Evidentiary Rules Unique to Fiduciary Litigation[1]

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Overview

- Two broad categories of cases[3] to consider:
    - Direct attacks on the substance of an estate plan, where the plaintiff is seeking to actually invalidate a gift or devise by demonstrating that it was the product of undue influence, the donor/testator/settlor lacked capacity, or that the gift or devise suffers from some other inherent defect that renders it void. Causes of action vary, but may include will caveats, declaratory judgment actions (Md. Code, Cts. & Jud. Proc. ("CJP") § 3-406), and actions for equitable remedies such as the imposition of a constructive trust; trial by jury is sometimes (but not always) available.[4]
    - Cases dealing with the interpretation, construction, or implementation of an estate plan, including the interpretation of express language contained in estate planning

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[1] Much of the material herein is adapted from the author's previous presentation, "Pesky and Persistent Evidentiary Issues in Estate & Trust Litigation," MSBA CLE (June 25, 2018), available at https://www.msba.org/product/pesky-and-persistent-evidentiary-issues-in-estate-trust-litigation-2/ , or from other materials previously published by Franke Beckett LLC or its predecessor, the Law Office of Frederick R. Franke, Jr. LLC.

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[3] The term "fiduciary litigation," used in its broadest sense, encompasses wide array of cases. Fiduciary duties are central in certain types of estate and trust litigation—for example, trustee or personal representative removal actions. Similar fiduciary obligations may govern the relations of retirement plan administrators, partners in a partnership, directors of a corporation, or members/shareholders in a closely-held businesses. In contrast, certain types of cases, such as will caveats, may never involve the application of "fiduciary" concepts such as the duty of loyalty or care, but are nonetheless frequently grouped into the "fiduciary litigation" category. In the author's opinion, if there is a unifying theme to "fiduciary litigation," it is that it nearly always involves a legal duty or relationship that requires *someone*—usually a party, but sometimes the court itself—to act for the benefit of, on behalf of, or to accomplish the wishes of another person. The author's litigation practice is focused on estate and trust disputes, disputes involving closely-held businesses, and guardianships. This presentation is focused on the types of fiduciary litigation that most frequently arise in the estate planning and administration context.

[4] For a more detailed analysis of the evidentiary and procedural issues posed by joinder or consolidation of common fiduciary litigation claims in the Circuit Court, see the author's materials provided in the MSBA CLE presentation *Pesky and Persistent Evidentiary Issues in Estate & Trust Litigation* (Maryland State Bar Association, June 2018).

documents. Causes of action include declaratory judgment actions (CJP §§ 3-406, 3-408), petitions for trust reformation or modification, and petitions for authority under Md. Code, Est. & Trusts ("ET") § 7-402 or to intervene in the administration of the trust under ET § 14.5-201.

- Broad theme to consider: The non-probate "revolution"[5]
    - Historically, estates were disposed of via testamentary instruments (wills and codicils). Rules regarding extrinsic evidence in estate planning disputes evolved from will contests or will construction actions.
    - Now, it is common for intergenerational wealth transfer to occur via non-probate instruments such as trusts, deeds, and contractual beneficiary designations. There is sometimes a tension between the rules governing will challenges and construction versus the rules for trusts or contracts.
- Goals of this Presentation
    - Introduce and explain some specific evidence rules that are common to the broad universe of "fiduciary litigation."
    - Highlight the crucial evidentiary distinctions between a "traditional" testamentary dispute in comparison to disputes over non-probate transfers (particularly trusts) and between pre-mortem and post-mortem gifts

<u>(Some) Critical Rules Governing Testimony in Fiduciary Litigation Cases</u>

- Extrinsic Evidence: Plain meaning rule, latent and patent ambiguities, and "surrounding circumstances" evidence; wills vs. trusts
    - The "Plain Meaning Rule" is a rule of construction that applies in matters of will/codicil interpretation.
        - The plain meaning rule requires that a testator's donative intent is found <u>strictly from the language used in a will</u>, regardless of the certainty derived from extrinsic evidence that such language misstates the testator's actual intent. A testator's intent is gathered from the "four corners" of the will, with the words

[5] Langbein, John H, "The Nonprobate Revolution and the Future of the Law of Succession," 97 HARV. L. REV. 1108 (March 1984).

of the will given their plain meaning and import; the Court is aided by canons of will construction and (as discussed below) "surrounding circumstances" evidence that does not contradict the will. *Friedman v. Hannan*, 412 Md. 328, 338-43 (2010).

