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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Supervised Estate of Larry J. Blair, Deceased,

Samantha Pulliam,

Appellant-Respondent,

v.

Jeffrey Peconge and Michael Peconge, Laura Jean Hesson,[1] Personal Representative of the Estate of Larry J. Blair,

Appellees-Petitioners.

September 17, 2021

Court of Appeals Case No. 21A-ES-494

Appeal from the Allen Superior Court

The Honorable Phillip E. Houk, Magistrate

Trial Court Cause No. 02D02-2001-ES-1

Kirsch, Judge.

[1] Laura Jean Hesson is not participating in this appeal, but because she is a party of record in the trial court, she is a party on appeal. *See* Ind. Appellate Rule 17(A).

[1] Samantha Pulliam ("Samantha") appeals the trial court's order that invalidated the transfer of ownership of Larry J. Blair's ("Larry") home to Samantha for $0.00 because the trial court found that the transfer was facilitated by Samanth's exercise of undue influence over Larry. On appeal, Samantha raises four issues, which we restate as:

> I. Whether the trial court abused its discretion in admitting into evidence medical records;
>
> II. Whether the trial court abused its discretion in allowing Larry's attorney to testify about Larry's declining health because the testimony violated the attorney-client privilege;
>
> III. Whether the trial court abused its discretion in finding that Samantha procured the transfer of Larry's property to her through undue influence; and
>
> IV. Whether the trial court erred in finding that the transfer of Larry's property to Samantha was invalid.

[2] We affirm.

Facts and Procedural History

[3] Larry owned a home in Fort Wayne, Indiana. *Tr. Vol. 2* at 42. Larry's deceased wife, Barbara, was the mother of Michelle Peconge ("Michelle") and Michael and Jeffrey Peconge ("Jeffrey," "Michael," or "the Peconges"), who had all lived with Larry while their mother was alive. *Id*. at 49.

[4] On March 12, 2010, Larry executed his last will and testament, which included the following provision:

> [If] I own any real estate on the date of my death, then I direct my Personal Representative to sell the real estate and to divide the net sale proceeds of the real estate as follows: 1/4 to my daughter, LAURA JEAN HESSON ["Laura"], per stirpes, 1/4 to my daughter, LISA JO ICE ["Lisa"], per stirpes, 1/6 to my step-child, MICHELLE PECONGE ["Michelle"], per stirpes, 1/6 to my step-child, [JEFFREY], per stirpes, and 1/6 to my step-child, [MICHAEL], per stirpes.

Ex. Vol. I at 167.

[5] In June 2019, Larry was hospitalized following complaints of "generalized weakness, fatigue, confusion, and uncoordinated gait[.]" *Id*. at 3. Doctors discovered that Larry had a large brain tumor, and on July 1, 2019, they operated on Larry to remove the tumor and referred him to radiation treatment and rehabilitation. *Id*. at 12-14. Larry was discharged from the hospital on July 29, 2019, but he was readmitted to the hospital the next day where he stayed until August 16, 2019. *Appellant's App. Vol. II* at 14. While in the hospital during his second stay, medical professionals observed that Larry: 1) was unable to consistently follow commands; 2) "demonstrated mild-moderate cognitive-linguistic deficits which impact speed of processing for reasoning, complex auditory comprehension and working memory . . ."; 3) needed help from his family to make decisions; 4) was disoriented to time and his situation; 5) had functional impairments, including decreased attention, poor judgment, problem solving, memory, concentration, expression, and comprehension of

language. *Ex. Vol. 1* at 5, 8-9. Larry could understand only simple expressions or gestures. *Id*. at 11. On a speech-language pathology evaluation, Larry tested as follows: delayed recall - 0%; problem solving/numeric reasoning – 0%; executive reasoning – 16%; and memory recall – 25%. *Id*. at 8. On August 15, 2019, the day before Larry was discharged from the hospital, Samantha, Larry's granddaughter, sent a text message to Lisa, stating, "Dr. Cannon recommends not doing [radiation] treatment. Gramps is already experiencing great confusion and is on a 3[-]person max assist for everything. Doc says [radiation treatment] will destroy what's left of his mind, and his quality of life will be non[-]existent." *Id.* at 90.

