

2013 WL 8743789 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Patricia A. MCCOLLOR, et al., Appellee,
v.
Frederick J. MCCOLLOR, Jr., et al., Appellants.

No. KEN-12-594.
June 20, 2013.

On Appeal from the Superior Court of Maine, Kennebec County

Brief of Appellants

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***1 STATEMENT OF THE FACTS**

Procedural History

Plaintiff Patricia McCollor (“Patricia”), in her individual capacity and as personal representative of the Estate of Frederick McCollor, Sr. (“Frederick”), commenced the present action in Waterville District Court against Defendants Frederick McCollor, Jr. (“John”) and Cheryl Stanton (“Cheryl”) by Complaint filed on February 4, 2011 seeking relief on three counts: (i) violation of the Improvident Transfers of Title Act; (ii) Undue Influence; and (iii) Conversion. Docket Entries, Appendix (“App.”) at 2. John and Cheryl filed an Answer on March 15, 2011. Docket Entries, App. at 3. On April 14, 2011, following Plaintiff’s Motion for Preliminary Injunction, the District Court entered a Consent Order, which in essence barred removal or disposition of the property during the pendency of the suit and required contact between parties and their attorneys for any actions regarding the subject real estate and personal property. Docket Entries, App. at 3. The matter was removed to Superior Court, assigned to a single Justice, and a Scheduling Order was issued on July 19, 2011. Docket Entries, App. at 5.

Patricia was granted leave to amend her initial Complaint on December 6, 2011 for the purpose of adding a count for Breach of Fiduciary Duty, and deleting referencing to a truck, which had been incorrectly included in the Conversion claim.¹ Amended Complaint, App. at 28. John and Cheryl filed an Answer to the Amended Complaint on December 27, 2011. Docket Entries, App. at 7.

A bench trial was held on January 24-25, 2012. Docket Entries, App. at 8. Following trial, post-trial briefs and motions were filed. Docket Entries, App. at 9. Both sides filed post-trial memoranda regarding deferred evidentiary rulings. Docket Entries, App. at 9. Both sides *2 also filed briefs with post-trial arguments. Docket Entries, App. at 9. On October 12, 2012, the Superior Court entered Judgment in favor of Patricia on the three remaining counts. Judgment, App. at 10. In its Judgment, the court also ruled on the evidentiary issues, which had been deferred at the trial. Judgment, App. at 13-14.

Following the Judgment, Patricia filed a second Motion to Amend Complaint, which was denied. Judgment, App. at 13. Patricia also filed a Motion to Amend the Judgment, which was granted. Order on Pending Motions, App at 24-25. In particular, the Motion to Amend was granted to ensure that the Judgment complied with 14 M.R.S. § 2401(2) and to address the issue of the personal property, which had not been addressed in the initial judgment. Order on Pending Motions, App. at 24-25. John and Cheryl filed a Motion to Amend Findings, for Additional Findings, and to Amend Judgment, which was granted in part (also to address the personal property issue) and denied in part. Order on Pending Motions, App. at 25-26. John and Cheryl also filed a Motion for New Trial, which was denied. Order on Pending Motions, App. at 26.

Trial Evidence

At trial, evidence was submitted in the form of testimony and exhibits. The first witness was Patricia. Patricia spent some time testifying about her marriage to Frederick and her work life. Trial Transcript (“Tr.”) Vol. 1 Pg. 5-10.²

Most pertinent to the issues before the Court are the circumstances and events surrounding October 20, 2008, the date of the property transfer in question. Tr. 1/46. Before and after this date, Patricia testified that she lived with her husband at 7 Lawrence Street in Waterville, Maine, a property they had jointly owned since sometime in 2006. Tr. 1/12-13, 17. *3 In 2006, Frederick began suffering from headaches, dizziness, and loss of balance. Trial Tr. 1/18.18. During this time, the couple slept in separate rooms because Frederick was a “chain smoker” and smoked at night. Tr. 1/23-24. As a result, Patricia checked on Frederick to make sure he did not drop a lit cigarette and cause a fire in the home. Tr. 1/24. At some point in 2008, Patricia checked on Frederick and found him holding his head and begging for her to “make it stop.” Tr. 1/29. At this point, Patricia enlisted the help of her son John to convince her husband to go to the doctor. Tr. 1/29. On September 5, 2008, Frederick was diagnosed with lung cancer and two inoperable brain tumors. Tr. 1/31-32. Following his diagnosis, Frederick slept “constantly,” suffered from depression, and had mood swings. Tr. 1/33-34.

Patricia testified that she was worried after the diagnosis and that John was her “primary” for “emotional support.” Tr. 1/ 45. She also testified upon cross examination, however, that she did not rely upon John for help with her finances, but only relied upon him to plow the yard of snow, take Frederick to medical appointments, and pick up prescriptions for Frederick.³ Tr. 1/ 86-87. Prior to the diagnosis in May of 2008 she had a memorial service for her mother and sometime during this same year her stallion was put down.⁴ Tr. 1/35. Following the diagnosis, Patricia continued to work full-time, helped Frederick with his finances, cared for her horses, and was elected president of the Sebasticook Riding Club.⁵ Tr. 1/60-61, 82-84.

