[Cite as *Estate of Eyrich*, 2016-Ohio-7165.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ESTATE OF: ELMER L. EYRICH, DECEASED.	:	**O P I N I O N**
	:	**CASE NO. 2016-T-0002**
	:	

Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2012 EST 0708.

Judgment: Affirmed.

George E. Gessner, Gessner & Platt Co., L.P.A., 212 West Main Street, Cortland, OH 44410 (For Appellee – Kathy Storey).

Stephen A. Turner, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481-1219 (For Appellants – Bruce W. Eyrich, Adrianne Danso and Corrisa Danso-McWitaner).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Adrianne Danso-Cool, appeals the judgment of the Trumbull County Court of Common Pleas, Probate Division, finding that a bank account opened by the decedent, Elmer L. Eyrich, was not an asset of his estate because it was "payable on death" to his daughter, appellee, Kathy M. Storey, and because the account was not the result of undue influence.[1] At issue is whether the trial court's findings were supported by competent, credible evidence. For the reasons that follow, we affirm.

1. While Bruce W. Eyrich and Corrisa Danso-McWitaner are also listed as appellants in this appeal, the proceedings below were initiated by Adrianne alone; the trial court's judgment did not address the other appellants; and only Adrianne filed a brief on appeal. Thus, Adrianne is the only proper appellant, and this opinion does not address the rights or obligations of the others.

{¶2} Appellee, Kathy M. Storey, was the fiduciary of the estate of her father, Elmer L. Eyrich, who died on April 27, 2012. Three years later, on April 13, 2015, she filed her final fiduciary account, which did not list a bank account opened by decedent at First Place Bank as an asset of the estate. Kathy's niece, appellant Adrianne Danso-Cool, filed an exception to the account due to this omission.

{¶3} The matter proceeded to hearing before the magistrate. Adrianne's statement of facts contains several misstatements and material omissions, resulting in a statement that often does not fairly reflect the evidence. The following statement of facts is derived from the transcript of the hearing and the exhibits admitted by agreement of the parties. Adrianne called Kathy, her aunt, to testify on cross-examination.

{¶4} Kathy testified that in 2011, while her father was living in a nursing home, he gave her his power of attorney. Kathy's mother had recently passed away. Also in 2011, Kathy filed in the trial court an application to be appointed guardian; however, that application was ultimately withdrawn and dismissed because two physicians concluded the decedent was competent. Kathy then filed an application to be appointed her father's conservator on the ground that her father, while competent, was physically infirm. The court appointed Kathy her father's conservator, granting her "full powers as proscribed in the Laws of Guardianship."

{¶5} Kathy testified that on February 4, 2012, her father met with Bob Morgan, a principal of Mountain Run Forestry, at her home, and the two men discussed Mountain Run's interest in buying and harvesting the standing timber on her father's property. On that date, the decedent signed a contract for the sale of the standing timber to Mountain Run, pursuant to which Mr. Morgan agreed to pay the decedent

$41,000. The contract provided that ten per cent of the price, i.e., $4,100, was due at signing and the balance ($36,900) was to be due the day the work started. Kathy said the two men negotiated the contract, and she had no part in those negotiations. She said she was doing the dishes when they discussed the contract. Kathy said that on the day her father signed the contract, Mr. Morgan gave him a check for $4,100.

{¶6} Kathy said that on February 6, 2012, two days after the contract was signed, Mountain Run's owner, Dave Fisher, called her and said his attorney wanted her to sign the contract. Kathy said she assumed this was because Mr. Fisher was not sure her father was competent because he was living in a nursing home at that time. At Mr. Fisher's insistence, Kathy signed her name with the designation "POA" in the witness section, although, she said, she did not witness her father sign the contract.

{¶7} Kathy said that on the next day, February 7, 2012, she drove her father to First Place Bank in order to open an account with the proceeds of the timber contract. He opened the account with the $4,100 initial payment. Kathy said he set up the account himself and she had nothing to do with it. The decedent said the account was to be used to pay his expenses. Kathy said she did not help her father open the account and did not sign any documents relating to the account. She also said she did not instruct anyone on how to set up the account.

{¶8} Kathy said that on February 23, 2012, when Mountain Run began work, its agent gave her a check for $36,900, the balance of the contract price. She picked up her father and he deposited the check in his First Place Bank account.