[6] Around the same time, Larry often did not recognize Jeffrey or Jeffrey's wife. *Tr. Vol. 2* at 53. Jeffrey recounted a conversation that occurred three weeks before Larry died where Larry asked someone to "get Harmony off his lap because he was sweating"; Harmony was Larry's Yorkshire Terrier that had died ten years earlier. *Id*. at 57. Larry experienced hallucinations while in the hospital, including one about Samantha's husband running down the hall with a wheel barrel. *Id.* at 77. Rachel Veenstra, another of Larry's granddaughters, testified that she saw Larry during his hospital stay and described him as "fragile mentally and physically . . . he was very overwhelmed by people and slower to follow the conversation." *Id*. at 31. According to Lisa, Larry had become a "child version" of himself. *Id*. at 74-75.

[7] Once Larry was discharged from the hospital on August 16, 2019, his granddaughter Samantha became his full-time caretaker. *Id*. at 99, 101, 165,

170. About one week later, Laura called Dan Borgmann ("Borgmann"), Larry's attorney, to change Larry's will. *Id*. at 14. On August 26, 2019, Borgmann went to Larry's home, and when he arrived, there were many people in Larry's house, including Samantha; Borgmann asked them to leave the family room where he was meeting with Larry. *Ex. Vol. 1* at 170; *Tr. Vol. 2* at 15. Even though Borgmann had asked for privacy, the family members who had left the room were listening from a side area of Larry's home. *Tr. Vol. 2* at 16. At some point during Borgmann's conversation with Larry, "they all rushed back into the family room," immediately declaring to Borgmann, "that's not what Larry wants to do." *Id*. at 15, 16. They then told Borgmann "what . . . Larry wanted or did not want." *Id*. at 17. Borgmann told Larry he "was concerned about him telling me one thing, [and] his sister, daughter and granddaughter telling me another." *Ex. Vol. 1* at 172. Borgmann told Larry he was not comfortable changing Larry's will, and Larry responded to Borgmann with the words "undue influence." *Tr. Vol. 2* at 17. Borgmann was taken aback by Larry's comment, as the term "undue influence" had not been used in the conversation before Larry used it. *Id*. at 22. At no point during this conversation did Larry try to convince Borgmann to change his will. *Id*. at 19.

[8] Once Samantha could not get Larry to change his will, she and Laura tried to transfer ownership of Larry's property to Samantha through use of Laura's power of attorney over Larry. *Id.* at 118. They asked Elisa Hoffman ("Hoffman"), an employee of Fidelity National Title, to help facilitate the transaction. *Id*. Hoffman declined their request because Larry had an attorney

who was handling Larry's estate matters. *Id*. Therefore, on August 27, 2019, Samantha, Laura, and Connie Ogden, Larry's sister, ("Connie") had Larry sign a purchase agreement in which he agreed to sell his home to Samantha for $0.00. *Ex. Vol. 1* at 76. The purchase agreement provided that Samantha was to gain possession of Larry's home that same day, but it reserved a life estate in the home to Larry. *Id.* at 77-78.

[9] Nine days later, on September 5, 2019, Larry executed a quit claim deed, which transferred title of his home to Samantha. *Id.* at 58-59. No one read aloud the contents of the deed before Larry signed it. *Tr. Vol. 2* at 47. At one point during the signing of the deed, the following exchange occurred between Samantha and Larry: "[Samantha]: All you're doing is adding my name to your title. That's all we're doing it [sic]. [Larry]: Signing it away. [Samantha]: No, we're not doing that. It's still yours." *Id*.