On October 20, 2008, Frederick informed Patricia that all three needed to go to Gateway Title to transfer the house into John and Cheryl's names and John explained the transfer was *4 intended to help avoid losing the house to MaineCare.⁶ Tr. 1/36. Patricia testified that she had never spoken to either John or Frederick about transferring the house prior to this day. Tr. 1/37. John's statement about MaineCare was the only statement he ever made to Patricia about the transfer prior to its occurrence. Tr. 1/81. Evidence was admitted at trial that on October 17, 2008 - three days before the closing - Frederick signed a check to Gateway Title for \$118 with the memo line of the check reading “Deed etc.” Tr. I/ 42-43; Plaintiff's Ex. 8, App. at 39. Patricia also testified that she had never spoken to her daughter Cheryl about the transfer and had no reason to believe that Frederick had spoken to Cheryl about the transfer prior to October 20, 2008. Tr. 1/79-80. Patricia testified that she had no evidence that John influenced Frederick to transfer the home. Tr. 1/86. Patricia testified that she never spoke to an attorney about the transfer, either on the phone or in-person, and that she could not remember reading the deed before signing it. Tr. 1/38, 82; Deed, Pl.'s Ex. 9, App. at 37-38. Finally, Patricia confirmed at trial the statement in her affidavit that Frederick may have wished to transfer the home and its contents to John. Tr. 1/116.

Frederick's condition worsened following the diagnosis and on June 4, 2010, Patricia came home to find that Frederick had been taken to the hospital as the result of a stroke. Tr. 1/48. Approximately three days after the stroke, John and Cheryl visited 7 Lawrence Street and made arrangements to have Frederick's dog euthanized. Tr. 1/54. Patricia was upset by this event, but also testified in corroboration with John that the dog, which was blind and protective of the home, attacked John when he was restraining the dog so that the paramedics could enter the home during his father's stroke. Tr. 1/56-57, 204-05.

*5 Following the stroke, Patricia testified that she was not included in discussions about Medicare or nursing care facilities and that John informed her he would take care of everything. Tr. 1/62-63. Frederick's own insurance covered his care until

MaineCare became active on October 14, 2010. Tr. 1/75. Patricia also testified that she and John had confrontations about the property in the home following its transfer by deed and that she and John both padlocked areas of the home to secure property. Tr. 1/122. Finally, Patricia testified that following the stroke, John had taken money out of Frederick's account pursuant to a power of attorney without her knowledge. Tr. 1/64-67. She testified that John transferred \$10,974.43 during Frederick's lifetime and \$1,528.35 after his death. Tr. 1/70. Frederick died on December 15, 2010. Tr. 1/77.

Patricia admitted to making false statements in her affidavit for preliminary injunction, which implied Cheryl was involved in the deed process. Tr. 1/105-07. Patricia also admitted to making false statements in her affidavit that John had stolen Frederick's truck and other personal property from the home. Tr. 1/109-10.

Cheryl was the next witness to testify. Cheryl testified that her only communications with the involved parties prior to the transfer on October 20th was a phone call with John confirming that the transfer was going to happen and a phone call with Attorney John Kirk (Patricia and Frederick's attorney for the transfer) about the signature process. Tr. 1/138-39. Cheryl did not sign the deed. Tr. 1/139. Cheryl also testified that John had informed her about the power of attorney and his using money from his father's accounts to pay his father's bills. Tr. 1/144. Cheryl never received money from her father's accounts. Tr. 1/144. Cheryl testified that Patricia chose not to participate in discussions about nursing care facilities. Tr. 2/130.

***6** John testified concerning the issues in dispute. John testified that he helped bring his father to most of his medical appointments starting immediately after his diagnosis in September of 2008. Tr. 2/162. He also testified that his mother's reliance on him did not increase following his father's diagnosis and was just "normal type favors." Tr. 2/137.

On June 4, 2010, the day of Frederick's stroke, John was called by his father, who was asking for help and sounding concerned. Tr. 1/162-63. When John arrived at 7 Lawrence Street, he needed to restrain the dog before paramedics would enter the home and assist his father. Tr. 1/163. John was unable to reach his mother by phone, but left her a note on the door informing her about the [stroke](#). Tr. 1/164-65. In interactions with his father after the [stroke](#), John found his father to be intelligible. Tr. 2/140. Testimony from Frederick's treating medical oncologist, Dr. Thomas Keating, confirmed this coherence. Tr. 2/172.

John visited Frederick every day in the hospital following his stroke. Tr. 2/166. On June 9, 2010, John brought a power of attorney to Frederick, which Frederick executed, designating John as having power of attorney over Frederick's financial affairs. Tr. 1/156. John and his sister also spent time selecting a nursing care facility for Frederick after the stroke. Tr. 2/139. John testified that his mother chose not to participate in the decisions about the nursing care facility and MaineCare application. Tr. 1/150,2/139.

On June 28, 2010, John opened a TD Bank account into which he transferred money from Frederick's checking and savings accounts, which were also held at TD Bank. Tr. 1/150-51; 1/167. John's personal accounts, checking and savings, were both held at Maine State Credit Union. Tr. 1/189, 2/150. John testified to a series of transfers that were made so he could make purchases to benefit Frederick. Tr. 1/71-77. John also acknowledged making transfers that were not for the benefit of Frederick. Tr. 1/186.

