UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 698

September Term, 2015

JESSE C. HENDRICK

v.

DAVID BRIAN HENDRICK

Eyler, Deborah S.,
Kehoe,
Shaw Geter,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 15, 2016

This case involves a familial dispute between father and son over ownership and profits from a piece of real property. Jesse Hendrick, the appellant, challenges the judgment of the Circuit Court for Calvert County, in a bench trial, declining to set aside a deed of certain real property to David Hendrick, his son and the appellee, and to grant an accounting of rents collected from that property pursuant to an alleged oral agreement with David.[1] Jesse presents two questions for review, which we have rephrased slightly:

I. Did the trial court err by not setting aside as invalid the February 6, 2012 deed?

II. Did the trial court err by declining to admit in evidence certain portions of David's Pretrial Statement?

For the following reasons, we answer both questions in the negative and shall affirm the judgment.

FACTS AND PROCEEDINGS

The property at issue is located in Calvert County at 455 Stoakley Road, Prince Frederick ("the Stoakley Property"). There are two dwellings on the Stoakley Property: the main house and the small house. Jesse and his first wife, Jean Hendrick (who was David's mother), acquired the Stoakley Property in 2000 as tenants by the entireties. They never resided there. Jean passed away in 2008.

On February 6, 2012, Jesse executed a deed granting a remainder interest in the Stoakley Property to David and reserving a life estate for himself ("the February 6

[1] For ease of discussion, we shall refer to the parties and many witnesses by their first names.

Deed"). On September 30, 2013, Jesse sued David, seeking to set aside the February 6 Deed and to recover payment of all rents received by David from the small house on the Stoakley Property. He alleged that David had orally agreed to pay him the rents.

On May 8, 2015, the case was tried to the court. Jesse called four witnesses to testify about the February 6 Deed and purported oral agreement: David; Thomas Axley, the attorney who drafted the deed; David's brother, Donald Hendrick ("Donald"); and Jesse's former housekeeper and current wife, Linda Hendrick ("Linda"). Jesse did not testify.[2] In his case, David testified and re-called Mr. Axley as a witness.

As pertinent to this appeal, the issues in dispute at trial were: 1) whether the February 6 Deed was the product of undue influence within a confidential relationship between David and Jesse, and 2) whether an oral contract existed between David and Jesse, which obligated David to give Jesse any of the rental income paid on the small house on the Stoakley Property. The following evidence was adduced.

According to David, his parents purchased the Stoakley Property for the purpose of providing him a house "to live in" and in which to "raise a family." Since July of 2001, David has lived in the main house on the Stoakley Property. Upon moving in, David paid $1,000 per month in rent to his parents. Beginning in December of 2010, Jesse rented the small house to tenants. In August of that same year, Jesse appointed

[2] Jesse also introduced numerous documents, including depositions taken of David, Donald, Jason Stevens, and Kevin Hassler (which is not included in the Record Extract).

Linda Shrout, his niece, his attorney-in-fact for health care decisions. Almost a year later, in May of 2011, he granted Shrout a general power of attorney over his affairs. Thereafter, the tenants of the small house sometimes paid rent directly to Shrout. On other occasions, the tenants paid the rent to David, who would in turn pass the funds on to Jesse or to Shrout.

At some point prior to February of 2012, Shrout approached David and gave him "choices" which he viewed as an ultimatum, for purchasing the Stoakley Property. At that time, Jesse was living on Accokeek Road in Brandywine, Maryland (the "Accokeek home") with his then-housekeeper, now second-wife, Linda. According to David, he told Jesse about his conversation with Shrout. According to Linda, David came to the Accokeek home, complained to Jesse that Shrout was trying to kick him out of the Stoakley Property, asked Jesse to "give" him the Stoakley Property, and promised Jesse he would "pay [Jesse] for life" if Jesse did so.

On either February 2 or 3, 2012, Jesse left a voicemail on David's cell phone, asking David to tell the tenants of the small house to stop sending their rent payments to Shrout. In the message, Jesse said he no longer was receiving rent checks from Shrout. Following receipt of this voicemail, David moved into the Accokeek home with Jesse for two weeks, in order to "be over there" for his father. David was concerned that Shrout was mishandling Jesse's finances and selling off his properties against his wishes. David testified that he did not support Jesse financially or assist in providing for his medical care, and Jesse never "[did] what I told him to do."

