript of the hearing was taken, however, a transcript was not filed with this Court for the preparation of this report.

FACTS

The ward, 86 year old Louise Hankins, a resident of Bratenahl, Ohio, was declared incompetent by this Court on December 12, 2006. Attorney, Gregory Thompson was duly appointed as guardian of her estate.

The ward's former son-in-law, Paul Radis, was given Louise Hankins' durable power of attorney on April 4, 2003, to assist Louise in all of her financial matters. In

DOCKETED

May 2005, the ward entered into a lease and purchase agreement regarding the sale of her personal residence at 13525 Lakeshore Blvd, Bratenahl, Ohio. Pursuant to that agreement, Louise sold her home to her fiduciary, Paul Radis, for \$97,000.00. In addition to the purchase price, Louise received a zero cost lease for the remainder of her life, unless she became insolvent or failed to reside in the property for sixty consecutive days.

The guardian, Gregory Thompson, as Plaintiff, now seeks to set aside the lease and purchase agreement and restore Louise Hankins as the title owner of all her property. Plaintiff also seeks reimbursement from Paul Radis for damages caused by his breach of fiduciary duty.

TESTIMONY

In the case at bar, Louise Hankins' physician, Dr. Lafferty, testified that he started seeing Louise as a patient in 1996. In a letter dated May 12, 2006, Dr. Lafferty notes that Louise "first developed signs of early Alzheimer's disease in 2000. By 2004, her dementia had reached a level in which she could not bathe regularly nor change her clothes without supervision." Dr. Lafferty concluded that "Ms. Hankins was not mentally competent to negotiate any legal transactions from 2003 onward."

A thorough review of Dr. Lafferty's contemporaneous patient notes (Plaintiff's Ex. 30) reveals that in March and April of 2004, (approximately one month before the sale of her home) Louise was suffering from moderate/advanced Alzheimer's disease, scoring 18 out of 30 on a mini-mental exam." Five months later, in October 2004, Dr. Lafferty again noted "patient appeared confused and

disoriented.”

Dr. Lafferty testified that in his professional opinion “Louise Hankins’ mental capabilities would not have been better on any given day to understand the lease or purchase agreement.” According to Dr. Lafferty’s testimony, “no way she could have understood this.” Dr. Lafferty further testified that in April or May of 2004 she “could not have given the appearance of competency.” Dr. Lafferty also testified he was sure he talked to Paul Radis in 2003 about her increasing confusion.

Paul Radis testified that following his divorce from Louise Hankins’ daughter, Judy, he continued to keep in close contact with his former mother-in-law. According to Paul, in 2003 he became Louise’s power of attorney and durable power of health care because “Louise trusted me.” Attorney Cheryl Evans prepared those documents. Although, Paul admits about talking to Dr. Lafferty about Louise’s physical health, he denies knowing that she had been diagnosed in 2000 with early Alzheimer’s.

Paul Radis further testified that in May of 2004 he, as the power of attorney, determined that Louise’s \$26,000.00 annual income was, in his opinion, insufficient to meet her ongoing financial obligations. According to Paul, he knew, however, that Louise wanted to stay in her home so he proposed to her that he would buy the home and she would get back a lease that would permit her to live in the home with no rental cost.

According to attorney William Carlin’s testimony, Louise Hankins ACTUALLY CONTACTED HIM in February 2004, and asked him to prepare a purchase agreement and lease back to her. Attorney Carlin had represented Paul

Radis in his 1995 divorce from Judy Barnes. Mr. Carlin testified that Louise knew what she wanted and he quoted her an agreed upon amount of \$1,800.00 to prepare the requested documents.

Attorney Carlin, then instructed Paul Radis to contact an independent residential estate appraiser, Matthew Madden, to obtain the current market value of Louise's home. Mr. Madden's appraisal, dated March 5, 2004, valued the property at \$97,000.00. (Defendant's Ex. B) Attorney Carlin testified that he then scheduled an appointment with Louise to tour the property and review the appraisal with her. According to Attorney Carlin, Louise "understood the nature of the transaction and she thought that the sale would generate funds which would allow her to remain in her home."

On approximately May 20, 2004, Attorney Carlin again met with Louise to "go over the purchase agreement line by line." Attorney Carlin's associate, attorney Nicholas Papa, testified that he prepared the documents as instructed by attorney Carlin. According to Papa, he was instructed to prepare a "lease" as opposed to a "life estate" because otherwise "they might have been able to set the transfer aside and attach the house."

