

JULIUS GARTON, SUE GARTON)
EDWARDS and JAMES GARTON,)
Individually, and SUE GARTON)
EDWARDS, on behalf of the Estate)
of MARIE GARTON RANDOLPH,)
)
Plaintiffs/Appellants,)
)
VS.)
)
HENRY NORMAN,)
)
Defendant/Appellee.)

Appeal No.
01-A-01-9511-CH-00514

Dickson County
No. 3001-93

FILED

June 14, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DICKSON COUNTY
AT CHARLOTTE, TENNESSEE

THE HONORABLE LEONARD W. MARTIN, CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

OPINION

Three of the beneficiaries under the will of their aunt, Marie Randolph, brought suit against another beneficiary, Mrs. Randolph's nephew Henry Norman, claiming that he had misused a confidential relationship with the testator to deplete her estate prior to her death. The trial court entered judgment for Mr. Norman, finding that Mrs. Randolph had transferred the bulk of her assets to him before a confidential relationship was established and that there was no evidence that he exercised undue influence over her. There was also no evidence that he failed to adequately provide for his aunt's health care while exercising responsibility for her under a power of attorney. We affirm.

I.

Marie Garton Randolph was a native of Dickson County, Tennessee, but spent most of her adult life in Evansville, Indiana with her husband, Ivan Randolph. Mr. Randolph, a retired insurance salesman, died in November of 1986. The Randolphs had no children of their own. They lived very modestly, and at the time of Ivan Randolph's death, they had accumulated assets of about \$250,000, most of which was in Certificates of Deposit in two Evansville banks.

Soon after Ivan Randolph passed away, Mrs. Randolph decided to return to Tennessee, where she still had many living relatives, including two sisters and a brother. She had been especially close to her sister Dorothy when they were growing up. Dorothy's son, the appellee Henry Norman, had regularly visited the Randolphs during their marriage. Henry Norman helped Mrs. Randolph move to Tennessee, and she depended on him after the move as well. The record shows that Mrs. Randolph rewarded her nephew generously for his assistance, making numerous gifts of money to him and his family. She also placed the bulk of her funds in several bank accounts held jointly in both their names, with rights of survivorship.

After Mrs. Randolph was declared incompetent, Mr. Norman handled her affairs under a power of attorney she had granted to him. He paid the bills she incurred for periods of residence in several nursing homes from the joint accounts mentioned above. Mr. Norman also withdrew money from the joint account for his personal benefit, purchasing real estate and a van with some of the funds.

Marie Randolph died in March of 1993, at the age of 82. After her death, her heirs discovered that there was only about \$5,800 remaining in a joint checking account, and very few other assets. Three of the beneficiaries under her will, the children of her brother, Rye Garton, filed suit to have Mr. Norman return to the estate the funds withdrawn from the joint accounts, claiming that he had gained possession of the money by exercising undue influence over the decedent.

The trial court dismissed the complaint, finding that there was no evidence that Mr. Norman exercised undue influence over his aunt at the time the joint accounts were established. The court also found no confidential relationship in the legal sense to have existed between Mrs. Randolph and Mr. Norman before his power of attorney had become effective, such as would raise a presumption of undue influence. This appeal followed.

II.

To deal with the appellants' arguments, we must discuss the transactions in the record in terms of three time periods: (1) The period after Ivan Randolph's death but before the execution of a power of attorney in favor of Mr. Norman; (2) the period after the power of attorney was executed, but before it became effective as a result of a declaration of Mrs. Randolph's incompetence; and (3) the period after Mrs. Randolph was declared incompetent.

a. The period before the execution of the power of attorney

In February of 1987, Mrs. Randolph moved back to Dickson County with the assistance of the appellee. She paid for the moving van and other expenses of the move, and also gave Mr. Norman \$25,000 for helping her. At about the same time, she transferred about \$70,000, from an Evansville account which she had held jointly with her late husband, to the bank of Dickson, where she opened another joint account with right of survivorship, in her name and that of Henry Norman.

Mrs. Randolph moved in with her widowed sister, Wilma Carney. Because she did not find her sister's Dickson home suitable for her needs, she gave Mrs. Carney \$25,000 to have it remodeled. She also paid her sister \$500 per month in rent.

On September 10, 1987, Mrs. Randolph executed her Last Will and Testament, naming Henry Norman and Sue Garton Edwards as co-executors. Her two sisters and ten nieces and nephews (including Henry Norman and Sue Garton Edwards) were named as beneficiaries of the estate, to share equally in its assets after all obligations were paid. The appellants do not challenge any of the above transactions, but they do challenge the propriety of Mr. Norman's subsequent use of the funds in the joint account established during this period.

b. The period before the declaration of incompetence.

The appellant, Sue Garton Edwards, had been exercising a power of attorney on behalf of another aunt, who was in a nursing home. Mrs. Edwards suggested to Marie Randolph that she give Henry Norman a power of attorney so he

could take care of her if she became unable to take care of herself. On May 20, 1988, Mrs. Randolph signed a power of attorney enumerating a long list of powers that Mr. Norman was authorized to exercise on her behalf. The final paragraph of the document reads as follows:

This power of attorney shall become effective upon my disability or incapacity. I shall be deemed disabled or incapacitated upon the election by my attorney to accept the certificate of a physician (who, in his opinion, is qualified) which states that the physician has examined me and that I am incapacitated mentally or physically and am therefore incapable of attending to my business affairs.