***7** Dr. Thomas Keating testified that he was the treating medical oncologist for Frederick following his diagnosis. Tr. 2 /171-72. Dr. Keating interacted with Frederick at the hospital as well as on two occasions at the Oak Grove nursing care facility. Tr. 2/172. Dr. Keating testified that Frederick appeared intelligible after his stroke. Tr. 2/172. He testified that John accompanied Frederick to every one of his medical appointments. Tr. 2/172-74. Finally, Dr. Keating did not feel he could state whether Frederick was dependent on John. Tr. 2/176.

Jennifer Gagliardi testified that she was employed by Gateway Title in Waterville and was the processor for the deed transfer that occurred on October 20, 2008. Tr. 2/99. She testified that she received a call from John about the possible transfer and she informed him that Frederick and Patricia would need to contact Attorney John Kirk ("Kirk"), an employee of Gateway Title, before she could proceed. Tr. 2/100-01. After being contacted by Kirk, she then began preparing the deed. Tr. 2/104-05. After the deed was prepared, she oversaw the signing process with Frederick, Patricia, and John. Tr. 2/107. She testified that she

asked both Frederick and Patricia to review the language of the deed and that she specifically made sure that they reviewed the final two paragraphs of the deed.⁷ Tr. 2/108.

Kirk is an attorney employed by Gateway Title in Bangor. Tr. 2/74. Kirk testified that he was contacted by Jennifer Gagliardi regarding a deed transfer from Frederick and Patricia to Cheryl and John because Gateway needed to make sure that it complied with the Improvident Transfers of Title Act (“ITTA”). Tr. 2/76-77. Kirk testified that he did not have any specific *8 recollection of the “actual conversation” with Frederick and Patricia. Tr. 2/78. Kirk testified, however, that it is his practice in these types of transfers to only speak with the parents and not the children. Tr. 2/77. When speaking to the parents in these types of transfers, he testified that he discusses the ITTA, undue influence, tax disadvantages for the children-recipients, the absence of control once property is transferred, Medicare/MaineCare consequences, and also invites the parents to ask any questions. Tr. 2/90. Finally, he testified that when speaking to parents in cases that might implicate the ITTA, he is not representing anyone's interests other than the parents. Tr. 2/93. Kirk also testified in his deposition that he did not “believe” that he had had an attorney-client relationship with Patricia. Tr. 2/96.

During Kirk's direct examination, he provided foundational testimony in a failed attempt to admit an “order summary” from Gateway Title concerning the McCollor transfer. Tr. 2/82; Order Summary, App. at 40. Kirk testified that an order summary is a “printout from our [Gateway's] processing program that tracks the order from the time that the file was open to the time that the file's closed.” Tr. 2/82. He testified to the following about the order summary: (1) as “title counsel” he handles the day-to-day legal work and was familiar with the order summary; (2) the summary was kept in the ordinary course of Gateway's business; (3) the entries on the summary were made at or near the time of the events they described; and (4) the entries are made by persons with personal knowledge of the events described. Tr. 2/83. In response to an objection from opposing counsel, the court informed John and Cheryl's counsel that he had not established that Kirk was a custodian or qualified witness in regards to the summary. Tr. 2/84. Following the objection, Kirk provided further foundational testimony that he was authorized to edit summaries and was completely familiar with the process used at Gateway for creating the *9 order summary in question. Tr. 2/85-86. Nonetheless, the court sustained the objection and excluded the order summary from evidence. Tr. 2/86.

Brenda Bolduc (“Brenda”) testified that she was in a romantic relationship with John from August 18, 2007 to December 31, 2010. Tr. 2/5. During her time with John, she noted that he and his mother had a “very strained” relationship. Tr. 2/60. She testified that John was stressed after his father's diagnosis and that she discussed his concerns about MaineCare following the diagnosis. Tr. 2/9-11. She also overheard a discussion between John and Cheryl about MaineCare and the possibility of losing the home. Tr. 2/12-13.

Brenda was present when Frederick called John on the day of his stroke. Tr. 2/14-15. She testified that the dog had to be restrained before paramedics could enter and that she was scared of the dog because on a prior occasion he had “come at me.” Tr. 2/14-15, 61. Following the stroke, she testified that she agreed to witness Frederick's signature of a blank document. Tr. 2/17. She testified that John allegedly added language at a later time to that document. Trial Tr. 2/17. The exhibit admitted at trial shows that John allegedly added language indicating that Frederick's intention in transferring the home was not to avoid the MaineCare penalty. Tr. 2/16; Plaintiff's Ex. 15.

Judgment

In its Judgment, the Superior Court made a number of findings. The Superior Court found that the real estate and property transfer in dispute occurred on October 20, 2008 when Patricia was 64 years old and Frederick was 68 years old. Judgment, App. at 14. It found that Frederick's illness began showing signs in 2006 and worsened in 2007. Judgment, App. at 15. During this time, Patricia was stressed and tired. Judgment, App. at 15.

