ORIGINAL

IN THE SUPREME COURT OF OHIO

Hallie Schiavoni Appellee vs. Brian Roy Appellant	)))))))))	On Appeal from the Medina County Court of Appeals, Ninth Appellate District Court of Appeals Case No. 11CA0108-M 12-1906

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BRIAN ROY

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EXPLANATION OF WHY THIS CASE IS A CASE OF URGENT PUBLIC OR GREAT GENERAL INTEREST

This case concerns a parent's ability to give gifts to her children unequally during her lifetime and the requirements for such gifts to survive a review by a probate court. While many parents provide for their children equally in their estate planning, gifts to their children during their lifetime will often vary, due to the different circumstances of such children. With an increasingly population, such questions regarding gift-giving will surely arise more frequently. What does a parent need to do to insure that such gifts will not be nullified and their intent thwarted by a probate court which could wrongfully determine said gifts were unfair to other children or that the parent lacked capacity? Here, the parent signed documents regarding many of the gifts in question and had her own independent legal counsel assisting her with her wishes.

The probate court in this matter, however, found the decedent lacked capacity and was unduly influenced by her son, the Appellant. The probate court totally ignored evidence that the decedent was competent to make these gifts presented by the decedent's treating medical professionals, as well as by her legal counsel who met with her several times when such gifts and other transactions were made. The only evidence of undue influence presented was the decedent's naming of her children as equal beneficiaries to her will. This court should accept jurisdiction to offer guidance to the public as to what a parent needs to do to insure that gifts made during his or her lifetime will not be disturbed.

In addition, the law is unsettled as to a probate court's jurisdiction over annuities and when an award of attorney's fees is appropriate when no punitive damages have been awarded and not all of the beneficiaries of the estate have benefited equally by the action. This court should accept jurisdiction to provide clarity in these situations, which are sure to continue to arise.

STATEMENT OF THE CASE AND FACTS

Appellee Hallie Schiaovni sued her brother, Appellant Brian Roy, alleging that he had misappropriated assets that belonged to their mother, Jean Roy. The probate court found in favor of Appellee, ordered judgment in favor of Appellee and awarded attorney fees. Appellant appealed, arguing the probate court did not have jurisdiction over Ms. Roy's annuities, the court's findings were against the manifest weight of the evidence and the probate court incorrectly awarded Appellee attorney fees. The court of appeals affirmed.

Jean Ruth Roy was born in 1920 and died in 2008. She had two children, Appellee and Appellant. In her 2000 will she appointed Appellant as executor and Appellee as her successor executor and made the parties equal beneficiaries. Also in 2000, she executed a durable power of attorney ("DPOA") naming Appellant as her attorney-in-fact. Attorney Marcia Bullard became Ms. Roy's counsel in 2000 and prepared the will and the DPOA.

Appellant managed his mother's affairs after his father died. He did not make any gifts with the DPOA. All of the gifts to Appellant were at his mother's discretion—he never requested them. Appellant testified he visited his mother every other day and they often discussed her finances. They had quarterly reviews, monthly reviews, and annual reviews with his mother's counsel, Attorney Bullard.

Appellant testified that the Standard Life Annuity, which paid a monthly benefit, was purchased pursuant to Ms. Roy's direction but he used the DPOA to do this. He testified that he was the only beneficiary of the Standard Life Annuity by the direction of his mother. Ms. Roy reviewed and initialed the Standard Life Annuity contract.

Ms. Roy owned the Hartford Annuity (formerly the MetLife Annuity) in 2000, which was annuitized. At that time Appellant was the sole beneficiary, and then, when it

changed to the Hartford Annuity, he and Appellee were made equal beneficiaries. Appellant testified that he was with his mother when she changed the beneficiary designation for this annuity back to him only in February of 2007. He further testified it was his mother's idea to change the beneficiary of this annuity solely to him, because she was distraught about Appellee ongoing failures to visit, failure to pay back loans due her and failure to return certain savings bonds which Appellee wrongfully took from her.

Appellant made disbursements from his mother's accounts to himself for mortgage payments. Ms. Roy agreed with this course of action and signed one of the checks.

Appellant researched Veteran's Administration ("VA") benefits for his mother, as his father was a veteran. He found out and explained to his mother that an irrevocable trust was needed to qualify for the benefit. Ms. Roy signed the trust on February 20, 2008 (in which the parties were equal beneficiaries) to qualify for the benefits, with Attorneys Bullard and Linda House as witnesses. Ms. Roy had to spend down her accounts to qualify for the benefit. Appellant testified she directed him to pay down an account and to disburse the excess to himself and his wife, Debra Roy.

Attorney Bullard explained the gist of the irrevocable trust and Ms. Roy stated she knew who she was and that she knew she was signing the trust. Attorney Bullard testified Ms. Roy knew and understood the purpose of the trust agreement.

Ms. Roy also requested a codicil to remove Appellee as the alternative executor of her will. Appellant was not with his mother when she signed the codicil but Attorneys Bullard and House were. Appellant testified his mother wanted to remove Appellee completely from the will, but he had dissuaded her. When Attorney Bullard discussed the codicil with Ms. Roy, she told her Appellee didn't come to see her.

Attorney Bullard did not see any signs of changes to Ms. Roy's cognitive capacity from the first time she saw Ms. Roy until the last time she saw her. At their meetings, Ms. Roy would listen and have comments or questions. Attorney House remembers Jean Roy as being a nice, proper person who seemed to know what she was about. Ms. Roy mentioned to her that the trust was going to give her benefits. Ms. Roy told her that Appellee didn't help her much, which was a spontaneous comment.

Debra Roy, Appellant's wife and a registered nurse, saw Ms. Roy about once every two weeks from 2004 to 2008. She never observed Ms. Roy being unkempt. She remembers Ms. Roy giving her and Appellant check and Ms. Roy being visibly shaken after talking with Appellee on the phone. She and Appellant found out Appellee was taking things from Ms. Roy. In December 2006, Ms. Roy told Appellant that Appellee had been confrontational with her and that Appellee had not sent her a Christmas gift.

Dr. Barnett, a psychologist, assessed and treated Ms. Roy from July 2006 to November 2006. During her thirteen sessions with Ms. Roy, Dr. Barnett saw some mild cognitive decline, but there were days Ms. Roy was perfectly lucid and they had good conversations. Ms. Roy was primarily oriented to place, person, situation for the sessions. Ms. Roy was alert almost all of the time and understood what was said. She was able to have normal conversations with Ms. Roy. During one of their sessions, Ms. Roy was adamant that Dr. Barnett was not to talk to her daughter, just her son. Ms. Roy often talked about her son and his children and she would get happily excited when he was coming to visit. Dr. Barnett believed there were days she thought Ms. Roy could make good decisions. She further testified that Ms. Roy could have made the decision to change beneficiaries up until the last day she saw her, which was November 1, 2006.

Dr. Feldman, Appellee's expert, never met or observed Ms. Roy. He claimed Ms. Roy's orientation fluctuated at different times. He testified she had mild cognitive impairment in 2000, which progressed to become severe cognitive impairment by 2008 or earlier. Dr. Feldman claimed that Ms. Roy was lacking in capacity to make high-level or complex financial decisions the last three years of her life. He did not believe she had the intellectual capacity to meaningfully make judgments on the February 2007 change of beneficiary of the Hartford Annuity.

Dr. Biros, Appellant's expert, testified mild impairment does not mean problems making decisions. Changing a will or a beneficiary does not require higher cognitive abilities. Even with moderate and severe impairment, there are still periods of lucidity when people can make their desires and needs known to family members. He claimed you cannot make a determination regarding capacity from diagnosis alone of paranoia, depression, anxiety and/or dementia.

The trial court found that after July 2006, Ms. Roy lacked the mental acuity to comprehend the nature of the transactions, their effect on her estate and the manifestly unequal treatment these transactions had for her children. The only evidence offered to support this finding was Dr. Feldman's unsupported conclusions. The trial court further found that the mortgage payments, the designation of Appellant as beneficiaries of the annuities and the gifts made on July 16, 2008 were the products of undue influence.

In support of his position on these issues, the Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A probate court lacks subject matter over transfers concerning annuities, as annuities are not estate assets.

Proceedings in probate court are restricted to those actions permitted by statute and by the constitution since the probate court is a court of limited jurisdiction. *Corron v. Corron* (1988), 40 Ohio St.3d 75. A probate court lacks subject matter jurisdiction over transfers concerning assets that are not estate assets. See generally *In re Estate of Jaric* (Sept. 18, 2002), 7th Dist. No. 00 CA 243, 2002 WL 31116088. Return annuities have been almost universally found to be non-probate assets in Ohio as well as other jurisdictions. *Adams v. Adams* (July 14, 2003), 12 Dist. No. CA2002-09-087, 2003 WL 21638002; *Abernethy v. Abernathy* (Ala. 1992), 611 So.2d 1021; *Estate of Peterson* (Cal. 1994), 28 Cal.App.4th 1742, 34 Cal.Rptr.2d 449; *Bergheger v. Boyle* (Ill.1994), 258 Ill.App.3d 413, 196 Ill.Dec. 324, 629 N.E.2d 1168; and *Adkins v. Dick* (September 6, 2001), Michigan Appellate Case Nos. 297820 & 298945, 2011 WESTLAW 3903219, unreported. In order for an asset to be included in a probate estate, title to the asset must rest in the decedent upon his or her death. *Burns v. Daily, supra*, at 702-703. If title does not reside in the decedent upon death, however, but passed to a third party by an inter vivos transaction or gift, then such property may not be included as an estate asset. *Id.*

The court in *Adams v. Adams* (July 14, 2003), 12 Dist. No. CA2002-09-087, 2003 WL 21638002, found that return annuities are non-probate assets and are not included in a decedent's probate estate. The court reasoned such annuities are similar to life insurance policies and should be treated similarly for estate planning and probate purposes. *Id.* Ohio courts have held that proceeds payable to a named beneficiary in a life insurance policy are not included in a decedent's probate estate. See *In re Gatch's Estate* (1950), 153 Ohio St. 401, 403. Finally, the *Adams* court found that proceeds paid to the beneficiaries of an annuity were not to be included in the decedent's probate estate. *Adams, supra.*

In the case at bar, the testimony presented was that both annuities in question were return annuities. Accordingly, such annuities and any proceeds paid to the beneficiary of such annuities are not probate assets and the trial court lacked the subject matter jurisdiction to determine any claims regarding such annuities or such proceeds.

The court of appeals citied cases concerning the probate court's jurisdiction over fiduciaries and power of attorney, but these cases are distinguishable in that none of them concerned an annuity, with the exception of *Levy v. Thompson*, 2nd Dist., No. CA20641, 2006-Ohio-5312. In *Levy*, a per stirpes designation was placed on one of the annuities at issue by an insurance agent with a power of attorney. The *Levy* court found the probate court had jurisdiction based upon its plenary power at law and equity to fully dispose of any matter that is properly before it and its jurisdiction to hear and determine actions involving the misuse of a power of attorney.

First, the jurisdiction issue before the court in the *Levy* matter concerned the power of attorney in that case, not whether the annuity was a non-probate asset or whether the court had jurisdiction over such asset. The *Levy* court did not consider the issue of whether a probate court has jurisdiction over claims regarding non-probate assets, such as annuities, and, therefore, does not support the finding of the court of appeals on this issue. Second, Appellant did not use the DPOA to change the beneficiary designation on the Hartford Annuity—Ms. Roy signed such change request herself. On the Standard Life Annuity, Ms. Roy ratified and initialed the contract of the Standard Life Annuity, unlike the decedent in the *Levy* case. This case, therefore, does not involve the misuse of a power of attorney, and is therefore distinguishable from *Levy*.

Proposition of Law No. II: A judgment must be reversed and a new trial ordered when the trial court clearly lost its way and created a manifest miscarriage of justice.

A. The trial court's finding that Ms. Roy lacked capacity was against the manifest weight of the evidence.

The test to be used to determine mental capacity is the ability of the donor to understand the nature, scope and extent of the business she is about to transact. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164. Testamentary capacity exists when the testator has sufficient mind and memory to understand the nature of business he or she is engaged in; to comprehend generally the nature and extent of his or her property; to hold in his or her mind the names and identity of those who have natural claims upon his or her bounty; and, finally, to be able to appreciate his or her relation to members of his family. *Niemes v. Niemes* (1917), 97 Ohio St.145, paragraph four of the syllabus. The burden is upon the party claiming incompetence to prove the matter by clear and convincing evidence. *McCluskey v. Burroughs* (1982), 4 Ohio App.3d 182.

Evidence that a donor suffered from dementia or Alzheimer's disease at the time of the transaction at issue, standing alone, is insufficient to raise the fact issue as to a lack of testamentary capacity without some evidence that the disease rendered her incapable of understanding the effect of her actions. *See Neumeyer v. Estate of Penick* (2009), 180 Ohio App.3d 654, 661. Further, medical records that depict an elderly, ill, forgetful and confused person by themselves do not demonstrate a lack of capacity. *Woods v. Wright* (August 24, 2004), 5th Dist. No. 2003AP110086, 2004-Ohio-4547, 2004WL1925434, at *3.

The only testimony presented that Ms. Roy lacked the capacity to make gifts or to determine beneficiaries of an annuity was from Dr. Feldman, Appellee's expert. He testified Ms. Roy lacked the ability to make financial decisions the last three years of her life and that deciding who should be a beneficiary of an annuity after her death was a complex financial decision. This testimony is contradicted by other witnesses and other evidence admitted at trial.

First, Dr. Barnett, a psychologist and only medical professional to testify who personally treated Ms. Roy, had a very different view of Ms. Roy's capacity and ability to make decisions. She met with Ms. Roy thirteen times, from July 2006 until November 2006. During each visit with Ms. Roy, she evaluated her orientation as to time, place and person and her general mental health. Dr. Barnett testified Ms. Roy would have been able to make the decision as to who should be a beneficiary for an annuity she owned.

Dr. Biros came to the contrary conclusion of Dr. Feldman and testified the information presented in the medical records did not preclude the possibility that Ms. Roy had periods of time in which she would have had the capacity to make decisions about her assets.

The witnesses who were present when Ms. Roy made some of the gifts or decisions at issue testified Ms. Roy demonstrated her mental capacity at such times. Appellant testified his mother absolutely knew what actions he was taking as to her finances and that she approved such actions. Attorney Bullard testified she did not see any cognitive decline in Ms. Roy from 2000 through 2008. She indicated Ms. Roy was always familiar with what was going on with her finances and she would ask appropriate questions when her finances were discussed. When Attorney Bullard presented the VA trust to be signed by Ms. Roy in 2008, she explained the purpose of the trust to her and Ms. Roy indicated she understood such trust would allow her to receive benefits. Attorney House was also present when Ms. Roy signed the trust in 2008. She testified during all the times she had seen Ms. Roy, Ms. Roy always appeared to be alert and to know what she was doing. Finally, Debra Roy also testified Ms. Roy would graciously gift money she had received for Appellant's and her mortgage payments.

Dr. Feldman's pronouncement that deciding who should be a beneficiary to an annuity was a complex financial decision is suspect. The decision on who gets the proceeds from an annuity

after one dies is not a complex decision and is no different than deciding who should be the beneficiary of one's will. Therefore, Ms. Roy only needed to understand the nature, scope and extent of the gifts she was making. Dr. Feldman did not offer testimony as to whether Ms. Roy would be able to make this specific type of determination during the last few years of her life. Accordingly, Dr. Feldman's testimony is not competent, credible evidence of Ms. Roy's lack of capacity for the gifts and transactions at issue in this matter.

When all of the evidence presented is looked at in its entirety, it is overwhelmingly clear that Dr. Feldman's testimony regarding Ms. Roy's lack of capacity is without adequate medical foundation. His decision as to what may constitute a complex financial decision is not a medical determination and thus his unqualified opinion stands alone and is unsupported by the evidence. Given the ample testimony and other evidence from witnesses who actually observed Ms. Roy that supports the conclusion Ms. Roy had the capacity to make the decisions in question, it is clear that the trial court lost its way in finding that Appellee had proven by clear and convincing evidence that Ms. Roy lacked capacity to complete the transactions in question.

B. The trial court's finding the Appellant exerted undue influence over his mother was against the manifest weight of the evidence.

The elements of undue influence are: (1) a susceptible testator; (2) another's opportunity to exert improper influence; (3) the fact of improper influence exerted or attempted; and (4) the result showing the effect of such influence. *See West v. Henry* (1962), 173 Ohio St. 498, 500.

When analyzing whether the influence brought to bear on the susceptible party was undue, the focus must be on whether the influence was reasonable under the circumstances. *Lah, supra,* at 171. Undue influence is defined as "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and she is induced to do or

forbear an act which she would not do or would do if left to act freely. *Ross v. Barker* (1995), 101 Ohio App.3d. 611, citing *Marich v. Knox Cty. Dept. of Human Serv.* (1989), 45 Ohio St.3d. 163. A party seeking rescission of a transaction for undue influence has the ultimate burden of proof by clear and convincing evidence. *Willis v. Baker* (1906), 75 Ohio St. 291, paragraph one of the syllabus. The presumption of undue advantage by reason of a confidential relationship is rebutted when it is shown that a gift was given in obvious accord with previous statements and conduct of the donor as to her intentions, even when the donor was old and sick. *See Quitter v. Nemes* (Dec. 24, 1975), 9th Dist. No. 7819, 1975 WL 180830, *1, *2.

The court in *Hamilton v. Hector* (1997), 117 Ohio App.3d 816, 821 found there was no undue influence when the evidence showed the decedent intended to leave her estate to her son, when the son took care of her, rather than her daughter, with whom she had a history of problems, despite a history of equal gift-giving to both children. The court in *Witte v. Witte* (1969), 22 Ohio Misc. 37, at a paragraph three of the syllabus, held undue influence upon a donor is not shown merely by proof the gifts arose from gratitude, affection, or esteem felt toward the donee.

As in the *Hamilton* case, Appellant devotedly attended to his mother and she had a history of problems with Appellee. According to Dr. Barnett, while Ms. Roy mentioned Appellant and his family often, she only mentioned Appellee once, and that was to tell Dr. Barnett not to contact her. Further, Ms. Roy expressed to both Attorney Bullard and Attorney House that Appellee did not come to visit her or take care of her. According to Appellant, Ms. Roy and her daughter had a confrontation in December 2006 and Appellee failed to send a Christmas gift that year. Further, evidence was presented that Ms. Roy was aware Appellee had failed to pay back loans to her and had taken savings bonds from her without her knowledge or permission. In addition, Ms. Roy removed Appellee as the successor executor of her will, though her original intention

was to disinherit Appellee entirely. Finally, there was evidence presented that Appellee was taking things from Ms. Roy. All of these facts demonstrate Ms. Roy had difficulties with her daughter, and understandably would not have wanted to give her more of her assets.

In regard to the beneficiary designation of the Hartford Annuity, Appellant was the sole beneficiary of such annuity after his father died, so removing Appellee as a beneficiary was simply returning to Ms. Roy's original intent for the annuity. Further, Ms. Roy signed the paperwork to change the beneficiary. Only a month later, in March 2007, Ms. Roy removed Appellee as her successor executor, which further demonstrates Ms. Roy's unhappiness towards her during this time period. In regard to the beneficiary designation of Standard Life Annuity, the evidence shows that Ms. Roy directed her son to designate himself as the sole beneficiary of such annuity and ratified her son's acts by initialing the purchase contract for same.

The only evidence Appellee offered of undue influence regarding the beneficiary designations of the annuities was the fact her mother had named the parties as equal beneficiaries in her will. This is not sufficient evidence to support a finding of undue influence by clear and convincing evidence, especially when ample evidence was presented that explained Ms. Roy's actions of naming Appellant as a beneficiary to the annuities and not Appellee. Accordingly, the trial court's finding that Ms. Roy's designation of Appellant as the sole beneficiary of the annuities was the produce of undue influence was against the manifest weight of the evidence.

The court of appeals affirmed the trial court's judgment that the gifts of mortgage payments and the 2008 cash gifts to Appellant and Debra Roy were the product of undue influence. While Appellant wrote checks to his mortgage company out of his mother's account, Ms. Roy signed at least one of the checks for his mortgage. According to Appellant and Debra Roy, Ms. Roy would often gift specific checks that she received from other sources to Appellant or Debra Roy.

Appellant learned and explained to his mother that a trust was needed to qualify for VA benefits, but she had to spend down some accounts to qualify for the benefit. Appellant testified that Ms. Roy directed him to do so and disburse the excess of $24,000.00 to himself and his wife in 2008.

The record is replete with examples of Ms. Roy's gratitude and affection towards her son and her animosity towards her daughter, which show Ms. Roy's intention and motivations for these gifts. The trial court's finding that Appellant exerted undue influence regarding these gifts is offensive, against public policy and against the manifest weight of the evidence.

Proposition of Law No. 111: Attorney fees may only be awarded as an element of compensatory damages when there is a punitive damage award.

Attorney fees may only be awarded as an element of compensatory damages where there is a punitive damage award. *Zappitelli v. Miller* (2007), 114 Ohio St.3d 102; *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178, 1831; *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 41; *Parrish v. Machlan* (1997) 131 Ohio App.3d 291, 297, citing *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St.3d 241, 245; *Gay v. Ludwig* (April 30, 2004), 1st Dist. Nos. C-030604, C-030607, 2004 WL 911324 at *4; *Roberts v. Mason* (1859), 10 Ohio St. 278, paragraphs one and two of the syllabus; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio At.3d 552, 558; and *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657. Because the trial court did not award punitive damages against Appellant, there is absolutely no legal basis to award Appellee attorneys' fees against Appellant personally.

The court of appeals, however, citied to several Ohio Supreme Court decisions decided after *Zappitelli, supra,* which stated attorney fees may be recoverable in actions involving bad faith. In none of these cases, however, did the Ohio Supreme Court actually affirm an award of

attorney fees based upon a finding of bad faith. Accordingly, it appears that the Ohio Supreme Court has not had opportunity to reconcile its holding in *Zappitelli,* i.e., that an award of punitive damages is required before attorney's fees can be awarded, with the proposition that all that is required for a fee award is a finding of bad faith. Indeed, the *Zappitelli* decision would not have any bearing if all that is needed to award fees is a finding of "bad faith", as the evidence required for "bad faith" is less stringent that that needed to award punitive damages.

Proposition of Law No. 1V: Attorney fees are not recoverable from the estate when not all of the beneficiaries received a greater sum than they would have received without the lawyer's services.

Appellee claimed her attorneys' fees should be paid by the Estate based upon the "common fund" doctrine and cites *In re Estate of Colosimo* (1957), 104 Ohio App. 342, *In re Keller* (1989), 65 Ohio App.3d 650 and *National City Bank v. Depew* (Dec. 31, 1997), 9th Dist. Nos. 18372, 18436, 1997 WL 823968. In *Colosimo*, the court denied compensating the claimant from the estate when parties were serving particular interests and not the estate as a whole. *Id.* citing *Kirkbride v. Hickok* (1951), 155 Ohio St. 165. Here, Appellee was clearly serving her own interests and not the interest of the Estate as a whole. In *Keller* the court found that in order to award fees, the legal services had to benefit all of the beneficiaries of the estate. *Id.* at 656. Appellant did not benefit from Appellee's prosecution of her claims. In *Depew*, the court found that fees were not recoverable when only one of the beneficiaries of the trust stood to gain from his action. Because Appellee was the only beneficiary of the Estate to gain from her claims against Appellant, she is clearly not entitled to an award of fees from the Estate.

The court of appeals, however, cited *In re Estate of Fugate*, 86 Ohio App.3d 293, 299 (1993), for the proposition that the test to determine whether the estate has benefited is whether all of the beneficiaries of the estate, in that capacity, have become entitled to receive a greater sum than

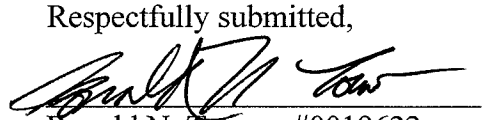
they would have received without the lawyer's services. The court of appeals determined that, as a result of Appellee's actions, Appellant would receive more from the Estate that he would have otherwise, even though he was the source of these extra funds. The court of appeals argued that since the test was what Appellant received in his capacity as beneficiary, it was proper to ignore the other consequences of Appellee's actions to Appellant.

None of the cases cited by the court of appeals, however, concerned a situation where one beneficiary had to pay money back into the estate and then had the estate award attorney fees to the party that caused them to have to pay such funds into the estate. Allowing such a result to stand would pervert one of the central policies behind the "common fund" doctrine that those that are only serving their particular interests and not the interests of the estate as a whole, should not benefit by having fees paid from the estate. As Appellant did not benefit from, and was penalized by, paying money into the Estate because of Appellee's action, his share of the Estate should not be further diminished by allowing the Estate to pay Appellee's attorney fees.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellant requests this court respectfully accept jurisdiction in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Support was served upon the following by U.S. Mail this 7th day of November, 2012 to Patricia J. Schraff, Schraff & King Co., L.P.A., 2802 S.O.M. Center Road, Suite 200, Willoughby, Ohio 44094 and Mary Jo Morse, 273 Main Street, Suite 200, Wadsworth Ohio 44281.

Ronald N. Towne #0019622
Ann L. Wehener, #0063216

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
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FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

HALLIE SCHIAVONI

Appellee

v.

BRIAN A. ROY, et al.

Appellant

C.A. No. 11CA0108-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 2010 02 CA 00006

DECISION AND JOURNAL ENTRY

Dated: September 28, 2012

DICKINSON, Judge.

INTRODUCTION

{¶1} Hallie Schiavoni sued her brother, Brian Roy, for conversion, breach of fiduciary duty, undue influence, unjust enrichment, and fraud, alleging that he had misappropriated assets that belonged to their mother, Jean Roy. Mr. Roy, who Ms. Schiavoni also sued in his capacity as executor of Ms. Roy's will, counterclaimed, alleging that Ms. Schiavoni had converted some of their mother's bonds and failed to repay loans to her. Following a trial to the bench, the probate court found in favor of Ms. Schiavoni and ordered Mr. Roy to distribute the misused assets to Ms. Schiavoni or Ms. Roy's estate. It also awarded Ms. Schiavoni prejudgment interest and attorney's fees. Mr. Roy has appealed, arguing that the probate court did not have jurisdiction over Ms. Roy's annuities, that the court's findings were not supported by the evidence and were against the manifest weight of the evidence, and that the court incorrectly awarded Ms. Schiavoni prejudgment interest and attorney fees. We affirm because the probate

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court had jurisdiction over the annuities, its decision was supported by sufficient evidence and was not against the manifest weight of the evidence, and it correctly awarded Ms. Schiavoni her prejudgment interest and attorney fees.

BACKGROUND

{¶2} After her husband died in 2000, Ms. Roy executed a will that appointed Mr. Roy as her executor and Ms. Schiavoni as her successor executor. The will also divided her estate equally between her two children. On the same day, she executed a durable power of attorney that named Mr. Roy as her attorney-in-fact. The will and power-of-attorney documents were prepared by Marcia Bullard, a lawyer who once worked with Mr. Roy's wife.

{¶3} Over the course of the next few years, Ms. Roy developed dementia. She subsequently moved into an assisted-living facility that was near Mr. Roy's house. Mr. Roy and his wife visited Ms. Roy regularly, and Mr. Roy began handling her financial affairs. Ms. Schiavoni testified that she also visited her mother regularly at the facility when she was in town, but said that she spent almost half the year living out-of-state. Ms. Roy died in 2008.

JURISDICTION OVER ANNUITIES

{¶4} Mr. Roy's first assignment of error is that the probate court lacked jurisdiction over two annuities that Ms. Roy had at the time of her death. One of the annuities was from the Hartford Life and Annuity Insurance Company. Ms. Roy purchased it in 2000 and initially named her children as co-beneficiaries. In 2007, however, she designated Mr. Roy as the sole beneficiary. The other annuity was from the Standard Life Insurance Company of Indiana. Mr. Roy bought it for Ms. Roy, allegedly at her direction, in February 2006. Mr. Roy was the sole beneficiary.

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{¶5} In its decision, the probate court determined that Ms. Roy lacked the mental capacity to change the beneficiary of the Hartford annuity. It also determined that the change-of-beneficiary designation was presumptively the product of undue influence and that Mr. Roy had failed to rebut the presumption by credible evidence. Regarding the Standard Life annuity, it determined that Mr. Roy had failed to rebut the presumption that the purchase was not the result of undue influence. It ordered Mr. Roy to pay half of the Hartford-annuity death benefit to Ms. Schiavoni and to pay the Standard-Life-annuity death benefit to Ms. Roy's estate.

{¶6} Mr. Roy has argued that the probate court did not have jurisdiction to determine any issues regarding the annuities because they were not probate assets. Under Section 2101.24(A)(1)(c) of the Ohio Revised Code, "the probate court has exclusive jurisdiction . . . [t]o direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates." That provision vests the probate court with "full power to determine what property is lawfully included in an inventory as assets." *In re Estate of Boone*, 190 Ohio App. 3d 799, 2010-Ohio-6269, ¶ 36 (7th Dist.). The probate court also "has jurisdiction to hear and determine actions involving the misuse of a power of attorney." *Estate v. Niemi v. Niemi*, 11th Dist. No. 2008-T-0082, 2009-Ohio-2090, ¶ 36 (citing R.C. 2101.24(B)(1)(b)); *see also* Section 2101.24(A)(1)(m) (providing that "the probate court has exclusive jurisdiction . . . [t]o direct and control the conduct of fiduciaries . . . .").

{¶7} Because Ms. Roy obtained the Standard Life annuity through Mr. Roy's exercise of the power of attorney, the probate court had jurisdiction to determine whether obtaining the annuity was a proper exercise of his authority. R.C. 2101.24(B)(1)(b). *See Levy v. Thompson*, 2d Dist. No. 20641, 2006-Ohio-5312, ¶ 20 (concluding that sister's alleged misuse of power of attorney provided probate court with jurisdiction to determine whether designation on annuity

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should be voided). Similarly, because Mr. Roy completed most of the Hartford annuity change-of-beneficiary form and he was with Ms. Roy when she signed it, the probate court had jurisdiction to determine whether he exercised undue influence over her regarding who she named as her beneficiary. *See* R.C. 2101.24(B)(1)(b); *In re Scott*, 111 Ohio App. 3d 273, 276 (6th Dist. 1996) ("The holder of a power of attorney has a fiduciary relationship with his or her principal. Such a relationship is 'one in which special confidence and trust is reposed in the integrity and fidelity of another . . . by virtue of this special trust.'") (quoting *Stone v. Davis*, 66 Ohio St. 2d 74, 78 (1981)). Accordingly, we conclude that the probate court had jurisdiction to determine whether the purchase of the Standard Life annuity and the change of beneficiary of the Hartford annuity were valid.

{¶8} Having determined that the annuity-beneficiary designations were not valid, the probate court had authority to decide how the annuities' death benefits should be distributed. R.C. 2101.24(C) ("The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code."). It, therefore, had authority to award Ms. Schiavoni half of the Hartford annuity and to order Mr. Roy to pay the amount he had received from the Standard Life annuity to Ms. Roy's estate. Mr. Roy's first assignment of error is overruled.

LACK OF CAPACITY

{¶9} Mr. Roy's second assignment of error is that the probate court's lack-of-mental-capacity finding was not supported by sufficient evidence and was against the manifest weight of the evidence. The probate court found that, after July 2006, Ms. Roy "was incompetent and incapable of managing her affairs and legally unable to give her property to anyone or any

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institution." "[She] lacked the mental acuity to comprehend the nature of the transactions, their effect on her estate and the manifestly unequal treatment these transactions had for her children."

{¶10} Regarding civil cases, the Ohio Supreme Court has written that, "[if] applying a sufficiency-of-the-evidence standard, a court of appeals should affirm a trial court [if] 'the evidence is legally sufficient to support the [judgment] as a matter of law.'" *Bryan–Wollman v. Domonko*, 115 Ohio St. 3d 291, 2007-Ohio-4918, ¶ 3 (quoting *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997)). When reviewing the manifest weight of the evidence in a civil case, this Court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Eastley v. Volkman*, 132 Ohio St. 3d 328, 2012–Ohio–2179, ¶ 20 (quoting *Tewarson v. Simon*, 141 Ohio App. 3d 103, 115 (9th Dist. 2001)).

{¶11} "The test to be used to determine mental capacity is the ability of the principal to understand the nature, scope, and extent of the business she is about to transact." *Cook v. Reising*, 181 Ohio App. 3d 546, 2009-Ohio-1131, ¶ 17 (9th Dist.). "The burden is upon the party claiming incompetence to prove the matter by clear and convincing evidence." *Modie v. Andrews*, 9th Dist. No. 19543, 2000 WL 1026682, *4 (July 26, 2000).

{¶12} Dr. David Feldman, a psychiatrist whose focus is in geriatric psychiatry, testified that he had reviewed Ms. Roy's medical records to develop an opinion on whether she had the capacity to manage her affairs. He noted that, although the records he received only went back to 2000, they indicated that she had pre-existing depression and anxiety problems. The records showed that she then developed an Alzheimer's-type dementia syndrome as well as behavior problems, agitation, and paranoia, all of which contributed to a "substantial" cognitive decline

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between 2000 and 2008. In 2000, her cognitive decline was mild, with only some short-term memory problems. By the time Ms. Roy fractured her shoulder in 2003, however, she "was very confused," which was partially caused by her progressive dementia.

{¶13} Dr. Feldman testified that, after 2003, Ms. Roy continued to have a "pretty ongoing level of cognitive decline," noting that the medical personnel who saw her generally documented her short-term memory impairment and orientation problems. In 2005, for instance, she told nurses that she thought someone was trying to murder her and, in 2006, she scored 18 out of 30 on a Mini-Mental Status Examination. Dr. Feldman explained that a score below 24 is considered "demented" and one under 20 is "in the moderate range of dementia." He also noted that when a psychologist saw her on a regular basis in 2006, Ms. Roy was consistently disoriented regarding time. He opined that between 2003 and 2006 she "was probably in the moderate cognitively impaired range." In addition, he noted that her anxiety and depression would have also impaired her mental capacity. Dr. Feldman concluded that Ms. Roy lacked the "capacity to make high-level or complex financial decisions . . . in the last three years of her life[.]"

{¶14} Dr. Canice Barnett, a psychologist who attempted to treat Ms. Roy in 2006, testified about her sessions with Ms. Roy. According to Dr. Barnett, Ms. Roy had generalized anxiety disorder and dementia with depression. She explained that Ms. Roy was very anxious and worried and sometimes refused to allow Dr. Barnett into her room, requiring Dr. Barnett to conduct their sessions from the hallway. Dr. Barnett said that Ms. Roy sometimes thought that people were stealing from her or that things had gone missing, even though the items were still in her room. Dr. Barnett also said that Ms. Roy's memory was moderately impaired, that she would talk about the same thing again and again, that she would move from one topic to another

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even if there was only a loose association, and that she was very reluctant to leave her room. On one occasion, Dr. Barnett observed Ms. Roy become obsessed with a group of flies outside, concerned that they were going to enter her apartment and land in her hair, even though the window was closed. On another occasion, Ms. Roy was not dressed when Dr. Barnett arrived, even though it was around the time for one of her favorite activities at the center. Dr. Barnett said that she stopped attempting to treat Ms. Roy after 13 sessions because Ms. Roy would get upset by the fact that she could not remember why Dr. Barnett was there and the sessions were not having any therapeutic effect.

{¶15} The probate court found that Ms. Roy suffered from anxiety and depression during her lifetime and that her conditions became more pronounced after the death of her husband in 2000. By 2003, she was diagnosed with Alzheimer's disease. It found that, when Ms. Roy entered assisted-living, she had had episodes of acute paranoia and a general decline in her mental ability. Relying on Dr. Feldman's and Dr. Barnett's testimony, it found that, after July 2006, she "was incompetent and incapable of managing her affairs and legally unable to give her property to anyone or any institution." It also found that she "lacked the mental acuity to comprehend the nature of the transactions, their effect on her estate and the manifestly unequal treatment these transactions had for her children."

{¶16} Mr. Roy has argued that the probate court incorrectly gave weight to Dr. Feldman's opinion because Dr. Feldman never met Ms. Roy. He has noted that Dr. Barnett testified that, despite Ms. Roy's difficulties, she would have been capable of making a decision to change the beneficiary of a life insurance policy throughout the time that she attempted to treat her. He has also noted that Dr. Kenneth Biros, a doctor whose practice is devoted entirely to extended-care patients, testified that someone with only a mild cognitive impairment would not

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lack the ability to make decisions about the disposition of her assets. Dr. Biros also explained that, even if someone has moderate or severe cognitive impairment, she could still have periods of lucidity in which she could communicate her desires to others. Mr. Roy has also noted that Ms. Roy's lawyer, Ms. Bullard, testified that she did not observe any signs of impairment when she reviewed a trust document with Ms. Roy in 2008. Mr. Roy has also noted that assessments by the staff at Ms. Roy's assisted living facility in 2007 and 2008 indicated that, although Ms. Roy had periods of confusion, she was alert and oriented to self and family, understood others and communicated well, and was still independent in dressing, bathing, mobility, vision, transferring, and eating. Mr. Roy has further argued that there was no evidence that Ms. Roy was impaired at the time she executed the documents at issue in this case.

{¶17} The level of mental capacity that Ms. Roy needed to make decisions about her finances depended on the nature of the transaction. *Cook v. Reising*, 181 Ohio App. 3d 546, 2009-Ohio-1131, ¶ 17 (9th Dist.). Regarding the annuities, Mr. Roy has argued that, even though they could be considered a fairly complex financial instrument, the ultimate decision of who received the death benefit was a fairly straight forward question, similar to whom should be the beneficiary of one's will. The Ohio Supreme Court has held that "[t]estamentary capacity exists when the testator has sufficient mind and memory: First, to understand the nature of the business in which he is engaged; second, to comprehend generally the nature and extent of his property; third, to hold in his mind the names and identity of those who have natural claims upon his bounty; fourth, to be able to appreciate his relation to the members of his family." *Niemes v. Niemes*, 97 Ohio St. 145, paragraph four of the syllabus (1917). Mr. Roy has also argued that the various monetary gifts that Ms. Roy made to him did not require a high degree of mental capacity.

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{¶18} Ms. Schiavoni testified that, until Ms. Roy developed dementia, she had always treated her son and daughter equally when it came to financial distributions. Her testimony is supported by the beneficiary selections that Ms. Roy made before she developed dementia. Dr. Barnett testified that, although Ms. Roy would often talk about her family, she usually only talked about Mr. Roy and his wife. She said that Ms. Roy mentioned Ms. Schiavoni on only one occasion, that it was "very minimal," and that it was only to inform her that Ms. Roy would not allow the doctor to talk to Ms. Schiavoni about their sessions. Regarding grandchildren, Dr. Barnett said that Ms. Roy only ever mentioned Mr. Roy's children and never mentioned Ms. Schiavoni's children.