On February 6, 2012, David called his friend Jason Stevens to pick Jesse up from the Accokeek home, on the pretext that Stevens was taking Jesse to Lowe's to purchase home supplies. Stevens drove Jesse to the end of the home's driveway, where David was waiting in his vehicle. Jesse got in David's vehicle, and David drove the two of them to the office of attorney Thomas Axley. David explained that the purpose of this arrangement with Stevens was to avoid a confrontation with Shrout's husband Michael, who David expected to be at the Accokeek home:

> I didn't want to have to go over there and call the cops and go through a bunch of stuff with Mike [Shrout]. That's why I had [Stevens], because it's easier for [Stevens] to pick him up, meet me at the end of – the middle of the driveway, than it was to have Mike start harassing me…because last time, Mike started pulling my father out of my car in his property…

During the visit to Mr. Axley's office, Jesse executed the February 6 Deed granting David a remainder interest in the Stoakley Property and reserving a life estate for himself. Jesse also executed a document appointing David as his attorney-in-fact with a general power of attorney.

David testified that it had been Jesse's idea to see an attorney, although David had arranged and paid for the appointment with Mr. Axley. Before the meeting, David had no idea what was going to occur at Mr. Axley's office. Both David and Mr. Axley testified that Mr. Axley represented Jesse during the transactions on February 6, 2012. Mr. Axley recounted his efforts to ensure that Jesse's actual intentions were being properly addressed:

> I purposefully tried to make sure that I was getting [Jesse's] decisions about issues and purposefully made a point of talking to [Jesse] apart from David Hendrick, and I actually purposefully brought my secretary in with me to

> sit through the interview for the purposes of confirming my conclusions about [Jesse's] competence.

Immediately following the visit to Mr. Axley's office, David suggested to Jesse the possibility of his (David's) paying Jesse the rents from the small house. According to David, Jesse promptly rejected the idea:

> Well, after we left Mr. Axley's office, we went out to lunch. And out of the goodness of my heart I did say that I would try to set aside rents from the little house for my father, and my father actually refused that, he said he had plenty of money, that he didn't need that, for me to use the money to fix the house up and repairs because he knew the house needed a lot of work.

David also testified that this conversation was the first and only time he discussed payment of rents from the small house with Jesse. In the weeks following the execution of the February 6 Deed, Jesse married Linda and moved to Florida. David and Jesse have had no contact since.

In June of 2013, the septic system for the small house failed and the tenants moved out. From February 6, 2012, until the tenants vacated, David collected the rents from the small house and deposited them in a separate bank account. David testified that he used the rents to pay for repairs, taxes, and insurance on the Stoakley Property. Since the execution of the February 6 Deed, he has paid off the remaining mortgage on the Stoakley Property.

In July and August of 2013, a lawyer representing Jesse sent David two letters requesting payment of all rents collected from the small house and an accounting of all actions David had taken regarding the Stoakley Property in his capacity as Jesse's attorney-in-fact.

In closing argument, Jesse's lawyer asserted that the February 6 Deed should be set aside as invalid because David was in a confidential relationship with Jesse when it was executed and the deed was the product of David's undue influence over Jesse. David's lawyer countered that the evidence did not support a finding of a confidential relationship between the parties; and David did not exert undue influence over his father to execute the deed because the transaction was fair, Jesse was represented by independent counsel, *i.e.,* Mr. Axley, and the deed only granted David a remainder interest in the Stoakley Property.

Jesse's lawyer also argued that David and Jesse had entered into an oral contract for David to pay to Jesse all the net profits from rents collected from the tenants of the small house on the Stoakley Property. He maintained that David somehow had used this agreement to fraudulently induce Jesse to execute the February 6 Deed. Counsel for David responded that, to the contrary, David's testimony was that he was under no obligation to pay the rents to Jesse and, in fact, Jesse had rejected David's suggestion for any type of agreement regarding payment of rents from the small house.