{¶9} Kathy said that two months later, her father passed away on April 27, 2012. She said that three days earlier, on April 24, 2012, she paid Lane Funeral Home $10,391 from the subject account for her father's funeral. She said that she, her father,

and Adrianne had arranged the funeral before her father died. After this withdrawal, the balance in the account was $27,714. On the day Kathy's father died, she withdrew $7,714, which she used to open an estate checking account at Cortland Bank to pay the estate's expenses. The balance left in the First Place Bank account was then $20,000.

{¶10} Kathy said that when her father opened the account, she did not know what a POD account was and she did not know she was the beneficiary of the account. Although her father told her the balance in the account would go to her on his death because she had taken care of her parents, Kathy said she did not believe the money remaining in that account belonged to her. Rather, she thought the account was part of her father's estate until November 2012, seven months after her father died, when her attorney's legal assistant told her she was the beneficiary of the account. After she was told the balance in the account ($20,000) belonged to her, she withdrew those funds.

{¶11} Following the hearing, the magistrate filed his decision finding that the funds that were received from the sale of the timber were deposited in an account at First Place Bank that was established by the decedent. The magistrate also found that the account was payable on death to Kathy and that the account should therefore not be included in the estate. Thus, the magistrate overruled Adrianne's exception to the final fiduciary account.

{¶12} Adrianne filed an objection to the magistrate's decision, arguing that because Kathy was her father's conservator and attorney in fact, she had a fiduciary relationship with the decedent, which gave rise to a presumption that the subject account was invalid. She further argued the magistrate did not acknowledge this presumption or make any finding that Kathy met her burden to show this gift was free of undue influence. Adrianne asked that the remaining proceeds from the sale of timber

be included in the estate. The court overruled the objection and adopted the magistrate's decision.

{¶13} Adrianne appeals the trial court's judgment, asserting three assignments of error. Because they are related, they are considered together. They allege:

{¶14} "[1.] The Probate Division erred when it determined the appellee rebutted the presumption that the gift of the proceeds of the sale of timber was the result of undue influence.

{¶15} "[2.] The Probate Division erred when it determined the appellant failed to establish that appellee exerted undue influence upon the decedent.

{¶16} "[3.] The Probate Division's finding that the decedent's gift of the proceeds of the timber to appellee was free of undue influence was against the manifest weight of the evidence."

{¶17} In general, "[t]he abuse of discretion standard is * * * the appropriate * * * standard to apply when reviewing a trial court's adoption of a magistrate's decision." *Harkey v. Harkey*, 11th Dist. Lake No. 2006-L-273, 2008-Ohio-1027, ¶47. However, an appellate court applies a manifest-weight standard of review when reviewing a trial court's findings of fact following a bench trial. *Terry v. Kellstone, Inc*., 6th Dist. Erie No. E-12-061, 2013-Ohio-4419, ¶12; *Patterson v. Patterson*, 3d Dist. Shelby No. 17-04-07, 2005-Ohio-2254, ¶26. "[A]n appellate court will not reverse a judgment as being contrary to the weight of the evidence as long as there is some competent, credible evidence supporting the judgment." *In re Kangas*, 11th Dist. Ashtabula No. 2006-A-0084, 2007-Ohio-1921, ¶81. The manifest-weight standard of review is the same in a civil case as in a criminal case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶17.

{¶18} When applying the manifest-weight standard of review, the reviewing court reviews the entire record, "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Eastley, supra,* quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001).

{¶19} "Under the manifest weight standard of review, we are 'guided by a presumption' that the fact-finder's findings are correct." *Terry,* at ¶13, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80 (1984). *See also Eastley* at ¶21; *Patterson* at ¶26. We must make "'every reasonable presumption * * * in favor of the judgment and the finding of facts.'" *Eastley, supra,* quoting *Seasons Coal Co.* at 80, fn. 3. "'If the evidence is susceptible of more than one construction,'" we are "'bound to give it that interpretation which is consistent with the * * * judgment [and] most favorable to sustaining the * * * judgment.'" *Id*., quoting *Seasons Coal Co*. at 80, fn. 3.