- The Plain Meaning Rule is an exclusionary rule – it prevents extrinsic evidence of the testator's actual intent from being admitted, even where the language of the will/codicil contradicts the testator's expressed (or "actual" intent).
- Rationale: Concern over evidence fabrication, the possibility of fraud, a concern that a decedent had relied on the language used, and because such extrinsic evidence is unattested, it therefore violates the will statutes.[6]
- *Emmert v. Hearn*, 309 Md. 19 (1987): the court refused to consider extrinsic evidence from the scrivener (and from a legatee who would testify against his pecuniary interest) that the phrase "personal property" was meant by the testator to only include tangible personal property and was not meant to include corporate stocks, bonds and bank accounts. The court held that the phrase "personal property" has a plain, established meaning and that extrinsic evidence could not be introduced to contradict that meaning. The Maryland court's ruling rendered meaningless a "pour-over" provision in the will directing the residue to an inter vivos trust.

- "Latent Ambiguity" exception to the Plain Meaning Rule
  - Extrinsic evidence may be admitted to show the testator's intent in the case of a latent ambiguity. As a general rule, extrinsic evidence is admissible to resolve a latent, but not a patent, ambiguity. *Friedman*, 412 Md. at 340.
  - "Latent Ambiguity" vs. "Patent Ambiguity:"
    - A latent ambiguity is an ambiguity where the terms of the will appear clear and without ambiguity, but those terms yield more than one meaning once the extrinsic evidence is permitted. An example of a latent ambiguity would be a bequest to "'my cousin John,' …if evidence extrinsic to the document reveals that the testator had no cousin named

[6] Andrea W. Cornelison, "Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule," 35 REAL PROP. PROB. & TR. J. 811, 815-18 (2001).

John when he executed the will but did have a nephew named John and a cousin named James."[7]

- A patent ambiguity is an ambiguity arising from an apparent contradiction within the document itself or where a term that is used in the document could yield several meanings. An example of a patent ambiguity would be a bequest of "my money," raising the question as to whether this phrase was intended to apply only to the decedent's cash on hand or, more generally, to the decedent's assets.[8]

- "Surrounding Circumstances" evidence

  - Surrounding Circumstances: In ascertaining the testator's intent, the court may consider the situation of the testator and his relations with the parties to whom he has devised or bequeathed his property. In that regard, the will must be read in the light of the surrounding circumstances existing at the time of its execution. *Castruccio v. Estate of Castruccio*, 239 Md. App. 345, 362 (2018), *cert. denied* 463 Md. 149; Miller, Edgar G., THE CONSTRUCTION OF WILLS IN MARYLAND §§ 12, 44 (1919).

  - Extrinsic evidence of "surrounding circumstances" that does not contradict, modify, or vary the terms of the will is always admissible to aid in interpretation. *Castruccio*, 239 Md. App. at 368 (citing *Veditz v. Athey*, 239 Md. 435, 441 (1965)).

  - Example of admissible "surrounding circumstances" evidence: The court permitted evidence of the testator's family relations, including his marital history and dislike of his wife's extended family, as well as the history of his previous estate planning, to be considered under the "surrounding circumstances" rule in a declaratory judgment action construing the terms of his will. *Castruccio*, 239 Md. App. at 371.

- Keep in mind: these limitations do NOT always apply to non-probate instruments (more on this below).

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[7] RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 11.1 cmt. c (2003).

[8] RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 11.1 cmt. b (2003).

- Rule 5-803(b)(3) State of Mind Hearsay Exception
    - A statement by an out-of-court declarant is not inadmissible under Rule 5-802 (the hearsay rule) if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Rule 5-803(b)(3).
    - The "state of mind" exception involves three "temporal" periods: forward-looking, present-looking, and backward-looking. *Figgins v. Cochrane*, 174 Md. App. 1, 26 (2007), *aff'd* 403 Md. 392 (2008).
        - "Forward-looking:" A statement of intent to prove the declarant's future action.
            - The classic case is *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), an insurance fraud case where a woman claimed her husband died in a certain remote location thereby entitling her to the death benefits from several policies. The insurance company acknowledged that someone had, in fact, died in that remote location but maintained that it was not Mr. Hillmon but a Mr. Walter. As evidence, the insurance company wanted to introduce letters from Mr. Walter saying he planned to go to that remote location. The evidence was held admissible to demonstrate that Mr. Walter probably went to the remote location.
            - There is no “corroboration” requirement—i.e., there is no requirement to prove that the future action have been completed by the declarant. *Gray v. State*, 137 Md. App. 460, 499–500 (2001), *rev’d on other grounds*, 368 Md. 529
        - "Present-looking:" A statement offered to prove the declarant's then-existing condition. This may be the broadest category, in that it permits a wide range of statements reflecting the declarant's contemporaneous thoughts and feelings. Such statements may not be truly "hearsay" at all, in that they do not relate to the "testimonial" capacities of the declarant. A statement of the declarant’s present state of mind may be the ultimate operative legal fact (e.g. was a