*10 In September 2008, Frederick was diagnosed with two inoperable [brain tumors](#) and inoperable [lung cancer](#). Judgment, App. at 15. Without specific reference to dates, the Superior Court found that Frederick “clearly relied” on John for help,

transportation, and guidance. Judgment, App. at 16. The Superior Court found that John was Patricia's "principal source for emotional support" and that she trusted him "100% to supply any information they needed. Judgment, App. at 16. The Superior Court also found that Patricia was under stress because of the diagnosis and she relied upon John to have a more clear assessment of events. Judgment, App. at 16. Finally, the Superior Court found that Patricia's relationship with Cheryl was poor since Cheryl was younger than 17 and that Patricia and Cheryl had minimal communication. Judgment, App. at 16.

The disputed transfer occurred on October 20, 2008. Judgment, App. at 16. The Superior Court found that Patricia was scared at the time of the transfer, she had not spoken to an attorney in-person or on the phone, and that she did not recall the closing agent, Jennifer Gagliardi, explaining the deed to her. Judgment, App. at 16-17. Patricia had never spoken to Frederick or John about the transfer prior to October 20, 2008. Judgment, App. at 16. The Superior Court found that Kirk had no recall of an "actual conversation" with Patricia and Frederick and declined to rely on Kirk's testimony about his usual practices when speaking to parents regarding an ITTA transfer. Judgment, App. at 17. Finally, the Superior Court found that Cheryl's name appeared on a document setting up the deed transaction, Cheryl spoke to Kirk about the transfer, and that she was "aware of the transaction and her brother's role in the transfer." Judgment, App. at 17-18.

Frederick suffered from a stroke on June 4, 2010. Judgment, App. at 18. Following the stroke, John as named power of attorney for Frederick effective June 9, 2010. Judgment, App. *11 at 19-20. A joint account with Frederick and John was created thereafter and transfers were made by John from Frederick's account to the joint account. Judgment, App. at 20. The Superior Court found \$10,974.43 in transfers occurred during Frederick's life and \$11,528.35 in transfers occurred after his death. Judgment, App. at 20. Patricia was not aware of these transfers at the time they occurred. Judgment, App. at 20. Aside from a \$1,312.88 transfer for a medical lift chair, the Superior Court did not find that John made transfers for the benefit of Frederick. Judgment, App. at 20. Cheryl did not receive any money from Frederick's account. Judgment, App. at 20.

***12 STATEMENT OF ISSUES**

I. Whether the Superior Court erred in granting judgment to Patricia for her claim of Improvident Transfer of Title when there was no evidence in the record that Patricia was dependent on others and no evidence that Frederick was not represented by independent counsel.

II. Whether the Superior Court erred in granting judgment to Patricia on her claim for Undue Influence when there was no evidence of a confidential relationship between either Patricia and John or Frederick and John.

III. Whether the Superior Court erred in its determination of damages for Patricia's claim of Breach of Fiduciary Duty.

***13 SUMMARY OF THE ARGUMENT**

The Superior Court's findings that Patricia was dependent upon her son and that her dependency was the result of a "significant limitation" in emotional or mental functioning were clearly erroneous and there is no evidence in the record supporting these findings. In fact, there was substantial contrary evidence that Patricia was very capable and high functioning at the time of the transfer. It was also clearly erroneous for the Superior Court to find that Frederick was not represented by independent counsel. There was no evidence in the record for this finding. Likewise, the Court's evidentiary ruling that Attorney John Kirk was not a qualified witness under [M.R. Evid. 803\(6\)](#) was clear error and this error substantially limited John and Cheryl's ability to show that Frederick was in fact represented by independent counsel for the transfer. Finally, it was clear error to find that the personal property was a "major transfer" under the ITTA because there was no evidence satisfying the statutory definition for that requirement. These errors require this Court to vacate the judgment on Patricia's claim for violation of the ITTA.

Additionally, the Superior Court's findings that there were confidential relationships between Patricia and John as well as between Frederick and John were clearly erroneous because there was no evidence in the record that such relationships existed

prior to or at the time of the transfer. These errors require this Court to vacate the judgment on Patricia's claim for Undue Influence.

Finally the Superior Court's award of damages for Breach of Fiduciary Duty was clearly erroneous because it disregarded evidence in Frederick's checking account statements and the sole evidence for a number of transfers was John's testimony that those transfers were made for *14 the benefit of Frederick. These errors require this Court to vacate the damages award for Patricia's Breach of Fiduciary Duty claim and remand for a new determination of damages.

*15 ARGUMENT

STANDARD OF REVIEW

This Court will uphold the findings of the Superior Court unless they are “clearly erroneous.” *Stickney v. City of Saco*, 2001 ME 69, ¶13, 770 A.2d 592, 600. A finding of fact is clearly erroneous when: (1) no competent evidence supporting the finding exists in the record; (2) the fact-finder clearly misapprehended the meaning of the evidence; or (3) the force and effect of the evidence, taken as a whole, rationally persuades us to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case. *Wells v. Powers*, 2005 ME 62, ¶ 2, 873 A.2d 361, 363.

