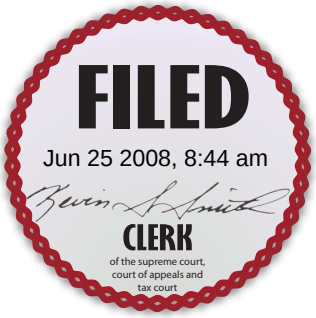
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANTS:

THOMAS BEEMAN
Anderson, Indiana

ATTORNEY FOR APPELLEE:

STEVEN C. SMITH
Anderson, Indiana

DOUGLAS R. LONG
Anderson, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE ESTATE OF ELSIE F. POWELL, Deceased	)	
SANDRA K. BENNETT, JUDITH J. SHORT, JODEL STONER, and PEARL KIMMBERLING,	)	
Appellants,	)	
vs.	)	No. 48A05-0711-CV-607
NEVA M. CAPLINGER,	)	
Appellee.	)	

APPEAL FROM THE MADISION SUPERIOR COURT
The Honorable James J. Jordan, Senior Judge
Cause No. 48D02-0702-ES-00001

June 25, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Sandra K. Bennett, Judith J. Short, Jodel Stoner, and Pearl Kimmerling (collectively the "Objecting Heirs") appeal the order of the Madison Superior Court denying their objection to the final accounting of the Estate of Elsie F. Powell. Upon appeal, the Objecting Heirs claim that the trial court erred in concluding that Neva Caplinger was the owner of accounts owned jointly by the decedent and Caplinger.

We affirm.

Facts and Procedural History

Elsie F. Powell died on June 20, 2003, at the age of 100. Elsie had two children, Hubert Kimmerling and Neva Caplinger. Hubert died in 2002, leaving Neva to take care of her mother. Elsie's will provided that Neva was to receive fifty percent of the estate, Neva's son, Jeffrey Caplinger, was to receive ten percent of the estate; Hubert's children, Sandra, Judith, and Jodel, and Hubert's widow Pearl (who are now the Objecting Heirs), were each to receive ten percent of the estate.

For the last several years of Elsie's life, Neva handled her mother's financial affairs. Neva was also her mother's primary caregiver, although Sandra would help out when Neva was unable to do so. On March 27, 1992, Elsie granted Neva a general durable power of attorney. Neva paid Elsie's bills and signed Elsie's name to checks from approximately 1995 until Elsie's death. On April 10, 1995, Elsie inherited $74,005.71 from the estate of her sister. Eight days later, Neva filed a petition for guardianship over Elsie. In the petition, Neva alleged that Elsie was unable to care for herself or her financial affairs due to "old age and infirmities." Appellant's App. p. 15.

The guardianship order was approved by court on the same day it was filed. The guardianship remained open until after Elsie's death.

On May 2, 1995, Elsie purchased from National City Bank two certificates of deposit ("CDs") for $36,000 each and made Neva a joint owner thereof. Neva was present when Elsie purchased the CDs, but did not participate in the purchase herself. The funds remained in the CDs until October 10, 2000, when the money was moved to another account at Star Financial Bank, again owned jointly by Elsie and Neva. At the time of this transfer, the funds had accumulated to $87,982. By January 2003, the account contained $102,710. In April of 2003, approximately eight years after the creation of the joint account and only a few months before Elsie died, Neva removed the money from the Star Financial Bank account. In August of 2003, Neva put $71,000 of this amount in another account owned jointly by her and her son.[1]

Elsie and Neva owned another account jointly which contained $12,756. Neva withdrew this money in June of 2002 and placed the funds into an account owned by her. The same day that she moved this money, Neva wrote a check for $15,000 to the attorney of her other son, who had apparently gotten into "some legal trouble." Tr. p. 40. Neva testified, however, that her mother knew about and consented to the withdrawal of this money.

[1] Elsie had another account at Star Financial Bank which contained $7,064.50. Neva removed the money from this account and moved it into an account owned by Elsie and Neva jointly. Prior to Elsie's death, Neva closed this account and used the funds. The trial court here found that Neva should pay this money back to the Estate, and Neva does not challenge this portion of the trial court's order; indeed, she asks that the trial court's order be affirmed.