Mr. Norman's answers to the plaintiff's interrogatories show that Mrs. Randolph made numerous gifts of money to him after she executed the power of attorney. The gifts were in the form of checks drawn on Mrs. Randolph's personal account, mostly in amounts ranging from \$500 to \$2,000.

In August of 1989, Mrs. Randolph had minor surgery on her hand. When she returned from the hospital, she suffered a fainting spell and was hospitalized. A CT scan was performed, which revealed moderate cerebral atrophy. Mrs. Randolph may have been alarmed by the implications of this finding, for shortly after she was discharged from the hospital, she asked Henry Norman to drive her to Evansville.

While there she closed out her remaining accounts, and gave her nephew about \$80,000, which he subsequently deposited in his personal account. Mr. Norman stated that Mrs. Randolph intended the sum to be a gift for the education of his two children, and for the care of his mother, and of a sister with Down's Syndrome. Shortly afterward, Mrs. Randolph added Henry Norman's name to the rest of her bank accounts making them all joint accounts with normal rights of survivorship. The appellants challenge all the transactions that occurred after the power of attorney

was executed, claiming that Mr. Norman abused his confidential relationship with his aunt for his own benefit.

At trial Mrs. Randolph's relatives, including the appellants, all characterized her as being a very independent woman, who was determined to pay her own way. She had undergone open heart surgery, and was somewhat frail, but she was apparently in reasonably good health when she left Indiana for Tennessee. She continued to do her own shopping and banking until just before she was admitted to a retirement home. As her physical condition deteriorated, she grew increasingly dependent upon Henry Norman and his wife Carleen, and she made sure that they were well-compensated for their efforts on her behalf.

For example, Mrs. Randolph retained her Indiana drivers license and did all the necessary driving for herself and for her sister. After the license expired, and she found herself unable to pass the Tennessee license test, she had to call on Henry or Carleen whenever she or Wilma wanted to go anywhere.

According to Carleen Norman, Mrs. Randolph wrote her an unsolicited check for \$100 each time Mrs. Norman took her and Wilma on an expedition, which might include a trip to the beauty shop and to the bank, lunch at a local restaurant and a bit of shopping. Later, when Mrs. Randolph was in a nursing home, and Mr. Norman was writing checks from the joint accounts for her expenses, he continued his aunt's practice by writing a \$100 check to Carleen each time she visited the nursing home and performed errands for Mrs. Randolph.

Family members testified that at some point, they noticed episodes of apparently irrational behavior on Marie Randolph's part. The first such episode to which a date can be attached was the June 1989 funeral of her brother, Rye Garton. Mrs. Randolph talked loudly and incoherently during the service, distracting other

worshippers. She sometimes became impatient and disruptive in her doctor's waiting room. She frequently became very angry and threatening towards her sister Wilma for no apparent reason, and began cursing and used foul language, which had been quite uncharacteristic for her.

c. The period after the declaration of incompetence.

On July 23, 1990, Mrs. Randolph became especially combative with Wilma, and was agitated and disoriented. The Normans took her to Goodlark Hospital in Dickson, where she was treated by Dr. Robert Orgain, a family practitioner. He wanted her transferred to a psychiatric hospital for observation, but no beds were available, so she remained at Goodlark Hospital.

On August 7, 1990, Dr. Orgain diagnosed Mrs. Randolph as suffering from mental confusion and senile dementia, and signed an affidavit declaring that she was mentally incapacitated. Henry Norman's Power of Attorney took effect from that date. Since Dr. Orgain and the Normans agreed that it would not be a good idea for her to return to Wilma's house, she was admitted to Cumberland Green Boarding Home in Hendersonville.

Mr. Norman's mother was a resident of the same retirement home. Two days after Marie Randolph was admitted to Cumberland Green, Dorothy Norman was found dead in her room. Henry Norman asked Mrs. Randolph if he could take money out of the joint account for his mother's funeral expenses. Marie Randolph agreed, and Mr. Norman wrote an \$8,000 check for that purpose.

Mrs. Randolph stayed at Cumberland Green for two months, with Mr. Norman paying her fees of \$800 per month as well as her other expenses, from the joint accounts. The patient was then transferred to Country Villa Boarding Home in

White Bluff, which charged a monthly fee of \$1,250. Mrs. Randolph remained at Country Villa for two years. Mr. Norman then moved her into a trailer on his property, which she shared with Wilma Carney for a few months. During those months, Mr. Norman wrote checks to himself of \$600 or \$700 as monthly rent for the trailer.

After a subsequent period of hospitalization, Mrs. Randolph was moved into the Claiborne-Hughes Nursing Home in Franklin. Costs at Claiborne-Hughes averaged about \$2,500 per month, not counting medication, and after three months Mr. Norman moved her back to Country Villa because he needed to “cut back.” Mrs. Randolph died ten days after returning to Country Villa.