On May 25, 2004, attorneys William Carlin and Nicholas Papa along with her former son-in-law, Paul Radis and granddaughter, Roxanne Grekar met at the ward's home in Bratenahl to consummate the purchase and lease. Roxanne testified that Paul requested her to come to her grandmother's home on May 25, 2004, so that she could help convince her grandmother that the transaction was "not really a sale." According

to Roxanne, her grandmother “could not have understood the documents.”

Roxanne further testified that when everyone gathered in her grandmother’s living room on May 25, 2004, Attorney Carlin began by trying to explain all the documents to Louise. Attorney Carlin asked Roxanne to help try to explain that these papers would “protect her property and her belongings.”

According to the testimony of all those present at this meeting, Louise was apprehensive and had reservations about signing any documents that would result in the sale of her property. After about an hour, Louise still refused to sign anything. According to the testimony of all four parties, the meeting was adjourned and everyone went outside to “take a break.” Roxanne testified she thought the meeting was over and drove home.

According to Paul Radis and attorneys Carlin and Papa, after a short fifteen minute break, everyone that was still there when back into the living room. According to their testimony, Louise now had no reservations about signing the documents and the deal was then completed.

LAW

One is presumed to have the capacity to transact business. Buzzard v. Public Employment Retirement System of Ohio (2000), 139 Ohio App. 3d 632. Starting with that presumption of capacity, the test to address the capacity is “whether the person claimed to be competent understood the nature of the transaction and the effects of his or her own actions.” Wallbrown v. Kent State University (11th Dist. 2001), 143 Ohio App. 3d 762. Plaintiff must illustrate incapacity by clear and

convincing evidence. Wallbrown, supra at 775. "One is not incapacitated to make or execute a deed merely because of advanced years or physical infirmities and senility, eccentricity, or even partial impairment of mental faculties." Schott v Pempek (1980), Ohio App., Lexis 13979.

The Ohio Supreme Court has defined clear and convincing evidence as "more than a mere preponderance, but not to the extent of such certainty as is required with beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." Cross v. Ledford (1954), 161 Oh St. 469.

Undue influence is defined as "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and she is induced to do or forbear an act which she would not do or would if left to act freely. Landon v. Lavrisiuk, Cuy. App. 84893, 2005-Ohio-4991. Undue influence exists when the wishes of the grantor are substituted by the wishes of the undue influencer; it must be such as to control the mental operations of the testator in making decisions regarding the disposition of her assets, overcome her power of resistance, and oblige her to make disposition of her property which she would not have made if left to act freely according to her own wishes and pleasure. West v. Henry (1962), 173 Ohio St. 498.

In order to sustain an allegation of undue influence, Plaintiff must prove the following: (1) a susceptible party; (2) another's opportunity to assert influence; (3) the fact of improper influence asserted or attempted; and (4) the result showing effect

of such improper influence. Lah v. Rogers (11th Dist. 1998), 125 Ohio App. 3d 164.

An inquiry into whether undue influence is present involves a two-step analysis: (1)

Whether the transaction was a result of influence brought to bear upon the susceptible

party; and (2) Whether that influence was actually undue. Wallbrown, 143 Ohio

App. 3d at 768.

Under Ohio Law, “a deed executed in the correct form is presumed to be valid and will not be set aside except upon clear and convincing evidence. Therefore, a

party seeking rescission and cancellation of a deed because of undue influence bears the

burden of proof by clear and convincing evidence.” Henkle v. Henkle (1991), 75

Ohio App. 3d 732. However, in Bobko v. Sagen (1989), 61 Ohio App. 3d 397, the

Eight District Court of Appeals held that “in an action to set aside a deed to a grantee

who was in a relationship of trust in confidence with the grantor, there is a

presumption that the transfer is invalid and burden is on the grantee to establish that

the transfer is valid.” Id at 408, citing McAdams v. McAdams (1907), 80 Ohio St.

232.

In the case at bar, by the grantee’s own testimony he admits that he held the

power of attorney because “Louise trusted him and needed his help with day to day

activities.” He alone was responsible for payment of her monthly obligations, the

scheduling of her health care providers, and the transportation to outside health care

facilities. It is undisputed that Paul Radis was in a fiduciary relationship with Louise

Hankins.

As her fiduciary, there is a rebuttable presumption that sale of Louise’s

property to himself is invalid. Paul Radis had the opportunity to assert influence upon an elderly woman that as the evidence shows, was diagnosed with Alzheimer's disease as early as 2000. His influence was clearly asserted on May 25, 2004, when he and two attorneys tried for over an hour to convince Louise Hankins that she should sell her home to raise money needed for her continued health care.