Elsie died on June 20, 2003. On July 8, 2003, Neva filed a petition to probate Elsie's will under supervised administration. Also on July 8, Neva filed a "Guardian's Report, Petition to Terminate Guardianship," in which she alleged that, after she was appointed as Elsie's guardian, Elsie's "health improved, and there was never a need to act in said capacity," and that she should not be required to file an accounting because "a guardianship accounting was never established and an inventory never filed due to [Elsie]'s improved health." Appellant's App. p. 70. Neva, acting as the personal representative of the Estate, also filed a waiver and consent to the final guardianship accounting.

On July 9, 2003, the trial court issued an order probating the will, authorizing the issuance of letters testamentary, and authorizing a supervised administration. The next day, the trial court entered an order which terminated the guardianship and concluded that Neva "should not be required to file any accounting" in the guardianship. Appellant's App. p. 76. On October 20, 2003, the Objecting Heirs filed a motion to vacate the order approving the final guardianship accounting, in which they noted that Elsie had inherited approximately $75,000 and that the inventory filed by Neva as personal representative of the Estate did not reveal what happened to this money. After an evidentiary hearing, the trial court denied the Objecting Heirs' motion on February 27, 2006.

On July 21, 2006, Neva filed a final accounting and petition to settle the estate. On August 23, 2006, the Objecting Heirs filed an objection to the petition to settle. In this objection, the Objecting Heirs claimed that the bank accounts listed above should have been included as assets of the Estate. The trial court held an evidentiary hearing on

the objection on July 6, 2007. On August 16, 2007, the trial court issued findings of fact and conclusions of law which granted the Objecting Heirs relief as to one of the three accounts in question, but otherwise denied their objections. The trial court's findings and conclusions provide in relevant part:

> e) The objecting beneficiaries are the grandchildren of Elsie and widow of Hubert Kimmerling all of whom were beneficiaries under Elsie's will and that disposition supports Elsie's intent to make Neva as Co-owner of the CD's in dispute.
> f) The Court finds the beneficiaries have standing to object to the final accounting.
> g) Elsie executed a Durable Power of Attorney on March 27, 1992 with Neva as an Attorney in Fact.
> h) That although a guardianship for Elsie was opened, it was never utilized and the Power of Attorney provided that it survived even upon the incompetence of [Elsie] so that a guardianship was unnecessary, not used[,] and eventually closed.
> i) These beneficiaries no standing [sic] nor were they entitled to notice to object to a prior guardianship accounting.
> j) The Court cannot determine the basis for the denial of Beneficiaries' objection in the Guardianship.
> k) In April of 1995, Elsie inherited approximately $74,000.00 and placed $36,500 each into two (2) separate CD's in her name and Neva as co-owners.
> l) These CD's eventually transferred to another bank retaining the same ownership in Elsie and Neva.
> m) That Elsie intended Neva to be joint owner with her since Neva by reason of Power of Attorney could have controlled this money.
> n) Joint ownership remained for approximately eight (8) years.
> o) Elsie had accounts in her name as well as jointly with Neva.
> p) Had the joint accounts remained intact until Elsie's death they would have been paid to Neva.
> q) The presumption of any undue influence upon Elsie by Neva was rebutted by Elsie herself initiating the original CD's with Neva as co-owner.
> r) The transferring of accounts in Elsie's name only were by Neva to qualify Elsie for Medicaid.

s) The account in the amount of $7,064.50 in Elsie's name alone should have been a part of the estate's assets and should be accounted for.
t) The matter of attorney fees and interest requires additional evidence.

Appellant's App. pp. 89-90. The Objecting Heirs now appeal.