The court ruled from the bench. Crediting the testimony of Mr. Axley and David, it found that there was no confidential relationship between David and Jesse. It further found that even if it assumed the existence of such a relationship, the evidence sufficiently rebutted any presumption of undue influence in the execution of the February 6 Deed. Finally, the court found that Jesse did not meet his burden of proving by a preponderance of the evidence that there was a "meeting of the minds" between him and David regarding payment of rents from the small house on the Stoakley Property. For

these reasons, the court declined to set aside the February 6 Deed and entered judgment in favor of David that same day.

This timely filed appeal followed.

DISCUSSION

I.

Jesse contends the circuit court erred by refusing to set aside the February 6 Deed. He argues that the court should have found that there was a confidential relationship between David and Jesse when the deed was executed, based on the following evidence: (1) he and David had "a lot of contact" and were "very close"; (2) David performed yardwork and other tasks for his parents; (3) David "often" collected the rent from the small house for Jesse; (4) Jesse "entrusted" David with informing the tenants of the small house to send their rent payments directly to Jesse; and (5) Jesse granted David a power of attorney over his affairs on the day the February 6 Deed was executed. Jesse further argues that the court should have found that David abused the confidential relationship by exerting undue influence over him to execute the deed, and therefore the deed was not valid.

David responds that, based on the facts adduced, the trial court did not err in finding that there was not a confidential relationship, and therefore Jesse's contention that the February 6 Deed was a product of undue influence lacks merit.

Whether a confidential relationship exists between family members is a matter of fact. *Latty v. St Joseph's Soc'y of Sacred Heart*, 198 Md. App. 254 (2011); *Orwick v. Moldawer*, 150 Md. App. 528 (2003). *See also Upman v. Clarke,* 359 Md. 32, 42 (2000)

("particularly in family relationships, such as parent-child and husband-wife, the existence of a confidential relationship is an issue of fact and is not presumed as a matter of law") (citing *Sanders v. Sanders,* 261 Md. 268, 276 (1971)).

We review a trial court's findings of fact for clear error and "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). So long as "there is competent or material evidence in the record" to support the court's findings of fact, we will not disturb them. *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455–56 (2004) (citations omitted).

In *Upman,* the Court of Appeals explained:

> We have spoken often about confidential relationships, but we have rarely attempted to define the concept. In *Green v. Michael,* 183 Md. 76, 84, 36 A.2d 923, 926 (1944), we regarded dependence as the key factor, holding that "[t]o establish such a relationship there must appear at least a condition from which dependence of the grantor may be found" (quoting *Snyder v. Hammer,* unreported in 180 Md. 690, 23 A.2d 653, reported in full in 180 Md. 690, 23 A.2d 653, 655 (1942)). Most of our discussion has been in the context of when a confidential relationship may be "presumed" although, in context, the word "found" may be more accurate. In *Green*, we stated that, in general, "a confidential relationship may be presumed whenever two persons stand in such a relation to each other that one must necessarily repose trust and confidence in the good faith and integrity of the other." *Green, supra,* 183 Md. at 84, 36 A.2d at 926.

359 Md. at 41-42. The Court concluded that the facts in that case supported the trial court's finding of a confidential relationship between Ms. Upman and the Clarkes (Ms. Upman's nephew and his wife). Ms. Upman, who was elderly, was hospitalized after suffering a fall and during the hospitalization was diagnosed with several illnesses. Upon being discharged from the hospital, she moved in with the Clarkes, who "assisted her in most of her daily activities—dressing, eating, bathing, even going to the bathroom[,]" and

"assumed control of her checkbook and paid her bills." *Id.* at 40. While she was living with the Clarkes, Ms. Upman amended her will and trust to make them the sole beneficiaries. She died six months later.

In *Sellers v. Qualls*, 206 Md. 58 (1954), the Court of Appeals likewise upheld a trial court's finding of a confidential relationship, at that time between the reverend of the church to which the decedent left her real property and the decedent. During the decedent's lifetime, the reverend had negotiated several land sales for her, conducted most of her business affairs, taken her to medical appointments, and chosen the attorney who drafted the will that devised her property to the church.

In *Shearer v. Healy,* 247 Md. 11 (1967), the Court held that the facts adduced at trial were not sufficient to support a finding of a confidential relationship. Healy, a "drinking companion" of the decedent, "did the cooking and kept the [decedent's] house" and discussed some business affairs with him. *Id.* at 19, 24. An old family friend of the decedent's foster mother took care of his affairs, however. The decedent left his estate to Healy instead of to his foster mother's friend. The Court noted that the decedent "only mentioned a few business matters to [Healy] and there [was] no evidence that he sought [Healy's] advice and followed it in regard to those matters." *Id.* at 25.

