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NO. 68222-9-I
(consolidated with No. 68224-5-I)

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF WILLIAM ROSS TAYLOR

REPLY BRIEF OF APPELLANT CHARLES TAYLOR II
AND BRIEF IN RESPONSE TO CROSS APPEAL

Paul A. Spencer
OSERAN HAHN SPRING
STRAIGHT & WATTS, P.S.
Suite #1430, 10900 N.E. 4th Street
Bellevue, WA 98004
425-455-3900

B. Jeffrey Carl
LAW OFFICE OF B. JEFFREY CARL
705 Second Ave, Suite 910
Seattle, WA 98104
206-682-5120

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I. INTRODUCTION

A thorough review of Caiarelli's Response will establish that there are insufficient facts to uphold the jury verdict on either intent or undue influence. This Reply will highlight what few real facts are present to support her case and how lacking her case actually is. First, however, Charles Taylor wants to address two issues in Caiarelli's briefing that are problematic. The first is the inclusion of gross misrepresentations of fact. The second is the constant reference to matters that are not germane to this appeal, but are included in an attempt to improperly influence the court against Petitioner and his family. Both tactics utilized by Caiarelli permeate her briefing and are beyond the bounds of legitimate argument.

II. MISREPRESENTATIONS IN CAIARELLI BRIEF

Caiarelli makes numerous factual misrepresentations in her brief. Following are examples of the more important ones.

Charles "was aware of his role in William's will." Response at p. 9. There is no direct evidence of this, and Charles flatly denies it. RP 11/22/11 PM, p. 38, ll. 6-19. As the basis for this claim, Caiarelli states that Craig Coombs' paralegal (Barbara Amos) sent an e-mail to Charles attaching a copy of William's will. Response at p. 9, referencing Exhibit 3. In fact, there is no direct evidence of Amos sending any e-mails to Charles. Exhibit 3 is a copy of an e-mail from William to Amos with

revisions to his will. The e-mail indicates that Charles was copied on that e-mail, but as pointed out, Charles denies he saw the will or any email. RP 11/28/12 PM, p. 38, ll. 16-19.

Caiarelli casts aspersions on Charles' testimony saying that "communications clearly occurred." Response at p .9. This assertion is based on the following statement of the evidence:

Shortly after Charles received a draft of William's will, William wrote to Coombs telling him to change the will to make Charles' son Chase a contingent beneficiary if A.C.T. died.

Response at p. 9. Presumably, when Caiarelli says that Charles received a draft of William's will, she is referring to the November 1, 2003 e-mail from William to Amos with revisions to his will and other estate planning documents; and when she says William wrote to Coombs to add Chase as a contingent beneficiary, she is referring to the November 13, 2003 e-mail from William to Amos. In fact, a review of the two e-mails indicates that the will was not being revised to add Chase as a beneficiary. Chase was already named as a contingent beneficiary in section 2.4 of the will (the contingent beneficiary section). Ex. 2. The revisions set forth in the November 13, 2003 e-mail involved a further contingency that had nothing to do with Chase.

“The proceeds from the Schwab IRA account, found by the Court of Appeals in Taylor to belong to Charles and Elizabeth, were paid to Reuben.” Response at p. 9. In fact, those proceeds were paid to the named beneficiaries, Charles and Elizabeth. Ex. 18, p. 3.

“...[T]he beneficiary designation was executed in exactly the same handwriting, handwriting that was not William’s.” Id. at f.n. 11. Caiarelli makes assertions that have no basis in fact. There is no evidence regarding the handwriting on any document at issue in this case, expert or otherwise.

“The Fidelity IRA was valued at approximately \$158,000.” Id. at p. 10. In fact the Fidelity IRA was valued at \$134,223.64. Ex. 106, p. 2. While this misrepresentation, even if believed, may not have an effect on the court’s decision, the source used by Caiarelli for this citation and many other citations of fact in her Response is inappropriate. Caiarelli cites to the unpublished Court of Appeals decision of December 20, 2010 (“Taylor I”) for this “fact.” In fact, she cites to Taylor I to support her factual allegations in pages 10-16 of her Response. Taylor I is simply incorrect with regard to the value of the Fidelity IRA. The facts in Taylor I come from the parties’ briefing in that appeal. That briefing included references to testimony and exhibits that were not admitted in the trial and clearly not before the jury; and in reversing the

trial court's summary judgment order, the court had to review the pleadings in the light most favorable to Caiarelli. While the decision in Taylor I remains the law of this case, the references in Taylor I to the facts are dicta rather than established facts. Perhaps more importantly those facts were not before the jury. Taylor I should not be cited to for the facts of this case, and the misrepresentation of the amount of the Fidelity IRA is an example of a reason for not doing so.

“In July 2005, William “made significant changes to two financial assets he left to ACT in this will...” the NWM policies and the Fidelity IRA. Response at p. 10. This mis-statement is significant as it clearly misleads this Court as Respondent mis-led the jury. While William did assign his interest in the NWM policies to his father in July 2005, this assignment in no way changed William's will. The NWM policies [nor any life insurance] were never mentioned in the will, were never part of the assets controlled by the will, and A.C.T. was never named as a primary beneficiary on any of the policies. Exhibit 3, 102.

“Because the Fidelity rollover form asked for a federal tax ID number if an owner selected “trust” as a beneficiary, William was unable to select “trust” as a beneficiary. Response at p. 10. That is not so. William could have selected “trust” and simply written in on the application that no EIN number had yet been obtained. This application

form was completed in handwriting and William could have written in whatever he wanted to write.

Reuben and Emily “had historically exerted significant influence over William...” Response at pp. 17-18 and p. 38. There is no evidence that this statement is true. Even during the several weeks in August 2003 when William exhibited behavior that resulted in Emily filing a guardianship action, there is no evidence of Reuben and Emily exerting influence over William. To the contrary, there is evidence that William was not seeking his parents’ advice. Ex. 6 (records fr. 8/11/11). Further, and more importantly there was no evidence that Charles Taylor was even aware of William Taylor’s actions in 2004 or more importantly in the summer of 2005.

William’s “antagonism” toward Caiarelli began after William took a car trip with Charles. Response at p. 22, f.n. 16. Caiarelli’s implication is that Charles was instrumental in William’s hard feelings toward Caiarelli. There is no evidence that William’s feelings toward Caiarelli were influenced at all by Charles. The testimony cited to by Caiarelli makes no such reference. There is no dispute that at the time he signed the beneficiary designations in question, William had very strong negative feelings toward Caiarelli. Those feelings most likely arose as a result of Caiarelli’s decision to divorce William, the divorce court’s

decision that Caiarelli was entitled to approximately \$600,000 of William's assets and Caiarelli's request that the divorce court order only supervised visitation with his son. Charles had nothing to do with any of the above.

The distribution of William's assets. Caiarelli claims that Charles has received more than \$1 million of William's estate and that A.C.T. has received nothing. Response at p. 24, f.n. 24. The record indicates that Charles received \$824,212.85 (\$692,000 from AIG and \$132,212.85 from Fidelity) CP 49, Ex. 106, p.2. The record does not show explicitly what A.C.T. received, but according to the Successor Personal Representative, 15% of William's total probate and nonprobate assets went into the estate account. Ex. 203. The SPR's analysis indicates that Charles received 53% of the total, so by deduction approximately \$233,267 went into the estate account and would otherwise pass to A.C.T..

“William, due to his mental and emotional problems, was particularly vulnerable to influence.” Response at p. 18. This has been a mantra of Caiarelli since the beginning of this case. However, there is absolutely no evidence that William had any mental or emotional problems after the two weeks in August 2003 and no evidence that he was **ever** particularly vulnerable to influence, even in August 2003. It should be pointed out that the Will relied upon by Caiarelli was executed literally

7 months after the events referenced. Further, testimony that William was independent and self-motivated went unrefuted. RP 11/21/11 PM, pp. 16-18 (testimony of Emily Taylor); RP 11/16/11 AM, p. 80, ll. 20-24 (testimony of Craig Coombs).

Nonetheless, Caiarelli repeats this refrain over and over, attempting to prove her assertion by repeatedly restating it regardless of its truth or contradiction.¹ For example:

- “...William was a man who had emotional troubles...” Response at p. 22.
- “...William was vulnerable mentally...” Id. at p. 27.
- “This is particularly critical given William’s mental vulnerability.” Id. at p. 33.
- “[William] was vulnerable and remained vulnerable.” Id. at p. 33, f.n. 23.
- “These factors, coupled with William’s mental and emotional vulnerability...” Id. at p. 37.
- “...William’s mental and emotional vulnerability made him particularly vulnerable.” Id. at p. 38.

Caiarelli’s Response should be read very closely. Any fact that the court considers important should be checked for veracity.

III. CAIARELLI'S "SMEAR CAMPAIGN"

The other inclusion in Caiarelli's briefing that is unwarranted is her smear campaign directed toward the entire Taylor family. She has included in her brief pages of either unfounded allegations or facts that have nothing to do with the issues of intent or undue influence and are being spun to put the Taylors in a bad light. The only conceivable purpose is to draw the court's attention away from the paucity of facts that support her position and to alienate the court against the Taylors. This has been a continuing tactic of Caiarelli from the beginning of this action.

Charles feels he must address these attacks to highlight the extent to which Caiarelli is willing to go, outside the bounds of professionalism, to win at all costs. The court will see these irrelevant, disparaging remarks throughout Caiarelli's briefing. Following are examples:

Caiarelli uses pages 12-14 to raise issues involving Charles Taylor's handling of the Estate when he was personal representative. All the issues raised by Caiarelli regarding the accountings, the money in the estate account, the Lexis, the Lincoln, etc., (1) are not relevant to the issues on appeal, (2) are spun by Caiarelli to impute heinous intentions to Charles and the Taylor family, and (3) were long since resolved in a

¹ This reminds one of the Lenin quote "a lie told often enough becomes the truth."

settlement between the Charles and the Estate, through the Successor Personal Representative Michael Longyear well prior to trial.² Perhaps most importantly, none of these purported “facts” were before the jury. The court should disregard Caiarelli’s smear campaign. Caiarelli cites to Exhibit 28 as support for her allegations. Exhibit 28 is Caiarelli’s February 9, 2009 motion to remove Charles Taylor as personal representative. The pages she cites to in the motion are simply her unsupported assertions. More importantly, the trial court refused to admit Exhibit 28 into evidence at trial. Her briefing is remarkably similar to the improper arguments knowingly made by counsel at trial, the intention being that even though it is improper to make certain statements, they are made anyway in an attempt to improperly influence the judge and/or jury. In Re Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012).