[10] The next day, September 6, 2019, Larry went into a coma, and he died on September 11, 2019. *Appellant's App. Vol. II* at 17. On November 19, 2019, the trial court admitted Larry's last will and testament to probate. *Id*. at 238. On March 6, 2020, the trial court appointed Laura as the personal representative of Larry's estate and authorized her to administer the estate as a supervised estate. *Id*. at 4. On June 5, 2020, the Peconges filed a Petition for Disclosure and Adjudication of Rights ("the Petition"). *Id*. at 23-24. They asked the trial court to determine that the transfer of Larry's home to Samantha was invalid and to also determine that Larry's home should be administered as part of his estate. *Id*.

[11] On October 20, 2020, the trial court held a hearing on the Petition. *Id*. at 8. At the beginning of the hearing, the Peconges asked the trial court to admit Larry's medical records into evidence, and Samantha objected, stating:

> [W]e do not have any objection to authenticity of the documents for purposes of admission. However, within the context of the documents in a particular number of the medical records there are a number of statements by witnesses in there that are presumably being offered for the truth of the matter asserted within the context of the medical records. They are therefore hearsay. . . . And similarly, there are a number of statements within the medical records that constitute opinion testimony of witnesses without any foundation having been laid for the admission of -- of that type of an opinion statement into record.

Tr. Vol. 2 at 9-10. Borgmann's deposition was played at the hearing. *Id*. at 13-26. In his deposition testimony, Borgmann discussed Larry's declining physical and mental health. *Id*. at 17-18. Laura objected, contending that playing Borgmann's deposition violated the attorney-client privilege. *Id*. Samantha did not object.

[12] When the hearing concluded, the trial court took the evidentiary issues under advisement and gave the parties ten days to file post-trial briefs on those issues. *Appellant's App. Vol. II* at 21. On November 23, 2020, the trial court issued its order on the disputed evidentiary issues, ruling, in part, that the medical records were admissible under Indiana Rule of Evidence 803(6) as business records. *Id*. at 21-22.

[13] On January 21, 2021, the trial court issued its final ruling, concluding that Larry was subjected to undue influence by Samantha, who was Larry's caretaker when Larry sold and deeded his home to Samantha. *Id*. at 18. The trial court also found that Samantha failed to show by clear and convincing evidence that the transfer of Larry's property to her was an arm's-length transaction. *Id*. Finally, the trial concluded that Larry lacked the requisite mental capacity to transfer his home to Samantha. *Id*.

> It is significant that, within hours of the closing on the real estate which took place at Larry's bedside, he slipped into a coma from which he never recovered. In fact, Larry died six days later.
>
> . . . .
>
> [B]ased on these findings, the Court finds that Larry Blair lacked the requisite mental capacity to transfer his home to Samantha.

Id. Therefore, the trial court found that the transfer of Larry's home to Samantha was invalid and ordered that Larry's home be returned to his estate. *Id*. at 19. On February 19, 2021, Samantha filed a motion to correct error, which the trial court denied on March 11, 2021. *Id*. at 10. Samantha now appeals. We will provide additional facts as necessary.

Discussion and Decision

[14] The trial court entered specific findings of fact and conclusions of law. *Appellant's App. Vol. II* at 13-18.

> When a trial court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings, and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. We do not defer to conclusions of law, however, and evaluate them de novo.

Supervised Est. of Allender v. Allender, 833 N.E.2d 529, 533 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*.

I. Admission of Larry's Medical Records

[15] Samantha argues the trial court abused its discretion when it admitted Larry's medical records into evidence. We review evidentiary rulings for an abuse of discretion, which occurs only when a trial court's ruling is clearly erroneous and against the logic and effect of the facts before it. *Weinberger v. Boyer*, 956 N.E.2d 1095, 1104 (Ind. Ct. App. 2011), *trans. denied*.