Discussion and Decision

The Objecting Heirs claim on appeal that Neva, who was acting as Elsie's guardian and attorney-in-fact, was in a dominant position over Elsie and therefore Neva's transfer of assets gives rise to a presumption that the transactions were the result of undue influence which Neva did not rebut. Neva claims that the evidence was sufficient to rebut any presumption of undue influence.[2]

Before addressing the issue of the presumption of undue influence, we first observe that issues involving the ownership of joint accounts are controlled by statutes. Indiana Code section 32-17-11-17(a) (2002) provides, "Unless there is clear and convincing evidence of a different intent, during the lifetime of all parties, a joint account belongs to the parties in proportion to the net contributions by each party to the sums on deposit." Thus, the money in the joint accounts at issue here belonged to Elsie during her lifetime because she contributed all of the initial funds put into the accounts, and there was no clear and convincing evidence of a different intent. See Shourek v. Stirling, 621 N.E.2d 1107, 1110 (Ind. 1993). Further, Indiana Code section 32-17-11-18 (2002) provides that "[s]ums remaining on deposit at the death of a party to a joint account

[2] Upon cross-appeal, Neva also claims that the trial court erred in concluding that the Objecting Heirs' claim was not barred by the doctrine of res judicata. Specifically, Neva asserts that the Objecting Heirs' current objections are precluded because they failed to appeal the trial court's denial of their objection to the final accounting of the guardianship. Because we conclude below that Neva presented sufficient evidence to rebut the presumption of undue influence, we do not address this argument.

belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created[.]" This provision eliminates the common-law presumption of undue influence with regard to joint accounts and instead replaces it with "a presumption that a survivor to a joint account is the intended receiver of the proceeds in the account." In re Estate of Banko, 622 N.E.2d 476, 480 (Ind. 1993). Therefore, if the money in the joint accounts at issue here had remained undisturbed until after Elsie's death, then Neva would be the presumptive owner of the money pursuant to Section 18(a). See Shourek, 621 N.E.2d at 1110 n.3; Banko, 622 N.E.2d at 480. However, because she withdrew the funds from the joint accounts *prior* to Elsie's death, Neva cannot now rely upon the statutory presumption of survivorship. See Shourek, 621 N.E.2d at 1110. This brings us back to the common-law presumption of undue influence.

Certain legal and domestic relationships give rise to a presumption of trust and confidence as to the subordinate on the one hand, and a corresponding influence as to the dominant party on the other. Hamilton v. Hamilton, 858 N.E.2d 1032, 1036 (Ind. Ct. App. 2006), trans. denied. Among these relationships are guardian and ward. Also, the designation of a power of attorney creates a fiduciary relationship between the principal and his agent, or attorney-in-fact. Id. If a plaintiff's evidence establishes (1) the existence of such a relationship, and (2) that the questioned transaction between the parties resulted in an advantage to the dominant party in whom the subordinate party had placed his or her trust and confidence, the law imposes a presumption that the transaction was the result of undue influence exerted by the dominant party, constructively

fraudulent, and, thus void. Id. The burden of proof then shifts to the dominant party to rebut this presumption by clear and unequivocal proof that the questioned transaction was made at arm's length and was therefore valid. Id.

We agree with the trial court that Neva was in a dominant position over Elsie as both her guardian and as her attorney-in-fact. The Objecting Heirs claim that the transactions whereby Neva took funds out of the accounts owned jointly by Elsie and Neva and placed the money into accounts owned by Neva were presumptively void because of Neva's dominant position. They also claim that the evidence before the trial court was insufficient to rebut this presumption. Neva does not directly deny that the presumption of undue influence operates in this case but claims that she presented evidence sufficient to rebut any presumption.

Neva claims that there was sufficient evidence to rebut any presumption of undue influence: specifically, that she was her mother's primary caregiver and thus the natural object of her mother's bounty, and also that her mother set up the accounts as joint accounts without any involvement by her. With regard to the latter claim, the Objecting Heirs claim that it is not enough that Elsie set up the accounts with Neva as a joint owner.