IV. ARGUMENT IN REPLY

A. The Jury’s verdict on intent was not supported by substantial evidence. Charles Taylor has challenged on Appeal the jury’s finding that William Taylor intended to name Charles Taylor in a representative capacity on the AIG online application and on the Fidelity IRA account application.(See Opening brief at p.14) Charles Taylor contends that

² As pointed out supra, at pp. 3-4Caiarelli cites to the decision in *Taylor I* for these “facts.” While the decision in *Taylor I* continues to be the law of the case, the factual portion of the decision is not.

Respondent failed to carry her burden of proof and that the jury's findings on the intent issue are not supported by substantial evidence and therefore they should have been reversed on Charles Taylor's Motion for entry of judgment of dismissal notwithstanding the verdict. In his opening brief Charles Taylor made the following references to lack of evidence that was before the jury.

1. There was no evidence before the jury of any discussions between William Taylor and Charles Taylor regarding insurance designations or IRA beneficiary designations in 2005 or at any point in time which would support a different intent than expressed on the documents themselves.(see Opening Brief at pgs.16,21)
2. There was no evidence before the jury of any discussions between William Taylor and anyone else regarding insurance designations or IRA beneficiary designations in 2005 or at any point in time which would support a different intent than expressed on the documents themselves.(opening Brief p.20-21)
3. There was no evidence before the jury of any statements or acts of William Taylor in 2005 which indicated that he [William Taylor] had any intent other than what was expressed in his

AIG insurance application and/or the Fidelity IRA beneficiary designation.(see Opening Brief at p. 15-16)

4. There was no evidence of any confusion on William Taylor's part when he made the AIG insurance policy elections and/or the Fidelity IRA beneficiary designation.(see Opening Brief at p.16)

In response to the above, Respondent argues that William Taylor's intent should be inferred from a Will he executed 16 months earlier.(See Respondent's Brief at p.20). Respondent does not deny nor offer any evidence to contradict the above statements with respect to a lack of evidence. Respondent is forced to concede that there was no evidence other than as expressed in the documents themselves of William Taylor's intent in 2005 when he executed the insurance policy documents and the Fidelity IRA account application. As stated in Allen v. Abrahamson, 12 Wn.App.103, 529 P.2d. 469 (1974) intent must be looked at proximate to the action at issue – in this case William Taylor's actions in July of 2005. The only evidence before the jury of William Taylor's intent in July of 2005, were the documents themselves.

Despite the foregoing, Respondent raises three arguments in her response brief trying to bridge the gap of intent. First, as indicated above Respondent urges the Court as she did the jury to look back 16 months to

ascertain William Taylor's intent.(See Respondent's Brief at p. 21)
Second, Respondent references purported testimony supporting intent wherein she states that "Coombs' testimony and that of William's friend Jennifer Coykendall that William never expressed an intent to make Charles or Reuben a beneficiary in his wills is particularly telling" . (See Respondent's brief at p.21) Respondent then goes on to cite various testimony by Coykendall and another neighbor Bruce Clouse regarding William Taylor's demeanor in the summer of 2005. Finally, Respondent argues that William Taylor couldn't designate his estate/the trust or Charlie Taylor as a trustee on either the Fidelity Account Application or the on-line AIG form, relying on Don Kelley's testimony.

First, there was zero evidence offered at trial by Respondent that William Taylor mentioned, discussed or even alluded to his estate plan (or beneficiary designations) with Ms. Coykendall or Mr.Clouse or anyone else for that matter in 2005. Any attempted citation to the record implying otherwise is bogus. Neither Ms. Coykendall nor Mr. Clouse had any knowledge of any of William Taylor's estate plans – insurance plans – nor any other personal facet of William Taylors life except that he had been involved in a bitter divorce. While it is true that William Taylor didn't like or appreciate Respondent in the spring and summer of 2005, it is

difficult to imagine what this has to do with Respondent's intent argument as to William Taylor's intent in the summer of 2005.

Respondent's argument with respect to William Taylor intent being inferred from the prior Will and Coomb's testimony also doesn't ultimately support her position. Respondent argues that the Coomb's will prepared 16 months earlier should be viewed as the expression of William's intent 16 months later. Respondent argues that William Taylor never intended to make Charles Taylor or Reuben Taylor a beneficiary of his Will as evidenced by the March 2004 Will. (See Respondent's brief at p.21). The inference being – William Taylor never intended Charles Taylor or Reuben Taylor to take anything upon his passing. However, this is simply a false statement and is clearly not supported by the record.

At the time William Taylor executed his March 2004 Will, William had no less than five life insurance policies in place all of which designated Charles or Reuben (or other immediate Taylor family members) as primary beneficiaries. (See Trial Exhibits 101 & 102) Further, and as importantly, A.C.T. was never a primary beneficiary of any of William Taylor's life insurance policies. Clearly, if William had wanted A.C.T. to be a primary beneficiary (or a beneficiary at all), he knew what to do as in one of the policies William Taylor named A.C.T. as a secondary beneficiary. (See Trial Exhibit 101)

Faced with no evidence as to any contrary intent, Respondent makes a circular argument – and suggests that we all assume he [William Taylor] intended to designate A.C.T. as the primary beneficiary on the AIG policies and the Fidelity Account application in the summer of 2005 but he [William] was prevented from doing. (Respondent’s Brief at p. 24) First, it should be pointed out that the evidence before the jury clearly indicated that William Taylor knew how to designate his son as an insurance policy beneficiary when he wanted to. (See Exhibit #101)

Second, if William Taylor’s intent was as he had expressed in all of his other life insurance policy designations, he completed all of the forms at issue correctly. Third, the only evidence before the jury with respect to William Taylor’s post July 2005 actions (i.e. the change in Northwestern Mutual Policy ownership), do not support Respondent’s intent argument.

Respondent’s implicit argument (which is completely unsupported by any authority) is that the Court should assume he [William Taylor] intended something other than as expressed on the documents themselves but was unable to do so. Respondent references the testimony of Ms. Tyra and her expert Don Kelley for the position that William Taylor couldn’t have done anything to designate Charles Taylor in a representative capacity on either the Fidelity IRA or AIG forms. Again,

this argument assumes an intent which is not supported by the evidence surrounding William Taylor's actions in the summer of 2005.

Respondent argues for example that Ms. Tyra, the Fidelity Branch manager who testified, stated that there was no space for the word trustees on the account application. (See Footnote 18 on page 24 of Response brief) Respondent mischaracterizes Ms. Tyra's testimony and ignores the document itself. Ms. Tyra testified that trustee was not one of the four listed categories on the application. RP(11-21-11 am) p.25. Moreover, a simple review of the Fidelity IRA account form reveals that the form was filled out by hand – in person, and that there was absolutely no limitation on what William Taylor could have written in the space provided. (See Trial Exhibits 30 and 106) Ms. Tyra further testified that “if a customer has any question about their beneficiary designation, we refer them to their estate planning attorney or some other specialist who could give them advice.” RP (11-21-11 am) at p.38. There was [and is] no evidence before the jury that William Taylor had any question or concern about his Fidelity account beneficiary designation.

With respect to the AIG policy form, Respondent argues that it would be impossible to complete this document so as to leave the proceeds to A.C.T. by naming Charles Taylor or Reuben Taylor as Trustees – citing the testimony of Don Kelley. (Respondent's brief at p. 25) Respondent

represents to the Court [citing their expert Don Kelley's testimony] that if Mr. Taylor had chosen the term "Trust" "he would have been required to give the date of the trust, and the tax identification number, neither of which would be available until William's death." (See Respondent's brief at p.25.) Again, Respondent mischaracterizes the testimony before the jury. Mr. Kelley testified that he had never even actually even been to or seen the AIG website. RP (11-21-11 am.) at p.75. Mr. Kelley also testified on cross-examination that he had no idea what happens when a person chooses the term "trust" as the designated beneficiary. RP (11-21/11 am.) at p.97.

Mr. Kelley also testified that he would anticipate the forms at issue had been set-up and developed after years and years of experience. RP (11-21-11 am.) at p.75. Mr. Kelley had to admit that the form at issue did provide the option of designating an Estate or Trust as a beneficiary. RP (11-21-11 am.) at p.95. He further admitted that a person could even designate a catchall "other" provision. RP (11-21-11 am.) at p.98. What Mr. Kelley was really testifying was that a typical "lay person" would not know how to navigate the form on the AIG website or would somehow get confused. RP (11-21-11 am.) at p.98. Unfortunately, neither Mr. Kelley nor the jury had any such information before it with respect to William Taylor's completion of the forms in question. Even Mr. Kelley had to

admit – the forms themselves indicated that Charles Taylor was the beneficiary and if that was his intent he had completed the form correctly. RP (11-21-11 am.) at p.102.

Trial Exhibit 47 contained the drop down list of AIG beneficiaries available to William Taylor – and included a multitude of choices which, if chosen, would have reflected Respondent’s claimed intent including DP Son, Estate, Other, Son or Trust. Any of the foregoing would have clearly indicated an intent consistent with Respondent’s position. However, William Taylor chose “brother”. To suggest it was impossible for him to reflect his “intent” on this policy beneficiary designation is absurd and clearly was not supported by the evidence before the jury.

Simply put there is no evidence to support any intent other than as expressed by William Taylor in the account documents – Charles his brother was his intended beneficiary. The trial Court allowed the jury to speculate as to intent – which speculation resulted in a jury finding that is not supported by any evidence and must be reversed.