[16] More specifically, Samantha contends the trial court abused its discretion in overruling her objection that Larry's medical records contained inadmissible hearsay and expert opinions for which the Peconges had failed to lay an adequate foundation. At the beginning of the trial, Jeffrey tendered Larry's medical records, which totaled nearly 3,800 pages. *Tr. Vol. 2* at 8-9; *Appellant's*

App. Vol. II at 21; *Appellee*s' *App. Vol. II* at 23. The records included information about Larry's health, including his medical history, cognitive assessments, physical exams, sleeping assessments, brain cancer diagnosis, post-surgical care, rehabilitation, medications, and palliative care. *Ex. Vol. 1* at 3-54, 79-86, 90. In her objection, Samantha claimed some of the records contained inadmissible hearsay and expert opinions that lacked evidentiary foundations. *Tr. Vol. 2* at 9-10. Samantha claimed that "a particular number of the medical records" were problematic, but she did not identify those "particular" records or specify the statements within the records that were inadmissible. *Id*.

[17] The trial court did not immediately rule on Samantha's objection, taking the issue under advisement, and inviting the parties to file post-trial briefs regarding Samantha's objection. *Id*. at 11. Samanatha's post-trial brief, like her objection at trial, did not specify which documents to which she objected, the specific statements within those documents that she contended were problematic, or the legal ground for each specific document and statement at issue. *Id.* at 27-33.[2] Because of this lack of specificity, the Peconges argue that Samantha has waived appellate review of the admissibility of the medical records. We agree.

[18] To preserve an evidentiary issue for appellate review, a trial objection must include the specific ground for the exclusion of the evidence and "specific as to the part or parts of the evidence being objected to." *Gayden v. State*, 863 N.E.2d

[2] After reviewing the parties' post-trial briefs, the trial court overruled Samantha's objections and determined the medical records were admissible under Indiana Evidence Rule 803(6). *Appellant's App. Vol. II* at 21.

1193, 1198 (Ind. Ct. App. 2007), *trans. denied*. Therefore, a "blanket objection" to multiple documents does not suffice because it leaves "the trial court the task of thoroughly evaluating every question and answer to determine their evidentiary propriety." *Kindred v. State*, 540 N.E.2d 1161, 1169 (Ind. 1989), *abrogated in part on other grounds by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007).

[19] Here, Samantha's objection was a blanket objection. While she gave two specific legal grounds for her objection and said that only some of the documents were inadmissible, she did not highlight specific documents among Larry's medical records or the specific parts of any particular document that were inadmissible. *Tr. Vol. 2* at 9-10. Samantha's vague objection "unloaded upon the trial court the responsibility of detecting inadmissible evidence and . . . circumvented [her] responsibility to articulate and adequately support specific objections." *See Kindred*, 540 N.E.2d at 1169.

[20] Samantha appears to contend that the large amount of Larry's medical records that the Peconges tendered for admission at trial excused her from the responsibility to make specific objections. However, Samantha cites no legal authority that vitiated her duty to make objections because of the large volume of records. Moreover, she could have sought a continuance to gain more time to review the documents, but apparently, she did not. Also, five days before trial, the Peconges gave Samantha a summary of the medical records, which identified by page number the medical records they intended to introduce at the hearing trial and were willing to give the trial court a chart that would point it

to the parts of the records that they were planning to tender as evidence. *Appellees' App. Vol. II* at 20. Thus, Samantha's attempt to negate her responsibility to make more specific objections based on the size of Larry's exhibit is without merit. Samantha has waived the issue of the admissibility of Larry's medical records.

[21] Finally, we briefly note that Samantha's brief on appeal displays the same shortcomings as her trial objection. Her brief does not identify specific documents, specific statements within those documents, or the legal ground supporting objections to any particular document, even though the medical records submitted on appeal total less than 100 pages. "[W]e will not, on review, sift through the record to find a basis for a party's argument," *Haddock v. State*, 800 N.E.2d 242, 245 n.5 (Ind. Ct. App. 2003), lest we become an advocate for a party rather than an adjudicator. *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018), *trans. denied*. Samantha has waived appellate review of her claim that the trial court abused its discretion in admitting Larry's medical records into evidence.

