MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Melissa Shebish,
Appellant-Respondent,

v.

Mark Murzyn,
Appellee-Petitioner

March 23, 2023

Court of Appeals Case No. 22A-ES-1572

Appeal from the Lake Circuit Court

The Honorable Marissa J. McDermott, Judge

The Honorable Jewell Harris, Jr., Commissioner

Trial Court Cause No. 45C01-1803-ES-247

Memorandum Decision by Chief Judge Altice
Judges Brown and Tavitas concur.

Altice, Chief Judge.

Case Summary

[1] For about thirteen months leading up to Frank M. Murzyn's (Frank) death on December 18, 2017, Melissa Shebish (Melissa) held a limited power of attorney (POA) with respect to Frank, her elderly father. After becoming Frank's POA, Melissa opened three bank accounts in Frank's name, with her as a joint signatory with survivorship rights. Significant amounts of Frank's money were deposited and withdrawn from these accounts over the time Melissa held the POA. Gifts were also made during this time, and Frank's 2010 Ford Focus was transferred by Melissa and her husband to a dealership after Frank's death.

[2] Mark Murzyn (Mark), one of Melissa's brothers, became successor personal representative of Frank's estate after their mother Judith Murzyn died shortly after Frank. In January 2019, Mark sought an attorney-in-fact accounting from Melissa and then filed objections to the accounting. The matter dragged out for years, ultimately coming before the trial court for an evidentiary hearing in May 2022, after the trial court denied Melissa's request for another continuance. Following the hearing, the trial court found that Melissa was liable to the estate in the total amount of $256,666.26.

[3] Melissa now appeals, presenting the following reordered and restated issues for our review:

1. Did the trial court abuse its discretion when it denied Melissa's request for a continuance of the May 2022 hearing, which resulted in her being unrepresented by counsel?

2. Did the trial court incorrectly presume undue influence by Melissa in several transactions and thus improperly shift the burden of proof to her?

[4] We affirm in part, reverse in part, and remand.

Facts & Procedural History

[5] Upon being discharged from the hospital in September 2016, Frank did not return to his home in Whiting, Indiana, with Judith, but rather moved in with Melissa and her family in Chicago so that she could care for him, as he required twenty-four-hour care and could not drive or walk. Shortly after the move, Frank had an "awkward" phone conversation with Mark. *Transcript Vol. 2* at 66. They did not speak again.

[6] On November 3, 2016, Frank executed a Durable POA, designating Melissa as his agent and expressly providing her with limited authority. Melissa's specifically defined powers included, among many others:

> **(E) Banking and other financial institution transactions.** To make, receive, sign, endorse, execute, acknowledge, deliver, and possess checks, drafts, bills of exchange, letters of credit, notes, stock certificates, withdrawal receipts, and deposit instruments relating to accounts or deposits in, or certificates, of deposit of banks, savings and loans, credit unions, or other institutions or associations. To pay all sums of money, at any time or times, that may hereafter be owing by [Frank] upon any account, bill of exchange, check, draft, purchase, contract, note, or trade acceptance made, executed, endorsed, accepted, and delivered by [Frank] or for [Frank], by my Agent….

Exhibits Vol. 3 at 17. Notably, in a different section of the document, it was clearly expressed that her powers did not include the authority to "[m]ake a gift" or "[c]reate or change rights of survivorship." *Id*. at 18.

[7] That same day, Melissa opened two accounts – a savings and a checking account – for Frank at Peoples Bank. Frank and Melissa were both listed as signatories on the accounts, which were designated as "Joint – With Survivorship (and not as tenants in common)." *Id*. at 169 (savings account agreement) and 170 (checking account agreement). In addition to signing the agreements on her own behalf, she signed Frank's name along with the notation "POA" and her initials. The savings account was opened with a beginning deposit of $30,000 and the checking with $38,562.05.

[8] Later that same month, a joint checking account was opened with Horizon Bank. As of November 20, 2016, the account balance was $2,534.73. The record does not contain the account agreement or any other opening documents. All that can be gleaned from the statements in the record is that both Frank and Melissa were listed on the account and that it was generally used to pay utility and medical bills and to make everyday purchases. Additionally, Frank's federal social security and state retirement benefits were regularly deposited in the Horizon Bank account.

[9] Frank died on December 18, 2017. That same day, a duplicate title was ordered over the internet for a 2010 Ford Focus owned by Frank. About two

months later, Melissa and her husband transferred the car to a dealership, which sold it for $6,396.73 on March 20, 2018.