B. The Jury’s Verdict on Undue Influence was not supported by substantial evidence.

1. Jury Instruction No. 13 was an erroneous statement of the law.

The resolution of the issue of the shifting of the burden of proof for undue influence regarding a beneficiary designation when a confidential

relationship exists depends on whether the court determines a beneficiary designation is more like an inter vivos transfer or a testamentary bequest. In support of her position that a beneficiary designation is more like an inter vivos gift, Caiarelli makes two arguments. First she refers the court to RCW 11.02.091 and second she argues that the court should disregard analogy to the burden of proof for joint bank accounts with rights of survivorship.

Caiarelli states that RCW 11.02.091 provides that a life insurance contract is not a testamentary asset. RCW 11.02.091 simply makes it clear that instruments like insurance contracts do not need to comply with the formalities of a will to be an effective transfer at death. Charles Taylor agrees that a life insurance beneficiary designation is not a testamentary bequest. In order to be a testamentary bequest, an instrument must comply with the formalities for executing wills. However, Taylor's argument is that for purposes of undue influence, a beneficiary designation should be treated more like a testamentary bequest than an inter vivos gift. RCW 11.02.091 does not contradict Taylor's position.

Caiarelli argues that Taylor's analogy to JTWROS bank accounts fails because the burden of proof there is statutory. While it is true that the burden of proof for undue influence regarding JTWROS bank accounts is statutory, it is the rationale behind that burden of proof that is important

here. Caiarelli argues that because there is no statutory burden of proof for undue influence regarding beneficiary designations, the legislature "...has not seen fit to overrule the common law principles involving transfers as to life insurance policies or IRA's." Response at p. 30. However, as both parties recognize, there are no Washington statutes or cases on point with regard to the burden of proof for undue influence regarding beneficiary designations. A decision one way or the other by this court will resolve an unresolved legal issue in Washington, but will not overrule existing law.

While there are no Washington cases directly on point, there is a 2000 case from Maryland's highest court (the Maryland Court of Appeals) that provides a well reasoned and thorough analysis of this burden of proof issue. In Upman v. Clarke, 753 A. 2d 4 (Md. 2000), several months before her death an elderly woman changed her revocable living trust to name her neighbors and current care-givers, the Clarkes, as beneficiaries, displacing several nieces and nephews that had been named in prior wills and trust documents. The displaced nieces and nephews brought an action alleging undue influence on the part of the Clarkes. Id. at 4. They argued that because a confidential relationship existed between the trustor and the Clarke's, the burden of proof was on the Clarke's to disprove undue influence. Id.

The Court of Appeals held that the revocable trust was “...clearly more akin to a testamentary instrument than to an *inter vivos* gift” and upheld the lower appellate court’s ruling that even though a confidential relationship existed between the trustor and the Clarkes, the burden of proof was on the nieces and nephews to prove undue influence. Id. at 12-13. The basis of that ruling was the retention of control by the trustor, exercisable through the power to revoke or change the trust, as compared with the complete loss of legal title as with an *inter vivos* gift. Id. at 11-12.

The court cited cases from other jurisdictions to support its conclusion, including Mercado v. Trujillo, 980 P.2d 824 (Wyo. 1999) (claim of undue influence with regard to revocable trust treated as testamentary disposition); In Re Estate of Tisdale, 171 Misc.2d, 716, 655 N.Y.S.2d 809 (Sur.Ct. 1997) (“substantial similarity between revocable trusts and wills” mandates treating claim of undue influence as with a will. Id. at 811); Ullman v. Garcia, 645 So.2d 168 (Fla.Dist.Ct.App. 1994) (retention of control is the paramount factor); Davidson v. Feurherd, 391 So.2d 799 (Fla.Dist.Ct.App. 1980) (“no real distinction exists between gifts of inheritance through a will and gifts through a revocable trust.” Id. at 802); and Haynes v. First Nat’l Bank, 432 A.2d 890 (NJ 1981) (with

regard to undue influence claim, court applied same standard to both revocable trust and will).

For purposes of the issue in this case, there is no distinction between a revocable trust, as in Upman, and the beneficiary designations at issue here. In both cases, the person making the gift retained full control, until that person died, over who the beneficiary would be. As with the trust in Upman, the proponent of the undue influence should have the burden of proof regardless of a confidential relationship between the designator and the beneficiary. The court should find that jury instruction no. 13 was erroneous, leaving the burden of proof on Caiarelli, and find there was insufficient evidence of undue influence to support the jury verdict.

2. There was no Confidential Relationship

The foregoing issue does not even have to be determined, however, if the court finds that there was no confidential relationship between Charles and William. The foundation for Caiarelli's claim of undue influence is the assertion that there was such a confidential/fiduciary relationship.³ Response at pp. 31-34. The material Caiarelli uses to construct that foundation is, however, inadequate.

³ Caiarelli's assertions of undue influence were first made some seven days before trial in her trial brief. Those assertions were not made as a result of any new evidence discovered by Caiarelli.

Charles had no fiduciary relationship with William as a result of William's estate planning documents. While William named Charles as attorney-in-fact in a power of attorney, that does not create a fiduciary relationship unless the power of attorney is exercised. It is undisputed that Charles never acted at attorney-in-fact for William. William named Charles as personal representative and trustee in his will. Such nominations do not create a fiduciary relationship. Those offices are only activated after a person dies, and no fiduciary relationship can exist with a person after he dies.

Caiarelli makes the statement that Charles and William "had no secrets from each other," implying that they shared all personal information. The actual testimony is much different. When asked if he and William "...shared stories, shared secrets, shared your heartfelt dreams together...", Charles responded "...I don't think we had any secrets. We shared common interests together." RP 11/22/11 PM, p. 33, l. 23 – p. 34, l. 5. The testimony implies instead that the brothers were not sharing very personal information.

Caiarelli then asserts that Charles described himself as able to influence William more than anybody else, the implication being that Charles had experience influencing William. Response at p. 33. Charles'

actual testimony creates a much different impression. In response to question about who William's main advisors were, Charles answered:

I don't know who William's main advisors were...I don't know if I was considered one of his advisors ...I was somebody that probably could influence William or perhaps talk to him, -- to him more than anyone else.

RP 11/22/11 PM, p. 39, l. 14; p. 40, ll. 6-11. Perhaps most importantly, there is no evidence that Charles ever tried to influence William in anything.

Caiarelli states that Charles advised William on a variety of topics including business matters. A review of Charles' testimony reveals that Charles and William discussed things they had in common. ("we shared common interests together...when we communicated together it was about those things.") *Id.*, p. 34, ll. 4-7. His testimony cannot fairly be read to infer that Charles gave William advice, but at most gave him his opinions – ordinary conversations that imply no confidential or fiduciary relationship. Further, there is simply no evidence that any of the conversations referenced took place in 2005.

Caiarelli claims that Charles knew the contents of William's will. There is no evidence of that, and Charles denied it; but even if he had, such knowledge would not create a confidential relationship. Charles and

William were brothers. They trusted each other. That is the stuff of a normal sibling relationship. Caiarelli does not have any additional material to shore up her intended foundation. All the other facts recited: phone calls every other week, a ski trip together, and attending a mediation, are simply incidents that one would expect to find in any sibling relationship. But a sibling relationship, even where the siblings are close and trust each other does not rise to the elevated level of a confidential or fiduciary relationship. McGilligan's Estate, v. McGilligan, 25 Wn.2d 313, 318, 170 P.2d 661 (1946).

3. There was no evidence of undue influence

Even if the court were to uphold the jury's finding of a confidential relationship and the burden of proof was on Charles, the evidence presented at trial was sufficient to clearly disprove any claim of undue influence. Charles did not need to present more evidence than was presented at trial. The undisputed evidence showed that Charles and William were over 1700 miles apart and had not seen each other for at least six months prior to William signing his beneficiary designations. There was no evidence that Charles spoke to William about any of the accounts or policies at issue nor even a scintilla of evidence the Charles even knew about the AIG and Fidelity beneficiary designations.

Once Caiarelli's misrepresentations and irrelevant accusations are stripped away, we are left with only one of the Dean factors that is applicable: Charles received a large portion of the combined probate and non-probate assets belonging to William at the time of his death. See Dean v. Jordan, 194 Wash 661, 79 P.2d 331 (1938). It is this factor upon which Caiarelli bases her entire case. Any analysis of this must be viewed in context, the bulk of the estate was life insurance proceeds and A.C.T. had never been a primary beneficiary under any of William's life insurance policies. Caiarelli states that "[i]t is *inconceivable* that William would effectively disinherit A.C.T. by giving the overwhelming bulk of his estate to his brother..." Caiarelli Response at pp. 25-26. The plain reality is that we will never know what William was thinking when he made the beneficiary designations – only that he made them the way he did.

Caiarelli likes to imply that Charles received all of William's assets, leaving ACT penniless. Again, any analysis must be in the context of the assets at issue – primarily money from life insurance policies that came to fruition as a result of a horrible accident. Charles did receive 53% of the probate and nonprobate assets. Ex. 203. However the existence of this factor alone cannot establish undue influence. In Re Bussler, 160 Wn.

App. 449, 466, 247 P.3d 821 (2011). Caiarelli can point to no cases in which that element alone was sufficient to find undue influence.

Even though Charles received slightly over 50% of William's assets, the leap from having a confidential relationship to unduly influencing William to leave those assets to Charles is just too large to make. There are no cases of undue influence where such a lack of proximity existed. A finding that Charles unduly influenced William under these circumstances would invite a flood of undue influence claims and no beneficiary designation would be safe from attack. How can a person unduly influence another from over 1,700 miles away, and when there is no evidence or indication that the alleged influencer even was aware about the matters he was purportedly wrongfully influencing the decedent about. The short answer is he cannot.

V. CAIARELLI'S CROSS-APPEAL MUST BE DISMISSED

Respondent has filed a motion to dismiss Petitioner's cross-appeal. That motion is pending before this Court. For the reasons set forth in that motion, Respondents request that the court dismiss Petitioner's cross-appeal. If the court determines that the cross-appeal should not be dismissed, the court should affirm the trial court on the evidentiary issues, and should affirm the trial court's rulings regarding the dismissals of Reuben and Emily Taylor for the reasons set forth below.