II. Testimony of Borgmann

[22] Samantha argues that the trial court abused its discretion by allowing Borgmann's deposition to be played at the hearing trial because playing that testimony breached the attorney-client privilege. Among other things, Borgmann's testimony addressed Larry's declining physical and mental health. *Tr. Vol. 2* at 17-18. Samantha acknowledges that she did not object to

Borgmann's testimony but contends the issue has been preserved for appellate review because Laura, Larry's personal representative, did object on this ground at the hearing. As we noted earlier, Laura is not participating in this appeal.

[23] Samantha has no standing to raise this issue, whether in the trial court or on appeal. The right to prohibit disclosure of confidential communications between attorney and client belongs to the client, and after the client's death, the right to belongs to the client's personal representative. *Mayberry v. State*, 670 N.E.2d 1262, 1268 n.5 (Ind. 1996); *see also Buuck v. Kruckeberg*, 121 Ind. App. 262, 271, 95 N.E.2d 304, 308 (1950). Samantha acknowledges this: "[T]he privilege . . . belongs to the client's personal representative." *Appellant's Reply Br.* at 9. Samantha is not the personal representative of Larry's estate, so she cannot raise this issue.

[24] Moreover, even if Samantha had standing to raise this issue, she would have waived the issue for failure to object at trial. It is axiomatic that an argument cannot be presented for the first time on appeal. *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015). Moreover, Samantha could not have preserved this issue by piggybacking on Laura's objection. "It is well settled that a joint objection and a joint exception to the ruling thereon, to be available to anyone joining therein, must be well taken as to all who join in such objection and exception." *Fowler v. Newsom*, 174 Ind. 104, 90 N.E. 9, 13 (1909); *see also Daniels v. Yancey*, 175 S.W.3d 889, 892 (Tex. App. 2005) ("one party may not use another party's objection to preserve an error where the

record does not reflect a timely expression of an intent to adopt the objection."), (superseded by rule on other grounds as stated in *In re Kings Ridge Homeowners Ass'n, Inc.*, 303 S.W.3d 773, 779 (Tex. App. 2009)). Whether because Samantha did not have standing to raise this issue or waived the issue for failing to object at trial, this issue is not properly before us.

III. Undue Influence

[25] Samantha argues that the trial court erred in finding that she exercised undue influence over Larry. The trial court found as follows:

> The Court finds that [Larry] was subject to the undue influence of [Samantha], his caretaker at the time of the transfer of the deed to his house to her. Samantha has failed to show by clear and unequivocal proof that the transfer of the deed was an arm's[-] length transaction.

Appellant's App. Vol. II at 18.

[26] Undue influence is the exercise of control by one person over another person to destroy that person's free agency and compel the person to do something he or she would have otherwise not done. *Carlson v. Warren,* 878 N.E.2d 844, 851 (Ind. Ct. App. 2007). Undue influence "may flow from the abuse of a *confidential relationship* in which confidence is reposed by one party in another with resulting superiority and influence exercised by the other." *Id*. (emphasis added and internal quotation marks omitted).

[27] Samantha correctly observes that there are two kinds of confidential relationships that can implicate undue influence, confidential relationships as a

matter of law and confidential relationships as a matter of fact.[3] *Id*. at 851-52. Confidential relationships as a matter of law are

> certain legal and domestic relationships [that] raise a presumption of trust and confidence as to the subordinate party on the one side and a corresponding influence as to the dominant party on the other. These relationships include that of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, parent and child, *and there may be others*.

Lucas v. Frazee, 471 N.E.2d 1163, 1166-67 (Ind. Ct. App. 1984) (emphasis added); *Scribner v. Gibbs*, 953 N.E.2d 475, 484 (Ind. Ct. App. 2011). Where such a relationship exists and the dominant party benefits from a transaction, a presumption of undue influence arises and the dominant party bears the burden of rebutting that presumption. *Carlson,* 878 N.E.2d at 851. The dominant party can carry that burden by presenting clear and convincing evidence that they acted in good faith, did not take advantage of the position of trust, and that the transaction was fair and equitable. *Scribner*, 953 N.E.2d at 484. The dominant