{¶20} R.C. 2131.10, Deposit Payable on Death, provides:

> **{¶21}** A natural person, * * * referred to * * * as the owner, may enter into a written contract with any bank * * * authorized to receive money on [a] * * * deposit * * * and transacting business in this state, whereby the proceeds of the owner's * * * deposit * * * may be made payable on the death of the owner to another natural person * * * referred to * * * as the beneficiary * * *. In creating such accounts, "payable on death" * * * may be abbreviated to "P.O.D."
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> **{¶22}** Every contract of [a] * * * deposit * * * authorized by this section shall be deemed to contain a right on the part of the owner during his lifetime both to withdraw the proceeds of such * * * deposit, * * * in whole or in part, as though no beneficiary has been named, and to designate a change in beneficiary. The interest of the beneficiary shall be deemed not to vest until the death of the owner.

{¶23} A payable on death account is thus created by a written contract, and, unlike a joint and survivorship account, does not vest any interest in the beneficiary

thereof until the owner's death. Thus, until his death, the owner may change the beneficiary of the account or may withdraw from the account in whole or in part. *Sheets v. Antes*, 10th Dist. Franklin No. 83AP-1003, 1985 Ohio App. LEXIS 8582, *6 (Aug. 22, 1985). In *Eger v. Eger*, 39 Ohio App.2d 14 (8th Dist.1974), the Eighth District held that the funds in a payable on death account remain in the sole ownership of the creator during his lifetime, and *do not become a part of the decedent's estate* because the legislature, in authorizing such accounts, intentionally created a method whereby such an account could be established without complying with the formalities of the statute of wills. *Id*. at 22.

{¶24} This court has stated that the essential elements of undue influence are: (1) a susceptible donor, (2) the donee's opportunity to exert undue influence on the donor, (3) the fact of improper influence exerted or attempted, and (4) the result showing the effect of such influence. *Sferra v. Shepherd*, 11th Dist. Trumbull No. 2014-T-0123, 2015-Ohio-2902, ¶36, citing *West v. Henry*, 173 Ohio St. 498, 501 (1962).

{¶25} Adrianne correctly states that, pursuant to *Estate of Niemi v. Niemi*, 11th Dist. Trumbull No. 2008-T-0082, 2009-Ohio-2090, "[w]here a * * * fiduciary relationship exists between a donor and donee, * * * a presumption arises that the transfer is invalid and the burden of going forward with the evidence shifts to the transferee to demonstrate the absence of undue influence." *Id*. at ¶38. However, Adrianne fails to acknowledge the remainder of this holding, which provides that "*the party attacking the transfer retains the ultimate burden of proving undue influence by clear and convincing evidence. Id*. (Emphasis added.)

{¶26} The trial court in its judgment noted Kathy testified that she had nothing to do with opening the account and that she did not know she was the account beneficiary

until several months after her father died. Based on the evidence presented, the trial court found that Kathy rebutted the presumption of undue influence and that Adrianne failed to prove that Kathy exerted undue influence over her father.

{¶27} Under her first assignment of error, Adrianne challenges the trial court's finding that Kathy rebutted the presumption of undue influence. In making this finding, the trial court acknowledged that a fiduciary relationship existed between Kathy and her father, which gave rise to the presumption, but that Kathy rebutted it. Adrianne concedes the trial court found that Kathy's father opened the POD account on his own, but Adrianne argues that, even if this was true, this does not mean the account was free of undue influence. However, to the contrary, this is exactly what it means. The fact that the decedent opened the account on his own - without any involvement by Kathy – supports the trial court's conclusion that it was made without undue influence. In support of her argument, Adrianne contends that Kathy did not testify that her father was involved in the deposit of the balance of the timber sale proceeds ($36,900) into his POD account. However, to the contrary, Kathy testified that when Mountain Run started work on the project on February 23, 2012, its agent gave her a check for the balance owed to her father under the contract, i.e., $36,900. She said she then picked up her father and took him to First Place Bank in order to deposit the funds. While Kathy did not specifically say her father was "involved" in depositing the balance of the funds into the account, the trial court could reasonably infer that from her testimony.