Finally, in *Orwick v. Moldawer*, *supra*, this Court affirmed a judgment in which the trial court had found that there was no confidential relationship between a daughter and her father. Although the daughter was responsible for her father's medical care, the father "was very much in control of his finances and estate" and had himself "sought the financial advice of an attorney, not that of his daughter." *Orwick*, 150 Md. App. at 539.

In the case at bar, the trial court's finding that there was not "a true confidential relationship" between David and Jesse "on or before February 6th," when Jesse executed the February 6 Deed, is amply supported by the evidence and is not clearly erroneous. The court credited David's testimony that Jesse "was an independent person" who "never relied [upon him] for instructions." The evidence showed that Jesse was neither financially nor medically reliant upon David at any time, and supported the court's finding that Jesse "was more than competent to handle his affairs." Regarding Jesse's competency, the court took notice that a separate guardianship proceeding in the Circuit Court for Prince George's County had been dismissed after the attorney assigned to investigate Jesse's mental capacity had found him to be competent. *See In Re Jesse C. Hendrick*, Case No. CAE 12-28204 (2012). These findings are wholly in accord with the case law, which requires proof of dependency by one party on the other to support a finding of a confidential relationship.

The evidence Jesse emphasizes on appeal—that David did yardwork, performed other tasks for his parents, and collected rent from the small house for his father on occasion—does not compel a finding that Jesse was dependent on David. Furthermore, the trial court did not err in declining to find a confidential relationship based on Jesse's having given David a power of attorney on the day he executed the February 6 Deed. As David's brother Donald testified, to Jesse, granting a power of attorney was the very opposite of a special act of trust:

> I'm going to tell you right now, anybody walked in there and try—to—and try to get a Power of Attorney, [Jesse] would go with you and give you

> Power of Attorney. There is four or five of these Powers of Attorney running around….

Other evidence in the record shows that Jesse granted and revoked several powers of attorney on different occasions to David, Donald, and Shrout, and revoked the February 6, 2012 power of attorney to David less than two weeks later.

For these reasons, we hold the trial court's finding that there was not a confidential relationship between David and Jesse when the February 6 deed was executed was supported by the evidence and was not clearly erroneous.

In *Upman,* the Court explained:

> [W]hen the challenged gift is an *inter vivos* one . . . and the person attacking the gift establishes that a confidential relationship existed between the donor and the donee, there is a presumption against the validity of the gift, and the burden shifts to the donee to establish, by clear and convincing evidence, that there was no abuse of the confidence.

359 Md. at 35. Jesse argues that the February 6 Deed should have been set aside on this basis. This argument lacks merit because the trial court properly found that there was no confidential relationship between David and Jesse.

II.

Apparently in an effort to challenge the trial court's finding that there was no oral agreement between David and Jesse for David to pay Jesse the net profits from rents collected from the tenants of the small house on the Stoakley Property, Jesse contends the trial court erred by not admitting portions of David's Pretrial Statement into evidence. David responds that Pretrial Statements are not admissible.

The relevant portion of David's Pretrial Statement reads:

> At the time [Jesse] conveyed the remainder interest in the Property to [David], a small house located on the Property was being leased as a residential dwelling. [Jesse] told [David] that he was not concerned with receiving the rental income from the small house; he had enough funds to care for himself. He requested that [David] collect the rental income and use it to pay the owner's insurance, property taxes and maintenance costs for the small house. [Jesse] stated that if there was any rental income left after these expenses they could be sent to him. This discussion regarding the leased house was in no way a part of or related to [Jesse's] conveyance of the remainder interest in the Property to [David].