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[3] Samantha correctly observes that in a confidential relationship as a matter of fact, a plaintiff carries a heavier burden of proof the dominant party exercised undue influence. In such relationships there is no presumption of undue influence. *Lucas v. Frazee*, 471 N.E.2d 1163, 1167 (Ind. Ct. App. 1984). The subordinate party carries the burden of proving the parties did not deal on equal terms and must also prove that the dominant party dealt with superior knowledge from a position of overpowering influence. *Id.* Alternatively, the subordinate party may prove she dealt from a position of weakness, dependence, or trust in the dominant party, which gave the dominant party an unfair advantage. *Id*. Only when the plaintiff establishes these facts does the burden of proof shift to the dominant party, who must then show no deception was practiced, no undue influence was used, and "all was fair, open, voluntary, and well understood." *Id*. Because we find that Samantha and Larry's relationship was a confidential relationship as a matter of law, we need not apply the analysis for relationships as a matter of fact.

party must show that the transaction at issue was an arm's-length transaction. *Allender*, 833 N.E.2d at 533.

[28] Samantha is correct that the trial court determined that her relationship with Larry was a confidential relationship as a matter of law, evinced by the trial court's finding that "Samantha has failed to show by clear and unequivocal proof that the transfer of the deed was an arm's[-]length transaction." *Appellant's App. Vol. II* at 18. Samantha argues this finding was incorrect because her relationship with Larry was not a relationship such as attorney and client, guardian and ward, principal and agent, pastor and parishioner, and parent and child; in other words, Samantha argues that her relationship with Larry was not a confidential relationship as a matter of law. *See Lucas*, 471 N.E.2d at 1166-67. Because the relationship was not confidential as a matter of law, Samantha claims the trial court erred in shifting the burden to her to prove that the transfer of Larry's property to her was an arm's-length transaction. We disagree.

[29] Confidential relationships as a matter of law are not restricted to relationships such as of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, parent and child. *Id*. As *Lucas* noted, "there may be other[] [such relationships.]" *Id*. at 1167. Other such relationships include familial relationships where the traditional roles are reversed. For instance, in the parent-child relationship, the parent is generally considered the dominant party. *Scribner*, 953 N.E.2d at 484. However, the child or other younger party in a familial relationship can be the dominant party

under some circumstances. *See Allender*, 953 N.E.2d at 533-34; *In re Rhoades*, 993 N.E.2d 291, 301 n.8 (Ind. Ct. App. 2013). For instance, a younger relative was deemed the dominant party in *Outlaw v. Danks*, 832 N.E.2d 1108, 1110-12 (Ind. Ct. App. 2005), *trans. denied*. There, a nephew, as caretaker of his aunt, was the dominant party in the relationship, and this familial relationship was a confidential relationship as a matter of law. *Id*.

[30] Here, in many other contexts, Larry, as the grandfather, would have been the dominant party in his relationship with Samantha. But as noted in *Allender* and *Outlaw*, roles in a familial relationship can be reversed where, as here, Samantha, as the granddaughter, exercised the dominant role. Many facts demonstrate this. Larry was recovering from surgery to remove a cancerous brain tumor. *Ex. Vol. 1* at 7, 12-14. Larry could not follow commands, and he could not make decisions without the help of family members. *Id*. at 5-6. Larry experienced significant linguistic and cognitive deficits, and he understood conversations between only 25% and 49% of the time. *Id*. at 5-6, 11. He was disoriented as to time and place, and he experienced hallucinations. *Id*. at 8; *Tr. Vol. 2* at 77. On a speech-language pathology evaluation, Larry tested as follows: delayed recall - 0%; problem solving/numeric reasoning – 0%; executive reasoning – 16%; and memory recall – 25%. *Ex. Vol. 1* at 8. The day before Larry was discharged from the hospital, Samantha observed that Larry needed help with everything: "Dr. Cannon recommends not doing [radiation] treatment. Gramps is already experiencing great confusion and is on a 3[-]person max assist for everything. Doc says [radiation treatment] will destroy

what's left of his mind, and his quality of life will be non[-]existent." *Ex. Vol. 1* at 90.