{¶28} Under her second assignment of error, Adrianne challenges the court's finding that she failed to prove by clear and convincing evidence that Kathy exerted undue influence on her father. However, Kathy testified that she had no involvement in the contract for the sale of timber and that her father opened the First Place Bank

account on his own. Moreover, Adrianne does not reference any direct evidence that Kathy exerted improper influence on her father.

{¶29} Further, circumstantial evidence corroborated Kathy's testimony that she had nothing to do with her father's creation of the account. Kathy said that when her father opened the account, she did not know the account was payable on death to her. She said that after her father's passing, she thought the balance in the account belonged to the estate. She said she first learned that the account balance was hers in November 2012, long after her father died, when her attorney's legal assistant so informed her. This testimony is supported by the fact that Kathy filed her inventory as conservator on September 19, 2012 (five months after her father's death), *which listed her father's First Place Bank account as an asset of the estate.* The trial court found in its judgment that, based on this inventory, the funds from the sale of timber did not come into the hands of Kathy as conservator until after the funds were deposited into the POD account established by her father.

{¶30} Further, after Kathy's father died, she used the account *only to pay the estate's bills and expenses*. Three days before her father died, Kathy withdrew $10,391 from the account to pay her father's pre-arranged funeral bill and, on the day he died, she withdrew $7,714 to open an estate account to pay other bills and expenses of the estate. It was only after her attorney's legal assistant told her that she was the account beneficiary that she understood the balance of the account was hers. It is difficult to argue with the simple logic in Kathy's testimony that "if I was out to get money, I wouldn't have taken the $7,000 out of the account to put into an account to pay his bills."

{¶31} The foregoing evidence supported the trial court's finding that Kathy did not exercise undue influence over her father.

{¶32} In light of Kathy's unequivocal testimony that she was not involved in negotiating the timber contract or opening the POD account, Adrianne's argument that certain circumstances indicated undue influence is unavailing since the trial court, as the trier of fact, was entitled to discount them. First, the fact that Kathy signed the timber contract under her power of attorney is irrelevant since, as she explained, she signed it that way at Mountain Run's insistence two days after the contract was executed and only as a witness.

{¶33} Second, contrary to Adrianne's argument, Kathy did *not* testify that Mountain Run gave the checks to her. Rather, she testified that under the contract, *her father, not she, was to be paid $41,000 for the timber*, ten per cent at signing and the balance due when Mountain Run began work under the contract. She said that Mr. Morgan gave the first check in the amount of $4,100 *to her father, not to her,* upon signing and he used it to open the account at First Place Bank. Later, when work on the project began, Mountain Run's agent handed the check for the balance to Kathy as she was present at the site. Kathy said she then picked up her father and drove him to the bank, showing she understood the check belonged to him. She was simply the conduit.

{¶34} Third, the fact that Kathy chose the bank where her father opened the account is of no consequence. As noted above, the decedent said the purpose of the account was to pay his expenses. Because the decedent was then living in a nursing home, Kathy did the running around for him. Kathy said she chose First Place Bank for her father to open the account because it was closer to her geographically and she knew the girls at that bank. Thus, this choice was made solely for her convenience and

had nothing to do with her father's decision to open an account with the proceeds of the timber contract to pay his expenses.

{¶35} Fourth and last, Adrianne argues a comment made by Kathy "suggested" that *she* deposited the second check into her father's account. However, while Kathy testified she "did not put that [second] check in until [she] did this," the court clearly considered this comment to be an isolated misspeak because it contradicted Kathy's other testimony that this money belonged to her father and that, after receiving the check, she picked him up and took him to the bank in order to deposit it. If Kathy, rather than her father, deposited the check, there would have been no need for her to pick him up and take him to the bank.

{¶36} In weighing the evidence, the trial court, as the trier of fact, was entitled to find Kathy's testimony to be credible and to discount the foregoing circumstances that Adrianne argues indicated undue influence. In so doing, the trial court did not err in finding that Kathy did not exert undue influence on her father because this finding was supported by competent, credible evidence. After reviewing the evidence, we cannot say the court clearly lost its way and created such a manifest miscarriage of justice that Adrianne was entitled to a new trial.

{¶37} For the reasons stated in this opinion, the assignments of error are overruled. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

TIMOTHY P. CANNON, J.,

THOMAS R. WRIGHT, J.,

concur.