A similar issue was addressed in Shourek, which although it did not involve the presumption of undue influence, did address the question of who owned money that had been held in a joint account: the estate of the deceased joint owner who had contributed all of the money in the joint accounts, or the surviving joint owner who had made no contributions. In Shourek, the surviving owner of certain joint accounts had moved money from the joint accounts just hours before the death of the joint owner. She was

sued for conversion by the decedent's estate and claimed in defense that she, as the surviving joint owner, had the right to withdraw such funds. She also claimed that the decedent had expressed an intent to transfer a present interest in the joint accounts to her, as evidenced by the authority given to her to make withdrawals from the joint accounts. Our supreme court observed that "[t]he right to withdraw and the right of ownership, however, are separate and distinct rights." 621 N.E.2d at 1110. The court held that the right to withdraw funds was not sufficient to create an ownership interest in the funds withdrawn prior to the death of the contributing joint owner. Id. However, the surviving joint owner had also been given physical possession of some of the certificates of deposit, keys to the decedent's house, and instructions where to find the account books. "These facts," the court held, "when combined with the above-discussed right of withdrawal, are evidence of [the decedent]'s intent to make a present gift subject only to funds being available for [her] immediate needs." Id. The court remanded for the trial court to determine from these facts whether an *inter vivos* gift occurred.[3] Id.

Based upon Shourek, we conclude that Neva cannot rebut the presumption of undue influence by relying solely upon the fact that her mother placed the money into joint accounts with Neva as joint owner with a right to withdraw. See id.; see also Rogers v. Rogers, 437 N.E.2d 92, 96 (Ind. Ct. App. 1982) ("[t]he mere fact that money is deposited in a joint bank account to the credit of the owner and another is not sufficient to

[3] Upon remand, the trial court entered summary judgment for the surviving joint owner, which was reversed by this court on appeal, which held that the above-mentioned facts were susceptible to conflicting inferences regarding the decedent's intent, making summary judgment inappropriate. See Shourek v. Stirling, 652 N.E.2d 865, 868 (Ind. Ct. App. 1995).

show an intent to make a gift to the other."). But, as in Shourek, the fact that Elsie placed the money into a joint account, combined with other evidence, could establish that Elsie intended the joint accounts to be an *inter vivos* gift. See 621 N.E.2d at 1110.

The other evidence which Neva refers us to consists of the fact that Neva acted as Elsie's primary caregiver and was thus, the natural object of Elsie's bounty. Here, there was evidence that Neva had taken care of her elderly mother during the last years of her life. Neva helped her mother with personal hygiene, took her to her doctor appointments, did her laundry, took her to the grocery store, and helped out with cooking. She also paid her mother's bills and checked with Elsie before she made any withdrawals. Although Sandra helped Elsie when Neva was unable to do so, there was no evidence that any of the Objecting Heirs helped Elsie even close to as much as Neva did. Neva was also Elsie's only surviving child. We also cannot ignore the trial court's finding, which is supported by the evidence, that Neva did not ask her mother to set up the accounts at issue as joint accounts; Elsie did so on her own.

Under these facts and circumstances, we cannot say that the trial court erred when it concluded that Neva had rebutted the presumption of undue influence. See Meyer v. Wright, 854 N.E.2d 57, 63 (Ind. Ct. App. 2006) (presumption of undue influence was rebutted by son, who had power of attorney over father, where son had looked to his father for advice and guidance, visited him nearly every day, and taken him to his doctor appointments, to the bank, and to dinner and was thus the natural object of his father's bounty), trans. denied; Outlaw v. Danks, 832 N.E.2d 1108, 1111 (Ind. Ct. App. 2005) (presumption of undue influence rebutted by evidence that nephew, who had power of

attorney over his aunt, had warm, loving relationship with aunt analogous to a mother-son relationship, that nephew had been caring for aunt for two years at the time her will was executed and was thus a natural object of his aunt's bounty), trans. denied; cf. In re Estate of Allender, 833 N.E.2d 529, 534 (Ind. Ct. App. 2005) (presumption of undue influence arose where son and his wife had power of attorney over his parents and presumption was not rebutted by son and wife's having taken care of parents where son did so not for familial love, but for pay because he had to have full-time employment while he was on parole, and there was evidence that son had yelled at and threatened his father on several occasions), trans. denied.

In conclusion, Neva's position as Elsie's guardian and attorney-in-fact, combined with Neva's actions of withdrawing money from the joint accounts prior to Elsie's death, gave rise to a presumption of undue influence with regard to the transactions in question. However, Neva presented sufficient evidence from which the trial court could have concluded that Neva successfully rebutted that presumption.

Affirmed.

MAY, J., and VAIDIK, J., concur.