[31] Because of Larry's post-surgery recovery, his inability to make decisions, and declining linguistic and cognitive skills, Samantha became Larry's full-time caretaker after Larry was discharged from the hospital. *Id.*; *Tr. Vol. 2* at 99, 101, 165, 170. Samantha and her husband "[d]id everything for [Larry]." *Tr. Vol. 2* at 101. Therefore, because the evidence established that Larry and Samantha were in a familial relationship where Samanta was the dominant party and Larry was the subordinate party, Larry and Samantha were in a confidential relationship as a matter of law. In addition, Samantha benefited from the transaction with Larry because she purchased and obtained title to Larry's home, which had a market value of $131,300.00, for $0.00. *Ex. Vol. 1* at 60, 76. Taken together, the foregoing facts created a presumption that Samantha used undue influence to get Larry to transfer title to his home to her. Thus, Samantha was required to meet her burden to rebut the presumption of undue influence with clear and convincing evidence that: 1) she acted in good faith; 2) she did not exploit position of trust she had with Larry; and 3) the transaction was fair and equitable. *Allender*, 833 N.E.2d at 533; *Scribner*, 953 N.E.2d at 484.

[32] Samantha failed to meet this burden. For instance, Samantha failed to prove by clear and convincing evidence that she acted in good faith. On August 26, 2019, Samantha eavesdropped Larry's conversation with Borgmann when Borgmann met with Larry to discuss possible changes to Larry's will. *Tr. Vol. 2* at 16. At one point during Larry and Borgmann's conversation, Samantha and

other family members rushed into the room and immediately declared, "[T]hat's not what Larry wants to do." *Id*. at 16. Once Smantha could not get Larry to change his will to her advantage, she and Laura tried to transfer ownership of Larry's property to Samantha through use of Laura's power of attorney. *Id*. at 118. Once that effort failed, on August 27, 2019, Samantha, Laura, and Connie presented Larry with a purchase agreement, which provided that Larry was selling his residence to Samantha for $0.00. *Ex. Vol. 1* at 76. When Samantha, Laura, and Connie presented the purchase agreement to Larrry to sign, it was not completely filled out, and Connie said they would fill out the rest of the purchase agreement later. *Tr. Vol. 2* at 42. Samantha also failed to demonstrate that she acted in good faith during her participation in the September 5, 2019, signing of the quit claim deed. Before Larry signed the deed, no one read aloud any terms of the deed to Larry. *Id*. at 47. During the signing of the deed, Samantha and Larry discussed the effect of executing the deed. "[Samantha]: *All you're doing right here is adding my name to your titl*e. That's all we're doing it. [Larry]: Signing it away. [Samantha]: No, we're not doing that. *It's still yours*." *Id*. at 47 (emphasis added). Given all the facts before it, the trial court could have found Samantha did not exhibit good faith when she said, "All you're doing right here is adding my name to your title" and "It's still yours," even if those words were not completely inaccurate. We too find that Samantha failed to show by clear and convincing evidence she acted in good faith. Because Samantha was required to prove three elements to rebut the presumption that she exercised undue influence over Larry and we have now determined that she failed to prove one of those elements – that she

acted in good faith – we need not address whether Samantha proved with clear and convincing evidence that she fulfilled the other two elements to rebut the presumption of undue influence, i.e., 1) that she did not exploit her position of trust with Larry and 2) that the transaction was fair and equitable. Accordingly, the trial court did not err in finding that Larry's transfer of his home to Samantha was procured through Samantha's undue influence.

IV. Invalid Transfer of Property

[33] Samantha argues that the trial court abused its discretion in ruling that the transfer of Larry's home to Samantha was invalid. In pertinent part, the trial court found:

> The Court finds that [Larry] was subject to the undue influence of [Samantha], his caretaker at the time of the transfer of the deed to his house to her.
>
> . . . .
>
> . . . . [T]he Court finds that [Larry*] lacked the requisite mental capacity* to transfer his home to Samantha.
>
> Therefore, the transfer of [Larry's] home . . . to [Samantha] is invalidated and is ordered returned to [Larry]. Due to [Larry's] death, the estate of [Larry] is directed to take possession of this real estate for distribution consistent with [Larry's] will.