A. Evidentiary Rulings

1. The Court's Refusal to Allow Certain Testimony From Amy Ainsworth Was Proper.

The court refused to allow Amy Ainsworth to testify about certain alleged conversations she had with Emily Taylor that purportedly were offered on the issue of undue influence. The court's action was proper because (1) the timing of the disclosure violated a court order, (2) allowing the testimony after trial had started and Ms. Ainsworth had already begun testifying would have prejudiced Respondents Taylor and (3) the late disclosure was willful and no explanation was provided as to why the disclosure had not been made sooner.

Caiarelli first raised the issue of undue influence in her trial brief that was filed November 9, 2011. Before that, her entire case was focused on William's intent. The trial court allowed the claim of undue influence to go forward, but required Caiarelli to provide a proffer on what evidence there was of any contact by Charles, Reuben or Emily with William after his divorce and at the time the beneficiary designations were made. See RP 11/15 p.17, ll. 15-24; RP 11/17 AM p. 85, ll. 9-16. At the time the court made that requirement, Caiarelli's counsel told the court that they had no direct evidence at all of any contact between William and any of

his family members for at least three months prior to William making the beneficiary designations. RP 11/15 p. 19, ll. 15-19, p.20 ll. 2-6; RP 11/17 AM p. 85, ll. 17-25. The written proffer required by the court was to be made before opening statement in order to ameliorate the prejudice of undue influence claim being raised at such a late date. The court told Caiarelli her entire claim could be struck if the proffer was not served before opening statement on November 16, 2011. at p. 86.

The written proffer was not made prior to opening statements on November 16, 2011. *Id.* at p. 86, ll. 7-12. Instead, Caiarelli provided a proffer the evening of November 16, 2011, after opening statements and the beginning of testimony, including testimony by Amy Ainsworth. The proffer referred to a conversation between Amy Ainsworth and Emily Taylor, in which Emily purportedly said that she had hour long telephone conversations with William during the three months before he made the beneficiary designations. Taylor counsel objected to the admission of the testimony on several grounds, including prejudice. The court agreed and refused to allow the testimony.

A trial court has broad discretion regarding a choice of sanctions for violation of a discovery sanction. CR 37(b)(2)(B); Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A trial court ruling on such sanctions will only be reversed on “clear showing of abuse

of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Burnet, supra, 131 Wn.2d at 494 (quoting Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 229, 548 P.2d 558, rev. denied, 87 Wn.2d 1066 (1976).

When the trial court ‘chooses one of the harsher remedies under CR 37(b), ...it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,’ and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.

Id., (citing Snedigar v. Hodderson, 53 Wn. App. 476, 487, 786 P.2d 1 (1989).

In Burnet, the trial court entered a discovery order requiring plaintiff to name all its experts and denote the issues each expert would testify about by December 1, 1990. Plaintiff filed a supplemental answer regarding its experts on April 18, 1991, notifying defendant for the first time that certain experts would be testifying regarding defendant’s negligence in credentialing certain doctors. On motion from defendant, the trial court ruled that plaintiff had violated the discovery order and that as a sanction, there could be no discovery on that issue. On appeal, the Court of Appeals upheld the trial court. The Washington Supreme Court,

however, overturned the Court of Appeals. In its decision, the Supreme Court distinguished two cases cited by defendants.

In Allied Fin. Servs. v. Mangum, 72 Wn. App. 164, 871 P.2d 1075 (1993), the trial court excluded testimony from a witness for defendant as a sanction for not naming the witness as required by pre-trial order. Id. at 166. The Court of Appeals upheld the trial court sanction as the defendant's violation of the court order was without a reasonable excuse and was therefore deemed willful. Id. at 168.

In Dempere v. Nelson, 76 Wn. App. 403, 886 P.2d 219 (1994), the primary witness disclosure was due September 9, 1991 and a pre-trial order required the parties to disclosure by January 20, 1992 which of those witnesses would be called at trial. On January 28, 1992, 13 days before trial, plaintiff disclosed an additional expert witness, Reich, who was not named in the primary witness disclosure. Plaintiff's excuse for not naming the expert sooner was that she had been unable to find a voice identification expert and only found Reich "by happenstance" on the day of the disclosure. Defendant objected on several grounds, including the prejudice in conducting additional discovery. Id. at 405.

The Court of Appeals upheld the trial court's sanction of excluding the expert. The failure of plaintiff to timely name the expert was deemed

willful because plaintiff's efforts to locate a voice identification expert were insufficient to excuse the violation of the court order. Id. at 406.

In distinguishing Mangum and Dempere, the Burnet court highlighted the fact that in Burnet the trial court not only excluded a witness, but also removed the claim from the trial. In addition, in Burnet significant time remained before trial, thus ameliorating the prejudice to defendant. The court also based its decision on the fact that the trial court did not enter any findings of a willful violation. Id. at 496.

In this case, the only reason offered by Caiarelli's counsel for not having disclosed the subject matter of the testimony sought to be admitted was that they had just found out about it. Id. at p. 9, ll. 10-12. The disclosure came after trial had begun, after the witness had started to testify, and after the date on which Caiarelli had been ordered to provide a proffer of proof on the issue to which the testimony related. The trial court engaged in discussions with counsel about the issue and was explicit about its reasoning on the record. Id. pp. 83-88 Lesser sanctions were considered but rejected. The trial court determined there was a willful violation because Caiarelli's counsel had not previously asked its own witness about the substance of the testimony at issue. Id. at pp. 13, 88. The court should affirm the trial court's refusal to allow the Ainsworth testimony as there is no basis to overturn the trial Court's ruling on this

issue.

2. Caiarelli's Argument That the Court Erred by Failing to Admit Exhibit 28 Has No Basis in Fact or in Law.

Caiarelli asks the Court of Appeals to find that the trial court erred when it excluded Exhibit 28, Caiarelli's Motion to Remove Charles Taylor as Personal Representative, that she claims included Reuben Taylor's deposition testimony. Response at p. 42. Caiarelli argues that Reuben Taylor's deposition testimony is relevant to the issue of undue influence.

Id.

Caiarelli cannot challenge the trial court's ruling excluding Exhibit 28 because Caiarelli did not make an offer of proof regarding the substance of the Exhibit. ER 103(a)(2); Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 26, 864 P.2d 15 (1993). At no point did Caiarelli even allude to what she now alleges, that she wanted portions of Reuben's deposition in evidence.

Petitioner's Exhibit 28 is designated as Caiarelli's Motion to Remove Charles Taylor as Personal Representative. Exhibit 28 was one of nine exhibits that the court refused to admit because they pertained to underlying probate estate issues and alleged actions of Charles Taylor that were no longer at issue in this action. CP 753. Both parties and the court clearly treated Exhibit 28 as being Caiarelli's Motion to Remove Charles

Taylor as Personal Representative, and no more. It is impossible that Caiarelli's Motion to Remove contained any of Reuben Taylor's deposition. Caiarelli's motion was filed February 1, 2009. Ex. 28. The deposition of Reuben Taylor was not taken until April 6, 2009. Id. Caiarelli's Motion to Remove Charles Taylor as Personal Representative could therefore not have contained any portion of Reuben Taylor's deposition – and it would be interesting to hear an explanation from Caiarelli's counsel as to how they can argue otherwise.

However, a review of the copy of Exhibit 28 that was designated as part of the record and transmitted to the Court of Appeals shows that the exhibit contains not just Caiarelli's Motion to Remove Charles Taylor as Personal Representative, but a transcript of the entire deposition of Reuben Taylor. Charles Taylor does not know how Reuben's deposition came to be included in Exhibit 28, but it is impossible that it was part of Caiarelli's Motion to Remove.

Caiarelli uses three pages of her Response (pp. 44-46) detailing "facts" that she suggests Reuben's deposition would contain. This is yet one more example of Caiarelli making statements in her briefing that are either misrepresentations, irrelevant to the issues at hand, and/or meant only to improperly color the court's perception of the Taylors. And it appears that the only way she could get this slander before the court is to

refer to documents not in the record. If Caiarelli really wanted to have Reuben Taylor's deposition testimony in the record, she could have read relevant portions of it into the record at virtually any time. The deposition was available to Caiarelli throughout the trial. In fact, Caiarelli counsel read some questions and answers from that deposition at trial when Reuben was testifying. RP 11/22/11 A.M. at pp. 88-91. In addition, as Reuben Taylor testified at trial, Caiarelli could have questioned him about any relevant issues at any time.

The court should completely disregard Caiarelli's argument in section E.3.b. (pp. 42-46) except to deny her claim of error for failure to admit Exhibit 28

B. The Dismissal of Reuben Taylor Should be Affirmed.

Caiarelli makes two arguments for overturning the trial court's December 1, 2011 order granting Reuben Taylor's CR 50(A) motion and dismissing the undue influence claim against him. (CP 891-93) First she argues that the court applied the wrong standard in making its decision; that the court "did not address whether Reuben had a confidential or fiduciary relationship with William." Response at p. 48. This is not true. The court's order states that:

4. Petitioners have not introduced even a scintilla of direct or circumstantial evidence of any direct or indirect contact between William Ross Taylor and Reuben

Taylor at all during the year 2005, and no evidence that Reuben discussed estate or gift matters with William since after the time Reuben had raised William and Charles to adults (footnote omitted). Obviously, without some evidence of some contact, there cannot be evidence of an ongoing confidential or fiduciary relationship between Reuben and William Ross Taylor at or around the time (or eve in the same year as) William Ross Taylor made a gift of the Northwestern Policies to this father.

(CP 892)

Caiarelli argues that focusing on the time frame from January 1, 2005 until William's death for evidence of a confidential relationship is too restrictive, and that the court should have expanded that time frame. However, Caiarelli can point to no cases in which a confidential relationship existed when there was no evidence of contact between the parties for six to nine months before the event that triggered a claim of undue influence. McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868 (1970) does not support Caiarelli's position. That case does not discuss time frames for a confidential relationship at all. McCutcheon does say, however, that "[a] confidential relationship exists between two people where one has gained the confidence of the other and purports to act or advise with the other's interest in mind." Id. at 357, citing Restatement of Restitution § 166 d. (1937). As there is no evidence of Reuben advising William of anything during 2005 -- or even at all during

William's adult life -- a confidential relationship between Reuben and William cannot be proven.

The evidence put forward by Caiarelli to support the finding of a confidential relationship is simply too weak. Reuben and William were father and son. William named Reuben as alternate executor and trustee in his will, and as alternate attorney-in-fact on a durable power of attorney. Caiarelli points to the fact that Reuben loaned William money.⁴ However, she does not add that Reuben asked for and received from William a promissory note and deed of trust on William's residence to secure the loan. RP 11/22/11 AM at p. 93, ll. 12-18. Caiarelli states that Reuben gave William business advice. What Caiarelli is alluding to is testimony from Reuben that in the 2000-2001 time frame, he declined to loan William money for a real estate venture. RP 11/22/11 AM at pp 97-98. The trial court was correct in finding that there was no evidence of a confidential or fiduciary relationship between Reuben and William.

Caiarelli's second argument is that the excluded Ainsworth testimony (see supra, pp. 26-31) and the excluded Exhibit 28 (see supra, pp. 31-33) would have shown that Reuben had contact with William in the

⁴ In support of this statement, Caiarelli cites to CP 1067 and 1071. Those pages are part of Exhibit 3 to Caiarelli's Response to Taylor's Motion For Summary Judgment Dismissing Emily and Elizabeth Taylor, filed November 10, 2011. The entire pleading, including exhibits, is designated as part of the Clerk's Papers, pages 975 – 1122. Pages

summer of 2005. While the court properly excluded the Ainsworth testimony, the excluded testimony did not even reference Reuben. Caiarelli argues that had the testimony not been excluded, Ainsworth would have testified that she had a conversation with Emily in 2005 in which Emily stated that she had hour long telephone conversations with William during the summer of 2005. Caiarelli's argument continues that if those calls took place, Reuben could have overheard them. As stated in the court's order, that is simply speculation. CP 892.

As for Exhibit 28, the court properly excluded that exhibit and the court should disregard anything in Caiarelli's brief that references Reuben's deposition unless it specifically refers to the trial testimony of Reuben, where he was questioned about certain answers he gave in his deposition. Caiarelli's counsel could have read relevant portions of Reuben's deposition into the record, but they did not do so. In any event, despite Caiarelli's assertions, nothing in Reuben's deposition supports a finding of undue influence.

While Caiarelli does not tell the court what relief she is seeking with regard to the cross-appeals, if the court were to find that the dismissal of Reuben Taylor was in error, a new trial would be required. Reuben was

1067 and 1071 are pages from Reuben Taylor's deposition, which is Exhibit 3 to that motion. Citing to the deposition is improper as it was not evidence before the jury.

dismissed at the end of Caiarelli's case, Reuben Taylor never put on a defense and the jury was not asked whether it found that Reuben had unduly influenced William.

C. The Dismissal of Emily Taylor Should be Affirmed.

Petitioner's TEDRA action did not seek any direct relief against Emily. No claim of undue influence was advanced against Emily. Petitioner's Amended TEDRA Petitioner only sought to recover the proceeds from the AIG insurance policies, the Fidelity IRA and the NW Mutual policies. It is undisputed, however, that Emily never received any of those proceeds. Charles Taylor received the proceeds of the AIG policies and the Fidelity IRA. Reuben Taylor received the proceeds of the NW Mutual policies. For this reason, the court dismissed Emily as she was not a necessary party to the action. CP 41-43.

Caiarelli contends that Emily is a necessary party because it was possible (before Reuben was dismissed) that a jury could find that Reuben unduly influenced William to assign the ownership in the NW Mutual policies to Reuben. If a jury did make such a finding, the assignment would be void and the original beneficiaries of those policies would be entitled to the insurance proceeds.

Caiarelli's theory continues that if it was determined that Emily was a rightful beneficiary of any of the NW Mutual policies, she would

then be required to put the proceeds in trust for ACT; and she is therefore a necessary party to this action.

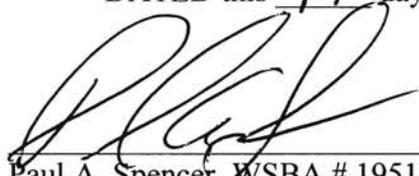
There are several problems with Caiarelli's argument. First, if it was determined that Emily was a rightful beneficiary of the NW Mutual policies, the only reason she would not be entitled to the insurance proceeds is if it could be proven either that William intended for the Emily to take the proceeds for the benefit of ACT, or that Emily had unduly influenced William to make her a beneficiary. Caiarelli has never claimed, however, that William intended to name Emily as a beneficiary in a representative capacity, for the benefit of ACT. (In fact, only one of the NW Mutual policies at issue was issued after ACT was born, and that policy named ACT as an alternate beneficiary.) Further, Caiarelli never included a cause of action for undue influence against Emily (or anyone else). And because the only policy that was purchased by William after ACT's birth was in June 2002 (policy 7201020, proceeds paid of \$23,214.96, Exhibits 101 & 102), Emily Taylor could not have unduly influence William to name her rather than ACT as beneficiary prior to the date the policy was purchased. Caiarelli has made no claims that undue influence took place in the time frame that preceded ACT's birth, for obvious reasons. Finally, even if the Court were to somehow somehow

consider this issue, Emily Taylor would be entitled to put on a defense as she was dismissed out of the case before she was required to do so.

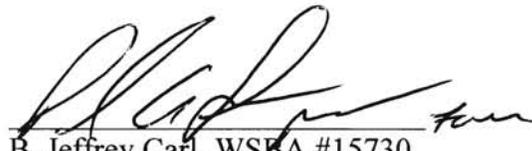
VI. CONCLUSION

For the reasons set forth below, the court should reverse the trial court and grant Charles Taylor's motion for entry of judgment of dismissal notwithstanding the verdict and deny Caiarelli's cross appeal.

DATED this 19th day of April, 2013.



Paul A. Spencer, WSBA # 19511
OSERAN HAHN SPRING
STRAIGHT & WATTS
Ste. 1420, 10900 NE 4th Street
Bellevue, WA 98004
425-455-3900



B. Jeffrey Carl, WSBA #15730
Law Office of B. Jeffrey Carl
705 Second Ave, Ste. 910
Seattle, WA 98104
206-682-5120

VII APPENDIX

Westlaw.

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▷
 Briefs and Other Related Documents

Judges and Attorneys

Court of Appeals of Maryland.
 Lawrence **UPMAN** et al.
 v.
 Kenneth **CLARKE** et al.

No. 120, Sept. Term, 1999.
 June 6, 2000.

Caveators brought action seeking to have set aside, on ground of undue influence, amendment to trust under which settlor transferred legal title to property to donees, as trustees, and provided for testamentary disposition of that property to donees upon settlor's death. The Circuit Court, Carroll County, Francis M. Arnold, J., entered judgment for donees. On appeal, the Court of Special Appeals affirmed, 127 Md.App. 628, 736 A.2d 380. Certiorari was granted. The Court of Appeals, Wilner, J., held that rule applicable to testamentary gifts, rather than rule applicable to gifts inter vivos, applied.

Affirmed.

West Headnotes

[1] Gifts 191 ⚡36

191 Gifts
 191I Inter Vivos
 191k35 Validity
 191k36 k. In general. Most Cited Cases

Wills 409 ⚡157(1)

409 Wills
 409IV Requisites and Validity
 409IV(F) Assent of Testator
 409k154 Undue Influence
 409k157 Personal, Confidential, or Fi-

duciary Relations

409k157(1) k. In general. Most
 Cited Cases
 (Formerly 409k157)

Regardless of whether the gift under attack is an inter vivos or a testamentary one, the first question in need of resolution is whether a confidential relationship existed between donor and donee.

[2] Attorney and Client 45 ⚡129(2)

45 Attorney and Client
 45III Duties and Liabilities of Attorney to Client
 45k129 Actions for Negligence or Wrongful
 Acts
 45k129(2) k. Pleading and evidence. Most
 Cited Cases

Trusts 390 ⚡372(1)

390 Trusts
 390VII Establishment and Enforcement of Trust
 390VII(C) Actions
 390k372 Evidence
 390k372(1) k. Presumptions and bur-
 den of proof. Most Cited Cases

In some relationships, such as attorney-client or trustee-beneficiary, a confidential relationship is presumed as a matter of law.

[3] Husband and Wife 205 ⚡1

205 Husband and Wife
 205I Mutual Rights, Duties, and Liabilities
 205k1 k. The relation in general. Most Cited
 Cases

Parent and Child 285 ⚡1

285 Parent and Child
 285k1 k. The relation in general. Most Cited
 Cases

In family relationships, such as parent-child

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and husband-wife, the existence of a confidential relationship is an issue of fact and is not presumed as a matter of law.

[4] Gifts 191 ⚡47(3)

191 Gifts
 191I Inter Vivos
 191k46 Evidence
 191k47 Presumptions and Burden of Proof
 191k47(3) k. Validity. Most Cited Cases

In the case of an inter vivos gift, the existence of a confidential relationship shifts the burden to the donee to show the fairness and reasonableness of the transaction.

[5] Gifts 191 ⚡47(3)

191 Gifts
 191I Inter Vivos
 191k46 Evidence
 191k47 Presumptions and Burden of Proof
 191k47(3) k. Validity. Most Cited Cases

Once a confidential relationship between the donee and donor is proved in an action challenging an inter vivos gift, the plaintiff is relieved from the necessity of proving the actual exercise of overweening influence, misrepresentation, importunity, or fraud, and the defendant has the burden of showing that a fair and reasonable use has been made of the confidence, that the transfer of the property was the deliberate and voluntary act of the grantor and that the transaction was fair, proper and reasonable under the circumstances.

[6] Gifts 191 ⚡49(2)

191 Gifts
 191I Inter Vivos
 191k46 Evidence
 191k49 Weight and Sufficiency

191k49(2) k. Validity. Most Cited Cases

Once a confidential relationship between the donee and donor is proved in an action challenging an inter vivos gift, the donee bears the heavy burden of establishing by clear and convincing evidence that there has been no abuse of the confidence.