This court reviews rulings on the admissibility of evidence for clear error or an **abuse** of discretion. *Chapman v. Robinson*, 2012 ME 141, ¶ 8, 58 A.3d 1123, 1125. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *M.R. Evid. 103(a)*. “Prejudicial injury occurs only if the evidence excluded was relevant and material to a crucial issue and if it can with reason be said that such evidence, if admitted, would probably have affected the result or had a controlling influence on a material aspect of the case.” *Todd v. Andalkar*, 1997 ME 59, ¶ 7, 691 A.2d 1215, 1218. *Rule 103* also requires in cases when the ruling was one excluding evidence that “the evidence was made known to the court by offer of proof or was apparent from the context within which questions were asked.” *M.R. Evid. 103(a)(2)*.

***16 I. THE SUPERIOR COURT ERRED IN GRANTING JUDGMENT TO PLAINTIFF ON COUNT I (IMPROVIDENT TRANSFER) AS IT RELATED TO THE REAL ESTATE BECAUSE THERE WAS NO EVIDENCE THAT PATRICIA MCCOLLOR WAS DEPENDENT ON JOHN MCCOLLOR, NO EVIDENCE THAT FREDERICK MCCOLLOR, SR. WAS NOT REPRESENTED BY INDEPENDENT COUNSEL AND THE PERSONAL PROPERTY TRANSFER WAS NOT A “MAJOR TRANSFER”**

The ITTA provides a statutory vehicle for specifically-defined claimants to demonstrate a presumption of undue influence in certain transfers of property. In particular, the ITTA provides that

[i]n any transfer of real estate or major transfer of personal property or money for less than full consideration or execution of a guaranty by an **elderly** person who is dependent on others to a person with whom the **elderly** dependent person has a confidential or fiduciary relationship, it is presumed that the transfer or execution was the result of undue influence, unless the **elderly** dependent person was represented in the transfer or execution by independent counsel.

33 M.R.S. § 1022(1). Included in this presumption are a number of statutorily-defined terms. 33 M.R.S. § 1021. The proof of certain terms are not disputed in the present appeal, including the facts that a “transfer” of real estate⁸ occurred, that Patricia and Frederick were both “**elderly**” persons and that the transfer of real estate was for less than full consideration. Central to this appeal, however, is the absence of evidence concerning the “dependency” of Patricia at the time of the transfer in question and the absence of evidence that Frederick was not represented by independent counsel prior to the transfer in question.

“Dependent,” with respect to an **elderly** claimant under the ITTA, means

wholly or partially dependent upon one or more other persons for care or support, either emotional or physical, because the **elderly** person: A. Suffers from a significant limitation in mobility, vision, hearing, emotional or mental functioning or the ability to read or write; or B. Is suffering or recovering from a major illness or is facing or recovering from major surgery.

*17 33 M.R.S. § 1021(1) (emphasis added). The ITTA places the burden of proof on the plaintiff for demonstrating dependency and requires proof by a preponderance of the evidence.⁹ Id.

A. There was insufficient evidence that Patricia (in her individual capacity) was a dependent person as defined in the ITTA

It was clearly erroneous for the Superior Court to find that Patricia was dependent on John or Cheryl. There was no evidence of dependency in the record nor was there evidence of a “significant” limitation in her emotional or mental functioning.

The Superior Court determined that¹⁰ :

The plaintiff has proved that the transfer of the house was in violation of the improvident transfer statute. 33 M.R.S. § 1022(1) (2011). The plaintiff and her husband were **elderly** dependent people and transferred their real estate to their children for no consideration and as a result of undue influence on the part of defendant John McCollor. The defendants have not rebutted the presumption of undue influence. Neither the plaintiff nor her husband was represented by independent counsel.

Judgment, App. at 22. Patricia was not dependent on any person in the time leading up to the real estate transfer or during the real estate transfer in October 2008.

As an initial matter, Patricia was clear in her own testimony that she did not rely upon her husband for support because she did not want to place further stress on him. Tr. 1/45. There is no question, from Patricia's own statement at trial, that she was not dependent upon her husband on and around the time of the transfer.

*18 Nor was Patricia dependent upon John. Patricia's testimony concerning alleged dependency was solely that *she* relied upon John for help with his father. This is a far cry from any proof, however, that she was dependent on John. Tr. I/ 45-46. The only testimony offered by Patricia as to her alleged dependency on John was a conclusory statement that John was her “primary” for emotional support, but there was no further testimony provided to support this statement Tr. 1/45. Indeed, Patricia testified on cross examination that she did not rely upon John for help with her finances, but only “relied” upon him to plow the “yard,” take Frederick to medical appointments, and pick up prescriptions for Frederick. Tr. 1/86-87. This minimal evidence was woefully insufficient for the Superior Court to find fulblown dependency by Patricia on John.

Nor was there any evidence that Patricia suffered from a significant limitation in emotional or mental functioning. Patricia's testimony and the Superior Court's findings that she was stressed and scared during the time surrounding her husband's illness and the transfer, although understandable given the facts, do not demonstrate a significant limitation in either emotional or mental functioning. Patricia's continued work and social life at this time, in addition to her care for Frederick physically and financially, actually suggest a resilience and absence of limitation on her mental functioning.