Appellant's App. Vol. II at 18-19 (emphasis added).

[34] A gift *inter vivos* must contain several elements, including: 1) The donor must be competent to contract; and 2) there must be freedom of will. *Larabee v. Booth*, 437 N.E.2d 1010, 1011 (Ind. Ct. App. 1982), *reh'g granted in part on other grounds*, 440 N.E.2d 489 (1982); *Norman v. Norman*, 131 Ind. App. 67, 78-79, 169 N.E.2d 414, 419 (1960). The mental capacity required to enter a contract is whether the person was able to understand in a reasonable manner the nature and effect of his action on the date of the agreement. *Wilcox Mfg. Grp., Inc. v. Mktg. Servs. of Ind., Inc.,* 832 N.E.2d 559, 562 (Ind. Ct. App. 2005).

[35] Evaluating mental capacity to contract for the sale of real property is closely akin to evaluating the mental capacity necessary to make a will. *Hunter v. Milhous*, 159 Ind. App. 105, 125 n.4, 305 N.E.2d 448, 460 n.4 (1973), *reh'g denied.* In will contests, evidence as to the testator's mental condition both before and after execution of the will is admissible. *Id*. Proof of unsoundness of mind of a permanent nature raises an inference that such a condition continues until proven otherwise. *Nichols v. Est. of Tyler*, 910 N.E.2d 221, 227 (Ind. Ct. App. 2009). "The period of time that may be covered by the examination relative to the mental capacity of the person in question, both prior and subsequent to the execution of the will, under all the circumstances in each particular case, must necessarily be left to a great extent to the sound discretion of the trial court, the abuse of which may be subject to review upon appeal." *Ailes v. Ailes*, 104 Ind. App. 302, 11 N.E.2d 73, 74 (1937).

[36] Much of the evidence we recited in the previous section regarding Samantha's undue influence over Larry supports the trial court's determination that Larry

lacked the requisite mental capacity to transfer his home to Samantha. Larry was recovering from surgery to remove a cancerous brain tumor. *Ex. Vol. 1* at 12-14. Larry could not follow commands, and he could not make decisions without the help of family members. *Id.* at 5-6. Larry had significant linguistic and cognitive deficits, and he understood conversations between only 25% and 49% of the time. *Id*. at 5-6, 11. He was disoriented as to time and place, and he experienced hallucinations. *Id*. at 8; *Tr. Vol. 2* at 77. On a speech -language pathology evaluation, Larry tested as follows: delayed recall - 0%; problem solving/numeric reasoning – 0%; executive reasoning – 16%; and memory recall – 25%. *Ex. Vol. 1* at 8. The day before Larry was discharged from the hospital, Samantha observed that Larry needed help with everything: "Gramps is already experiencing great confusion and is on a 3[-]person max assist for everything." *Id*. at 90. Once Larry was discharged from the hospital on August 16, 2019, and placed in the Samantha's care, Samantha and her husband "[d]id everything for [Larry]" until he went into a coma. *Tr. Vol. 2* at 101.

[37] Based on the foregoing facts, it was reasonable for the trial court to conclude that Larry's unsoundness of mind was a permanent condition. *See Nichols*, 910 N.E.2d at 227. Thus, it was reasonable for the trial court to determine that Larry was not competent to enter a purchase agreement with Samantha for his home or to later execute a quit claim deed to transfer title of his home to Samantha or that Larry's actions were a product of his free will. *See Larabee*, 437 N.E.2d at 1011. Accordingly, the trial court did not abuse its discretion in setting aside the purchase agreement and quit claim deed and directing Larry's

estate to take possession of the home for distribution in accordance with Larry's last will and testament. *See Ailes*, 11 N.E.2d at 74; *Appellant's App. Vol. II* at 19.

[38] Affirmed.

May, J., and Vaidik, J., concur.