transfer intended by the declarant to be gratuitous?), meaning that the statement will be the primary, or only, source of evidence. *Figgins v. Cochrane*, 174 Md. App. at 32 (quoting McCormick on Evidence (4th Ed. 1992), § 274, 227–28).

- "Backward-looking:" Statements of memory or belief to prove the fact remembered or believed are not included in the exception, unless they relate to the "execution, revocation, identification, or terms of declarant's will."
    - This limited exception is grounded on "practical grounds of expediency and necessity rather than logic." Advisory Cmte. Note, Fed. R. Evid. 803(3).
    - If this exception is based on "practical grounds" rather than "logic," then should it follow that the exception should be expanded to apply to all "will substitutes" (e.g. revocable trusts, account titling, beneficiary designations)? *See Ebert v. Ritchey*, 54 Md. App. 388 (1983) (applying state-of-mind exception to statements regarding joint bank accounts); *Figgins*, 174 Md. App. at 28 (classifying *Ebert* as a "backwards-looking" case); *but cf. D.A.R. v. Goodman,* 128 Md. App. 232, 238 (1999) (implying that *Ebert* related to forward-looking statements of intent).

- Dead Man's Statute
    - The Dead Man's Statute provides as follows: "A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement." Md. Code, Cts. & Jud. Proc. § 9-116.
    - The Dead Man's Statute only applies to a limited category of witnesses and only in certain cases.
        - By its own terms, the Dead Man's Statute restricts only the testimony of *parties*, not all witnesses. *Reddy v. Mody*, 39 Md. App. 675, 682 (1978). A "party" is one

with an interest in the property sought or a person having a direct pecuniary and proprietary interest in the outcome of the case. *Id.* (citing *Trupp v. Wolff*, 24 Md. App. 588 (1975)).

- Moreover, the Dead Man's Statute applies only in cases where the outcome will tend to increase or diminish the estate of a decedent by establishing or defeating a cause of action by or against the estate. *Reddy v. Mody*, 39 Md. App. 675, 679 (1978). For example, the Dead Man's Statute will not apply in a dispute over the proper payee of life insurance proceeds if the judgment would not result in the estate receiving the life insurance proceeds. *See e.g. Sheeler v. Sheeler*, 207 Md. 264, 269 (1955). Therefore, the Dead Man's Statute does not usually apply in a will caveat, but may apply in a case where the validity of a non-probate arrangement (e.g. beneficiary designation) has been challenged, and the outcome could increase or decrease the value of the estate.

- Definition of "transaction"
  - Maryland courts have limited the definition of "transaction" to include only testimony that the decedent could contradict with his or her own knowledge, if he or she were living. *Ridgely v. Beatty*, 222 Md. 76 (1960).
  - In some cases, this interpretation means that the scope of a "transaction" for Dead Man's Statute purposes will be broader than the common definition of "transaction."
    - For example, a party could not testify as to her understanding that she was to be reimbursed by the decedent for funds the party advanced to an attorney on behalf of the decedent. *Boyd v. Bowen*, 145 Md. App. 635 (2002). This was because the decedent, if alive, could have contradicted the party's testimony. This was the case even though the party was not, in a conventional sense, purchasing or procuring anything from the decedent.
    - The Dead Man's Statute does not, however, bar admission of all testimony or documentary evidence that relates in any way to a "transaction." A party could introduce letters from a decedent that related to the purported transaction at issue, even if the party could not

testify as to the transaction itself or any statement made by the decedent. *Stacy v. Burke*, 259 Md. 390 (1970). A party could testify about payments made to third parties, but could not testify that such payments were made pursuant to an agreement with the decedent. *Ridgely v. Beatty*, 222 Md. 76 (1960). In both cases, the decedent could not contradict the evidence at issue based on his or her own knowledge, so the evidence was not barred by the Dead Man's Statute.