[10] On March 27, 2018, Judith petitioned the Lake Superior Court for probate of his will. That same day, the supervised estate of Frank M. Murzyn (the Estate) was opened, and Judith was appointed personal representative. When Judith died less than three months later, Mark was appointed as successor personal representative of the Estate.

[11] On January 29, 2019, Mark filed on behalf of the Estate a Motion for Attorney in Fact to Deliver an Accounting (Motion for Accounting). Melissa filed no response, and on February 28, 2019, the trial court granted the motion and ordered Melissa to deliver, within sixty days, a written accounting of all transactions she entered into on behalf of Frank.

[12] After obtaining multiple extensions of time, on August 22, 2019, Melissa filed a Partial Certificate of Compliance Regarding Accounting of Power of Attorney. Thereafter, Mark filed a Motion for Rule to Show Cause due to Melissa's failure to fully comply with orders relating to the Motion for Accounting. The matter was set for hearing on October 24, 2019. At the hearing, the trial court ordered Melissa to pay $500 to the Estate towards its attorney fees and to deliver a full accounting by November 13, 2019, to "include, but not be limited to, identification of all then-existing accounts and investment accounts together with any transactions relating thereto." *Appellant's Appendix Vol. II* at 77. As

ordered, Melissa filed a Revised and Supplemental Accounting of Power of Attorney with several exhibits attached (the Accounting).

[13] The case was eventually transferred to the Lake Circuit Court due to a conflict of interest. The Lake Circuit Court assumed jurisdiction on January 14, 2020.

[14] On May 18, 2020, Mark filed written objections to the Accounting and petitioned to recover estate assets, to which Melissa filed a lengthy response. The matter was set for a full-day bench trial in October but was then rescheduled many times by agreement of the parties. The parties agreed to mediate, and mediation occurred in May and October 2021 but was ultimately unsuccessful.

[15] On November 1, 2021, Melissa's attorney, Scott Pyle (Attorney Pyle), filed a motion to withdraw his appearance, which was granted. The trial court then converted the trial set for November 16 to a status hearing. The order from the status hearing indicated that Attorney Pyle had withdrawn because he was practicing with a new law firm but that there remained a possibility that he would re-enter his appearance "in the coming days." *Id.* at 155. Accordingly, the trial court granted Attorney Pyle fourteen days "to re-enter his Appearance before the Court proceeds with re-setting the full-day evidentiary hearing." *Id.* The order provided further: "Should 14 days pass and Atty. Pyle does not re-enter his Appearance, [Melissa] will have until December 14, 2021 to retain new counsel." *Id.*

[16] On November 30, Attorney Pyle filed a notice regarding his representation status in which he indicated that a determination regarding whether he would be able to re-enter his appearance was "still pending" and that he anticipated "receiving a determination [by] the week of December 5, 2021." *Id.* at 184. Attorney Pyle did not re-enter his appearance by December 14 or anytime thereafter, and Melissa did not retain new counsel.

[17] On December 29, 2021, the trial court scheduled the evidentiary hearing for March 1, 2022. Melissa, pro se, filed a motion to continue the hearing on February 24, 2022, requesting a sixty-day continuance "in order to determine counsel, and or obtain file materials." *Id.* at 187. The trial court granted the motion over Mark's objection. The hearing was reset for May 17.

[18] In the meantime, Mark filed motions in limine seeking, pursuant to the Dead Man's Statute, to prohibit Melissa and her husband from testifying adversely to the Estate about anything Frank said or did during his lifetime regarding matters related to the Accounting. Melissa, pro se, sought and obtained two successive extensions of time to respond to the motions in limine.[1] When Melissa did not respond by the final deadline of April 26, Mark requested a summary ruling on the motions in limine, which the trial court granted on May 12, 2022.

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[1] Both motions for extensions were filed shortly before the deadlines to respond, and the second motion, filed April 14, 2022, indicated that Melissa was still trying to retain Attorney Pyle and that she anticipated the process to be complete at some point the following week.

[19] On May 11, six days before the scheduled trial, Melissa, pro se, filed a verified motion to continue. In the motion, Melissa indicated that she had phone discussions with Attorney Pyle "in late April" and then again on May 6 and May 10 and learned that he would be unavailable to represent her at the scheduled hearing due to a "conflict" as well as needed "[h]earing preparation." *Id*. at 194. Melissa asked for a continuance of the evidentiary hearing "in order to resolve said conflict" or "to obtain new counsel and [h]earing preparation." *Id*. at 195. The trial court summarily denied this motion the day after it was filed.

