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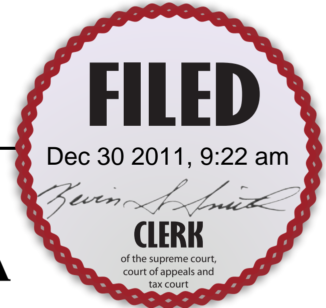


# IN THE COURT OF APPEALS OF INDIANA

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| IN RE: THE ESTATE OF LUCILLE LEHNERD McMANN, | ) | |
| MARY JANE McMANN, ELIZABETH M. McMANN and PATRICIA A. McMANN, | ) | |
| Appellants-Petitioners, | ) | |
| vs. | ) | No. 71A04-1103-ES-106 |
| DOREEN McMANN-TRIMBOLI, Trustee, LUCILLE L. McMANN REVOCABLE TRUST AGREEMENT DATED JANUARY 21, 2009, and DOREEN McMANN-TRIMBOLI, | ) | |
| Appellees-Respondents. | ) | |

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0910-ES-367

**December 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Mary Jane, Elizabeth, and Patricia McMann (hereinafter "the Sisters"), appeal summary judgment for their sister, Doreen McMann-Trimboli, who is the sole beneficiary of the will of their mother, Lucille McMann. As Doreen designated ample undisputed evidence the will was not a product of undue influence, we affirm.

## FACTS AND PROCEDURAL HISTORY

Lucille's husband Ray McMann died on December 1, 2008. Ray and Lucille had seven children. One of them, Doreen, lived with Ray and Lucille for several years before Ray died. In 1998 Ray and Lucille executed wills providing generally that after the death of the surviving spouse the estate would be divided equally among the seven children. Ray died December 1, 2008, and on January 21, 2009, Lucille executed a new will and trust agreement. Doreen was the sole beneficiary; the other children would benefit only if Doreen predeceased Lucille.

After Lucille died the Sisters brought a will contest alleging Lucille's new will was void as a product of undue influence by Doreen. Doreen moved for and was granted summary judgment.

## DISCUSSION AND DECISION

When reviewing a summary judgment, we apply the same standard as does the trial court. *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853, 858 (Ind. Ct. App. 2010). Summary judgment is appropriate if the pleadings and evidence submitted demonstrate there are no genuine issues of material fact and the moving party is entitled to

judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Id.* at 858-59. Because a summary judgment comes to us clothed with a presumption of validity, the appellant must persuade us an error occurred. *Id.* at 859. If the summary judgment can be sustained on any theory or basis in the record, we must affirm. *Id.* Still, we carefully review a summary judgment in order to ensure a party is not improperly denied his or her day in court. *Id.*

Undue influence is an exercise of sufficient control over a person, the validity of whose act is brought into question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised. *Gast v. Hall*, 858 N.E.2d 154, 166 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*. It is an intangible thing that only in the rarest instances is susceptible of what may be termed direct or positive proof. *Id.* That difficulty is enhanced by the fact that one who seeks to use undue influence does so in privacy. *Id.* Undue influence therefore may be proven by circumstantial evidence, and the only positive and direct proof required is of facts and circumstances from which undue influence may reasonably be inferred. *Id.*

As circumstances tending to support an inference of undue influence, it is proper to consider the character of the beneficiary and interest or motive on her part to unduly influence the testator, and facts and surrounding circumstances giving her an opportunity to

exercise such influence. *Id*. Undue influence is essentially a question of fact that should rarely be disposed of via summary judgment. *Id*.

Certain legal and domestic relationships 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. *Supervised Estate of Allender v. Allender*, 833 N.E.2d 529, 533 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. One such relationship is that of parent and child.[1] *Id*. In such cases, the law imposes a presumption that a transaction was the result of undue influence exerted by the dominant party, constructively fraudulent, and thus void, if the plaintiff's evidence establishes there was such a relationship and the questioned transaction between those parties resulted in an advantage to the dominant person in whom trust and confidence was reposed by the subordinate. *Id.* At that point, the burden of proof shifts to the dominant party, who must demonstrate by clear and unequivocal proof that the questioned transaction was made at arm's length and thus was valid. *Id. And see Villanella v. Godbey*, 632 N.E.2d 786, 790 (Ind. Ct. App. 1994) (presumption may be rebutted by clear and convincing evidence the transaction was fair and equitable and defendant acted in good faith without taking advantage of his position of trust).