[7] Gifts 191 ⚡36

191 Gifts
 191I Inter Vivos
 191k35 Validity
 191k36 k. In general. Most Cited Cases

Where a confidential relationship exists in the context of an inter vivos transfer, the courts will not allow a transaction between the parties to stand unless there is a full and fair explanation of the whole transaction.

[8] Wills 409 ⚡163(1)

409 Wills
 409IV Requisites and Validity
 409IV(F) Assent of Testator
 409k162 Evidence
 409k163 Presumptions and Burden of Proof
 409k163(1) k. In general. Most Cited Cases

In attacking a will on the ground of undue influence, the burden of proving the undue influence is on the one attacking the will.

[9] Wills 409 ⚡155.1

409 Wills
 409IV Requisites and Validity
 409IV(F) Assent of Testator
 409k154 Undue Influence
 409k155.1 k. Nature and degree in general. Most Cited Cases

Undue influence which will avoid a will must

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be unlawful on account of the manner and motive of its exertion, and must be exerted to such a degree as to amount to force or coercion, so that free agency of the testator is destroyed.

[10] Wills 409 ↪ 155.3

409 Wills

409IV Requisites and Validity

409IV(F) Assent of Testator

409k154 Undue Influence

409k155.3 k. Importunity, persuasion and threats. Most Cited Cases

A party attacking a will on the ground of undue influence must prove that the will was obtained by coercion or by importunities which could not be resisted, so that the motive for the execution was tantamount to force or fear.

[11] Wills 409 ↪ 155.1

409 Wills

409IV Requisites and Validity

409IV(F) Assent of Testator

409k154 Undue Influence

409k155.1 k. Nature and degree in general. Most Cited Cases

Mere suspicion that a will has been procured by undue influence, or that a person had the power unduly to overbear the will of the testator is not enough to warrant setting aside the will on the ground of undue influence; rather, it must appear that the power was actually exercised, and that its exercise produced the will.

[12] Trusts 390 ↪ 372(1)

390 Trusts

390VII Establishment and Enforcement of Trust

390VII(C) Actions

390k372 Evidence

390k372(1) k. Presumptions and burden of proof. Most Cited Cases

When a gift is made through the device of a re-

vocable trust under which the donor presently transfers legal title to property to the donee, as trustee, and provides for the testamentary disposition of that property to the donee upon the death of the donor, the rule applicable to testamentary gifts, rather than that applicable to gifts inter vivos, applies to an action alleging that the gift resulted from undue influence; thus, the burden of proof remains with the person challenging the gift, even if there is a confidential relationship between the donor and the donees.

[13] Trusts 390 ↪ 376

390 Trusts

390VII Establishment and Enforcement of Trust

390VII(C) Actions

390k376 k. Appeal. Most Cited Cases

No remediation was required by fact that trial court incorrectly allocated burden of proof to donees, rather than to disinherited relatives, in relatives' action seeking to have set aside, on ground of undue influence, amendment to trust under which settlor transferred legal title to property to donees, as trustees, and provided for testamentary disposition of that property to donees upon settlor's death; because trial court found sufficient evidence to rebut presumption it created of undue influence, it would necessarily have found insufficient evidence to show undue influence had it applied appropriate burden and standard of proof.

**5 *35 J. Brooks Leahy (Dulany & Leahy, LLP, on brief), Westminster, for petitioners.

Howard A. Roland, Baltimore, for respondents.

Argued before BELL, C.J., and ELDRIDGE, RODOWSKY, RAKER, WILNER, CATHELL and HARRELL, JJ.

WILNER, Judge.

Under Maryland common law, there are two very different burdens and standards of proof that

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may be applicable when a gift is challenged on the ground that the donee exercised undue influence over the donor. As we shall explain, when the challenged gift is an *inter vivos* one—a present gift made during the donor's lifetime—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. When the gift is testamentary, however, taking effect upon the death of the donor, the existence of a confidential relationship between the donor and donee is simply one suspicious circumstance to be considered; it does not, of itself, give rise to a presumption of invalidity, and the burden remains with the person challenging the gift to prove a substantially overbearing undue influence.

The principal issue before us now is which of those two rules applies when the gift is made through the device of a revocable trust under which the donor presently transfers legal title to property to the donee, as trustee, and provides for the testamentary disposition of that property to the donee upon the death of the donor. **6 In the circumstances of this case, we shall hold that the rule applicable to testamentary gifts applies.

*36 BACKGROUND

Genevieve Upman, widowed since 1967, died childless on March 1, 1996, at the age of 88. Under her Last Will and Testament, dated August 28, 1995, her entire estate, after payment of taxes and expenses, was left to the Genevieve Upman Trust. The trust was initially created in June, 1994, but was amended by Ms. Upman in September, 1995. Under the 1995 amendment, the net trust estate was to be distributed, in equal shares, to Ms. Upman's nephew, Kenneth Clarke, and his wife, Patricia, "in gratitude for the care and affection extended to me in my declining years."

After the Will was admitted to probate, several other nephews and nieces of Ms. Upman, who had been named as beneficiaries under prior Wills, filed

proceedings attacking the Will and the 1995 amendment to the trust. In the Orphans' Court for Carroll County, they filed a caveat to the Will, contending that Ms. Upman lacked testamentary capacity when she signed the Will and that the Will was procured by the exercise of undue influence by Kenneth and Patricia Clarke. In an action filed in the Circuit Court for Carroll County, they sought to invalidate the 1995 amendment to the trust, contending that Ms. Upman was not competent when she executed that amendment and that the Clarkes, as relatives and caretakers of Ms. Upman, took advantage of a confidential relationship between her and them and improperly influenced her to make the gift to them through the 1995 amendment to the trust.

The issues raised in the caveat proceeding were transmitted to the Circuit Court and consolidated with the action challenging the amendment to the trust. Because the Will and the 1995 amendment to the trust were executed within a week of each other, the parties agreed that the evidence relating to both competence and undue influence would be the same with respect to both instruments. The caveat issues were resolved by a jury, which, in special verdicts, determined that Ms. Upman did not lack testamentary capacity when she executed *37 the August, 1995 Will and that the Will was not procured by the exercise of undue influence on the part of either Kenneth or Patricia Clarke. In the second action, which was decided by the court without a jury, the Clarkes admitted that they had a confidential relationship with Ms. Upman. Relying on cases dealing with undue influence attacks on *inter vivos* gifts, the court concluded that, once a confidential relationship is found, the burden falls on the trusted party—in this case the Clarkes—to show that their conduct was proper. The court found, however, that the Clarkes had met that burden and that there was no undue influence.

The plaintiffs abandoned their attack on the Will but appealed the judgment entered for the Clarkes with respect to the 1995 amendment to the

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trust. The Court of Special Appeals affirmed that judgment, but not entirely on the basis used by the Circuit Court. *Upman v. Clarke*, 127 Md.App. 628, 736 A.2d 380 (1999). The appellate court concluded that the revocable trust created by Ms. Upman was more in the nature of a testamentary disposition than an *inter vivos* gift and that, as a result, the Circuit Court erred in shifting the burden to the Clarks to prove non-abuse of the confidential relationship. It concluded instead that the burden remained with the plaintiffs to prove that the 1995 amendment was the product of undue influence. That error did not require reversal, however, as it actually favored the plaintiffs. The Court of Special Appeals reviewed the evidence and concluded that it more than sufficed to support the Circuit Court's finding that the 1995 amendment was the free and voluntary act of Ms. Upman. *Id.* at 648, 736 A.2d at 391.

Until March, 1995, Ms. Upman lived alone in her home in Ellicott City—the **7 marital home she had shared with her husband. At some point, she began to suffer from polymyositis—a chronic arthritic problem—and from and after the mid-1980's, she began to rely on her niece, Christine Healey, one of the plaintiffs, and Kenneth Clarke for some assistance in maintaining her home, with various errands, and with paying bills and keeping her checkbook. In 1989, at Ms. Upman's request, Ms. Healey arranged for a lawyer to prepare a Will *38 for Ms. Upman. In that Will, signed in December, 1989, Ms. Upman left her stocks and bonds to 14 nephews and nieces, in equal shares. She directed that any real estate—her house—be sold and that 50% of the proceeds be distributed to three nieces and a nephew of her late husband, and that the rest of her estate, including the other 50% from the sale of her home, be distributed to her five brothers and sisters, Mr. Clarke, and Ms. Healey. Ms. Healey was designated as personal representative.

In 1991, the Clarks contacted another attorney—one who had done some work for them in the past—and had another Will drawn for Ms. Upman. In

this second Will, signed in April, 1991, Ms. Upman left her stocks and bonds to an expanded group of 20 nieces and nephews. A specific bequest of \$1,000 to her church was added. The disposition of the real estate and the balance of the estate remained unchanged. Ms. Healey and Mr. Clarke were named as co-personal representatives.

In May, 1994, Ms. Upman signed a third Will, which made no substantial changes from the second, and, a month later, she created a revocable trust—the Genevieve Upman Trust. Ms. Upman named herself as the sole trustee and directed that she be paid from the trust, during her lifetime and as long as she remained mentally capable of managing her own affairs, so much of the income and principal of the trust as, from time to time, she requested. Ms. Upman reserved the right to revoke or amend the trust and to appoint a successor trustee. In the event of her death or inability to manage her own affairs, she designated Ms. Healey and Mr. Clarke, jointly, as successor trustees. She directed the trustees, during any period that she was unable to manage her affairs, to distribute so much of the income and principal, for her benefit, as they believed desirable for her care and support. Ms. Upman directed that, upon her death, her estate be distributed to those persons, and in the shares, specified in her latest Will.

There is some conflict in the evidence as to what property was placed in the trust. The Declaration of Trust referred to *39 an attached Schedule A, which provided for the transfer of Ms. Upman's Ellicott City home and the furniture “and other personal property” in it. There is no reference either in that Schedule or in any later document to any transfer of Ms. Upman's bank accounts, stocks, or other cash or securities. It appears, however, that stocks, bonds, and bank accounts were, indeed, transferred to the trust. The Information Report and accompanying Inventory filed with the Register of Wills after Ms. Upman's death showed that approximately \$213,000 in assets had been transferred to the trust in June, 1994, including \$12,000 in U.S. Savings

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Bonds, \$17,500 in stock, over \$46,000 in bank accounts, Ms. Upman's Ellicott City property valued at \$135,000, and \$2,300 in other tangible personal property. Counsel for plaintiffs informed the court that about 95% of Ms. Upman's property was in the trust and that only \$8,000 to \$9,000 passed through the probate estate. The transfer of those assets is also consistent with the direction that she receive, on request, income and principal from the trust estate during her lifetime; indeed, the failure to place those liquid, income-producing assets in the trust at that time would be *in* consistent with that provision.