Attorney Nicholas Papa testified that he toured the home prior to May 25, and found it to be in "deplorable condition." Yet he insists that he and attorney Carlin were acting as her attorneys when they drafted a lease agreement keeping her in a home in deplorable condition. The evidence presented to this Magistrate raises serious concerns as to whom Attorney Carlin and Attorney Papa were actually representing. A review of Attorney Carlin's work file (Defendant's Ex. H) reveals that the only contact phone number that Attorney Carlin had during his representation of Louise Hankins was Paul Radis' phone number. Although, Attorney Carlin denies representing Paul Radis during this transaction, the evidence is clear he represented him before it (Paul's 1995 divorce) and after it (filed a Motion for Continuance in this Court on May 22, 2006, on behalf of his client, Paul Radis) (Plaintiff's Ex. 22). The Ohio Supreme Court declared over 100 years ago;

"This Court has frequently declared with emphasis its disapproval of all schemes and devices by which trustees may seek, even with honest motives, to acquire in their own right, the trust property committed to their hands for administration in the interest of beneficiaries whose rights should be guarded with scrupulous fidelity. Any relaxation of this salutary principal would be full of peril and uncertainty." Caldwell v. Caldwell (1988), 45 Ohio St. 512.

Defendant, Paul Radis argues that not only was Louise Hankins competent, she was desirous of selling her home to ensure her continued occupancy. Paul Radis points out that he took the necessary steps to ensure that he was paying "fair market value" and insists that it was an arms-length transaction.

Both parties argued at considerable length about whether the purchase of the lake-front property in Bratenahl for \$97,000.00 was a fair price. This Magistrate finds the question of "fair market value" to be almost irrelevant. "Any transfer of property from a principal to his attorney-in-fact is viewed with some suspicion." Studniewski v. Krzyzanowski (1989), 65 Ohio App. 3d 628. "Self dealing transactions by a fiduciary are presumably invalid." Estate of Cunningham (1989) 5th Dist. 89-CA-10. In the case at bar, the fiduciary used his position of trust to facilitate the purchase of Louise Hankins' real estate. Whether he paid a fair price is irrelevant. It is the opinion of this Magistrate that the evidence is clear and convincing that the seller of that property was certainly susceptible to undue influence and that undue influence was asserted.

Furthermore, the testimony of Dr. Lafferty, Louise's treating physician, was unequivocal. It was his professional opinion that "there was no way that Louise Hankins, because of the effect of Alzheimer's disease, could have understood a lease and/or a purchase agreement on May 25, 2004." Paul Radis clearly has not presented sufficient evidence to rebut the presumption of invalidity or undue influence. The purchase of the ward's property by her fiduciary should be set aside and the funds used to purchase should be returned to Paul Radis subject the expenses and claims

discussed below.

CLAIMS AND EXPENSES

Because the sale of the property should be voided and the title of the property returned to the seller, both parties should be made whole. Paul Radis claims that he had to borrow money to purchase the Bratenahl home. Defendant claims that the costs of the interest on that mortgage since 2004 totals in excess of \$20,000.00. In addition, Defendant claims to have spent an excess of \$62,000.00 in repairs, taxes, and insurance. (Defendant's Ex. F)

INTEREST ON MONEY BORROWED

Defendant, Paul Radis, went to Dollar Bank in 2004 and borrowed \$97,000.00 to purchase Louise Hankins' property. A mortgage on that loan was not secured with the Bratenahl property. Paul know claims that he has paid \$20,881.18 in "mortgage interest on Lakeshore property." (Defendant's Ex. F)

The fiduciary's "costs" of borrowing money to improperly purchase his principal's real estate is simply not part of the "making the parties whole" equation. Paul Radis' finance charges are not the fault of Louise Hankins, an innocent seller. As this Court has previously declared in this report, Paul Radis abused his fiduciary relationship with an incompetent and susceptible principal that could not have understood the consequences of selling her home. The fact that he had to incur financing charges to facilitate the purchase is a decision that he made and is a cost that he alone should bear. This Court of equity will not compensate a fiduciary who has unclean hands.

UPKEEP AND UTILITIES

After the purchase of the Bratenahl property, Louise Hankins, continued to live there until October, 2005. According to the testimony of Paul Radis, the home was in dire need of repairs in order for Louise to live in a safe environment.