- Attorney-client privilege and the testamentary exception
    - The attorney-client privilege, codified at CJP § 9-108, generally precludes disclosure of confidential communications made by a client to his attorney for the purpose of obtaining legal advice.[9] The client holds the privilege, and therefore may waive it.[10] The privilege survives the death of the client. *Zook v. Pesce*, 438 Md. 232, 241 (2014) (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998).
    - Testamentary Exception
        - Maryland recognizes the "testamentary exception" to the attorney-client privilege: "It may be laid down as a general rule of law, gathered from all the authorities, that, unless provided otherwise by statute, communication by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him." *Zook*, 438 Md. at 243 (quoting *Benziger v. Hemler*, 134 Md. 581 (1919)).
        - The rationale for this exception is that "in the context of a contested estate, such disclosure 'helps the court carry out the decedent's estate plan'" *Zook*, 238 Md. at 242 (quoting Edward J. Imwinkelried, *The New Wigmore, A Treatise On Evidence: Evidentiary Privileges* § 6.13.2(b) (Richard D. Friedman ed., 2nd Ed. 2010)). As the purpose of this exception is to help "carry out the decedent's estate plan," the Court of Appeals has conditioned its applicability on whether

[9] *See, e.g., E.I du Pont de Demours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 414 (1998).

[10] *See, e.g., Blanks v. State*, 406 Md. 526, 539-40 (2008).

the communications would clarify the testator's "donative intent." *Id.* at 243 ("[I]n a dispute between putative heirs or devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that the evidence or testimony tends to help clarify the donative intent of the decedent.")

- Although the name of the exception implies that it is available only in disputes regarding wills or codicils, in *Zook* the Court of Appeals concluded that the exception applied to a "living trust" that was, in effect, a will substitute. *Zook*, 438 Md. at 251.

- Waiver of the privilege

  - If the testamentary exception (or some other recognized exception) does not apply, then the privilege will generally remain in effect absent a waiver.

  - Waiver by Personal Representative: At common law, a personal representative[11] of an estate may waive the privilege on behalf of a deceased under certain circumstances.

    - Very broadly, this may occur in circumstances where the waiver would operate in the interest of the client, his estate, or persons claiming under him, and would not damage the client's reputation.[12]

    - Modern cases focus on whether invoking the privilege would serve to obscure evidence of the decedent's intent, or perhaps whether the parties seeking to invoke the privilege are doing so as a purely tactical measure to avoid disclosure. *See, e.g. Matter of Estate of Thomas*, 179 A.D. 3d 98 (N.Y. App. Div. 4th 2019) (permitting the respondent/executor to waive attorney-client privilege, thereby allowing decedent's attorney to testify that the decedent had transferred shares of stock to the respondent prior to death and consequently such stock was not an

[11] Some authority suggests that in addition to the Personal Representative, the heirs-at-law may waive the privilege. "Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent," 67 A.L.R. 2d 1268, §§ 3, 4 (1959).

[12] *See* n. 11, *supra*.

estate asset); *Matter of Bassin*, 28 A.D.3d 549, 550 (N.Y. App. Div. 2nd 2006) (executor/son permitted to waive privilege and allow attorney to testify as to donative intention behind deed); *Mayorga v. Tate*, 203 A.D.2d 11 (N.Y. App. Div. 2nd 2002).

- However, there is no clear or bright-line rule that permits a personal representative to waive the privilege under *all* circumstances. *See In re Miller*, 584 S.E.2d 772 (N.C. 2003) (wife/executrix not permitted to waive attorney-client privilege in the context of a pre-trial murder investigation in which the husband/decedent was apparently a suspect).

- Waiver by Decedent: Disclosure of otherwise-privileged communications by the client to third parties can result in a complete, "subject matter waiver" of the privilege.[13] However, the better-reasoned authorities recognize that partial or limited disclosure of such communications in a non-adversarial context does not result in a blanket subject matter waiver. *In re Von Bulow*, 828 F.2d 94, 103 (2nd Cir. 1987) (disclosure of certain attorney-client communications in a book published and promoted by the litigant waived the privilege only as to those communications, but did not extend to unpublished communications that took place between litigant and his attorneys); *see also Baehr v. Creig Northrop Team*, 2015 WL 13598388 at *1 (D. Md. 2015) (relying on *In re von Bulow*).