During the same period that Henry Norman was paying for Mrs. Randolph’s nursing home care, he was also making investments in real estate and in his wife’s antique business with funds from the joint accounts. Because those accounts were becoming seriously depleted, Mr. Norman cashed \$15,600 worth of Mrs. Randolph’s Series E government bonds in December of 1992. On the advice of his attorney, that such a transaction might be improper, he put funds back into the estate to equal that amount.

III.

The appellants essentially challenge all the financial transactions between Marie Randolph and Henry Norman that took place after May 20, 1988 on the theory that the execution of the power of attorney created a confidential relationship between the parties by operation of law. The appellee argues to the contrary, that a confidential relationship did not arise between the parties until Mrs. Randolph was certified as incompetent in accordance with the triggering provisions of the power of attorney which are quoted above.

While prior law required that the existence of a confidential relationship be proven by the preponderance of the evidence, our Supreme Court has recently stated that “an unrestricted power of attorney, in and of itself, creates a confidential relationship between the parties.” *Matlock v. Simpson*, 902 S.W.2d 384 at 386 (1995). We agree with the appellee however, that a power of attorney that has not yet taken effect, and which may be altered or revoked at any time by the person granting it cannot be considered to be unrestricted.

Where a confidential relationship exists, a transaction resulting in benefit to the dominant party gives rise to a presumption of undue influence which can only be rebutted by clear and convincing evidence. See *Richmond v. Christian* 555 S.W.2d 105 (Tenn. 1977). Where it does not exist, the burden of proving that a gift or conveyance was procured by means of undue influence rests with the party asserting such influence. See *Kelly v. Allen*, 558 S.W.2d 845 (Tenn 1977).

In the present case, because the confidential relationship did not arise until after Mrs. Randolph was declared incompetent, it is the appellants’ burden to prove “the elements of dominion and control by the stronger over the weaker, or ... a showing of senility or physical and mental deterioration of that donor or that fraud or duress was involved, or other conditions which would tend to establish that the free agency of the donor was destroyed, and the free will of the donee was substituted therefor.” *Kelly v. Allen*, supra, at 848. While Mrs. Randolph’s condition did deteriorate during this period, we do not believe that the appellant has presented any evidence to indicate that her “free agency” was destroyed.

The proof shows to the contrary that during the period in question, the acts of Mrs. Randolph were her own, and that she maintained her independence of action to the maximum extent possible consistent with her declining physical condition. For example, Mrs. Edwards testified that when Marie Randolph was living

with Mrs. Carney, she kept all her personal items separate from her sister's, including her own refrigerator and her own food; that she did her own cooking; that she dressed and bathed herself; and that she paid her rent regularly to her sister.

Two employees of the Bank of Dickson testified that Mrs. Randolph always did all her own banking, even when Carleen Norman had to accompany her because she had become unable to drive. Mrs. Norman would always sit on the couch in the bank while Mrs. Randolph transacted her business at the teller's window or in the safety deposit vault.

The appellants have asserted that Mrs. Randolph did not intend for Mr. Norman to be able to use the funds in the joint accounts for his own benefit, or for him to gain sole possession of the funds upon her death, and they have also implied that Mrs. Randolph did not understand the implications of a joint and survivor account.

But they have brought forth no proof of a contrary intention, aside from bare assertions such as that of Julius Garton that Mrs. Randolph was very frugal, and that "I just can't believe she would have given away that amount of money." However her generous gifts to the Normans (and to her sister Wilma) can be easily understood in light of the fact that other family members rarely visited Mrs. Randolph, and they paid her very little attention. She clearly relied very much on the Normans for her own care, and that of her sister.

The implication that Mrs. Randolph did not understand what she was doing in establishing the joint accounts is undermined by the fact that she worked in a bank when she was younger. A signature card on one of the accounts has been admitted as an exhibit. The card contains a heading on the back reading JOINT ACCOUNT-PAYABLE TO EITHER OR SURVIVOR, beneath which can be found the signatures of both Marie Randolph and Henry Norman.

IV.

After Mrs. Randolph was declared incompetent, Mr. Norman became subject to a fiduciary duty to use the funds he held jointly with his aunt to meet her medical and other needs. After her death, he became the absolute owner of the remaining funds, pursuant to the survivorship provisions of the account. See Banks, 10 Am Jur 2d §§ 369-371 (1963).

The proof shows that Henry Norman did meet his aunt's needs, and that he wrote checks amounting to about \$65,000 for her nursing home care, medical bills and pharmacy expenses. During the same period, he purchased two pieces of rental property out of the same accounts, a house costing \$23,950, and a commercial building costing \$28,000. Because he dealt in such a cavalier manner with the funds entrusted to him, he would probably have had to liquidate his recently-acquired real estate holdings in order to pay Mrs. Randolph's nursing home bills if she had lived very much longer.

The trial court found Mr. Norman's conduct somewhat disturbing, but held that on the facts presented, he was entitled to prevail. We have scrutinized the record carefully, and we are persuaded that the trial court did not err.

V.

The judgment of the trial court is affirmed. Remand this cause to the Chancery Court of Dickson County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellants.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE