[Cite as *Bayes v. Dornon*, 2015-Ohio-3053.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

PENNY L. BAYES, et al.	:	
	:	
Plaintiffs-Appellees	:	Appellate Case No. 2014-CA-129
	:	
v.	:	Trial Court Case No. 20144002
	:	
LEON E. DORNON, JR., et al.	:	(Appeal from Probate Court)
	:	
Defendants-Appellants	:	
	:	

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O P I N I O N

Rendered on the 31st day of July, 2015.

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Leon Dornon, Jr., appeals from a judgment entered after a bench trial, finding him guilty of having concealed or embezzled assets. In support of his appeal, Dornon contends that the trial court lacked subject matter jurisdiction without finding that an inter vivos gift from Leon Dornon, Sr. was invalid. Dornon also contends that the trial court's decision was against the manifest weight of the evidence.

{¶ 2} We conclude that the trial court had jurisdiction over this matter. Although property that passes by an inter vivos gift or transaction is not property of an estate retrievable by an executor under R.C. 2109.50, a probate court can decide that the inter vivos gift or transaction was invalid, in which case the property is an asset of the estate retrievable by R.C. 2109.50. We further conclude that the trial court's decision, finding Dornon guilty of concealment or embezzlement, was not against the manifest weight of the evidence. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} In 2011, Leon Dornon, Sr. was diagnosed with lymphoma.[1] Shortly after his diagnosis, he consulted with the law firm of Daniels and Jeffries to have a will and trust created. Junior accompanied his father to the attorney's office. At that time, Junior learned that Senior had over $300,000 in assets. Senior had worked as a carpenter during his lifetime, was very thrifty, and saved a lot of money. Senior had only attended school through the sixth grade. He was 79 when he died on October 8, 2013.

[1] To avoid confusion, we will refer to Leon Dornon, Jr. as "Junior" and to Leon Dornon, Sr., as "Senior."

{¶ 4} In July 2011, Senior signed a Revocable Living Trust Agreement ("Trust"), which designated Senior as the settlor and trustee. The Trust named Junior as the successor trustee upon the resignation, incompetency, or death of the trustee. According to Article I of the Trust, the property in the trust consisted of the items described in Schedule A, which included "Household Goods and Furniture and all other tangible personal property." Trial Ex. B, pp. TA35 and TA51.[2] After the settlor's death, the trust became irrevocable.

{¶ 5} Senior had five living children. Upon his death, the balance of the trust was to be divided into equal shares for four of the children: Junior; Penny Bayes; Jimmy Dornon; and Rita Sheeley. No provision was made for the remaining child, Brenda Wiley, because she had ample property of her own. The shares of Jimmy and Penny were also to be reduced by $5,400 and $5,300, respectively, because of loans that Senior had made to them.

{¶ 6} Senior's will, also signed in July 2011, named Junior executor of the will. In July 2011, Senior also signed several other documents, including: a durable power of attorney naming Junior his attorney-in-fact immediately for financial transactions; a living will naming Junior as his health-care agent; and a State of Ohio Living Will Declaration. Junior knew from the beginning that he was the successor trustee for the trust, and also knew he had the power of attorney for his father's health. However, he claimed that he was unaware of the financial power of attorney.

{¶ 7} When these documents were signed, Senior was given instructions by his attorney about transferring property into the trust, including adding payable on death

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[2] The parties stipulated to the admission of trial exhibits A-J.

(POD) instructions to his financial accounts. However, he did not do so until shortly before his death.

{¶ 8} Senior's daughter, Penny Bayes, testified that she quit work after Senior was diagnosed in 2011, in order to take care of him. At that time, Senior was residing in his own home. Bayes stated that she took care of her father in 2011, 2012, and into 2013. The time Bayes spent with her father decreased a bit when it appeared he was in remission. During Senior's illness, Junior took Senior to doctor's visits. Neither Bayes nor Junior discussed their father with each other, as communication between them was poor and they rarely saw each other.

{¶ 9} Junior and his wife, Teresa, had significant financial problems, apparently largely caused by gambling. At some point after the trust and other documents had been signed, Junior obtained $20,000 from his father because the home in which Junior and Teresa lived was in foreclosure.[3] Junior's testimony about this money was conflicting. At times he described it as a loan and at other times he said it was not a loan. He also contradicted himself about repayment. He stated in his deposition that he had paid some of the money back in cash about once a week. He could not recall how long the payments went on or exactly how much he had paid back. Deposition of Leon Dornon, Jr., pp. 124-125. However, at trial, Junior stated that while he had attempted to pay his father back, Senior said not to worry about it and never accepted repayment. Transcript of Proceedings, p. 110.

{¶ 10} By May 2013, Teresa's property was in foreclosure again, and Teresa had filed a bankruptcy petition. A foreclosure sale was scheduled for December 2013. In

[3] Teresa was the owner of record on the property, not Junior.

late August 2013, Senior's condition had worsened significantly, and he was moved into Junior's home on August 30, 2013. Hospice care started the next day.

{¶ 11} Junior did not notify any of his siblings for two weeks that his father was in his home. Around the middle of September, Junior went to Bayes' home and told her. Thereafter, Bayes and other siblings were able to visit Senior, but there was friction among the siblings, and Bayes stated that she felt unwelcome in Junior's home. When Bayes visited, Senior told her that he wanted to go to his own home. He also told this to another sister and to Hospice personnel. Bayes and her sister offered to stay with their father in his own home, but Junior would not allow it.

{¶ 12} A hospice evaluation done on August 30, 2013, indicates that Senior's primary diagnosis was acute leukemia, with a secondary diagnosis of lymphoma, stage 3. He had been diagnosed as having a "life-limiting illness with a life expectancy of six months or less." Ex. G, p. CMH19.

{¶ 13} An assessment on September 4, 2013, indicated that Senior was oriented to person and place, but was forgetful and lethargic.[4] Junior indicated to Hospice personnel that Senior was sleeping most of the time. At that time, Senior expressed desire to have a blood transfusion for symptom management. Senior had a transfusion on September 5, 2013.

{¶ 14} On September 16, 2013, Senior's caregiver, Teresa, reported that Senior had been more alert after receiving a transfusion, but was now becoming more restless. At that time, Senior was unable to state the date, year or president, and was disoriented/confused and lethargic. He also was "not eating but a few bites but will drink

[4] The Hospice nurse, Jennifer Trimble, testified about this visit as well as others that are mentioned in the main text, as she was present during these visits.

liquids if assisted." *Id.* at CMH59. On September 18, 2013, Trimble again described Senior as alert as to person, but disoriented/confused and lethargic. At the time, Senior was retaining urine, was only taking bites of food, and was having difficulty swallowing pills and food. Trimble inserted a catheter and left it in place.

{¶ 15} The next day, on September 19, 2013, Senior had a temperature of 101.2 degrees, was not eating, and was "in and out of sleep." *Id.* at CMH71. On September 20, 2013, Senior was alert to person, but was disoriented/confused and lethargic. His temperature was 102 degrees, and Teresa reported that he was sleeping most of the time. At that time, Trimble indicated that Senior was "able to open eyes to verbal stimuli but is confused, quickly falls asleep." *Id*. at CMH81.

{¶ 16} According to Trimble, Teresa stated during this visit that Junior did not want his father to have any more blood transfusions, as this would be difficult for Senior. Trimble did not discuss this with Senior that day, or subsequently. She indicated that she always asks the patient first about transfusions, if she is able to get a response. Trimble inserted a Tylenol suppository on September 20, 2013, and instructed Teresa that Tylenol was in the care kit that Hospice had provided. During this visit, Trimble was also informed about a family member (Bayes) having called the sheriff's department because of concerns about whether Senior was being cared for appropriately. Junior instructed Hospice not to release any information to Bayes.

{¶ 17} September 20, 2013, was a Friday. The notes indicate that Trimble left Junior's home that day around 12:45 p.m. According to Junior, Senior asked Teresa that afternoon to call Huntington Bank because he had to do a POD. Junior stated that even though he was getting his father's mail, he did not open it and had no idea where Senior

had assets or the amount of the assets. After Teresa called Huntington Bank, an individual from that bank came to the house on Friday after work, and allowed Senior to sign a POD for the Huntington account.

{¶ 18} Teresa also called WesBanco Bank, Inc. ("WesBanco") on Friday, and spoke to Nancy Masters, the banking center manager. Teresa asked Masters to come out to the house, and asked questions about what happens when someone "passes." Teresa mentioned that Senior was on his deathbed. Masters refused to come to the house, because she was not comfortable doing that.

{¶ 19} According to Junior, Senior's fever "broke" Friday night, and Senior indicated on Saturday that he wanted to go to two other banks, New Carlisle Federal Bank (Federal), and WesBanco, to do PODs for those accounts. Junior, Senior, and Teresa first went to Federal, and a bank employee brought the paperwork out to Junior's car. After Senior signed the POD, they drove to WesBanco. Junior testified that his father began talking in the car about taking his money out of WesBanco. He also mentioned burying his money in the yard. Junior believed Senior's comments were triggered by the Sheriff's visit the previous evening (Friday) to check on Senior. Purportedly, after that visit, Senior said (referring to Bayes), that she was crazy.[5] Junior also indicated that, weeks before, Senior had mentioned removing Junior's siblings from the trust.

{¶ 20} When they arrived at WesBanco, Teresa and Junior wheeled Senior into the bank in a wheelchair. Masters was surprised to see how well Senior looked, after hearing that he was on his deathbed. Masters did not have any specific recollection of

[5] It is unclear when the Sheriff's visit occurred, but it was not the night before the visit to WesBanco, as the visit was discussed with the Hospice nurse when she visited earlier in the day on Friday, June 20, 2013.

what she said to Senior and what he said to her. In her testimony, she generalized that he wanted to close his account and that he wanted cashiers' checks made out in his name or Leon Dornon, Jr. Masters did recall explaining that if "or" is used, either person can cash the check, and she felt that Senior understood. She also stated that Senior did not appear confused or lethargic.

{¶ 21} One check was for $138,895.61, and that account was closed. The other account was the one in which Senior's social security check was deposited, and it had to be left open. $300 was left in that account, and a check for $41,658.98 was issued. A POD was also signed for the latter account, making it payable on death to Junior. After Senior's death, Junior deposited the money remaining in this account ($1,261) into the trust.

{¶ 22} Masters handed the checks to Junior, because Senior was sitting down in the wheelchair, and she was behind the counter. According to Junior's trial testimony, when he went to hand the checks to Senior, Senior told him to keep them and put them in Junior's bank, that they were his. This contrasts with Junior's testimony in his deposition, during which the following exchange occurred:

> Q. And did he say anything to you when he gave it to you?
>
> A. No. He said to put it in my bank.
>
> Q. That's what he said?
>
> A. Pretty much, yeah.
>
> Q. What did he say to you? Don't say pretty much. What did he say to you?
>
> A. He just [sic] give me the check. That's all there is to it. *I mean,*

he never said what to do with it. He [sic] give it to me.

(Emphasis added.) Deposition of Leon Dornon, Jr., pp. 36-37.

{¶ 23} On September 24, 2013, the two checks (totaling $180,554.59) were deposited in Wright-Patterson joint checking and savings accounts belonging to Junior and Teresa Dornon. For the month of September 2013, the beginning balance in their savings account had been $5.01, and the beginning balance in their checking account was $537.06.

{¶ 24} Another $32,184 was deposited on October 28, 2013, based on a division of the Trust proceeds after Senior's death. $50,000 was used in December 2013 to bring Teresa's property out of foreclosure, $28,000 was spent on a motor home, great sums were expended on gambling (close to $30,000), and the rest, in Junior's own words, was spent "just blowing it." *Id.* at p. 34. By August 31, 2014, the savings account balance was $6.46, and the checking account balance was $1,025. Junior did not tell any of his siblings about the $180,000 withdrawal; according to his testimony, Senior did not want anyone to know. He also did not tell the attorney who had prepared the trust and other documents.

{¶ 25} Returning to the issue of Senior's mental condition, we note that Trimble's next Hospice visit to Senior was on Tuesday, September 24, 2013. At that time, she described Senior as forgetful, disoriented/confused, and lethargic. He was oriented to person. His temperature was 102.6. A chaplain was present at that time and talked to the family about Senior's decline. After prayers and a discussion of the dying process at Senior's beside, Brenda Wiley left, very upset, and slammed the door. During this visit, Junior told Trimble that he did not want any additional lab draws or blood transfusions.

{¶ 26} On September 27, 2013, Trimble's notes indicated that Senior was unable to verbalize. During that visit, Teresa talked at length with Trimble about Senior's daughters, who purportedly had been estranged from Senior for years and were now coming to see him. Teresa also talked about family members who were attempting to say mean things to Senior. Teresa told Trimble that she and Junior did not want any information given to anyone other than Teresa and Junior over the telephone, and a password was established. Trimble indicated that this was uncommon, but she complied with the request.

{¶ 27} Senior died on October 8, 2013. Two of Junior's sisters, Bayes and Sheeley, filed an action for concealment in August 2014, after observing Junior buying expensive things that cost more than the amount he had received from the trust, while being bankrupt at the same time.

{¶ 28} After hearing the evidence, the trial court found Junior guilty of concealing, embezzling, conveying away, and being in possession of money belonging to Senior's estate. The court ordered Junior to pay $135,415.94 (the total amount taken, minus Junior's share), plus an additional 10% penalty, into the estate. The court also ordered that Junior would not be permitted to serve as executor or the estate or as the successor trustee for the Trust. In addition, the court granted a preliminary injunction preventing Junior from transferring any assets other than assets held in his checking account to pay normal living expenses. Junior now appeals from the judgment of the trial court.

II. Jurisdiction Over Concealment Action

{¶ 29} Junior's First Assignment of Error states that:

The Trial Court Abused Its Discretion in Finding the Appellant Guilty of Concealment Pursuant to R.C. 2109.50 in the Absence of Subject Matter Jurisdiction to Do So Without First Making a Finding that the Gift Was Invalid.

{¶ 30} Under this assignment of error, Junior appears to contend that in order to obtain subject matter jurisdiction over a concealment action, the trial court must make a finding that an inter vivos gift is invalid. According to Junior, the trial court failed to make such a finding.

{¶ 31} R.C. 2109.50 provides, in pertinent part, that:

> Upon complaint made to the probate court of the county having jurisdiction of the administration of an estate, a testamentary trust, or a guardianship or of the county where a person resides against whom the complaint is made, by a person interested in the estate, testamentary trust, or guardianship or by the creditor of a person interested in the estate, testamentary trust, or guardianship against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, personal property, or choses in action of the estate, testamentary trust, or guardianship, the court shall by citation or other judicial order compel the person or persons suspected to appear before it to be examined, on oath, touching the matter of the complaint.

{¶ 32} R.C. 2109.52 further provides that:

> When passing on a complaint made under section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if

either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, personal property, or choses in action of the estate, testamentary trust, or guardianship. If the person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind.

* * *

In all cases, except when the person found guilty is the fiduciary, the probate court shall render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the personal property or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of the proceedings or complaint; except that the judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this section.

If the person found guilty is the fiduciary, the probate court shall render judgment in favor of the state against the fiduciary for the amount of the moneys or the value of the personal property or choses in action concealed, embezzled, conveyed away, or held in possession, together with penalty and costs as provided in this section.

{¶ 33} In support of his position that the trial court lacked jurisdiction, Junior relies

on *Harrison v. Faseyitan*, 159 Ohio App.3d 325, 2004-Ohio-6808, 823 N.E.2d 925 (7th Dist.). In *Harrison*, the court stated that, typically, "if a defendant takes a person's money before death or before institution of a guardianship, then a concealment action is not the appropriate remedy because the money was not taken from the estate; rather, it was taken from an individual before the existence of an estate. On the other hand, if a defendant takes a person's money after that person died or after that person became a ward, meaning that an estate was in existence at the time the money was taken, then a concealment action is proper." *Id.* at ¶ 30, citing *In re Leiby's Estate*, 157 Ohio St. 374, 381, 105 N.E.2d 583 (1952); *In re Estate of Black*, 145 Ohio St. 405, 410-411, 62 N.E.2d 90 (1945); and *Goodrich v. Anderson*, 136 Ohio St. 509, 511, 26 N.E.2d 1016 (1940). (Other citation omitted.)

{¶ 34} However, in *Harrison*, which involved a guardianship, the court allowed the action with respect to assets that were dissipated after the time the individual had notice of the alleged incompetency of the ward, even though no guardian had been appointed at that time. *Id.* at ¶ 32-35, citing R.C. 2111.04(D). In support of this position, the court also relied on a recent decision of the Eleventh District Court of Appeals, which had held in a different situation that:

> [A]lthough property that passed by inter vivos gift or transaction is not property of the estate retrievable by an executor under R.C. 2109.50, the probate court can determine that the inter vivos gift or transaction was invalid, in which case the property is an asset of the estate retrievable by R.C. 2109.50. *Rudloff v. Efstathiadis*, 11th Dist. No. 2002-T-0119, 2003-Ohio-6686, (where a fiduciary takes property, there is a presumption

> of undue influence that the fiduciary must rebut by clear and convincing evidence of a gift, and the probate court has jurisdiction under R.C. 2101.24(A)(1)(l) to decide a declaratory action on the validity of gift).

Harrison at ¶ 36.

{¶ 35} In *Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, 855 N.E.2d 856 (which was decided after both *Harrison* and *Rudloff*), the Supreme Court of Ohio noted its prior recognition that "concealment actions under R.C. 2109.50 and 2109.52 could be applicable to recover certain assets wrongfully concealed, embezzled, or conveyed away *before* the creation of the estate." (Emphasis sic). *Id.* at ¶ 33, citing *Fecteau v. Cleveland Trust Co*., 171 Ohio St. 121, 167 N.E.2d 890 (1960).

{¶ 36} Citing *Harrison* and *Rudloff*, the court also stressed in *Goldberg* that:

> Similarly, other courts have acknowledged that "although property that passed by inter vivos gift or transaction is not property of the estate retrievable by an executor under R.C. 2109.50, the probate court can determine that the inter vivos gift or transaction was invalid, in which case the property is an asset of the estate retrievable by R.C. 2109.50." *Harrison v. Faseyitan*, 159 Ohio App.3d 325, 2004-Ohio-6808, 823 N.E.2d 925, ¶ 36, citing *Rudloff v. Efstathiadis*, Trumbull App. No. 2002-T-0119, 2003-Ohio-6686, 2003 WL 22931382 (concealment action was appropriate to recover funds passed to a third party by inter vivos transaction where the validity of the underlying transfer is challenged); *see, also, In re Estate of Kelsey*, 165 Ohio App.3d 680, 2006-Ohio-1171, 847 N.E.2d 1277, ¶ 33, citing *Rudloff* ("Where, as here, a dispute exists regarding title, the probate

court is not deprived of jurisdiction to resolve the dispute * * * ").

> "[A] plaintiff has stated an actionable cause under R.C. 2109.50 if he alleges that the asset is the exclusive property of the estate and that the defendant has unauthorized possession of the asset or in some way has impermissibly disposed of it." *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 407, 629 N.E.2d 500.

Goldberg at ¶ 34-35.

{¶ 37} *Goldberg* also distinguished a prior decision of the court, which had concluded that "a concealment action 'may not be successfully pursued where it appears from the evidence that title to such property had been transferred by the ward, *pursuant to a valid agreement*, prior to the guardianship.' " (Emphasis sic.) *Id.* at ¶ 38, quoting *Black*, 145 Ohio St. at 405, 62 N.E.2d 90, paragraph four of the syllabus. The Supreme Court of Ohio noted in *Goldberg* that in contrast to *Black*, "the underlying concealment action here alleges that there was no valid agreement transferring [the ward's] assets to Goldberg." *Id.*

{¶ 38} Accordingly, jurisdiction is appropriate where the claim is that an inter vivos transaction was improper and that the property in question belongs to the estate. Furthermore, contrary to Junior's contention, the trial court clearly concluded in its decision that the transfer of the checks was not a valid inter vivos gift to Junior.

{¶ 39} "The essential elements of an *inter vivos* gift are '(1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there and (2), in pursuance of such intention, a delivery by the donor to the donee of the subject-matter of the gift to the extent practicable or possible,

considering its nature, with relinquishment of ownership, dominion and control over it.' " (Emphasis sic.) *Helton v. Helton*, 114 Ohio App.3d 683, 685-86, 683 N.E.2d 1157 (2d Dist.1996), quoting *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21, 4 N.E.2d 917 (1936), paragraph one of the syllabus.

{¶ 40} In this regard, the trial court found the actions of Junior suspicious, and concluded that Senior was not in total command of his faculties at the time of the transfer. The court also found that Senior's action in having the check made out to "Leon Dornon or Leon Dornon, Jr.," rather than simply to Leon Dornon, Jr., was consistent with the intention that the checks would be deposited into the Trust accounts over which Senior was the trustee and Junior was the successor trustee. Furthermore, the trial court concluded that Junior's testimony was not credible, and that Junior failed to act in good faith as the successor trustee of the trust, and with respect to his fiduciary duty as attorney in fact under the power of attorney.

{¶ 41} The trial court, therefore, held that a valid transfer did not occur. At the time the money was removed from the WesBanco accounts, Senior had possession and ownership of the money. "[T]he fact that a trust instrument has been signed does not mean that all the property in the trust has been delivered." *Cartwright v. Batner*, 2014-Ohio-2995, 15 N.E.3d 401, ¶ 36 (2d Dist.) On September 21, 2013, the money in the WesBanco accounts had not been delivered to the trust, even though Senior's attorney had advised him in July 2011 that he needed to transfer his accounts to the trust using PODs. Consequently, the WesBanco accounts would have been includable in Senior's estate, and they were properly subject to an action brought under R.C. 2109.50. Consistent with its jurisdiction, the trial court held that the inter vivos transfer was invalid,

and that the assets in question should be paid to Senior's estate.

{¶ 42} We also note that R.C. 2101.24(B)(1)(b) gives probate courts concurrent jurisdiction over inter vivos trusts, and the action against Junior was brought pursuant to that section as well.

{¶ 43} Based on the preceding discussion, Junior's First Assignment of Error is overruled.

III. Alleged Abuse of Discretion in Factual Findings

{¶ 44} Junior's Second Assignment of Error states that:

> The Trial Court Abused Its Discretion When, Against the Manifest Weight of the Evidence, It Failed to Find the Transfer of $180,554.59 to Appellant Met the Elements of a Valid Gift.

{¶ 45} Under this assignment of error, Junior contends that the trial court's ruling was against the manifest weight of the evidence on two grounds. The first ground is that the trial court incorrectly concluded that Senior was subject to undue influence and that he lacked competence to give a valid gift.

{¶ 46} The manifest weight standard of appellate review used in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), applies in both civil and criminal cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Consequently, in civil cases, "[w]hen a [judgment] is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier 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.' " *State v. Hill*, 2d Dist. Montgomery No. 25172, 2013-Ohio-717, ¶ 8, quoting *Thompkins* at 387. "A judgment should be reversed as being against the manifest weight of the evidence 'only in the exceptional case in which the evidence weighs heavily against the [judgment].' " *Id*., quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 47} Concerning the weight of the evidence, Junior initially argues that no expert testimony indicated that Senior was "incompetent." He also relies on the fact that he did not use his power of attorney to consummate the transactions, and that no presumption of undue influence arose.

{¶ 48} As an initial matter, we note that Junior was not required to have used his power of attorney in order for a confidential or fiduciary relationship to arise. "The donee has the burden of showing by clear and convincing evidence that the donor made an *inter vivos* gift." (Emphasis sic.) *Helton*, 114 Ohio App.3d at 686, 683 N.E.2d 1157, citing *Smith v. Shafer*, 89 Ohio App.3d 181, 183, 623 N.E.2d 1261 (3d Dist.1993). (Other citation omitted.) "Where a confidential or fiduciary relationship exists between a donor and donee, the transfer is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee." *Studniewski v. Krzyzanowski,* 65 Ohio App.3d 628, 632, 584 N.E.2d 1297 (6th Dist.1989), citing *Willis v. Baker*, 75 Ohio St. 291, 79 N.E. 466 (1906). (Other citation omitted.) "In such circumstances a presumption arises, and the party with the superior position must go forward with proof on the issue of undue influence and fairness of the transaction while the party attacking a completed gift on that basis retains the ultimate burden of proving undue influence by

clear and convincing evidence." (Citations omitted.) *Id.*, citing *Willis*. (Other citations omitted.)

{¶ 49} "The elements of undue influence are (1) a susceptible party, (2) another's opportunity to influence the susceptible party, (3) the actual or attempted imposition of improper influence, and (4) a result showing the effect of the improper influence." *Ingle v. Ingle*, 2d Dist. Greene No. 2005CA110, 2006-Ohio-3749, ¶ 51, citing *West v. Henry*, 173 Ohio St. 498, 501, 184 N.E.2d 200 (1962).

{¶ 50} As was noted, the existence of a relationship giving rise to undue influence does not depend on the use of a power of attorney. "A confidential relationship exists whenever trust and confidence is placed in the integrity and fidelity of another." *Diamond v. Creager*, 2d Dist. Montgomery No. 18819, 2002 WL 313137, *3 (Mar. 1, 2002), citing *Thorp v. Cross*, 11th Dist. Portage No. 97-P-0079, 1998 WL 35264418 (Oct. 16, 1998). "A confidential relationship can be moral, social, domestic, or merely personal in nature." *Id.*, citing *Thorp*. (Other citation omitted.) Furthermore, "a caregiver may be found to be in a confidential relationship with a decedent whom [he or she] cared for prior to death." (Citation omitted.) *Id.* at *4.

{¶ 51} After reviewing the record, we conclude that the trial court's decision was not against the manifest weight of the evidence. The record indicates that a confidential or fiduciary relationship existed between Junior and Senior. Although Junior did not use the financial power of attorney during the WesBanco transaction, Senior did repose trust and confidence in his son by giving him a financial power of attorney and a health-care power of attorney, and by making him a successor trustee on the revocable trust.[6] In

[6] Although a breach of fiduciary duty was not required in this case, a successor trustee of

addition, Junior and his wife, Teresa, were caregivers for Senior during his last illness.

{¶ 52} Senior was a susceptible party, since he was gravely ill in the final stage of his terminal illness, was in a weakened condition, and was totally dependent on his caregivers. Junior also had the opportunity to exert influence, since his father was in his home and under his control. In fact, Junior acted to restrict the presence of others, as well as their access to information and their ability to care for Senior. Junior also exerted improper influence, as found by the trial court, which concluded that Junior was not credible and acted against his father's best interest. As the trial court noted, Junior did not know at the time of transfer how much money would be needed for his father's medical care during his last weeks or months of life. Despite this fact, Junior allowed his father to randomly dispose of two-thirds of his estate.

{¶ 53} We have frequently stressed that:

> The credibility of the witnesses and the weight to be given to their testimony are primarily matters for the trier of facts to resolve. *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the

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an inter vivos trust has been held to have breached a fiduciary duty to trust beneficiaries where the trustee claimed that the decedent's property had been gifted to her prior to death. *See In re Estate of Taggart v. Smith*, 5th Dist. Fairfield No. 09CA0016, 2009-Ohio-6557, ¶ 14-17 and 29.

> factfinder, who has seen and heard the witness." *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997).

Individual Business Servs. v. Carmack, 2d Dist. Montgomery No. 25286, 2013-Ohio-4819, ¶ 20.

{¶ 54} As was noted, the trial court did not find Junior credible, and we give substantial deference to that conclusion. Furthermore, the trial court did not need to find Senior legally incompetent. As an example, there was no indication in *Diamond* that the decedent was of unsound mind or incompetent; instead, the issue was whether her caregivers had exercised undue influence on her during the last months of her life, making the change in her will to their favor invalid. *Diamond*, 2d Dist. Montgomery No. 18819, 2002 WL 313137, at *5-6.

{¶ 55} This observation does not mean that competency is irrelevant to the issue of an inter vivos gift. In this regard, the Sixth District Court of Appeals stated that:

> "An inter vivos gift is an immediate, voluntary, gratuitous and irrevocable transfer of property by a competent donor to another." (Citation omitted.) *Smith v. Shafer*, 89 Ohio App.3d 181, 183, 623 N.E.2d 1261 (3d Dist.1993). Competency in this sense means that the donor has the mental capacity to understand the nature of making a gift and the intent to do so. Because inter vivos gifts are similar in nature to the process of disposing of one's property at death, the test for testamentary capacity can be used.

In re Estate of Lucitte, 6th Dist. Lucas No. L-10-1136, 2012-Ohio-390, ¶ 61.

{¶ 56} In *Lucitte,* the court of appeals went on to note that:

> "Testamentary 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."

Id., quoting *Niemes v. Niemes*, 97 Ohio St. 145, 119 N.E. 503 (1917), paragraph four of the syllabus.

{¶ 57} However, a donor's lack of intention to give a gift may be established by lack of capacity, or it may be established by other means, including fraud or undue influence exhibited on the donor. *See, e.g., Wright v. Bloom*, 69 Ohio St.3d 596, 635 N.E.2d 31 (1994), paragraph two of the syllabus (holding that "[t]he opening of a joint and survivorship account in the absence of fraud, duress, undue influence or lack of capacity on the part of the decedent is conclusive evidence of his or her intention to transfer to the surviving party or parties a survivorship interest in the balance remaining in the account at his or her death."). (Citation omitted.)[7] *See also Cartwright*, 2014-Ohio-2995, 15 N.E.3d 401, at ¶ 36 (undue influence or fraud); *Cooper v. Smith*, 155 Ohio App.3d 218, 2003-Ohio-6083, 800 N.E.2d 372, ¶ 1 (4th Dist.) (fraud, overreaching, or some other circumstance causing retention of a gift to be unjust); and *In re Guardianship of Simmons*, 6th Dist. Wood No. WD-02-039, 2003-Ohio-5416, ¶ 26 (undue influence or fraud).

{¶ 58} In the case before us, there was evidence of both lack of capacity and undue influence. As was noted above, there was substantial evidence that Senior was

[7] Wright involved the opening of a joint and survivorship account and is not directly applicable. Nonetheless, the situation is similar.

confused and disoriented during documented times right before and after the transaction. Although there was testimony from the bank teller that Senior did not appear confused, their interaction was very brief, and the trial court could have properly decided to place little weight on this testimony, compared to the rest of the evidence. However, as was already indicated, it was not necessary to prove that Senior was incompetent; a finding that undue influence was exerted would have been sufficient to invalidate the inter vivos gift.

{¶ 59} As a further matter, there was conflicting evidence about whether Senior delivered the checks to Junior by relinquishing "ownership, dominion and control * * *." *Helton*, 114 Ohio App.3d at 686, 683 N.E.2d 1157. The conflicting evidence was based on contradictions between Junior's deposition testimony, where he stated that Senior handed him the check without saying anything, and Junior's trial testimony, where he maintained that Senior told him to keep the check and said the money was his (Junior's). The trial court noted the conflicting testimony in its decision, and also stated that the court "found it difficult to assign any weight of credibility to [Junior's] testimony in this matter. His testimony was self-serving." Decision, Doc. #51, p. 7. We accord substantial deference to the trier of fact and find that the court's decision in this regard was not against the manifest weight of the evidence.

{¶ 60} Finally, Junior contends that the decision was against the manifest weight of the evidence insofar as the court concluded that Senior did not intend to gift the money to Junior. In this regard, Junior relies on his close relationship with his father and the lack of Bayes' significant relationship with her father. Again, however, these are matters of credibility, upon which we give substantial deference to the trier of fact. There was

evidence disputing Junior's version of events, and the trial court gave little, if any, weight to Junior's testimony.

{¶ 61} Accordingly, the trial court's decision was not against the manifest weight of the evidence. The Second Assignment of Error, therefore, is overruled.

IV. Conclusion

{¶ 62} All of Junior's assignments of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, P.J. and DONOVAN, J., concur.

Copies mailed to:

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