At trial, Jesse's lawyer sought to introduce into evidence the portion of David's Pretrial Statement quoted above. The trial court declined:

> **[Counsel for Jesse]**: And, now, Your Honor, we also offer in evidence parts of the pretrial statement that the Defendant has filed. . . .
>
> **The Court**: That's his counsel's argument to me or his summation of what they feel that the case is about. That's not conclusive evidence coming from David Hendrick's mouth.
>
> **[Counsel for Jesse]**: Didn't suggest it was conclusive, Your Honor, but it is factual, and I suggest that you have a right to and ought to consider it in deciding this case….
>
> **The Court**: You all can argue to me what I should take from the evidence, but a pretrial statement prepared by counsel, I can't take that as an admission from David Hendrick at all.
>
> **[Counsel for Jesse]**: Your Honor, I respectfully offer it. I proffer it.
>
> **The Court**: All right, well, it's not—
>
> **[Counsel for Jesse]**: I proffer the pretrial statement made by the Defendant through his counsel.
>
> **The Court**: It's not admitted, okay.

[Counsel for Jesse]: Very well.[3]

As with all rulings on the admissibility of evidence, we review the trial court's exclusion of David's Pretrial Statement for abuse of discretion. There is an abuse of discretion when the court acts "without reference to any guiding rules or principles." *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312 (1997) (citations omitted).

Rule 2-504.2(a) provides that on motion or its own initiative the court may direct the parties "to appear before it for a conference before trial." And, "[i]f the court directs, each party shall file not later than five days before the conference a written statement addressing the matters listed in section (b) of this Rule." Section (b) includes "(2) A brief statement by each defendant of the facts to be relied on as a defense to a claim[.]" This Rule is modeled on Rule 16 of the Federal Rules of Civil Procedure, the purpose of which is to "identify the litigable issues. . . . prior to trial," thereby promoting efficient case management. Fed R. Civ. P. 16(c) Advisory Committee's Note To 1983 Amendment.

The information provided in a Pretrial Statement is counsel's version of what the evidence is expected to show at trial. It is not a sworn statement by any witness (or

[3] David argues that Jesse did not preserve for review the issue whether the Pretrial Statement was admissible. Specifically, he asserts that Jesse's lawyer acquiesced in the trial court's decision to exclude the Pretrial Statement from evidence by agreeing that the Pretrial Statement was not "conclusive" and saying "[v]ery well." This is incorrect. Jesse's counsel proffered David's Pretrial Statement three separate times as evidence the court should have considered. By stating "[v]ery well," his counsel merely was acknowledging the court's ruling, not agreeing with it.

counsel) and the information may allude to evidence that is not admissible for a variety of reasons, including that it is hearsay. Pretrial Statements are for the sole purpose of advising the court about the parties' positions before trial and clearly are not intended to be evidence in the case. Accordingly, the trial court properly ruled that David's Pretrial Statement was merely "what [David and his counsel] feel that the case is about" and was not admissible as substantive evidence.[4]

Even if the Pretrial Statement were admissible, which it was not, it would have had no impact on the trial court's ruling in any event. Section 1, Paragraph 3 of the Pretrial Statement mirrors the testimony David gave at trial about the alleged oral agreement: that Jesse told him to use the rental income from the small house for "insurance, property taxes and maintenance costs," and that any leftover rental income "could be sent to him." This is identical to David's testimony that he was not obligated to pay any rent from the small house to Jesse, because he told Jesse he "would try to set aside rents from the little house for [Jesse], and [Jesse] actually refused that, he said . . . for me to use the money to fix the house up and repairs because he knew the house needed a lot of work." The Pretrial Statement also does not contradict David's testimony that he and Jesse did not have any discussions about rental income from the small house

[4] Jesse argues that *Brooks v. Brooks*, 184 Md. 419 (1945), holds that statements of counsel are binding on the client and therefore the Pretrial Statement is binding on David. This is inaccurate. *Brooks* held that a litigant was bound by a motion made by her attorney in court. Here, we are dealing with the admissibility of the Pretrial Statement as evidence, not with whether an attorney had the authority to act on behalf of her client.

before Jesse executed the deed on February 6, 2012. Paragraph 3 states, "[t]his discussion regarding the leased house was in no way part of or related to [Jesse's] conveyance of the remainder interest in the Property to [David]." Contrary to what Jesse suggests, David's Pretrial Statement did not provide any evidence materially different from the testimony before the court. The trial court correctly found on the evidence before it that there was no "meeting of the minds" sufficient to show that David and Jesse had entered into an oral contract concerning net rental income from the small house on the Stoakley Property.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.