According to Paul, he expended approximately \$62,000.00 from 2004 to the present maintaining the Lakeshore property. (Post trial brief of Defendant, pg. 10, referring to Defendant's Ex. F)

It is important to note that although Defendant Paul Radis argues that he spent \$62,000.00 in expenses, the funds used for those expenses and repairs belonged to Louise Hankins. Paul Radis did not advance an ADDITIONAL \$62,000.00. He simply used the ward's funds for the upkeep and repair of what should have remained as her home.

Upon close inspection of Defendant's Exhibit F, it is apparent that Defendant's total expenditure of \$62,165.70 includes the \$20,881.18 "mortgage interest" previously addressed and dismissed by this Magistrate. The remaining "utility and maintenance costs" are \$41,347.52.

The vast majority of these costs are monthly utility bills which are recognized by this Magistrate as reasonable and legitimate maintenance expenses that Louise Hankins would have paid if she had still owned her own home. However, a total of \$2,850.00 in expenditures appears to this Magistrate to be of no apparent value to Louise Hankins. This Magistrate questions the expenditure of \$2,200.00 in 2006 for accounting fees and expenditures of \$450.00 and \$200.00 paid to Terry Burk for a

power of attorney accounting ordered by this Court in 2006.

It is therefore the recommendation of this Magistrate that Paul Radis be ordered to reimburse Louise Hankins a total of \$2,850.00 for the improper expenditure of her funds that were not for the benefit of Louise Hankins.

LEASE OBLIGATION

Defendant, Paul Radis argues that from May 2004 through December 2005, Louise lived rent-free at a value of \$28,500.00 (19 months at \$1,500.00 per month). (Defendant's post trial brief pg. 10)

Apparently, Defendant's argument is based on the theory that he could have been charging another renter \$1,500.00 per month. That argument flies in the face of the facts. If the property had not been improperly purchased from Louise Hankins, then Louise Hankins would have been living in her own home, rent-free with no mortgage payments. As Judy Barnes, Louise's daughter, correctly points out "before Mr. Radis acquired the power of attorney, Ms. Hankins owned two properties free and clear with taxes paid up to date, she had \$34,000.00 in the bank, a Key Money market account worth \$8,000.00 and received approximately \$30,000.00 a year from her pension, social security, and annuity. By July 2006, Ms. Hankins owned no property and was almost completely broke." (Closing Argument of Judy Barnes, pg. 2)

Therefore, it is the recommendation of this Magistrate that Defendant's claim of \$28,500.00 for Louise Hankins' "lease obligation" should be dismissed.

GIFTS MADE BY POWER OF ATTORNEY, PAUL RADIS

(a) Farm Property

Paul Radis testified that in June 2003 he, at Louise Hankins' request, issued a quit claim deed transferring Louise Hankins' property in Huntsburg, Ohio to her daughter Judy Barnes. The value of that gift was approximately \$79,000.00.

(Defendant's accounting included in Plaintiff's Ex. 7) Paul Radis further testified that the Huntsburg property was a liability because the insurance company had refused to continue insuring it because Louise wasn't living there.

The transfer of the ward's Huntsburg property was without consideration. This transfer is totally inconsistent with the apparent needs of the ward. Consistently throughout Paul Radis' testimony he maintained that all his actions taken as Louise Hankins' power of attorney were directed at minimizing her expenses in order to preserve her diminishing assets. The gifting away of a \$79,000.00 asset is not consistent of that testimony.

Paul Radis, as her appointed power of attorney in 2003, had a fiduciary responsibility to protect her assets and maximize her investments. Two months after his appointment he gave away her farm for no consideration. The transfer of the ward's property to her daughter, Judy Barnes, appears to be consistent with an ill conceived plan designed to divest the ward of all her property and money and qualify her for medicaid. The gift of the ward's Huntsburg property to her daughter, Judy Barnes, should be set aside and title ownership returned to the ward, Louise Hankins.

(b) Cash Gifts

The accounting prepared by the power of attorney (Plaintiff's Ex. F) indicates that from 2003 through 2005, Paul Radis as power of attorney of Louise Hankins, made gifts totaling \$20,684.04 to the ward's daughter and grandchildren. A year after the fiduciary purchased the ward's property "in order to raise money" he gifted away \$19,000.00 to family members including his son. Additional payments of \$816.75 were made to cover his son's gambling losses. These gifts must be viewed in the light cast by the fiduciary. Paul Radis testified repeatedly that Louise Hankins was running out of money and needed to sell her home to raise funds to pay for her escalating health care costs. As her fiduciary, his sole obligation was to protect Louise Hankins and to protect her funds. Instead of preserving those funds, he engaged in a systematic spend-down towards medicaid. These gifts totaling \$20,684.04 should be set aside and should be repaid to the ward by her former power of attorney, Paul Radis.