[20] At the beginning of the bench trial on May 17, 2022, the trial court noted its prior denial of a continuance but allowed Melissa to make an argument for the record. Melissa indicated that while she would prefer to have Attorney Pyle represent her, if the conflict could not be resolved, she had spoken to other attorneys that were willing to meet with her "this week regarding the case." *Transcript Vol. 2* at 6. She indicated that Attorney Pyle was there to testify regarding the situation. The court responded, "I don't mind hearing from Attorney Pyle, but either you're ready with a new attorney today or you're not." *Id*. Attorney Pyle testified briefly, explaining why Melissa had been unable to retain him when she tried again in late April 2022 and the conflict that became apparent by early May. He explained that he had unsuccessfully attempted to secure conflict counsel to appear at this hearing but that he found attorneys willing to meet with Melissa and be retained if the hearing was continued.

[21] After Attorney Pyle's testimony, the trial court stated:

> So I understand the nature of the circumstances here. Unfortunately, this withdrawal was granted in November of 2021. We've continued the matter several times. There have been court dates that were set, and the court date is what dictates the schedule of this case, not the availability of a particular attorney. So while I understand you would prefer to have the services of Attorney Pyle, once you realized that's not happening, it's your obligation to retain some other counsel so that you're prepared for the court date that's set. That just is what it is, and that's the reason why the motion was denied. So for today, we're going to proceed.

Id. at 10. Melissa retorted that she needed an attorney due to the complexity of the case. The court responded that it did not disagree but that there was no reason she could not have retained an attorney. The court continued:

> Based on everything I've heard, you just insisted upon trying to get Attorney Pyle to remain in the case when he withdrew. He hasn't been in the case since November of last year…. And it seems as though you just continue to beat a dead horse, that he's not available. He's not even meeting with you. All you had to do is hire another attorney and we wouldn't be having this discussion right now.

Id. at 11.

[22] The trial proceeded with Melissa representing herself. Mark, the only witness, offered testimony regarding the specific objections that the Estate had with respect to the Accounting. The bulk of the evidence was presented through exhibits that had been filed with the various pleadings, including with the

Accounting. Although Melissa did not testify, she acknowledged, in hindsight, that she "obviously [] should have taken better records." *Id*. at 77. At the conclusion of the hearing, the trial court took the matter under advisement.

[23] On June 6, 2022, the trial court issued an order entering judgment in favor of the Estate in the sum of $256,666.26. The judgment amount consisted of: $6,323.00 in ATM withdrawals from the Horizon Bank checking account; $27,460.00 in checks made payable to Melissa from the Peoples Bank checking account; $81,586.00 in cash back from deposits made into the Peoples Bank savings account; $77,000.00 "gifts made by [Melissa] in violation of the POA terms;" $6,396.73 for the 2010 Ford; and $57,900.53 in attorney fees and mediation costs incurred by the Estate as a result of Melissa's negligent exercise of the POA. *Appellant's Appendix Vol. II* at 32. Regarding the various bank transactions at issue, the court found that they were unauthorized (despite her being listed on the joint accounts) and that Melissa failed to " provide any supporting documentation or evidence indicating that the funds … were used for Frank's benefit." *Id*. at 30-31.

[24] Melissa now appeals. Additional information will be provided below as needed.

Discussion & Decision

1. Motion for Continuance

[25] Melissa argues that the trial court abused its discretion when it denied her motion for continuance that she filed on May 11, 2022, six days before the

scheduled trial. It is well established that a trial court's denial of a motion to continue a trial date is reviewed for an abuse of discretion, and "there is a strong presumption the trial court properly exercised its discretion." *Gunashekar v. Grose*, 915 N.E.2d 953, 955 (Ind. 2009). A denial will be found to constitute an abuse of discretion "only if the movant demonstrates good cause for granting it." *Id*. The fact that the movant will be compelled to defend without counsel is not sufficient to establish good cause; the movant must also be "free from fault." *Danner v. Danner*, 573 N.E.2d 934, 937 (Ind. Ct. App. 1991), *trans. denied*; *see also Homehealth, Inc. v. Heritage Mut. Ins. Co.*, 662 N.E.2d 195, 198-99 (Ind. Ct. App. 1996) (finding that movants were "free from fault" because they had no prior notice of counsel's conflict and "were exceptionally diligent in attempting to hire substitute counsel once notified that their present counsel must withdraw"), *trans. denied*.