In March, 1995, Ms. Upman suffered a fall in her home. It is not clear what prompted the fall. There was a suggestion**8 in the hospital records that she may have had a seizure; Ms. Clarke postulated that she may have become disoriented from taking too much of a sedative that had recently been prescribed for her. She was found by Ms. Healey on the floor in a confused state and was taken to the hospital, where she remained for eight days. This episode created a crisis for Ms. Upman. In addition to her chronic arthritis, she was diagnosed with a collection of other maladies, including vasculitis, osteoporosis, an inflamed ulcer on an ankle, and progressive dementia. She was reported as weak and confused. The hospital discharge summary stated that she "now needs close observation."

It was clear that Ms. Upman could not return to her home, to live alone. Several options were considered by the family. *40 Ms. Healey thought that, given the extensive care she would need, Ms. Upman should be placed in a nursing home or similar kind of facility, a prospect that Ms. Upman adamantly opposed. Ultimately, the **Clarkes** agreed to have her live with them, and they prepared a separate room for her in their home. Ms. Upman remained in the **Clarkes'** home for about 11 months, until she died. Ms. Clarke assisted her in most of her daily activities—dressing, eating, bathing, even going to the bathroom. The **Clarkes** assumed control of her checkbook and paid her bills.

In August, 1995, Ms. Clarke asked the lawyer

who had prepared the second and third Wills and the revocable trust to prepare a new Will and an amendment to the trust. The attorney prepared the documents and sent them to Ms. Upman, along with a letter stating that, if she wished, the attorney would come to the home to answer any questions she might have. Ms. Upman did not respond, other than to send the attorney a check for his services along with a "thank you" note. On August 28, 1995, Ms. Upman signed the Will in the presence of two neighbors of the **Clarkes**. Her signature to the trust amendment required notarization, so on September 3, 1995, Ms. Clarke took her to the local bank where, before a notary, she signed the amendment.

As noted, the new Will and the trust amendment made a substantial change in Ms. Upman's estate plan. The Will directs the payment of debts, taxes, funeral, last illness, and administration expenses and leaves the entire balance of the estate to the Genevieve Upman Trust. The new provision added to the trust directs the payment of any debts, taxes, and administration expenses not paid by the probate estate and provides that all remaining property in the trust be distributed to the **Clarkes**. Ms. Upman's siblings and other nieces and nephews were dropped as beneficiaries.

DISCUSSION

In the Circuit Court, the plaintiffs challenged the two 1995 instruments on competence as well as undue influence *41 grounds, and much of the evidence concerned Ms. Upman's mental capacity. That evidence was in some conflict. The plaintiffs did not contest Ms. Upman's competence or testamentary capacity with respect to any of the instruments signed prior to 1995. It was their position that she deteriorated significantly after signing the 1994 instruments and that she remained in a confused and helpless state, entirely dependent on the **Clarkes**. They stressed her age, her frail physical condition, the fact that her physician believed, in March, 1995, that she suffered from progressive dementia, and incidents in which she seemed confused as to dates, was forgetful, or appeared to suf-

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fer from some delusions.

Testimony presented by the lawyer who prepared the 1991, 1994, and 1995 instruments, by the witnesses to the 1995 Will, and by the notary who attested her signature to the 1995 amendment to the trust, on the other hand, was to the effect that Ms. Upman was alert, knew what she was doing, and appeared to be acting voluntarily. There was abundant evidence from **9 them, from the Clarkes, from an outreach person from the church who visited Ms. Upman from time to time, and from others sufficient to show that Ms. Upman (1) changed her mind about leaving her estate to between 14 and 20 people, with whom she had only infrequent contact, (2) was content living with the Clarkes, and (3) was deeply grateful to them for taking care of her and avoiding her placement in a nursing home.

[1] As we indicated at the commencement of this Opinion, two different rules have developed under Maryland law with respect to challenges based on undue influence. The first question in need of resolution, whether the gift under attack is an *inter vivos* or a testamentary one, is whether a confidential relationship existed between donor and donee. 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 *42 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. See also *Tracey v.*

Tracey, 160 Md. 306, 318, 153 A. 80, 85 (1931) (confidential relationship may be presumed from a relationship “such that one must from the very necessities of the situation repose confidence in the other, and where the one in whom such confidence is reposed is thereby enabled to exert a dominating and controlling influence over the other”).

[2][3] In some relationships, such as attorney-client or trustee-beneficiary, a confidential relationship is, indeed, presumed as a matter of law. Otherwise, and 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. See *Sanders v. Sanders*, 261 Md. 268, 276, 274 A.2d 383, 388 (1971). Here, as noted, the Clarkes admitted that they had a confidential relationship with Ms. Upman when she signed the 1995 Will and trust amendment, so that much is not in dispute.

[4][5] In the case of an *inter vivos* gift, the existence of a confidential relationship shifts the burden to the donee to show the fairness and reasonableness of the transaction. As we held in *Sanders, supra*, 261 Md. at 276-77, 274 A.2d at 388:

“In other words, once the relationship is proved, the plaintiff is relieved from the necessity of proving ‘the actual exercise of overweening influence, misrepresentation, importunity, or fraud,’ and the defendant has the burden of showing that a fair and reasonable use has been made of the confidence, ‘that the transfer of the property was the deliberate *43 and voluntary act of the grantor and that the transaction was fair, proper and reasonable under the circumstances.’ ”

(citations omitted).

[6][7] We have described the donee's burden as a “heavy” one, *Sanders, supra*, 261 Md. at 277, 274 A.2d at 388, of establishing by clear and convincing evidence that there has been no abuse of the confidence. *Wenger v. Rosinsky*, 232 Md. 43, 49,

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192 A.2d 82, 86 (1963). In *Green, supra*, 183 Md. at 85, 36 A.2d at 927, we said, in the context of an *inter vivos* transfer, that “[w]here a confidential relationship exists, the courts will not allow a transaction between the parties to stand **10 unless there is a full and fair explanation of the whole transaction.”

[8][9][10][11] The rule governing attacks on Wills is very different. In *Koppal v. Soules*, 189 Md. 346, 351, 56 A.2d 48, 50 (1947) and *Stockslager v. Hartle*, 200 Md. 544, 547, 92 A.2d 363, 363-64 (1952), we distilled from earlier cases that, in attacking a Will on the ground of undue influence, the burden of proving the undue influence is on the one attacking the Will and that:

“undue influence which will avoid a will must be unlawful on account of the manner and motive of its exertion, and must be exerted to such a degree as to amount to force or coercion, so that free agency of the testator is destroyed. The proof must be satisfactory that the will was obtained by this coercion ... or by importunities which could not be resisted, so that the motive for the execution was tantamount to force or fear. Mere suspicion that a will has been procured by undue influence, or that a person had the ‘power unduly to overbear the will of the testator’ is not enough. It must appear that the power was actually exercised, and that its exercise produced the will.”

(citations omitted). See also *Knowles v. Binford*, 268 Md. 2, 298 A.2d 862 (1973); *Moore v. Smith*, 321 Md. 347, 582 A.2d 1237 (1990).

*44 There is a rational basis for the two different rules. Persons ordinarily desire to retain possession and use of their property while they are alive. If someone who stands in a fiduciary or confidential relationship with another exerts *any* influence on that person to obtain an *inter vivos* transfer of the person's property, for less than full value, that influence is regarded, at least presumptively, as undue and requires an explanation. The exertion of influence for personal gain is, itself, a breach of the

trust implicit in the confidential relationship, especially when it causes the person reposing trust to be deprived of his or her property. Thus, in *Vocci v. Ambrosetti*, 201 Md. 475, 485, 94 A.2d 437, 442 (1953), we stated the general rule to be that “he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence” and concluded that the relationship itself requires the dominant party “to abstain from all selfish projects.”

A testamentary gift is different. Obviously, persons can no longer enjoy property after their death; they suffer no loss from a testamentary gift. Testamentary gifts are thus more natural and expected, and the persons most likely to receive them are those who often *do* stand in a fiduciary or confidential relationship with the donor-parents, children, spouses, siblings, close friends, trusted employees. In *Shearer v. Healy*, 247 Md. 11, 25, 230 A.2d 101, 107-08 (1967) and later in *Anderson v. Meadowcroft*, 339 Md. 218, 227, 661 A.2d 726, 730 (1995), drawing on principles stated earlier in *Parfitt v. Lawless*, 2 P. & D. 468 (1872), *Griffith v. Diffenderffer*, 50 Md. 466, 483-84 (1879), and *Sellers v. Qualls*, 206 Md. 58, 72, 110 A.2d 73, 80 (1954), we observed:

“there is an obvious difference between a gift whereby the donor strips himself of the enjoyment of his property while living and a gift by will, which takes effect only from the death of the testator. In cases of gifts by will the fact that a party is largely benefited by a will prepared by himself is nothing more than a suspicious circumstance of more or less weight according to the facts of the case.”

[12] *45 The instrument before us has features of both an *inter vivos* gift and a testamentary one. To the extent that Ms. Upman transferred legal title to her property to the Clarkes and authorized them, as trustees, to deal with that property, there was an *inter vivos* transfer—an immediate parting of legal title. Although it appears that the property was

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placed in the trust in 1994, it was the 1995 amendment**11 that made the Clarkes the trustees and thus it was that amendment that effected a transfer of legal title to the property from Ms. Upman, as trustee, to the Clarkes, as trustees. On the other hand, the actual gift to the Clarkes was predominantly testamentary, for two reasons. First, because Ms. Upman reserved the right to revoke the trust, she retained the power, with the stroke of a pen, to undo the transfer and recover full legal title to the property, at any time and for any reason. Second, although the Clarkes were entitled to exercise trust powers over the property, they had no right to beneficial enjoyment of it until Ms. Upman's death. They were limited, in their immediate control over the property, to their authority as trustees.

We dealt with this issue, albeit without much discussion, in *Knowles v. Binford*, *supra*, 268 Md. 2, 298 A.2d 862, in which, as here, an attack was made on a revocable trust by disappointed relatives. The settlor created the trust in 1959, placing in it certain securities. The income and so much of the principal as she requested was to be paid to her during her lifetime, and upon her death, the trustee was to pay estate and inheritance taxes, funeral and medical expenses, and certain lump sums to named individuals, continue the trust for the benefit of the settlor's brothers, and, upon their death, to pay the remaining balance to her nieces and nephews. In time, she moved from Baltimore to Philadelphia and thus had less frequent contact with her Baltimore nieces, especially after the deaths of her two brothers, and she came under the domination of a friend and the friend's nephew. In October, 1969, she executed an amendment to the trust that, upon her death, left the entire estate to the friend for life, with the remainder to the friend's nephew. The nieces who were thus *46 disinherited sued to have the 1969 amendment declared invalid on the ground of mental incompetency and undue influence exercised by the friend and her nephew.

The attack involved only the revocable trust. There was no Will at issue. Nonetheless, we obvi-

ously regarded the trust as testamentary in nature. In determining whether the amendment was invalid because of undue influence, we not only applied the substantive standard applicable to caveats to Wills—those set forth in *Stockslager v. Hartle*, *supra*, 200 Md. 544, 92 A.2d 363—rather than the standards applicable to *inter vivos* gifts, *id.* at 4-5, 298 A.2d at 863, but made clear that the burden of proof on the issue was with those attacking the trust. *Id.* at 11, 298 A.2d at 866. In the particular case, the Circuit Court had found from the evidence that the amendment *was* the product of undue influence, and we affirmed that determination. The only difference between *Knowles* and this case, apart from the evidence bearing on undue influence, was the fact that the trustee, throughout, was a bank, not the beneficiaries. It is a difference without significance, however, for, as we have said, the Clarkes in this case had no beneficial use of the property by virtue of their status as trustees.

The approach taken in *Knowles* is consistent with that used in other States. In *Mercado v. Trujillo*, 980 P.2d 824 (Wyo.1999), a case close in point, a revocable trust attacked as the product of undue influence was treated as a testamentary disposition and the burden of proof was placed on the contestant. In *In re Estate of Tisdale*, 171 Misc.2d 716, 655 N.Y.S.2d 809 (Sur.Ct.1997), the issue was whether a proceeding to set aside a revocable trust on grounds of undue influence and fraud was triable before a jury. Under New York law, a probate contest involving a Will was triable before a jury. Noting that revocable trusts are frequently used as substitutes for wills, often in order to avoid court supervision of estate administration, the court concluded that “[t]he substantial similarity between revocable trusts and wills (and the illusory concept of a revocable trust as a contract) mandates the conclusion that the nature of the relief **12 requested in a *47 proceeding to set aside a trust is the same as the nature of the relief requested in a proceeding to set aside a will.” *Id.* at 811. Compare *In re Estate of Aronoff*, 171 Misc.2d 172, 653 N.Y.S.2d 844 (Sur.Ct.1996), reaching an opposite conclusion

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with which the *Tisdale* court disagreed.

In *Ullman v. Garcia*, 645 So.2d 168 (Fla. Dist. Ct. App. 1994), the court held that the guardian of an incapacitated settlor could not challenge a revocable trust, on the ground of undue influence, during the settlor's lifetime. That result was dictated by a Florida statute, but, according to the court, "the reasoning behind this rule is that the devisee of a revocable trust does not have any control over ownership of the trust property until the settlor's death." *Id.* at 169. The retention of control exercisable through the power to revoke the trust distinguishes a revocable trust from other types of conveyances. The court noted that an *inter vivos* gift is complete when made—the donor retains no control over the property—but that, with a revocable trust, the devisee does not come into possession until the settlor's death, and even that interest is contingent upon the settlor not exercising the retained power to revoke. *See also Davison v. Feuerherd*, 391 So.2d 799 (Fla. Dist. Ct. App. 1980), holding that an action for tortious interference with an expected bequest, cognizable with respect to expected bequests by Will, would also lie with respect to a revocable trust. The court observed that "no real distinction exists between gifts of inheritance through a will and gifts through a revocable trust," that "[b]oth forms of giving create only an expectancy in the beneficiary and, in both forms, the donor has the privilege of changing his mind." *Id.* at 802.

In *Haynes v. First Nat'l State Bk.*, 87 N.J. 163, 432 A.2d 890 (1981) and *Raimi v. Furlong*, 702 So.2d 1273 (Fla. Dist. Ct. App. 1997), a Will and a revocable trust which, as here, were part of a testamentary scheme, were challenged on the ground of undue influence. The courts treated both instruments as testamentary and applied the same standard to both.

The plaintiffs cite a number of cases in which we treated gifts of interests in bank accounts as subject to the standards *48 applicable to *inter vivos* gifts, notwithstanding that some of those accounts were in trust form, as indicative of a view

that a gift in trust is nonetheless an *inter vivos* gift. *See, e.g., Owings v. Owings*, 233 Md. 357, 196 A.2d 908 (1964); *Hancock v. Savings Bank of Baltimore*, 199 Md. 163, 85 A.2d 770 (1952); *Benedict v. Warehime*, 187 Md. 150, 49 A.2d 444 (1946); *Reil v. Wempe*, 145 Md. 448, 125 A. 738 (1924); *see also Midler v. Shapiro*, 33 Md. App. 264, 364 A.2d 99 (1976). What plaintiffs overlook, however, is that a gift of a bank account, or a joint interest in a bank account, grants the donee immediate access to funds in the account. Indeed, the terms governing such accounts often allow the donee to deplete the funds in the account at any time, with or without the donor's consent. *See Kornmann v. Safe Deposit & Trust Co.*, 180 Md. 270, 274, 23 A.2d 692, 694 (1942) (standard language used in joint bank accounts in trust form—"subject to the order of either"—does not make the power of withdrawal joint, but, rather, the power to withdraw "exists completely in each beneficiary, with the power of separate and independent exercise" and either trustee may "appropriate to her own use all of the money on deposit in [the] account") (citations omitted). The trust at issue here, by contrast, did not confer an immediate benefit on anyone other than Ms. Upman. This especially holds true because the Clarkes never attempted to exercise any beneficial control over the trust to strip Ms. Upman of income and principal.

The trust here, even with the 1995 amendment, is clearly more akin to a testamentary instrument than to an *inter vivos* gift, and, for that reason, the Court of Special Appeals was correct in allocating the burden of proving undue influence to **13 the plaintiffs. We need not decide here whether, had the Clarkes actually disposed of the assets of the trust or exercised substantial control over them to the detriment of Ms. Upman, the result would be different. Whether an instrument of this kind is to be regarded as testamentary or *inter vivos* may depend on how it is, in fact, implemented.

[13] *49 We agree as well with the intermediate appellate court's conclusion that the Circuit

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Court's incorrect allocation of the burden of proof to the Clarkes does not require any remediation. There can be no doubt that, having found sufficient evidence to rebut the presumption it created of undue influence, it would necessarily have found insufficient evidence to show undue influence had it applied the appropriate burden and standard of proof. That evidence was more than adequate to show no abuse of the confidential relationship.

JUDGMENT OF COURT OF SPECIAL APPEALS AFFIRMED, WITH COSTS.

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Briefs and Other Related Documents (Back to top)

- 2000 WL 34400297 (Appellate Brief) Brief of Appellants (Feb. 4, 2000)
- 1999 WL 33882938 (Appellate Brief) Appellants' Brief and Record Extract (1999)
- 1999 WL 33882939 (Appellate Brief) Brief of Appellees (1999)

Judges and Attorneys(Back to top)

Judges | Attorneys

Judges

• **Arnold, Francis M. Hon.**
 State of Maryland Circuit Court, 5th Judicial Circuit
 Westminster, Maryland 21157
 Litigation History Report | Profiler

• **Bell, Hon. Robert M.**
 State of Maryland Court of Appeals
 Annapolis, Maryland 21401
 Litigation History Report | Judicial Reversal Report
 | Judicial Expert Challenge Report | Profiler

• **Cathell, Hon. Dale R.**

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• **Eldridge, Hon. John C.**
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• **Harrell, Hon. Glenn T. Jr.**
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• **Wilner, Hon. Alan M.**
 State of Maryland Court of Appeals
 Annapolis, Maryland 21401
 Litigation History Report | Judicial Motion Report |
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Attorneys

Attorneys for Petitioner
 • **Leahy, J. Brooks**
 Westminster, Maryland 21157
 Litigation History Report | Profiler

Attorneys for Respondent
 • **Roland, Howard A. Jr.**
 Baltimore, Maryland 21228
 Litigation History Report | Profiler

END OF DOCUMENT

DECLARATION OF SERVICE

On this 19th day of April 2013, I emailed and deposited into the United States Mail postage prepaid copies of the forgoing Appellant’s Reply Brief and Response to Cross Appeal to the following parties:

Philip A. Talmadge,
Talmadge & Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
Co-Counsel for Petitioner

Charles Kimbrough,
12811 NE 34th Place
Bellevue, WA 98005-1319
Co-Counsel for Petitioner

Madeline Gauthier,
Gauthier & Associates
11033 NE 24th St. #200
Bellevue, WA 98004
Co-Counsel for Petitioner

Kelly Snyder
Stanford University
Office of Planned Giving
Arrillaga Alumni Center
326 Galvez Streer
Stanford, CA 94305

Wesley W. Curtis
University of Illinois
258 Henry Administration
Building
506 S. Wright St.
Urbana, IL 61801

In addition the original of the Appellant’s Reply Brief and Response to Cross Appeal was forwarded for filing with the Washington State Court of Appeals, Division I, at 600 University St., Seattle, Washington 980101.

Karen Pay
Karen Pay, Legal Assistant
Oseran, Hahn, Spring, Straight & Watts, P.S.

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