The mere fact of a familial relationship coupled with stress from tragic events cannot be sufficient to undo a transfer between two adults of sound mind. The statutory requirements for dependency and a significant emotional or mental limitation cannot and should not be satisfied without specific supporting evidence. Patricia's self-serving allegations of trust and reliance are not supported by actual facts demonstrating her dependency on John. In addition, if the Court does accept the Superior Court's findings of trust and reliance, then these findings are still *19 insufficient evidence to demonstrate dependency, which clearly

implies more than the trust one would normally expect between a parent and child. The same argument applies to Patricia's alleged significant limitation in emotional or mental functioning. Mere allegations of fear and stress are not specific evidence of a significant mental or emotional limitation. None of the evidence presented by Patricia showed that her emotional or mental functioning was limited significantly around the time of the transfer. The specific evidence presented, in fact, showed the exact opposite of a person suffering from a significant limitation in her emotional or mental functioning. Allowing a presumption of undue influence based on mere allegations and absent actual evidence of dependency and limitation exposes the child-recipients of parent-child property transfers to expensive post-trial litigation from able-minded, but regretful parents over the age of 60.

B. Frederick McCollor was represented by independent counsel

It was Patricia's burden to demonstrate by a preponderance of the evidence that Frederick was not represented by "independent counsel" in order to prevail on her claim of a violation of the ITTA. 33 M.R.S. § 1022(1). Independent counsel is defined as "an attorney retained by the **elderly** dependent person to represent only that person's interest in the transfer." This Court has held that "an attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *Board of Overseers of the Bar v. Mangan*, 2001 ME 7, 9, 763 A.2d 1189, 1192 (citations omitted). An attorney-client relationship can form in the absence of factors such as a retainer agreement or fee agreement. *Larochelle v. Hodsdon*, 1997 ME 53, ¶ 12, 690 A.2d 986, 989. The formation of an attorney-client relationship may be *20 implied from the conduct of the parties. *Board of Overseers of the Bar v. Dineen*, 500 A.2d 262, 264-265 (1985).

There is no evidence in the record to support the finding that Frederick was not represented by independent counsel. Patricia testified that she and Frederick had not spoken about the transfer until the day of the transfer when Frederick informed her that they were going to Gateway Title. Although Patricia testified that she did not speak with an attorney about the transfer, she did not provide any evidence that Frederick did not speak with an attorney prior to the transfer.¹¹ Although Kirk did not recall - understandably - the specific details of a conversation he had three years prior with Patricia and Frederick, he did testify that he received a call from Jennifer Gagliardi about the McCollors and that under the circumstances he would have spoken to Frederick and Patricia before preparing the deed.

Kirk's testimony that he did not "believe" that he had an attorney-client relationship with Patricia was far from dispositive of the issue of whether or not an attorney-client relationship actually formed.¹² The conduct of the parties clearly implied the formation of an attorney-client relationship based on Frederick's payment for services three days before the transfer, Kirk's professional competence in matters concerning deed transfers under the ITTA, and the advice Kirk testified he would have conveyed to Frederick, including advice about the ITTA and undue influence. Furthermore, Kirk testified that when speaking to parents in transfers affected by the ITTA, he only represents the interests of the parents.

*21 In addition to the absence of evidence that Frederick was not represented by independent counsel, John offered business record evidence showing affirmatively that Frederick was represented by counsel. It was clear error for the Superior Court to not admit this evidence on the grounds he was not a qualified witness. This exclusion prejudiced John and Cheryl because the evidence was relevant and material to the crucial issue of whether Frederick was represented by independent counsel at the time of the transfer under the ITTA and had the order summary been admitted it would have weighed heavily on this material aspect of the case. The contents of the order summary were apparent from the context in which Kirk testified about his foundational knowledge of order summaries.

M.R. Evid. 803(6) provides an exception to the rule against the admission of hearsay when the evidence presented are records of regularly conducted business.¹³ "The basic guarantee of trustworthiness which justifies the exception for business records embodied in Rule 803(6) is the use and reliance on these records by a business in its everyday activities." Field & Murray, *Maine Evidence* § 803.6A at 47 (Supp. 1980). The purpose of the exception, based on this guarantee of trustworthiness, is that

the Court may consider the contents of a business record without requiring the offering party to produce a witness with first-hand knowledge of the events recorded in the record. *Beneficial Maine Inc. v. Carter*, 2011 ME 77, ¶ 12, 25 A.3d 96, 101. *22 The necessary foundation for business records may be provided by the custodian of the record, “other qualified witness” or by a certification complying with M.R. Evid. 902(11). M.R. Evid. 803(6).

This Court has held that “[t]he fact that the witness did not prepare or supervise the preparation of the record does not destroy the ability of the witness to provide the foundation for its admission as a ‘qualified witness.’” *State v. Hager*, 691 A.2d 1191, 1193 (Me. 1996). In *Hager*, this Court found that the witness, an administrative assistant at a credit union, was a qualified witness for purposes of admitting credit card receipts based on her foundational testimony that she was intimately involved with the operations of the credit union and had personal knowledge of the process for creating the credit card receipts. *Id.* at 1194.

Kirk's foundational testimony demonstrated his intimate knowledge of the “day-to-day legal work” at Gateway Title and showed personal knowledge about the creation of order summaries. He testified that he has access to the order summary records, he is authorized to edit order summary records, and that he has personal knowledge of how an order summary is created by the “processing system” used at Gateway.