Doreen demonstrated Lucille did not act under Doreen's undue influence. The Sisters contend there is sufficient evidence of Doreen's undue influence to defeat summary

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[1] The parent is generally the dominant party in such a relationship, but a child may be dominant by virtue of being an ailing parent's caretaker. *Allender*, 833 N.E.2d at 533-34.

judgment in the form of evidence of 1) Doreen's motive to unduly influence Lucille; 2) the timing of Lucille's change to her estate plan; 3) Lucille's condition; and 4) Doreen's control over the Sisters' ability to communicate with Lucille. However, their arguments appear to address only whether a presumption of undue influence arose. Assuming *arguendo* it did, any such presumption was rebutted, as explained below, by undisputed evidence.

We note presumptions are not themselves evidence, but rather affect the burden to produce evidence. *See* Indiana Evid. R. 301 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption"). Presumptions "are not regarded as evidence but rules of law [that] guide the order of proof and establish the bounds of a *prima facie* case." *Peavler v. Bd. of Com'rs of Monroe Cnty.*, 557 N.E.2d 1077, 1083 (Ind. Ct. App. 1990), *trans. denied*.

We therefore agree with Doreen that the inquiry before us is "whether there is undisputed evidence that Lucille was acting under her own free will in revising her estate plan." (Appellees' Br. at 9.) *See McCartney v. Rex*, 127 Ind. App. 702, 705, 145 N.E.2d 400, 401 (1957) (undue influence sufficient to void a will must be "directly connected with and operate at the time of its execution" with such force that the supposed will is in reality that of another and not of the testator). However, the one having influence over the testator need not be present at the time and place of the preparation and execution of the will in order to vitiate it on such grounds if undue influence previously acquired still persists at such time so that, but for it, the will would have been different from that actually executed. *Id*. at 401-

02.

There is no genuine issue of fact as to whether there was any such influence directly connected with the execution of the will and operating at the time of its execution. The trial court therefore correctly granted summary judgment. Doreen designated evidence she quit her job and moved from Chicago to Granger to help Ray and Lucille after Ray had back surgery. She thereafter continued to live with them, and lived with Lucille after Ray died. There was evidence Lucille was estranged from, or at least had little contact with, the Sisters in recent years. There was evidence Lucille was mentally alert, independent, and in control of her affairs until her death. She discussed her estate plan with her attorney on four occasions in the two months after Ray died, and her counsel found she was competent, she was aware of her relationships with the various members of her family, she understood the nature of her property, and she knew what she wanted to do with it. She "made her wishes clear" to counsel that she wanted Doreen to be her beneficiary because Doreen had quit her job in Chicago and moved to Granger to help Ray and Lucille. (App. at 242.) Doreen was not present when Lucille met with counsel about her estate plan. Counsel said: "Lucille was the dominant party in her relationship with her children." (*Id*.)

We have found no undue influence in similar situations where a beneficiary had cared for a testator relative and was the natural object of the testator's bounty. *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, thus, was the natural object of his father's bounty), *reh'g denied, 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 thus was a natural object of his aunt's bounty), *trans. denied.*

We acknowledge the Sisters' evidence that Lucille had Parkinson's Disease and required care from a home health nurse and others; that the new estate plan was executed shortly after Ray died; that "someone reported" Doreen said to Lucille at Ray's funeral "Now would be a good time to take care of your will," (App. at 174); that one sister believed Lucille looked frail, unnerved, and worried at Ray's funeral; that Doreen sometimes interfered with the Sisters' efforts to communicate with Lucille; and that Ray and Lucille's prior will provided for bequests for all the children. None of those allegations give rise to a genuine issue of fact as to whether there was undue influence *directly connected with and operating at the time of the will's execution* and with such force that Lucille's will "was in reality that of another," *see McCartney*, 127 Ind. App. at 705, 145 N.E.2d at 401. Because the Sisters have not shown such a genuine issue of material fact, summary judgment was appropriate. Therefore, we affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.