{¶19} Mr. Roy argued that Ms. Roy had legitimate reasons for treating him more favorably than Ms. Schiavoni, alleging that Ms. Schiavoni obtained loans from Ms. Roy that she did not repay, that she misappropriated some of Ms. Roy's bonds and that, at one point, she changed the mailing address for the Hartford annuity to her home address. The probate court, however, found him not credible.

{¶20} Upon review of the record, we conclude that Ms. Schiavoni presented sufficient evidence from which the probate court could determine that there was clear and convincing evidence that Ms. Schiavoni did not have a sufficient degree of mental capacity to change the beneficiary of the Hartford annuity, authorize Mr. Roy to obtain the Standard Life annuity and open a joint bank account with right of survivorship, or appreciate the quantity, size, and frequency of monetary gifts that she was making to Mr. Roy. The court's conclusion is supported by the testimony of Dr. Feldman and Dr. Barnett, their records, and the reports generated by the assisted-living facility. We also conclude that the probate court did not lose its way when it found that there was clear and convincing evidence that Ms. Roy failed to

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appreciate her relation to all of the members of her family at the time she changed the beneficiary of the Hartford annuity, told Mr. Roy to obtain the Standard Life annuity, told Mr. Roy to open the checking account, and made numerous monetary gifts to Mr. Roy and his family. Mr. Roy's second assignment of error is overruled.

UNDUE INFLUENCE

{¶21} Mr. Roy's third assignment of error is that the probate court's judgment regarding who should receive the Hartford and Standard Life annuity death benefits was not supported by sufficient evidence and was against the manifest weight of the evidence. In particular, he has argued that the court incorrectly concluded that the beneficiary designations were the product of undue influence and a breach of his fiduciary duty to Ms. Roy.

{¶22} "The essential elements of undue influence are: (1) a susceptible testator, (2) another's opportunity to exert influence on the testator, (3) the fact of improper influence exerted or attempted, and (4) a result showing the effect of such influence." *Kryder v. Kryder*, 9th Dist. 25665, 2012-Ohio-2280, ¶ 30. "[If] a fiduciary or confidential relationship exists between the donor and the donee," however, "the transfer is regarded with suspicion that the donee may have brought undue influence to bear upon the donor." *Modie v. Andrews*, 9th Dist. No. 19543, 2000 WL 1026682, *4 (July 26, 2000). "In such a case, a presumption of undue influence arises, and the donee bears the burden going forward and showing, by a preponderance of the evidence, that the gift was free from undue influence." *Id.* The probate court found that Mr. Roy, who was Ms. Roy's fiduciary, failed to rebut the presumption that he unduly influenced his mother.

{¶23} Mr. Roy has argued that it was reasonable for his mother to give her assets to him because he devoutly attended to her and she had a history of problems with Ms. Schiavoni. He has argued that, in addition to not paying back loans and taking savings bonds from Ms. Roy,

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Ms. Schiavoni did not visit Ms. Roy at the assisted-living facility, had a confrontation with her in December 2006, and did not give her a Christmas present in 2006. He has also argued that Ms. Schiavoni took things from Ms. Roy's room at the facility. Regarding the Hartford annuity, Mr. Roy has argued that, originally, he was the sole beneficiary of a joint annuity that his parents had before his father died. When Ms. Roy converted it after her husband's death, she named both of her children as beneficiaries. Her later decision to name him as the sole beneficiary, therefore, was just going back to the original designation.

{¶24} As we have previously noted, the probate court did not find Mr. Roy's testimony about the unpaid loans and stolen bonds credible. Ms. Schiavoni testified that she never failed to give her mother a Christmas present, which the court found credible. Mr. Roy's claim that Ms. Schiavoni did not visit her mother is inconsistent with his assertion that she had a fight with Ms. Roy in December 2006 and stole things from Ms. Roy's room. Regarding the history of the Hartford annuity, Mr. Roy did not present any written evidence that the funds for the Hartford annuity came from a prior annuity.

{¶25} It is undisputed that Mr. Roy obtained the Standard Life annuity for Ms. Roy using his authority as her attorney-in-fact and that he helped her complete the change of beneficiary form for the Hartford annuity. Upon review of the record, we conclude that the probate court's decision that he failed to rebut the presumption of undue influence regarding those transactions was supported by sufficient evidence and was not against the manifest weight of the evidence. Mr. Roy's third assignment of error is overruled.

MORTGAGE PAYMENTS AND CASH GIFTS

{¶26} Mr. Roy's fourth assignment of error is that the probate court's judgment regarding Ms. Roy's cash gifts to Mr. Roy, including paying his mortgage, was not supported by

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sufficient evidence and was against the manifest weight of the evidence. As with the annuity-beneficiary designations, the court found that the purported gifts were the product of undue influence.

{¶27} According to Mr. Roy, when he went through Ms. Roy's mail with her, if there were any checks that were payable to her, she would tell him that she wanted him to have the money instead. He, therefore, would deposit the sum in their joint checking account then write a check to his home mortgage company. Mr. Roy also said that, after his mother moved into the assisted-living facility, he learned that she could qualify for additional Veterans benefits. To be eligible for the program, she needed to dispose of some of her assets, and he did that by gifting $24,000 to himself and his wife. Mr. Roy further said that Ms. Roy insisted on paying for his gas when he took her on trips away from the facility and that she paid to have his car washed because she enjoyed the experience of going through an automated car wash.

{¶28} The probate court found that Mr. Roy failed to rebut the presumption that the gifts he made to himself from Ms. Roy's assets were not the product of undue influence. It found that, although he may have originally meant to act as a dutiful son, over time he began "pilfering" from his mother's estate. It noted that the mortgage payments, car expenses, and other cash gifts were not the only assets that Mr. Roy did not use for Ms. Roy's benefit. Specifically, it found that he had used his mother's funds to make donations to his favorite charities and that he had given hundreds of dollars of her money to a Lutheran ministry, even though she was not Lutheran. He also purchased all of her dietary supplements at full price from a company that he owned. The court further noted that there was a provision in Ms. Roy's power-of-attorney document that limited his ability to make gifts to himself to $5000 annually.

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{¶29} In support of his argument, Mr. Roy has pointed out that Ms. Roy signed one of the checks that he wrote to his mortgage company. That was the only document that he presented, however, to support his claim that the sums of money he received from Ms. Roy were gifts. While the check was from 2005, a time before the time by which the court found that Ms. Roy was incompetent, that fact does not conclusively establish that the payment was a gift, that the other mortgage payments were gifts, or that any of the other financial benefits Mr. Roy received were gifts. We conclude that the probate court's conclusion that Mr. Roy failed to rebut the presumption of undue influence was supported by sufficient evidence and was not against the manifest weight of the evidence. Mr. Roy's fourth assignment of error is overruled.

ATTORNEY FEES

{¶30} Mr. Roy's fifth assignment of error is that the probate court incorrectly awarded Ms. Schiavoni her attorney fees. He has argued that the court incorrectly ordered him to pay her fees because it did not award punitive damages. He has also argued that the court incorrectly authorized Ms. Roy's estate to reimburse Ms. Schiavoni for her attorney fees.

{¶31} "Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009–Ohio–306, ¶ 7 (quoting *Nottingdale Homeowners' Ass'n Inc. v. Darby*, 33 Ohio St. 3d 32, 33 (1987)). "However, there are exceptions to this rule. Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees . . . or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant[.]" *Id.* They may also be awarded as an element of compensatory damages if punitive damages are awarded. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 558 (1994).

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{¶32} The probate court found that Mr. Roy should pay Ms. Schiavoni's attorney fees because he had acted in bad faith. Mr. Roy has not contested the court's finding. Rather, he has argued that, in *Zappitelli v. Miller*, 114 Ohio St. 3d 102, 2007-Ohio-3251, the Ohio Supreme Court held that attorney fees may only be recovered as an element of compensatory damages if punitive damages have been awarded. *Id.* ¶ 6. *Zappitelli*, however, did not involve an allegation of bad faith. Moreover, since *Zappitelli*, the Ohio Supreme Court has continued to recognize that attorney fees may be recovered in actions involving bad faith. *State ex rel. Waiters v. Szabo*, 129 Ohio St. 3d 122, 2011-Ohio-3088, ¶ 15; *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009–Ohio–306, ¶ 7; *Reagans v. MountainHigh Coachworks Inc.*, 117 Ohio St. 3d 22, 2008-Ohio-271, ¶ 36; *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton County Bd. of Elections*, 115 Ohio St. 3d 437, 2007-Ohio-5379, ¶ 55. The Supreme Court has not held that an award of punitive damages is a prerequisite to an award of attorney fees when the award is based on the bad-faith conduct of the defendant. Accordingly, we are not persuaded to reconsider our precedent on this issue. *E.g.*, *Technical Constr. Specialties Inc. v. New Era Builders Inc.*, 9th Dist. No. 25776, 2012-Ohio-1328, ¶ 26; *Mauger v. Inner Circle Condo. Owners Ass'n*, 9th Dist. No. 10CA0046-M, 2011-Ohio-1533, ¶ 23; *LEH Props. Inc. v. Pheasant Run Ass'n*, 9th Dist. No. 10CA009780, 2011-Ohio-516, ¶ 22.

{¶33} Regarding whether the court correctly authorized the estate to reimburse Ms. Schiavoni for her attorney fees, Section 2113.36 of the Ohio Revised Code provides that, "[i]f an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration." Ohio courts have held that this language authorizes the probate court to order an estate to pay an attorney employed by an heir or beneficiary of the estate if the attorney's services benefited the

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estate. *In re Keller*, 65 Ohio App. 3d 650, 656 (8th Dist. 1989); *see In re Estate of Brown*, 83 Ohio App. 3d 540, 542 (12th Dist. 1992). Known as the "common fund theory" of recovery, it is "based on 'the equitable doctrine that where one has created, augmented, or preserved a fund he may be compensated therefrom.'" *In re Estate of Fugate*, 86 Ohio App. 3d 293, 298 (1993); *Brown*, 83 Ohio App. 3d at 542 (quoting *In re Colosimo*, 104 Ohio App. 342, 342-43 (2d Dist. 1957)). The test to determine whether the estate has benefited is whether all of the beneficiaries of the estate, in that capacity, have become entitled to receive a greater sum than they would have received without the lawyer's services. *Fugate*, 86 Ohio App. 3d at 299. This Court has applied the common fund doctrine in multiple cases. *Nat'l City Bank NE v. Depew*, 9th Dist. Nos. 18372, 18436, 1997 WL 823968, *7 (Dec. 31, 1997); *Pedler v. Pedler*, 9th Dist. No. 9812, 1981 WL 3937, *1-2 (Apr. 15, 1981).

{¶34} Mr. Roy has argued that the common fund doctrine does not apply to the facts of this case because Ms. Schiavoni was primarily serving her own interests when she sued to recover the assets he converted. In its judgment, the probate court ordered Mr. Roy to return approximately $135,500 to the estate. Under the terms of Ms. Roy's will, her estate was to be divided between Mr. Roy and Ms. Schiavoni equally. Although Mr. Roy is the source of the recovered assets, in his capacity as a beneficiary of Ms. Roy's will, both he and Ms. Schiavoni will receive more than they would have if Ms. Schiavoni had not brought this action. The court, therefore, correctly determined that Ms. Schiavoni could recover her attorney fees from the estate. Mr. Roy's fifth assignment of error is overruled.

PREJUDGMENT INTEREST

{¶35} Mr. Roy's sixth assignment of error is that the probate court incorrectly awarded Ms. Schiavoni prejudgment interest. He has argued that her motion for prejudgment interest was

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untimely under Section 1343.03(C) of the Ohio Revised Code. Although there is no time limit in the text of Section 1343.03(C), the Ohio Supreme Court has held that a motion for prejudgment interest under that section "must be made to the trial court following the verdict or decision in the case and in no event later than fourteen days beyond the entry of judgment." *Cotterman v. Cleveland Elec. Illuminating Co.*, 34 Ohio St. 3d 48, paragraph one of the syllabus (1987). The probate court initially announced its decision on April 13, 2011. Ms. Schiavoni did not move for prejudgment interest until May 5, 2011.

{¶36} Mr. Roy's argument is without merit because the probate court's initial decision was not the court's judgment. "A judgment is 'the final determination of the rights of the parties in action.'" *Countrywide Home Loans Inc. v. Yankovich*, 9th Dist. No. 24768, 2010-Ohio-4651, ¶ 3 (quoting *Hoffman v. Knollman*, 135 Ohio St. 170, 175 (1939)); *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, 150 (1976). Although the court decided most of the issues in this case in its April 13, 2011, journal entry, it failed to dispose of Ms. Schiavoni's surcharge and fraud claims. The court did not dispose of those claims until October 31, 2011. Accordingly, Ms. Schiavoni's motion, which was filed in May 2011, was timely under *Cotterman*. *See Coon v. Technical Constr. Specialties Inc.*, 9th Dist. No. 24542, 2010-Ohio-417, ¶ 23 (concluding that a court may consider a motion for prejudgment interest that was filed before judgment was entered). Mr. Roy's sixth assignment of error is overruled.

CONCLUSION

{¶37} The probate court had jurisdiction to determine the validity of the change of beneficiary designation for the Hartford annuity and whether Mr. Roy properly obtained the Standard Life annuity. Its decision regarding whether Mr. Roy converted Ms. Roy's assets is supported by sufficient evidence and is not against the manifest weight of the evidence. The

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court also correctly awarded Ms. Schiavoni prejudgment interest and her attorney fees. The judgment of the Medina County Probate Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, P. J.
BELFANCE, J.
CONCUR.

APPEARANCES:

RONALD N. TOWNE, TIMOTHY HANNA, and ANN L. WEHENER, Attorneys at Law, for Appellant.

PATRICIA J. SCHRAFF and JOHN P. THOMAS, Attorneys at Law, for Appellee.

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MEDINA COUNTY OHIO
PROBATE COURT
FILED
JUDGE JOHN J LOHN

2011 OCT 31 P 3: 20

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MEDINA COUNTY, OHIO

HALLIE SCHIAVONI,	)	CASE NO: 2010 02 CA 0006
Plaintiff	)	JUDGE JOHN J. LOHN
-vs-	)	**JUDGMENT ENTRY**
BRIAN R. ROY	)	
Defendant	)	

In accordance with the August 25, 2011 Journal Entry of the Ninth District Court of Appeals of Ohio in Case No. 11CA081-M, this Court hereby finds in favor of the Defendant Brian Roy on Plaintiff Hallie Schiavoni's surcharge claim and fraud claim. This Court further finds that Plaintiff has provided an account since this Court's July 12, 2011 Judgment Entry and Plaintiffs accounting claim is now moot.

Further, this Court finds in favor of Plaintiff, and against Defendant, as to her claims for conversion, breach of fiduciary duty, unjust enrichment, and undue influence, and the findings of fact and conclusions of law in support of which are set forth in this Court's July 12, 2011 Judgment Entry.

Therefore, the Court enters judgment in favor of the Plaintiff Hallie Schiavoni against Defendant Brian Roy on the claims of conversion, breach of fiduciary duty, unjust enrichment, and undue influence, and orders Defendant Brian Roy to pay an award of money damages in favor of Plaintiff in the amount of $70,000.00, and orders the Defendant Brian Roy to pay an award of money damages in favor of the Estate of Jean Ruth Roy in the amount of $135,572.22 based upon the findings in this Court's July 12, 2011 Judgment Entry.

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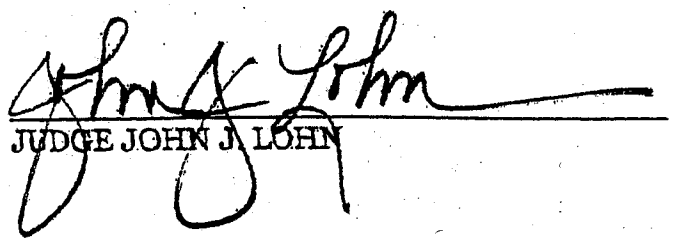
Plaintiff shall also be awarded prejudgment interest in the amount of $35,105.12 as of November 1, 2011, which interest shall continue to accrue at the amount of 4.0% per annum, as set forth in this Court's July 12, 2011 Judgment Entry and as further calculated in Exhibit "A", which is attached to this Entry and incorporated by reference herein.

As set forth in the July 12, 2011 Judgment Entry, Plaintiff shall also be awarded her attorneys' fees and costs against both Defendant and the Estate of Jean Ruth Roy in the amount of $74,655.01.

Finally, this Court also incorporates by reference its July 12,2011 Judgment Entry into this Judgment Entry, and states that this Judgment Entry, therefore, resolves all claims against all parties and there is no just reason for delay.

SO ORDERED.



JUDGE JOHN J. LOHN

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	Remedy	Amt	Rate	AccuralDate	Judg. Date	Yrs.	Prejudgment Interest Amt.*Rate*Yrs.
Mortgage Payments	Pay Estate	$37,876.00	4.0%	8/1/2006	11/1/2011	2.89	$7,961.22
Credit Card Transactions	Pay Estate	$17,736.43	4.0%	6/19/2006	11/1/2011	5.25	$3,811.63
Huntington Bank	Pay Estate	$3,000.00	4.0%	6/29/2005	11/1/2011	5.37	$761.42
Standard Life Annuity	Pay Estate	$44,364.01	4.0%	2/6/2006	11/1/2011	6.35	$10,180.63
Gifts to Self and Wife	Pay Estate	$24,000.00	4.0%	6/16/2008	11/1/2011	5.74	$3,242.96
First Merit Account	Pay Estate	$8,595.78	4.0%	12/4/2008	11/1/2011	2.91	$1,000.41
Hartford Annuity	Pay Plaintiff	$70,000.00	4.0%	12/4/2008	11/1/2011	2.91	$8,146.85

Attorney Fees Pay Plaintiff and Estate $74,655.01

Ex. A.

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A-20

MEDINA COUNTY OHI
PROBATE COURT
FILED
JUDGE JOHN J LOHN

2011 JUL 12 AM 11:

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO
PROBATE DIVISION

Hallie Schiavoni

Plaintiff

vs.

Brian Roy

Defendant/Third-Party Plaintiff

vs.

Venetia Lynne Stadler

Third-Party Defendant

CASE NO. 2010 02 CA 00006

JUDGE JOHN J. LOHN

JUDGMENT ENTRY

This matter came on for hearing on December 20 through 24, 2010 and January 10, 2011 for a bench trial on a complaint, counterclaim and third-party complaint. This Court, having considered evidence presented at trial, finds Defendant. Brian R. Roy liable for conversion, breach of fiduciary duty, fraud, undue influence, unjust enrichment and failure to account for assets belonging to the Estate of Jean Ruth Roy, and for money damages in favor of Plaintiff, Hallie Schiavoni. The Court further denies all claims asserted by the Defendant against Plaintiff and Third-Party Defendant Venetia Stadler.

This matter also came on for hearing on May 18, 2011 for Plaintiff's Motion for Attorneys' Fees. This Court, having considered the evidence presented at the hearing, finds in favor of Plaintiff, and against Defendant personally, in full, for Plaintiff's attorneys' fees.

This matter also came on for hearing on June 28, 2011 for Plaintiff's and the estate's Joint Motion for Prejudgment Interest. This Court, having considered the evidence presented at the hearing, finds in favor of Plaintiff and the estate, and against Defendant, for prejudgment interest.

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Jean Ruth Roy was born on April 16, 1920. She died December 12, 2008. She had two children: Brian Roy and Hallie Schiavoni. In her 2000 will she appointed her son Brian Roy as executor of her estate and her daughter Hallie Schiavoni as successor executor. The estate was to be divided equally between the two siblings. In 2008 she created a trust naming Mr. Roy as trustee. Upon her death, the trust assets would pass to Mr. Roy and Mrs. Schiavoni equally.

Also in 2000 Mrs. Roy executed a durable power of attorney (DPOA) naming Mr. Roy her attorney-in-fact. A number of Mr. Roy's self-dealing transactions under the authority of the power of attorney are the subject of this lawsuit. He named himself the remainder beneficiary of Mrs. Roy's annuity. He named his wife beneficiary of Mrs. Roy' ss life insurance. He used his mother's money to pay his mortgage, make donations to charities with which he was affiliated, give gifts to his wife and authorize numerous payments from his mother's credit card for personal expenses. Mr. Roy kept detailed records of all these transactions, none of which he shared with his sister or his mother's attorney. He testified his mother had the mental capacity to direct the transfers. He said he did nothing improper to induce her to make gifts to him, and—specifically regarding his mother paying his mortgage—he encouraged her *not* to do that. He admitted his mother never wrote any notes to document these transactions.

From October 2000 until her death in December 2008, the Decedent and Mr. Roy had a special confidential relationship. Mr. Roy was the Decedent's primary family representative; he and his wife regularly visited her at the Inn of Medina. He was a caregiver, a bookkeeper and financial advisor. Mr. Roy went so far as to inform three health care providers (Lakewood Hospital, Bradley Bay Health Center and the Inn of Medina) that he and his wife were his mother's *only* family contacts and that under no circumstances were they to contact Mrs. Schiavoni or share medical information about his mother with her.

Additionally, Mrs. Roy and Mr. Roy had a fiduciary relationship as principal and agent arising by virtue of the DPOA.

Mr. Roy testified that in his relationship with his mother, he "wore many hats." His mother relied upon him, trusted him, confided in him and needed him to conduct her personal business.

In 2008 the Decedent created the Jean Ruth Roy Irrevocable Trust. The trust provided that upon Mrs. Roy's death, the trust assets were to be distributed equally to Mr. Roy and to Mrs. Schiavoni. She also made a codicil to her will removing Mrs. Schiavoni as alternate executor and

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naming instead Mr. Roy's wife. The codicil did not change the beneficiary designations: both Mr. Roy and Mrs. Schiavoni would share in their mother's estate equally.

The Decedent suffered from anxiety and depression during her lifetime. Her condition became pronounced and more complicated after the death of her husband in 2000. By 2003 she was diagnosed with Alzheimer's disease. The medical records indicate she had episodes of acute paranoia and a general decline in mental abilities when she became a resident of the Inn of Medina in January 2005. Based upon the testimony of Dr. Barnett, Dr. Feldman and other medical personnel and the documentary evidence duly admitted during the trial, the Court concludes that after July 2006, Mrs. Roy was incompetent and incapable of managing her affairs and legally unable to give her property to anyone or any institution. After July 2006 Mrs. Roy lacked the mental acuity to comprehend the nature of the transactions, their effect on her estate and the manifestly unequal treatment these transactions had for her children.

Transactions made after July 2006 —effectuated by the Defendant himself or persons he selected—defeated, overbore and contravened his mother's desire to give her property equally to her two children. The Court doubts whether Mrs. Roy was aware or understood what Mr. Roy was doing with her property.

Something must be said about the Defendant's credibility. Mr. Roy may have originally meant to act as a dutiful son after his father died. Perhaps at first he may have understood that as confidant and caregiver for his mother he was required to act with principle and fidelity. But things changed.

While maintaining an air of rectitude, the Defendant began pilfering from his mother's estate. A few examples demonstrate his greed: 1) he used his mother's money to pay his mortgage; 2) he used his mother's money to make donations to his favorite cultural, religious and social charities; 3) he used his mother's credit card to pay for car washes and gasoline fill-ups for his cars, 4) he gave hundreds of dollars of his mother's money (she was a Methodist) to Lutheran Outdoor Ministries, a charity for which he served as a director, and; 5) he used his mother's money to buy dietary supplements from Airboryn Enterprises—a company he and his wife own.

How can you let your elderly mother pay your mortgage month after month, year after year? How can you let your home-bound mother pay for your gasoline and carwashes? How can the president of a company charge his own mother for products his company sells?

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Half of Mr. Roy's credibility problem is his dubious claim his mother gave all these gifts to him. The other half of his problem is he accepted them.

There is no documentary evidence his mother knew about these self-rewarding transactions or that she had a discrete, rational understanding of what her son was up to. Indeed Mr. Roy had such a fetish for documentation he made his mother sign a copy of a letter to his sister in five different places on four different dates. But he never had her sign even one of the checks for his mortgage or his charities or the "gifts" to him and his wife.

Mrs. Roy's attorney, who met periodically with Mrs. Roy and her son to go over her finances, never knew about Mr. Roy's self-dealing. He never disclosed the "gifts" to Attorney Bullard.[1]

Mr. Roy is a prim, fastidious man. He knows his Bible. He tells his sister that she should read Exodus 20 (The Ten Commandments). At the trial, he declared—germane to nothing—his sister is an alcoholic. In a December 5, 2003 letter to his mother, he said,

> "Hallie does not have a good understanding of financial investment vehicles ... You and Dad sent me to college for a business education. Financial investing was part of the curriculum."

Mrs. Schiavoni did not need a "good understanding of financial investment vehicles" to justify her suspicions about her brother. She knew he was controlling their mother. She knew he couldn't be trusted. She didn't need an undergraduate degree in business to know her mother was being taken advantage of. All she needed to know about was her brother's character.

She was right. Within two years after he wrote the 2003 letter, he was gifting himself car washes and mortgage payments, designating himself a remainder beneficiary of an annuity and creating survivorship "vehicles" that bypassed probate, avoided his mother's trust and paid off handsomely upon his mother's death.

Mr. Roy was both attorney-in-fact and a caregiver for his mother.

Where a confidential or fiduciary relationship exists between a donor and donee, a gift is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. *Studniewski v. Krzyzanowski* (1989), 65 Ohio App. 3d 628, 632,584 N.E.2d 1297. In such cases a presumption of undue influence arises and the burden of going forward with evidence shifts to the donee to show that the conduct was free of undue influence or fraud and that the donor acted voluntarily and with a full understanding of the act and its consequences. The donee may rebut

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[1] Apparently this wasn't important enough to include on the agenda Mr. Roy prepared for the annual financial meetings.

the presumption of undue influence by a preponderance of the evidence. *In re Guurdianship of Emma Marshall* (Butler Co. Ct of Appls. Case Nos. *CA96-11-239, CA96-11-244),* 1998 Ohio App. LEXIS 2275.

A general, durable power of attorney does not authorize an attorney-in-fact to transfer the principal's property to himself or to others, unless the power of attorney explicitly confers this power. An attorney-in-fact may not make gratuitous transfers of the principal's assets unless the power of attorney from which the authority is derived expressly and unambiguously grants the authority to do so, *In re Estate of Buckner* 2009 Ohio 2447.

Among other powers, the DPOA granted Mr. Roy limited powers as to gift-giving:

> (24) To make gifts or consent to split gifts (under Internal Revenue Code 5.2513) to any one of either my spouse and lineal descendants, including my attorney-in-fact, for the purpose of continuing my established annual gift program in any amount, with respect to persons other than my spouse, not exceeding $10,000 annually with respect to any one of them: provided, however, that gifts to ray attorney-in-fact or his or her creditors shall not exceed $5,000 annually, and further provided that gifts to my lineal descendants shall be in per stirpital shares

The DPOA required equal amounts of gifts to Mrs. Roy's lineal descendants: Mrs. Schiavoni and her descendants and Mr. Roy and his descendants. In no event could these gifts exceed $5,000 per year for Mr. Roy or his creditors. The DPOA made no provision for unilateral gifts to Mr. Roy's spouse or to churches, theatrical organizations or automobile clubs.

Finding of Undue Influence

The elements of undue influence include a susceptible testator, another's opportunity to exert it, the fact of improper influence exerted or attempted and the result showing the effect of such influence. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 65-66, 567 N.E.2d 1291, quoting *West v. Henry* (1962), 173 Ohio St. 498, 50i, 20 0.0.2d 119,1S4 N.E.2d 200. Each one of these elements has been proved by clear and convincing evidence.

Proceeds from the sale of condominium

In 2001 Mrs. Roy deeded her condominium to herself, Mrs. Schiavoni and Mr. Roy. In 2007 the condominium was sold and all the proceeds were deposited into a bank account belonging to Mrs. Roy. The Plaintiff argues the Defendant fraudulently induced her to forego her share of the proceeds from the sale of the condominium. The Defendant's explanation that the condominium was titled in the three names "for tax and estate planning purposes" is plausible. There is no evidence of fraud regarding the distribution of the proceeds of the condominium sale. The condominium was

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owned by Mrs. Roy. There is no evidence she intended to make a gift to her son and daughter at the time the deed was put into her and her children's names. There is no evidence she intended to gift a portion of the proceeds of the sale to her children when it was sold.

Judgment shall be rendered in favor of the Defendant and against the Plaintiff as to this transaction.

Creation of Joint and Survivor Checking Account

Funds in a joint and survivorship account belong during the lifetime of all parties to the parties in proportion to their contributions, *Estate of Averxett v. Averiett*, 1993 Ohio App. LEXIS 4048 (Ohio Ct. App., Summit County Aug. 18, 1993). Mrs. Roy contributed all the funds in these accounts.

Mr. Roy established a joint checking account (with right of survivorship) in his and his mother's name using the DPOA. The account was funded from solely his mother's assets. The creation of the account is presumptively the product of undue influence. There is no credible evidence that Mrs. Roy intended to gift the balance in the account to her son when she died. The presumption of undue influence was unrebutted.

As of the date of Mrs. Roy's death, there was $8,595.78 in the account. Judgment shall be rendered in favor of the Plaintiff. The amount of $8,595.78 shall be returned to the estate.

Payment of Defendant's Mortgage

From 2005 to 2008 the Defendant paid his own mortgage using his mother's funds from the Huntington Bank and FirstMerit checking accounts, for a total of $37,876. The Defendant stated these payments were authorized by his mother as gifts to him. The DPOA restricted him from gifting more than $5,000 per year to himself or his creditors. In addition, the DPOA required him to give equal amounts to his sister under the *per stirpes* clause of the gifting provision. The unilateral payments to himself were beyond the scope of his powers as attorney-in-fact and presumptively the product of undue influence. Additionally, the transactions are presumptively the product of undue influence based upon Mr. Roy's relationship as caretaker, next friend and confident. The Defendant failed to rebut the presumption by credible evidence.

Judgment shall be rendered in favor of the plaintiff. The amount of $37,876 shall be returned to the estate.

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Credit Card Transactions

From 2005 to 2008 the Defendant applied for and used a Visa Credit card in his mother's name and paid expenses with it from his mother's funds. The self-dealing payments were presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence. For transactions occurring after July 2006, Mrs. Roy lacked the capacity to authorize, ratify or waive objections to those transactions.

Judgment shall be rendered in favor of the Plaintiff. The amount of $17,736.43 shall be ordered returned to the estate.

$3,000 gift from Huntington Bank Account

On June 29, 2005 the Defendant gifted himself $3,000 from the Decedent's Huntington Bank Account. This transfer is presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence.

Judgment shall be rendered in favor of the Plaintiff. The amount of $3,000 shall be returned to the estate.

Standard Life Annuity

Defendant used the DPOA to purchase a Standard Life Annuity with his mother's funds in 2006. This establishment of himself as beneficiary is presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence. The Defendant received $44,364.01 after his mother died.

Judgment shall be rendered in favor of the Plaintiff and the amount of $44,364.01 shall be returned to the estate.

Gifts of $9,500 and $5,000 to himself and $9,500 to his wife

On June 16, 2008 the Defendant gifted $9,500 to himself, $9,500 to his wife and wrote a check to himself for another $5,000. Mrs. Roy lacked the donative capacity to authorize, ratify or waive any objection to these gifts. Further, these transactions were beyond the scope of his powers under the DPOA and. by failing to make any reciprocal gifts to his sister, contravened his authority to make gifts. These transactions were presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence.

Judgment shall be rendered in favor of the Plaintiff. The amount of $24,000 shall be returned to the estate.

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Hartford life Annuity

Mrs. Roy purchased a Hartford Life Annuity in 2000 naming the Plaintiff and the Defendant as equal beneficiaries. In February 2007 the Defendant caused his mother to sign a change in beneficiary designation to make himself the sole beneficiary of the annuity.

In 2007 Mrs. Roy lacked the mental capacity to change the beneficiary designation. Moreover the change of beneficiary designation was presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence. The annuity was valued at $140,000 at the time of Mrs. Roy's death.

The change of beneficiary form is invalid and the sum of $70,000 is awarded to Plaintiff as her half-share of the annuity.

Jean Ruth Roy Revocable Trust

In March 2008 Mrs. Roy established the Jean Ruth Roy Irrevocable Trust with her son as trustee. The Defendant testified the total value of the trust was approximately $180,000 as of the death of his mother. The trust terms state that upon Mrs. Roy's death, the trust shall terminate and the trust shall be distributed one-half each to Mr. Roy and Mrs. Schiavoni. Mr. Roy testified the trust has about $180,000 in funds, but he has yet to provide any accounting or distribution to Mrs. Schiavoni.

Mrs. Roy lacked the capacity to establish the trust in 2007. The trust is void and all assets of the trust shall be returned to the estate. Mr. Roy failed to provide a full accounting to Mrs. Schiavoni of the supposed trust since its inception. He shall provide the accounting in seven days and restore all trust assets to the estate.

Defendant's Counterclaim

Count One of the counterclaim alleges the Decedent and Mrs. Schiavoni had a contract wherein Mrs. Roy loaned Mrs. Schiavoni $2,000 and Mrs. Schiavoni agreed to repay the $2,000. The counterclaim alleged that Mrs. Schiavoni had not repaid $1,300 of the loan.

Count Two of the complaint realleged the allegations in Count One and made a claim against Mrs. Schiavoni for unjust enrichment, based upon her retention of the $1,300.

The Defendant failed to prove Count One and Count Two by a preponderance of the evidence. The Plaintiff proved that any outstanding loans from Mrs. Roy to Mrs. Schiavoni were settled during the Decedent's lifetime either by repayment or by the Decedent gifting any outstanding repayment amounts to Mrs. Schiavoni by way of express waiver of the right to repayment.

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Count Three of the counterclaim alleged that Mrs. Schiavoni removed from her mother some Series HH U.S. savings bonds in the amount of $27,000 and converted the bonds to her own use.

Count Four of the counterclaim realleged the allegations in Count Three of the counterclaim and made a claim against Mrs. Schiavoni for trespass to chattel relating to the Series HH Bonds.

The Defendant failed to prove by a preponderance of the evidence a breach of contract, conversion or trespass to chattel. The evidence showed Mrs. Schiavoni received HH bonds from her father in the late 1990s. They were put in the names of Mrs. Roy and Mrs. Schiavoni. In April 2006 Mrs. Roy delivered to Mrs. Schiavoni $27,000 in series EE savings bonds as a gift. She made an identical gift to her son.

At the time he filed his application for authority to administer the estate; Mr. Roy did not list claims the estate had against Mrs. Schiavoni. It appears this meritless claim against Mrs. Schiavoni was meant to retaliate against her for filing her complaint.

The Counterclaim is dismissed.

Defendant's Third-Party Complaint

The Third-Party Complaint is directed at Venetia Stadler.

Count One alleged Venetia Stadler borrowed $7,000 from the Decedent and failed to repay the entire amount and owes the estate the sum of $4,635, plus interest.

Count Two alleged Venetia Stadler's retention of $4,635 is unjust.

Count Three alleged that the Decedent loaned $5,815.46 to Venetia Stadler and that she failed to repay the entire loan. Defendant demanded $3,880.46 the remaining balance on the loan, plus interest for breach of contract.

Count Four realleged all the allegations in the previous counts and alleged the Decedent paid Baldwin Wallace College $5,815.46 for Venetia Stadler's college expenses and that Venetia Stadler promised to pay the Decedent back. She failed to repay all the money to the Decedent and was unjustly enriched in the amount of $3,880.46, plus interest.

There was no evidence any of contract between Venetia Stadler and the Decedent. There was no credible evidence she was unjustly enriched.

At the time he filed his application for authority to administer the estate; Mr. Roy did not list claims the estate had against Mrs. Stadler. It appears this meritless claim against Mrs. Stadler was meant to retaliate against her mother Mrs. Schiavoni for filing her complaint.

The Third-Party Complaint is dismissed.

Plaintiff's Motion for Attorneys' Fees

Plaintiff requested that the Court award payment of her attorneys' fees and costs against the estate and against Defendant personally. The estate administrator with will annexed, Attorney Mary Jo Morse, consented to the payment of Plaintiff's attorneys' fees from the estate. This Court awards Plaintiff's attorneys' fees as requested against both the estate and Defendant, personally.

Findings of Fact

On May 18, 2011, the Court held a hearing on Plaintiff's request for attorneys' fees. At the hearing, Plaintiff provided testimony from her attorney Patricia J. Schraff, Esq. of Schraff & King Co., LPA, as to the reasonableness of Plaintiff's attorneys' fees and costs. Attorney Schraff testified that Plaintiff's cost of litigation in pursuing this action individually and on behalf of the estate amounted to $74,655.01, which consisted of $65,890.01 in Schraff & King attorneys' fees and costs; $7,865.00 for Dr. Feldman's professional services; and $900.00 for Dr. Biros' professional services.

Attorney Schraff testified that the nature of the professional relationship was to represent Plaintiff with regard to the Decedent's Estate. Attorney Schraff further testified that an extraordinary amount of time and labor was required because Defendant never provided an account of his actions as attorney-in-fact or as trustee for the Decedent. Moreover, the discovery process was extensive and included document production, subpoenas, and numerous depositions.

Attorney Schraff testified that there was great novelty and difficulty with the case in that Defendant managed the Decedent's assets for nearly ten years and involved both probate and non-probate assets. Further, the hostility between the parties ran deep as indicated by Defendant's removal as Executor.

Attorney Schraff testified as to her experience and that of Schraff & King with regard to estate planning, estate administration, and probate litigation. Attorney Schraff testified that the attorneys at her Firm have many years of experience practicing in the probate court and regularly litigate cases similar to this case.

Attorney Schraff further testified that her Firm's acceptance of this case precluded other employment due to the intensive amount of hours necessary to prepare for and to litigate the case and because Schraff & King has a very active practice.

Attorney Schraff testified as to the amount involved in dispute included approximately $140,000.00 in non-probate assets, the retrieval of $120,000.00 in probate assets for the Estate, and approximately $180,000.00 in the Trust.

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Attorney Schraff testified that the Judgment Entry reflected the results obtained for Plaintiff.

Attorney Schraff testified that time limitations were imposed by the circumstances in the case in that Schraff & King had only two years from the Decedent's date of death to unravel almost a decade of numerous transactions and conversion by the Defendant.

Plaintiff further provided an itemization setting forth the legal services that Schraff & King performed during the two plus years it represented Plaintiff. The Schraff & King fee bill reflected a total of 417.40 hours spent by the attorneys at Schraff & King at an hourly rate ranging from $140.00 per hour to $225.00 per hour depending upon the experience of each attorney involved. Total Schraff & King attorneys' fees and costs amounted to $65,890.01.

Plaintiff provided evidence that services performed by her medical expert, Dr. Feldman, which included his expert report, case review, and testimony at trial amounted to $7,865.00. Plaintiff provided evidence that the cost of deposing Defendant's expert witness, Dr. Biros, was $900.00.

In total, Plaintiff provided evidence that her attorneys' fees and costs of litigation amounted to $74,655.01.

Defendant provided no testimony at the hearing.

The estate administrator with will annexed, Mary Jo Morse, Esq., consented to the payment of Plaintiff's attorneys' fees from the estate for services rendered.

Conclusions of Law

The reasonableness of attorney fees is guided by the factors listed in Rule 1.5 of the Ohio Rules of Professional Conduct. Time and labor by the attorney is not the only factor to be considered by the court. *In re Estate of Wybarg*, 84 Ohio App.3d 1, 616 N.E. 2d 245 (Ohio App. 6 Dist. 1992). The evidence presented clearly indicated that Plaintiff's counsel satisfied all elements of Rule 1.5 of the Ohio Rules of Professional Conduct, and that the attorneys' fees incurred by Plaintiff were reasonable.

It is well settled that attorney's fees are recoverable when there is a specific statutory provision allowing such or where the losing party has acted in bad faith, *State ex rel. Durkin v. Ungaro* (1988), 39 Ohio St. 3d 191, 193, 529 N.E.2d 1268. Attorneys' fees may also be awarded against a defendant that has been found liable of conversion or when bad faith is shown. *Bench Billboard Co. v. Columbus*, 63 Ohio App.3d 421, 579 N.E.2d 240 (Ohio App. 10 Dist. 1989); *Fulks v. Fulks*, 95 Ohio App. 515, 121 N.E.2d 180 (Ohio App. 4 Dist. 1953). Because the Defendant acted

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in bad faith, committed fraud, and converted assets, the Court finds him personally liable for Plaintiff's attorneys' fees.

The probate court may also authorize the payment of reasonable fees from an estate to an attorney employed by an heir or beneficiary where the attorneys' services were rendered to the benefit of the estate. *In re Keller*, 65 Ohio App.3d 650, 584 N.E.2d 1312 (Ohio App. 8 Dist. 1989). The probate court may allow attorney fees to a beneficiary where the beneficiary is reasonably justified in bringing suit and where the litigation provides a benefit. *National City Bank v. Depew*, 1997 Ohio App. LEXIS 5975 (Ohio Ct. App., Summit County Dec. 31, 1997); citing *Pedler v. Pedler*, 1981 Ohio App. LEXIS 13741 (Ohio Ct. App. Summit County Apr. 15, 1981). Compensation is based on "the equitable doctrine that where one has created, augmented or preserved a fund, he may be compensated therefrom" *In re Colosimo*, 104 Ohio App.342, 149 N.E.2d 31 (Ohio App. 2 Dist. 1957). It is indisputable that Plaintiff rendered a benefit to the estate by pursuing and recovering assets that were misappropriated, converted, and carried away by Defendant, and returned to the estate.

Based on the foregoing facts and applicable law, Plaintiff met her burden of proof and provided evidence sufficient to support her request for attorneys' fees. It is further the opinion of this Court that Plaintiff established by clear and convincing evidence that these services benefitted the estate.

Judgment on attorneys' fees shall be rendered in favor of the Plaintiff. The Court finds Defendant personally liable for Plaintiff's attorneys' fees and costs in the amount of $74,655.01. The Court authorizes the estate to pay the award of Plaintiff's attorneys' fees and costs assessed against Defendant personally.

Plaintiff's and the Estate's Joint Motion for Prejudgment Interest

Plaintiff and the estate filed a joint motion for prejudgment interest due to Defendant's conversion, fraud, and failure to make a good faith effort to settle the case. Prejudgment interest as requested by Plaintiff and the estate is granted.

Findings of Fact

On June 28, 2011, the Court held a hearing on the Joint Motion for Prejudgment Interest. At the hearing, Plaintiff presented the following evidence:

- On February 16, 2010, Plaintiff issued a demand letter to Defendant requesting $148,603.34 to settle the case and resolve all claims with Defendant.

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- On December 2, 2010, Defendant offered $19,500.00 to settle.
- On December 9, 2010, Plaintiff counter demanded $150,000.00. The increased demand resulted from a more thorough understanding of transactions involved and expenditures made by Defendant following additional discovery.
- Defendant did not make any further offer of settlement during the pendency of the action.

Conclusions of Law

The general rule in a complaint for conversion is that the plaintiff is awarded interest from the time of conversion. *Wozniak* v. *Wozniak*, 90 Ohio App. 3d 400 (Ohio App. 9 Dist. 1993); citing *Lyle v. Durham*, 16 Ohio App. 3d 1, 3, 473 N.E.2d 1216, 1219 (Ohio App. 1 Dist.1984). The date of calculation for an award of interest is within the sound discretion of the trial court. *Id.; Cincinnati Ins. Co. v. First Natl. Bank* (1980), 63 Ohio St.2d 220, 226, 17 O.O.3d 136, 139-140, 407 N.E.2d 519, 523.

Prejudgment interest may also be awarded under Ohio Revised Code §1343.03, which provides in pertinent part:

> (A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code.
>
> * * *
>
> (C)(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

Ohio Rev. Code Ann. § 1343.03(C) indicates that interest on a judgment based on tortious conduct may be computed from the date the cause of action accrued to the date of payment.

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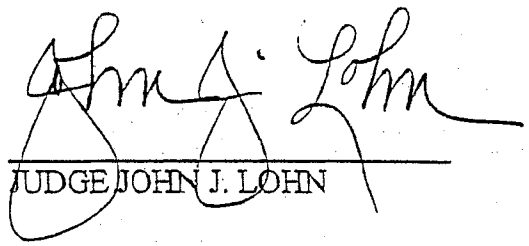
In addition to unlawfully converting assets belonging to Plaintiff and the estate, Defendant failed to make a good faith effort to settle the case and failed to properly evaluate his liability. Moreover, Plaintiff made good faith efforts to settle the case, which were rebuffed by the Defendant.

Pursuant to R.C. 5703.47, the prejudgment interest rate is four percent (4%) per annum, which is awarded from the following dates that Defendant converted assets:

Asset	Amount	Interest Accrues From
Huntington Bank Check	$3,000.00	June 29, 2005
Standard Life Annuity	$44,364.01	February 6, 2006
Credit Card Transactions	$17,736.43	June 19, 2006
Mortgage Payments	$37,876.00	August 1, 2006
Gifts to Self and Wife	$24,000.00	June 16, 2008
First Merit Account	$8,595.78	December 4, 2008
Hartford Annuity	$70,000.00	December 4, 2008

Costs of the action are taxed to Brian Roy, against whom judgment is rendered. Costs shall be paid within 30 days from the date of this order.

SO ORDERED.



JUDGE JOHN J. LOHN

July 12, 2011

Date

NOTICE

This Judgment Entry is a Final Order. As provided in Rule 4 of the Rules of Appellate Procedure, parties have a right to appeal within thirty (30) days of the date of this Judgment Entry.

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MEDINA COUNTY OHIO
PROBATE COURT
FILED
JUDGE JOHN J LOHN

2011 APR 13 AM 9:31

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO
PROBATE DIVISION

Hallie Schiavoni
Plaintiff
vs.
Brian Roy
Defendant/Third-Party Plaintiff
vs.
Venetia Lynne Stadler
Third-Party Defendant

CASE NO. 2010 02 CA 00006

JUDGE JOHN J. LOHN

JUDGMENT ENTRY AND ORDER

This matter came on for hearing on December 20 through 24, 2010 and January 10, 2011 for a bench trial on a complaint, counterclaim and third-party complaint. This Court, having considered evidence presented at trial, finds Defendant, Brian R. Roy, liable for conversion, breach of fiduciary duty, fraud, undue influence, unjust enrichment and failure to account for assets belonging to the Estate of Jean Ruth Roy, and for money damages in favor of Plaintiff, Hallie Schiavoni. The Court further denies all claims asserted by the Defendant against Plaintiff and Third-Party Defendant Venetia Stadler.

Jean Ruth Roy was born on April 16, 1920. She died December 12, 2008. She had two children: Brian Roy and Hallie Schiavoni. In her 2000 will she appointed her son Brian Roy as executor of her estate and her daughter Hallie Schiavoni as successor executor. The estate was to be divided equally between the two siblings. In 2008 she created a trust naming Mr. Roy as trustee. Upon her death, the trust assets would pass to Mr. Roy and Mrs. Schiavoni equally.

Also in 2000 Mrs. Roy executed a durable power of attorney (DPOA) naming Mr. Roy her attorney-in-fact. A number of Mr. Roy's self-dealing transactions under the authority of the power of attorney are the subject of this lawsuit. He named himself the remainder beneficiary of Mrs. Roy's annuity. He named his wife beneficiary of Mrs. Roy's life insurance. He used his mother's money to pay his mortgage, make donations to charities with which he was affiliated, give gifts to his

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wife and authorize numerous payments from his mother's credit card for personal expenses. Mr. Roy kept detailed records of all these transactions, none of which he shared with his sister or his mother's attorney. He testified his mother had the mental capacity to direct the transfers. He said he did nothing improper to induce her to make gifts to him, and—specifically regarding his mother paying his mortgage—he encouraged her *not* to do that. He admitted his mother never wrote any notes to document these transactions.

From October 2000 until her death in December 2008, the Decedent and Mr. Roy had a special confidential relationship. Mr. Roy was the Decedent's primary family representative; he and his wife regularly visited her at the Inn of Medina. He was a caregiver, a bookkeeper and financial advisor. Mr. Roy went so far as to inform three health care providers (Lakewood Hospital, Bradley Bay Health Center and the Inn of Medina) that he and his wife were his mother's *only* family contacts and that under no circumstances were they to contact Mrs. Schiavoni or share medical information about his mother with her.

Additionally, Mrs. Roy and Mr. Roy had a fiduciary relationship as principal and agent arising by virtue of the DPOA.

Mr. Roy testified that in his relationship with his mother, he "wore many hats." His mother relied upon him, trusted him, confided in him and needed him to conduct her personal business.

In 2008 the Decedent created the Jean Ruth Roy Irrevocable Trust. The trust provided that upon Mrs. Roy's death, the trust assets were to be distributed equally to Mr. Roy and to Mrs. Schiavoni. She also made a codicil to her will removing Mrs. Schiavoni as alternate executor and naming instead Mr. Roy's wife. The codicil did not change the beneficiary designations: both Mr. Roy and Mrs. Schiavoni would share in their mother's estate equally.

The Decedent suffered from anxiety and depression during her lifetime. Her condition became pronounced and more complicated after the death of her husband in 2000. By 2003 she was diagnosed with Alzheimer 's disease. The medical records indicate she had episodes of acute paranoia and a general decline in mental abilities when she became a resident of the Inn of Medina in January 2005. Based

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upon the testimony of Dr. Barrett, Dr. Feldman and other medical personnel and the documentary evidence duly admitted during the trial, the Court concludes that after July 2006, Mrs. Roy was incompetent and incapable of managing her affairs and legally unable to give her property to anyone or any institution. After July 2006 Mrs. Roy lacked the mental acuity to comprehend the nature of the transactions, their effect on her estate and the manifestly unequal treatment these transactions had for her children.

Transactions made after July 2006 —effectuated by the Defendant himself or persons he selected—defeated, overbore and contravened his mother's desire to give her property equally to her two children. The Court doubts whether Mrs. Roy was aware or understood what Mr. Roy was doing with her property.

Something must be said about the Defendant's credibility. Mr. Roy may have originally meant to act as a dutiful son after his father died. Perhaps at first he may have understood that as confidant and caregiver for his mother he was required to act with principle and fidelity. But things changed.

While maintaining an air of rectitude, the Defendant began pilfering from his mother's estate. A few examples demonstrate his greed: 1) he used his mother's money to pay his mortgage; 2) he used his mother's money to make donations to his favorite cultural, religious and social charities; 3) he used his mother's credit card to pay for car washes and gasoline fill-ups for his cars, 4) he gave hundreds of dollars of his mother's money (she was a Methodist) to Lutheran Outdoor Ministries, a charity for which he served as a director, and; 5) he used his mother's money to buy dietary supplements from Airboryn Enterprises—a company he and his wife own.

How can you let your elderly mother pay your mortgage month after month, year after year? How can you let your home-bound mother pay for your gasoline and carwashes? How can the president of a company charge his own mother for products his company sells?

Half of Mr. Roy's credibility problem is his dubious claim his mother gave all these gifts to him. The other half of his problem is he accepted them.

There is no documentary evidence his mother knew about these self-rewarding transactions or that she had a discrete, rational understanding of what

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her son was up to. Indeed Mr. Roy had such a fetish for documentation he made his mother sign a copy of a letter to his sister in five different places on four different dates. But he never had her sign even one of the checks for his mortgage or his charities or the "gifts" to him and his wife.

Mrs. Roy's attorney, who met periodically with Mrs. Roy and her son to go over her finances, never knew about Mr. Roy's self-dealing. He never disclosed the "gifts" to Attorney Bullard. [1]

Mr. Roy is a prim, fastidious man. He knows his Bible. He tells his sister that she should read Exodus 20 (The Ten Commandments). At the trial, he declared—germane to nothing—his sister is an alcoholic. In a December 5, 2003 letter to his mother, he said,

> "Hallie does not have a good understanding of financial investment vehicles . . . You and Dad sent me to college for a business education. Financial investing was part of the curriculum."

Mrs. Schiavoni did not need a "good understanding of financial investment vehicles" to justify her suspicions about her brother. She knew he was controlling their mother. She knew he couldn't be trusted. She didn't need an undergraduate degree in business to know her mother was being taken advantage of. All she needed to know about was her brother's character.

She was right. Within two years after he wrote the 2003 letter, he was gifting himself car washes and mortgage payments, designating himself a remainder beneficiary of an annuity and creating survivorship "vehicles" that bypassed probate, avoided his mother's trust and paid off handsomely upon his mother's death.

Mr. Roy was both attorney-in-fact and a caregiver for his mother.

Where a confidential or fiduciary relationship exists between a donor and donee, a gift is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. *Studniewski v. Krzyzanowski* (1989), 65 Ohio App. 3d 628, 632, 584 N.E.2d 1297. In such cases a presumption of undue influence arises and the burden of going forward with evidence shifts to the

[1] Apparently this wasn't important enough to include on the agenda Mr. Roy prepared for the annual financial meetings.

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donee to show that the conduct was free of undue influence or fraud and that the donor acted voluntarily and with a full understanding of the act and its consequences. The donee may rebut the presumption of undue influence by a preponderance of the evidence. *In re Guardianship of Emma Marshall* (Butler Co. Ct. of Appls. Case Nos. *CA96-11-239, CA96-11-244*), 1998 Ohio App. LEXIS 2275.

A general, durable power of attorney does not authorize an attorney-in-fact to transfer the principal's property to himself or to others, unless the power of attorney explicitly confers this power. An attorney-in-fact may not make gratuitous transfers of the principal's assets unless the power of attorney from which the authority is derived expressly and unambiguously grants the authority to do so, *In re Estate of Buckner* 2009 Ohio 2447.

Among other powers, the DPOA granted Mr. Roy limited powers as to gift-giving:

> (24) To make gifts or consent to split gifts (under Internal Revenue Code 5.2513) to any one of either my spouse and lineal descendants, including my attorney-in-fact, for the purpose of continuing my established annual gift program in any amount, with respect to persons other than my spouse, not exceeding $10,000 annually with respect to any one of them; provided, however, that gifts to my attorney-in-fact or his or her creditors shall not exceed $5,000 annually, and further provided that gifts to my lineal descendants shall be in per stirpital shares

The DPOA required equal amounts of gifts to Mrs. Roy's lineal descendants: Mrs. Schiavoni and her descendants and Mr. Roy and his descendants. In no event could these gifts exceed $5,000 per year for Mr. Roy or his creditors. The DPOA made no provision for unilateral gifts to Mr. Roy's spouse or to churches, theatrical organizations or automobile clubs.

Finding of Undue Influence

The elements of undue influence include a susceptible testator, another's opportunity to exert it, the fact of improper influence exerted or attempted and the result showing the effect of such influence. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 65-66, 567 N.E.2d 1291, quoting *West v. Henry* (1962), 173 Ohio St. 498,

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501, 20 O.O.2d 119, 184 N.E.2d 200. Each one of these elements has been proved by clear and convincing evidence.

Proceeds from the sale of condominium

In 2001 Mrs. Roy deeded her condominium to herself, Mrs. Schiavoni and Mr. Roy. In 2007 the condominium was sold and all the proceeds were deposited into a bank account belonging to Mrs. Roy. The Plaintiff argues the Defendant fraudulently induced her to forego her share of the proceeds from the sale of the condominium. The Defendant's explanation that the condominium was titled in the three names "for tax and estate planning purposes" is plausible. There is no evidence of fraud regarding the distribution of the proceeds of the condominium sale. The condominium was owned by Mrs. Roy. There is no evidence she intended to make a gift to her son and daughter at the time the deed was put into her and her children's names. There is no evidence she intended to gift a portion of the proceeds of the sale to her children when it was sold.

Judgment shall be rendered in favor of the Defendant and against the Plaintiff as to this transaction.

Creation of Joint and Survivor Checking Account

Funds in a joint and survivorship account belong during the lifetime of all parties to the parties in proportion to their contributions, *Estate of Averiett v. Averiett*, 1993 Ohio App. LEXIS 4048 (Ohio Ct. App., Summit County Aug. 18, 1993). Mrs. Roy contributed all the funds in these accounts.

Mr. Roy established a joint checking account (with right of survivorship) in his and his mother's name using the DPOA. The account was funded from solely his mother's assets. The creation of the account is presumptively the product of undue influence. There is no credible evidence that Mrs. Roy intended to gift the balance in the account to her son when she died. The presumption of undue influence was unrebutted.

As of the date of Mrs. Roy's death, there was $8,595.78 in the account. Judgment shall be rendered in favor of the Plaintiff in the Amount of $8,595.78.

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Payment of Defendant's Mortgage

From 2005 to 2008 the Defendant paid his own mortgage using his mother's funds from the Huntington Bank and FirstMerit checking accounts, for a total of $37,876. The Defendant stated these payments were authorized by his mother as gifts to him. The DPOA restricted him from gifting more than $5,000 per year to himself or his creditors. In addition, the DPOA required him to give equal amounts to his sister under the *per stirpes* clause of the gifting provision. The unilateral payments to himself were beyond the scope of his powers as attorney-in-fact and presumptively the product of undue influence. Additionally, the transactions are presumptively the product of undue influence based upon Mr. Roy's relationship as caretaker, next friend and confident. The Defendant failed to rebut the presumption by credible evidence.

Judgment shall be rendered in favor of the plaintiff. The amount of $37,876 shall be returned to the estate.

Credit Card Transactions

From 2005 to 2008 the Defendant applied for and used a Visa Credit card in his mother's name and paid expenses with it from his mother's funds. The self-dealing payments were presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence. For transactions occurring after July 2006, Mrs. Roy lacked the capacity to authorize, ratify or waive objections to those transactions.

Judgment shall be rendered in favor of the Plaintiff. The amount of $17,736.43 shall be ordered returned to the estate.

$3,000 gift from Huntington Bank Account

On June 29, 2005 the Defendant gifted himself $3,000 from the Decedent's Huntington Bank Account. This transfer is presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence.

Judgment shall be rendered in favor of the Plaintiff . The amount of $3,000 shall be returned to the estate.

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Standard Life Annuity

Defendant used the DPOA to purchase a Standard Life Annuity with his mother's funds in 2006. This establishment of himself as beneficiary is presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence. The Defendant received $44,364.01 after his mother died.

Judgment shall be rendered in favor of the Plaintiff and the amount of $44,364.01 shall be returned to the estate.

Gifts of $9,500 and $5,000 to himself and $9,500 to his wife

On June 16, 2008 the Defendant gifted $9,500 to himself, $9,500 to his wife and wrote a check to himself for another $5,000. Mrs. Roy lacked the donative capacity to authorize, ratify or waive any objection to these gifts. Further, these transactions were beyond the scope of his powers under the DPOA and, by failing to make any reciprocal gifts to his sister, contravened his authority to make gifts. These transactions were presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence.

Judgment shall be rendered in favor of the Plaintiff. The amount of $24,000 shall be returned to the estate.

Hartford Life Annuity

Mrs. Roy purchased a Hartford Life Annuity in 2000 naming the Plaintiff and the Defendant as equal beneficiaries. In February 2007 the Defendant caused his mother to sign a change in beneficiary designation to make himself the sole beneficiary of the annuity.

In 2007 Mrs. Roy lacked the mental capacity to change the beneficiary designation. Moreover the change of beneficiary designation was presumptively the product of undue influence. The Defendant failed to rebut the presumption by credible evidence. The annuity was valued at $140,000 at the time of Mrs. Roy's death.

The change of beneficiary form is invalid and the sum of $70,000 is awarded to Plaintiff as her half-share of the annuity.

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Jean Ruth Roy Revocable Trust

In March 2008 Mrs. Roy established the Jean Ruth Roy Irrevocable Trust with her son as trustee. The Defendant testified the total value of the trust was approximately $180,000 as of the death of his mother. The trust terms state that upon Mrs. Roy's death, the trust shall terminate and the trust shall be distributed one-half each to Mr. Roy and Mrs. Schiavoni. Mr. Roy testified the trust has about $180,000 in funds, but he has yet to provide any accounting or distribution to Mrs. Schiavoni.

Mrs. Roy lacked the capacity to establish the trust in 2007. The trust is void and all assets of the trust shall be returned to the estate. Mr. Roy failed to provide a full accounting to Mrs. Schiavoni of the supposed trust since its inception. He shall provide the accounting in seven days and restore all trust assets to the estate.

Defendant's Counterclaim

Count One of the counterclaim alleges the Decedent and Mrs. Schiavoni had a contract wherein Mrs. Roy loaned Mrs. Schiavoni $2,000 and Mrs. Schiavoni agreed to repay the $2,000. The counterclaim alleged that Mrs. Schiavoni had not repaid $1,300 of the loan.

Count Two of the complaint realleged the allegations in Count One and made a claim against Mrs. Schiavoni for unjustment enrichment, based upon her retention of the $1,300.

The Defendant failed to prove Count One and Count Two by a preponderance of the evidence. The Plaintiff proved that any outstanding loans from Mrs. Roy to Mrs. Schiavoni were settled during the Decedent's lifetime either by repayment or by the Decedent gifting any outstanding repayment amounts to Mrs. Schiavoni by way of express waiver of the right to repayment.

Count Three of the counterclaim alleged that Mrs. Schiavoni removed from her mother some Series HH U.S. savings bonds in the amount of $27,000 and converted the bonds to her own use.

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Count Four of the counterclaim realleged the allegations in Count Three of the counterclaim and made a claim against Mrs. Schiavoni for trespass to chattel relating to the Series HH Bonds.

The Defendant failed to prove by a preponderance of the evidence a breach of contract, conversion or trespass to chattel. The evidence showed Mrs. Schiavoni received HH bonds from her father in the late 1990s. They were put in the names of Mrs. Roy and Mrs. Schiavoni. In April 2006 Mrs. Roy delivered to Mrs. Schiavoni $27,000 in series EE savings bonds as a gift. She made an identical gift to her son.

At the time he filed his application for authority to administer the estate; Mr. Roy did not list claims the estate had against Mrs. Schiavoni. It appears this meritless claim against Mrs. Schiavoni was meant to retaliate against her for filing her complaint.

The Counterclaim is dismissed.

Defendant's Third-Party Complaint

The Third-Party Complaint is directed at Venetia Stadler.

Count One alleged Venetia Stadler borrowed $7,000 from the Decedent and failed to repay the entire amount and owes the estate the sum of $4,635, plus interest.

Count Two alleged Venetia Stadler's retention of $4,635 is unjust.

Count Three alleged that the Decedent loaned $5,815.46 to Venetia Stadler and that she failed to repay the entire loan. Defendant demanded $3,880.46 the remaining balance on the loan, plus interest for breach of contract.

Count Four realleged all the allegations in the previous counts and alleged the Decedent paid Baldwin Wallace College $5,815.46 for Venetia Stadler's college expenses and that Venetia Stadler promised to pay the Decedent back. She failed to repay all the money to the Decedent and was unjustly enriched in the amount of $3,880.46, plus interest.

There was no evidence any of contract between Venetia Stadler and the Decedent. There was no credible evidence she was unjustly enriched.

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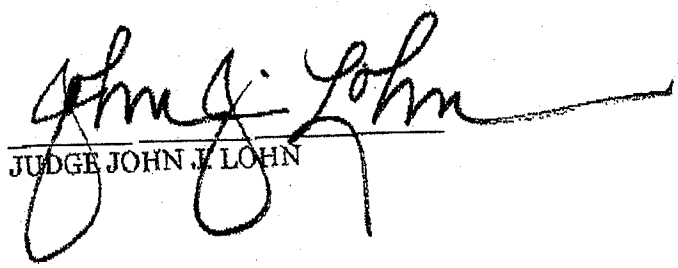
At the time he filed his application for authority to administer the estate; Mr. Roy did not list claims the estate had against Mrs. Stadler. It appears this meritless claim against Mrs. Stadler was meant to retaliate against her mother Mrs. Schiavoni for filing her complaint.

The Third-Party Complaint is dismissed.

This is not a final order. The case shall be reset for hearing on Plaintiff's claim for attorney fees, at the convenience of the court.

SO ORDERED.



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