The exclusion of this important document was significant. Had it been admitted it would have been that much clearer that Frederick was in fact represented by an attorney in this transaction. The Superior Court would have had no choice but to determine that Frederick was represented by independent counsel based on Kirk's testimony that he only represents the parents in transfers subject to the ITTA, thereby defeating a determination that John and Cheryl had violated the ITTA.¹⁴ The refusal to admit this evidence ignores the very purpose underlying *23 Rule 803(6) because the Superior Court's exclusionary ruling required John to produce a witness with first-hand knowledge of events that were recorded in reliable business records created and maintained in the regular course of business by Gateway Title. This error in evidentiary ruling also resulted in a mischaracterization of Kirk's testimony because it suggested that his failure to recall the details of a routine business conversation from three years prior inferred that the call never happened. The order summary expressly demonstrates Kirk had a conversation with Frederick before the transfer and the ruling to exclude this evidence was clear error.

C. There was no evidence that there was a “major transfer” of personal property under the ITTA

The ITTA creates a presumption of undue influence for transfers of personal property only when those transfers are “major transfers.” 33 M.R.S. § 1022(1). A major transfer means “a transfer of money or items of personal property which represent 10% or more of the **elderly** dependent person's estate.” 33 M.R.S. § 1021(5).

There was zero evidence presented that would support a finding as to what percent of Frederick's estate was transferred when the contents of the home were transferred pursuant to the deed on October 20, 2008. This fundamental requirement was not even mentioned in the Superior Court's initial Judgment. Judgment, App. at 13-23. The Order on Pending Motions, which later ordered return of the property to Patricia, again failed to mention anything about amount or proportion of the property in question, but simply referred to “personal property taken by Defendants from the real estate.” Order on Pending Motions, App. at 25. Patricia did not meet her burden under the ITTA to demonstrate she is entitled to return of the personal property.

***24 II. THE SUPERIOR COURT ERRED IN GRANTING JUDGMENT TO PATRICIA AGAINST JOHN ON COUNT II (UNDUE INFLUENCE) BECAUSE THERE WAS NO EVIDENCE OF A CONFIDENTIAL RELATIONSHIP**

“Undue influence is defined as ‘unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation [ship] between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.’” *Theriault v. Burnham*, 2010 ME 82, ¶ 6, 2 A.3d 324, 325-26 (citations omitted). A presumption of undue influence may be proven by a preponderance of the evidence when the proponent shows (i) the existence of a “confidential

relationship” and (ii) a transfer of assets to the superior party in that relationship. *Avery v. Whatley*, 670 A.2d 922, 925 (Me. 1996).

The burden of persuasion for the existence of a confidential relationship lies with the moving party and must be shown by a preponderance of the evidence. *Ruebsamen v. Maddocks*, 340 A.2d 31, 34 (Me. 1975). The elements necessary for a confidential relationship are “the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation.” *Id.* Although a family relationship may lead the court to find that a confidential relationship exists, the presence of kinship and a mere allegation of trust is not sufficient for finding the existence of a confidential relationship - there must be “a statement of the facts indicating the actual placing of confidence and trust, and the **abuse** of the relation.” *Id.* When the parties are of mature years and in full possession of their faculties, then a family relationship will not give rise to a finding of a confidential relationship unless there is “evidence of superior intellect or will on the part of the one or the other, or of trust reposed or confidence **abused**.” *Id.* (citations omitted).

***25 A. There was no evidence of a confidential relationship between Patricia and John**

Patricia's evidence of a confidential relationship between her and John consisted only of the fact of their kinship and an allegation of trust without a showing of the facts indicating the actual placement of trust.¹⁵ *Ruebsamen* makes clear that this type of proof is insufficient for purposes of establishing the existence of a confidential relationship. Prior to the day of the transfer, Patricia admitted that she had never spoken to John about the transfer and that she only relied on him to plow the yard, a chore he had done even before his father's diagnosis. Evidence of John transporting Frederick to and from appointments is not evidence that Patricia placed trust in John. In addition, Brenda Bolduc, a witness for Patricia, testified that John and Patricia had a “very strained relationship.” Patricia's statement that John was her primary for emotional support prior to the transfer is simply not supported by any evidence of when or how she placed trust in John.

Even if this Court accepts the Superior Court's finding that Patricia's mere allegation of trust is factual evidence of trust, Patricia presented no evidence of a “great disparity of position and influence” between her and John. The record is devoid of facts suggesting that John had any control over Patricia prior to the October transfer. The allegations about nursing care facilities, padlocking of property, and the power of attorney are all subsequent to the property transfer in question. There is evidence of only one direct statement from John to Patricia prior to the transfer: John's mistaken statement about the possibility of losing the home to MaineCare. This single statement is not evidence of a “great disparity of power and influence” between John and Patricia. In contrast, testimony was presented that Patricia was very capable and in control of her work, financial, and personal life before and at the time of the transfer.

***26 B. There was no evidence of a confidential relationship between Frederick and John on or around the time of transfer**

Patricia presented no evidence of a confidential relationship between John and Frederick at the time of the transfer. The deed transfer, which is the subject of the Undue Influence claim, took place on October 20, 2008. Patricia, therefore, had to show that an actual placement of trust and a great disparity of position existed between Frederick and John on or before October 20, 2008. Evidence after the date of transfer, such as evidence about Frederick's stroke on June 4, 2010, his subsequent admission into the Oak Grove nursing care facility, and the execution of the Power of Attorney is not evidence supporting Patricia's claim of Undue Influence. When this evidence is excluded from the Undue Influence analysis it becomes clear that Patricia has presented no evidence of a confidential relationship between Frederick and John at the time of the transfer.