<u>Wills vs. Trusts and Non-Probate Transfers; Pre-Mortem and Post-Mortem Planning</u>

- Parol Evidence in the Trust and Non-Probate Context

  - The Plain Meaning Rule applies to wills and codicils only. *Shriners Hospital for Crippled Children v. Maryland Nat. Bank*, 270 Md. 564, 581-2 (1973). In contrast to will or codicil cases, parol evidence is admissible to correct a unilateral mistake by the settlor/grantor in inter vivos trusts; reformation (or the imposition of a constructive trust to remedy a mistake) has also been available for deeds of gift, life insurance contracts, and other instruments that serve to transfer wealth upon the decedent's death.[14]

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[13] *Harrison v. State*, 276 Md. 122, 136-37 (1975).

[14] John H. Langbein & Lawrence W. Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?," 130 U. PA. L. REV. 521, 527 (1982); Joseph W. deFuria, Jr., "Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation," 40 CATH. U. L. REV. 1, 34-35 (1990) (footnotes omitted); *Shriners Hospital*, 270 Md. at 581-82.

- Trusts Under the Maryland Trust Act:
    - Inter vivos vs. Testamentary: Reformation and modification has historically been available for inter vivos trusts. At common law, testamentary trusts were governed by the law of wills. [15] However, the Maryland Trust Act purports to eliminate the distinction between inter vivos and testamentary trusts. Md. Code Ann., Est. & Trusts ("ET") § 14.5-102.[16] The common law of trusts and principles of equity also supplement the Maryland Trust Act to the extent not modified by statute. ET § 14.5-106.
    - Expansive Definition of "Terms:" The Maryland Trust Act defines the "terms of a trust" as "the manifestation of the intent of the settlor regarding the provisions of a trust as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." ET § 14.5-103(aa).[17]
    - Reformation of trusts is now governed by ET § 14.5-413: "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the intention of the settlor if it is proved by clear and convincing evidence that both the intent of the settlor and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." The statute broadens the traditional doctrine of reformation in allowing extrinsic evidence even where the trust instrument is unambiguous.[18]
    - Modification

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[15] *Shriner's Hospital for Crippled Children v. Maryland Nat. Bank*, 270 Md. 564, 581-2 (1973); RESTATEMENT (THIRD) OF TRUSTS § 4.

[16] The commentary to Section 415 of the Uniform Trust Code (the model provision upon which ET § 14.5-413 is based) expressly states that it applies equally to inter vivos and testamentary trusts. This approach would mirror that of the RESTATEMENT (THIRD) OF PROPERTY, WILLS & OTHER DONATIVE TRANSFERS, § 12.1.

[17] For a more comprehensive overview of the admissibility of extrinsic evidence to establish the "terms" of a trust, see Frederick R. Franke, Jr. & Anna-Katherine Moody, "The Terms of the Trust: Extrinsic Evidence of Settlor Intent," 40 ACTEC L. J. 1 (Spring 2014).

[18] RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 12.1, cmt. b (2003); Unif. Trust Code § 415 (2000).

- Modification for Unforeseen Circumstances (ET 14.5-411(a)): The Court may modify the administrative or dispositive terms of the trust, or terminate the trust, if because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification shall be made in accordance with the probable intention of the settlor.[19]

- Modification for Impracticability or Waste (ET 14.5-411(b)): The Court may modify the administrative provisions of a trust if continuation on its existing terms would be impracticable, wasteful, or impair the administration of the trust.

- Modification to Achieve Tax Objectives (ET 14.5-414): To achieve the tax objectives of the settlor, the court may modify the terms of a trust in a manner that is not contrary to the probable intention of the settlor.

- Evidentiary Presumptions – Confidential Relationship; Post-Mortem vs. Pre-Mortem Gifts

    - A "confidential relationship" between the testator/settlor/donor and the beneficiary can dramatically shift the burdens at trial.

    - "Confidential relationship" may be found "whenever two persons stand in such relationship to each other that one must necessarily repose trust and confidence in the good faith and integrity of the other." *Green v. Michael*, 183 Md. 76, 84 (1944); see also *Tracey v. Tracey*, 130 Md. 306, 318 (1931) (a confidential relationship is "such that one must from the very necessities of the situation repose confidence in the other, and where the one in whom such confidence is reposed is thereby enabled to exert a dominating and controlling influence over the other.")

        - The issue of a confidential relationship is generally a question of fact. *Sanders v. Sanders*, 261 Md. 268, 276 (1971). However, certain types of relationships can

[19] In the non-adversarial context, ET § 14.5-410 permits modification "on the consent of the trustee and all beneficiaries," provided that the court concludes that the modification "is not inconsistent with a material purpose of the trust." ET § 14.5-111 (non-judicial settlement agreements) dispenses with the need to obtain court approval in many trust modification matters, again subject to the requirement that the settlement "does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this title or other applicable law." The common law of wills provides a somewhat analogous solution for consent modification of testamentary dispositions, insofar as "redistribution agreements" between heirs and devisees are enforceable as contracts even without court approval. *Brewer v. Brewer*, 386 Md. 183 (2005).

create a legal presumption of a confidential relationship (e.g. attorney-client and trustee-beneficiary). *Id*. Under modern case law, there is no *presumed* confidential relationship between parent-child or husband-wife. *Upman v. Clarke*, 359 Md. 32, 42 (2000).[20]

- Several factors are significant in determining whether there is a confidential relationship, including the "dependent" party's advanced age, physical debility, cognitive impairment, and dependence or reliance upon the "dominant" party for care and protection or guidance in business affairs. *Figgins v. Cochrane*, 403 Md. 392, 410 (2008). The level of dependence for financial or business affairs is particularly important. *Orwick v. Moldawer*, 150 Md. App. 528, 538-39 (2003).

- Significance of testamentary vs. lifetime transfers

  - For inter vivos transfers, the existence of a confidential relationship between the donor/settlor and donee/beneficiary creates a presumption that the gift or transfer is the product of undue influence. *Figgins v. Cochrane*, 403 Md. 392, 411 (2008); *Sanders v. Sanders*, 261 Md. 268, 276 (1971). To rebut the presumption, the donee/beneficiary bears a "heavy burden" (sometimes characterized as the "clear and convincing" standard) and must show "the fairness and reasonableness of the transaction," and demonstrate that the transfer was “the free and uninfluenced act of the grantor, upon full knowledge of all the circumstances connected with it and of its contents." *Figgins*, 403 Md. at 411.

  - For testamentary (or testamentary "type") transfers, a confidential relationship is a significant factor in determining whether undue influence was present. Maryland Pattern Civil Jury Instructions 29:4 (5th ed. Supp. 2019); *Moore*, 321 Md. 347 at 353; *Conrad*, 183 Md. App. at 559-60. However, unlike with an inter

[20] The Maryland cases do not conclusively identify the principal-agent relationship as one where a "confidential relationship" must be presumed. *Upman v. Clarke*, 359 Md. 32, 42 (2000). However, the real-world evolution of the "durable" power of attorney as a disability planning tool may not be reflected in the older judicial decisions, particularly those pre-dating the 2010 Maryland General and Limited Power of Attorney Act. Under the current Maryland statutes, an agent who "has accepted appointment" under a power of attorney owes affirmative duties to the principal. ET § 17-113. Unless otherwise provided in the power of attorney, the agent owes a duty of loyalty to the principal; a duty to not create a conflict of interest with respect to the principal; and a general duty to preserve the principal's estate plan. ET § 17-113(b).

vivos transfer, the presence of a confidential relationship does not shift the burden of proof away from the plaintiff/caveator. *Upman*, 359 Md. at 43-44.

- The rationale for this differing treatment is that "[p]ersons ordinarily desire to retain possession and use of their property while they are alive . . . [whereas] persons can no longer enjoy property after their death; they suffer no loss from a testamentary gift." *Upman*, 359 Md. at 44. In *Upman*, the decedent had a pourover will/revocable trust, and assets had been transferred to the revocable trust prior to her death. *Id.* at 39. Nonetheless, the Court deemed the revocable trust as "testamentary" in nature (for the purposes of determining whether a burden shift applied),[21] since the decedent had retained the ability to amend or revoke the trust, and held the sole beneficial interest in the trust prior to her death. *Id.* at 45, 48.

[21] In some cases, determining the degree to which a transaction was an inter vivos transfer for the purposes of the confidential relationship/burden shifting analysis may be a challenge. For example, a party who adds another person to a joint account as a joint holder with rights of survivorship is not considered to have made a "testamentary" transfer under the multiple party account statute. Md. Code, Fin. Inst. ("FI") § 1-204. While the joint holders are alive, the titling of the account only creates a "presumption" that all joint holders own the underlying funds in the account; the presumption can be rebutted through evidence of intent, including who contributed the funds and who exercised control over the funds. *Morgan Stanley & Co., Inc. v. Andrews*, 225 Md. App. 181, 189 (2015); *Wagner v. State*, 445 Md. 404, 435 (2015) (citing *Andrews*). FI § 1-204 provides, with some exceptions, that at the death of a party to the account, the surviving joint holder(s) becomes the owner(s) of the funds in the account.