[26] According to Melissa, after discovering "at the last minute a conflict that precluded [Attorney Pyle's] representation," she "acted with diligence and sought a continuance to obtain counsel." *Appellant's Brief* at 5, 19. Melissa asserts that the trial court's denial caused her "unfair prejudice through no fault of her own." *Id*. at 19. We cannot agree.

[27] The record establishes Melissa's clear lack of diligence. Attorney Pyle withdrew his appearance at the beginning of November, *six months* before the bench trial. Upon his withdrawal, Attorney Pyle informed the trial court that he might be re-entering an appearance in the coming days but that a determination had to be made with his new law firm. As a result, the trial court

converted the trial scheduled for November 16, 2021, to a status hearing and, after said hearing, granted Attorney Pyle fourteen days to re-enter his appearance. Should Attorney Pyle not do so, the court indicated in its order that Melissa would have until December 14, 2021, to retain new counsel before the court would reschedule the trial.

[28] Melissa remained unrepresented, and nearly two months after the trial was rescheduled for March 1, 2022, and five days before the rescheduled trial, she filed a motion to continue. In the pro-se motion, Melissa noted Attorney Pyle's continued unavailability and asked for sixty days "in order to determine counsel, and or obtain file materials." *Appellant's Appendix Vol. II* at 187. The trial court granted the continuance over Mark's objection.

[29] Despite having a fresh two months to obtain new counsel, Melissa plodded along on her quest to be represented by Attorney Pyle. The new trial date loomed, and Mark had filed motions in limine on March 11 to which Melissa failed to respond, even after obtaining two eleventh-hour extensions of time to respond.

[30] Six days before the May 17 trial, Melissa filed another pro-se motion to continue. Though she had had "[d]iscussions" with Attorney Pyle in "late April," he remained unavailable to represent her and, on May 10, confirmed with her that he had a conflict. *Id*. at 194. On May 10, Attorney Pyle began trying to help find an attorney for Melissa. In her May 11 motion to continue,

Melissa asked for a continuance to "resolve" Attorney Pyle's conflict or to "obtain new counsel and [h]earing preparation." *Id*. at 195.

[31] Under the circumstances of this case, the trial court did not abuse its discretion in denying Melissa's request for another continuance. Attorney Pyle withdrew his appearance on November 1, 2021, and the trial took place on May 17, 2022. Melissa had ample opportunity – more than six months – to retain different counsel but, as recognized by the trial court, she waited, relying on the mere possibility that Attorney Pyle might be able to re-enter his appearance. Melissa was not free from fault.

2. Burden of Proof

[32] We now turn to the merits of the trial court's judgment. Melissa contends that the trial court improperly applied the presumption of undue influence and thus shifted the burden of proof to her. This argument is based on her assertion that the documentary evidence established that Frank "acted independently both in creating his joint accounts with Melissa and in making several disbursements from those accounts." *Appellant's Brief* at 19. Melissa also notes that she did not benefit from most of the cash gifts listed in the Accounting.

[33] "A person holding a power of attorney is in a fiduciary relationship to the person granting the power." *Estate of Rickert*, 934 N.E.2d 726, 730 (Ind. 2010); *see also* Ind. Code § 30-5-6-3. At common law, a transaction is presumed to be invalid when a fiduciary engages in self-dealing. *Estate of Rickert*, 934 N.E.2d at 730. That is, if Melissa used her fiduciary position to transfer an interest in

Frank's assets to herself, the transfer is presumed invalid and the burden shifts to her to establish, by clear and convincing evidence, that the transaction was voluntary and fair. *See id*. ("If undue influence is presumed, the burden 'then shifts to the dominant party to demonstrate, by clear and unequivocal proof, that the transaction was voluntary and fair.'") (quoting Henry's Indiana Probate Law and Practice § 30.18 at 155 (2009)).

[34] To avoid this onerous burden shifting, Melissa relies upon I.C. § 30-5-9-2(b), which provides:

> A gift, bequest, transfer, or transaction is not presumed to be valid or invalid if the gift, bequest, transfer, or transaction:
>
> (1) is:
>
> (A) made by the principal taking action; and
>
> (B) not made by an attorney in fact acting for the principal under a power of attorney; and
>
> (2) benefits the principal's attorney in fact.

See also Estate of Rickert, 934 N.E.2d at 730 (observing that this statutory provision "eliminates the presumption of invalidity of a 'gift, bequest, transfer, or transaction' between the principal and the attorney-in-fact only if it is 'made by the principal' and 'not made by an attorney-in-fact acting for the principal under a power of attorney'").

[35] Melissa directs us to the creation of the Peoples Bank accounts. She claims that the opening agreements for the accounts "bore both Frank's and Melissa's

signatures." *Appellant's Brief* at 22. Thus, Melissa reasons that Frank acted in his own capacity in creating the joint accounts with rights of survivorship, making I.C. § 30-5-9-2(b) applicable to defeat the presumption of invalidity that generally applies to transactions that benefit fiduciaries. According to Melissa, this voluntary act by Frank effectively gave her joint control over all funds deposited in the accounts – regardless of proportional ownership of the funds[2] – and without the need to individually consider each subsequent transaction involving the accounts.

[36] The fault with Melissa's argument lies in its premise that Frank – himself – signed the joint account agreements. The signatures on those agreements, however, plainly reveal that Melissa signed her own name *and* Frank's name along with the "POA" notation and her initials. *Exhibits Vol. 3* at 169 (savings account agreement) and 170 (checking account agreement).

[37] Under these circumstances, it was Melissa's burden to prove by clear and convincing evidence that her use of the POA to create the joint accounts with rights of survivorship in Frank's money was "voluntary and fair." *Estate of Rickert*, 934 N.E.2d at 730 ("In sum, it was up to Taylor to prove by clear and convincing proof that her use of her power of attorney from Rickert to create accounts purportedly giving her rights of survivorship in Rickert's money was

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[2] Ind. Code § 32-17-11-17(a) provides: "Unless there is clear and convincing evidence of a different intent, during the lifetime of all parties, a joint account belongs to the parties in proportion to the net contributions by each party to the sums on deposit."

'voluntary and fair.'"). The record before us contains no evidence regarding the creation of these accounts aside from the opening documents. Moreover, the Durable POA in this case expressly provides that Frank did not grant Melissa the authority to "[c]reate or change rights of survivorship," which is precisely what she did. *Exhibits Vol. 3* at 18.

[38] In sum, we conclude that the trial court properly shifted the burden of proof to Melissa to show, by clear and convincing evidence, that the various bank transactions in question were used for Frank's benefit or were otherwise voluntary and fair. *See Estate of Rickert*, 934 N.E.2d at 730 (finding that fiduciary failed to present evidence showing decedent's "knowing and voluntary consent to [joint accounts with rights of survivorship] or their inherent fairness," despite "abundant means to validate these transactions by third party witnesses or contemporary documents"). With one minor exception discussed directly below, Melissa did not succeed at trial in establishing that the ATM withdrawals, the cash back from deposits, and the checks made out to Melissa from Frank's accounts were voluntary and fair.

[39] As Melissa observes, certain checks made payable to her from the Peoples Bank account were actually signed by Frank. The record reveals three such checks that the trial court included in its judgment – a $3,000 check on December 8, 2016; a $2,500 check on January 17, 2017; and a $4,000 check on February 1,

2017.[3] These checks total $9,500. Because Frank, himself, made these transactions benefiting Melissa, these transactions were improperly presumed by the trial court to be invalid. *See* I.C. § 30-5-9-2(b). On remand, the trial court is directed to reduce by $9,500 the portion of the award relating to the checks made payable to Melissa.

[40] Finally, we address the trial court's award related to cash gifts. As noted above, the Durable POA did not authorize Melissa to make gifts on behalf of Frank. The trial court found that Melissa improperly made $77,000.00 in gifts to herself and other family members (including Mark's immediate family). The limited evidence in the record, however, does not support this award. The only evidence indicating that cash gifts/payments were made comes from the Accounting filed by Melissa, which itemizes these amounts and expressly provides that they were "given directly by [Frank]" during her time as POA. *Exhibits Vol. 3* at 29. In other words, this portion of the trial court's judgment in favor of the Estate was clearly erroneous because there is no evidence that Melissa made any of these cash gifts. On remand, the trial court is directed to vacate this part of the award to the Estate.[4]

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[3] Melissa asserts there were five checks signed by Frank. We have thoroughly reviewed the pages in the record cited by Melissa and have found only three checks that were signed by Frank *and* included in the judgment.

[4] On appeal, Melissa does not challenge the judgment as it relates to the sale of Frank's vehicle after his death or the award of attorney fees. This does not foreclose Melissa from addressing the award of attorney fees on remand given our reversal of a substantial portion of the judgment.

[41] Judgment affirmed in part, reversed in part, and remanded.

Brown, J. and Tavitas, J., concur.