(c) Compensation Paid to Paul Radis by Paul Radis

The accounting prepared by Paul Radis included in Exhibit 7 sets forth disbursements made on behalf Louise Hankins from 2003 until 2006. Upon close examination, that accounting indicates that Paul Radis compensated himself a total of \$7,100.00 for "administrative fees." These fees were apparently computed at \$300.00 per month.

There is no evidence presented to this Magistrate that indicates that Louise Hankins agreed to or knew that her power of attorney was charging her \$300.00 per

month to pay her bills. Plaintiff's Exhibit 1, the durable power of attorney, does not provide for any compensation to the power of attorney. Nor was there any testimony offered to substantiate the compensation or an itemization of the services provided that would entitle the power of attorney to be compensated.

Based on the fiduciary's reckless conduct, as outlined in detail above, it is the opinion of this Magistrate that Paul Radis should not be compensated for his services as power of attorney. Therefore, \$7,100.00 should be repaid to the ward by the former power of attorney, Paul Radis.

RECOMMENDATION

Based on the foregoing facts and applicable law, it is the opinion of this Magistrate that Paul Radis was in a fiduciary relationship with Louise Hankins as her power of attorney. As her fiduciary, there is a presumption that any transfer to him is invalid and the burden of going forward shifts to the fiduciary to rebut this presumption through clear and convincing evidence.

It is the opinion of this Magistrate that the fiduciary has failed to rebut this presumption by clear and convincing evidence. It is further the opinion of this Magistrate that the medical evidence presented by Louise Hankins' personal physician clearly and convincingly establishes that not only was Louise Hankins suffering from dementia prior to and during the sale of her home, but also that Paul Radis was aware of that condition. Her medical condition prevented her from understanding the nature and/or complexity of the sale and/or lease of her home.

It is therefore the recommendation of this Magistrate that sale and transfer of

the ward's Bratenahl property be set aside and title be returned to the ward. It is further the recommendation of this Magistrate that Paul Radis be reimbursed his purchase price minus the following unauthorized and improper expenditures.

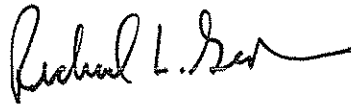
1. \$20,684.04, improper gifts.
2. \$7,100.00, excessive and unsupported "administrative fees."
3. \$2,850.00, expenditures made for accounting fees that were of no benefit to the ward.

It is further the recommendation of this Magistrate that Paul Radis' reimbursement should further be reduced by the reasonable costs of this litigation to be determined by this Court after further hearing. It is the recommendation of this Magistrate that any and all itemized attorney fee applications along with a complete list of the litigation expenses shall be submitted to this Court by July 17, 2009. A hearing on those fee applications will be held on August 14, 2009, at 10:00 a.m.

It is further the recommendation of this Magistrate that the transfer of the ward's property in Huntsburg, Ohio be vacated and the title of the property immediately returned to the ward, Louise Hankins.

Pursuant to Civil Rule 53 (D)(3)(b)(iv), a party shall not assign as error on appeal a Court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Civil Rule 53 (D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Civil Rule 53 (D)(3)(b).

Respectfully submitted,



Richard L. Gedeon
Magistrate

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Division of the Court of Common Pleas

Court House

Cleveland, Ohio 44113

ANTHONY J. RUSSO
PRESIDING JUDGE

JOHN A. POLITO
COURT ADMINISTRATOR
MAGISTRATE

LAURA J. GALLAGHER
JUDGE

June 18, 2009

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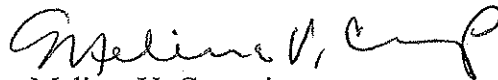
In Re: Gregory Thompson -v- Paul Radis, et al.
Case No. 2007 ADV 129205

Dear Counselor:

Enclosed please find a copy of the Magistrate's Decision filed this day in the above-caption matter.

For further guidance please refer to the Ohio Rules of Civil procedure.

Sincerely,



Melissa V. Cummings
Deputy Clerk

/mvc

Enclosure

cc: Jeffrey Embleton, Esq.

Judy Barnes

Gregory Thompson