Again, the mere fact of kinship is insufficient for purposes of establishing a confidential relationship. Although there was certainly evidence to show that Frederick relied upon John for help with his medical needs and emotional support, this is expected behavior between a son and father. Such behavior does not, however, show a great disparity of position and influence between the parties. There was no evidence of superior will or **abused** confidence. In fact, evidence was presented that Frederick

signed the check for the deed services at Gateway and continued to personally collect rent on the transferred property until the time of his stroke when it was likely no longer feasible to do so from the hospital. John also presented evidence that Frederick was represented by independent counsel through the testimony of Kirk and the order summary, assuming this Court accepts John's argument that denying admission of the order summary was clear error.

***27 III. THE SUPERIOR COURT ERRED IN ITS DETERMINATION
OF DAMAGES ON COUNT IV (BREACH OF FIDUCIARY DUTY)**

Fiduciary duties may arise as a matter of statute, 18-A M.R.S. § 5-914 or by operation of law, *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, ¶5, 738 A.2d 839.¹⁶ This Court treats a fiduciary relationship synonymously with a confidential relationship. *Ruebsamen v. Maddocks*, 340 A.2d 31, 36. The necessary requirements, therefore, are identical to those noted above: (i) "the actual placing of trust and confidence in fact by one party in another" and (ii) "a great disparity of position and influence between the parties." *Bryan R.*, 1999 ME 144, ¶ 19, 738 A.2d at 846. "Although in general, [this Court] will not disturb the fact award of damages, [it] will vacate an award if the fact-finder found damages in disregard of the facts." *Dalphonse v. St. Laurent & Son, Inc.*, 2007 ME 53, ¶ 20, 922 A.2d 1200, 1205.

In its Judgment, the Superior Court determined that "[t]he plaintiff has proved that defendant John McCollor breached his fiduciary duty with regard to the transfer and use of Frederick J. McCollor, Sr. money." Judgment, App. at 22. In its determination of damages for this breach, the Court awarded Plaintiff \$21,189.90 in damages. Judgment, App. at 23.

It was clearly erroneous for the Superior Court to award damages in the present amount because the court's award disregarded self-authenticated bank account records. Patricia offered self-authenticated bank account records for Frederick's savings account and checking account. Pl. Ex. 12; Tr. 1/65-67. She also offered statements for the account created by John for the purpose of transferring money from Frederick's two account after Fredrick signed the power of attorney ("POA account"). Pl. Ex. 13; Tr. 1/65-67. Patricia submitted two summaries of the *28 information contained in these accounts pursuant to *M.R. Evid. 1006*. Pl. Ex. 19, 20.¹⁷ The two summary exhibits both purported that John, upon closing Frederick's checking account on January 21, 2011, received \$8,773.16. The actual bank statement showing the amount transferred upon closing of Frederick's checking account on January 21, 2011, however, shows that only \$00 was received. The court erroneously included the \$8,773.16 figure in apparent reliance on the summaries and Exhibit 13, which was the closing balance of the POA account and not the closing balance of Frederick's checking account. The court's error resulted in \$8,673.16 in damages not supported by record evidence. The addition of this amount to the determination of damages was clearly erroneous.

This damages finding was also clearly erroneous because the un rebutted testimony of John supported a finding that a number of the transfers included in the Superior Court's damages award were made directly on behalf of Frederick and pursuant to a valid power of attorney. On cross-examination and in conjunction with Plaintiff's Exhibit 13, John testified to a number of transfers that were made for the benefit of Frederick.

The only record evidence establishing what happened to the money came from John, who testified that the money he transferred was used for his father's benefit. No record evidence was provided by Patricia that rebutted John's testimony. Though the Superior Court cast doubt on John's credibility, at the end of the day, the only evidence concerning how the monies were in fact spent came from John. In the absence of any other evidence to the contrary the Superior Court erred in summarily determining that John absconded with the monies transferred from his father's account to John's account.

***29 CONCLUSION**

WHEREFORE, for the foregoing reasons, Defendants/Appellants respectfully request that this Court vacate the judgment of the Superior Court as to each count and remand the case to the Superior Court for entry of judgment on each count for Defendants/Appellants.

Footnotes

- 1 Plaintiff's Conversion claim was dismissed before trial. Docket Entries, App. at 10; Judgment, App. at 13.
- 2 Trial transcript references will be denoted with the transcript volume number first followed by the page reference in that volume.
- 3 Patricia's testimony also indicated that snow plowing was something John had done before Frederick's diagnosis and associated illness. Tr. 1/86-87.
- 4 Patricia testified that riding horses was a hobby. Tr. 1/35.
- 5 Patricia and John testified that Frederick continued to receive money from his rental properties after the diagnosis. Tr. 1/58, 196-97.
- 6 Included in this transfer was also the transfer of personal property existing in the home prior to the transfer, including pine lumber and the various pieces of personal property listed in the appraisal sheet. Tr. 1/93-94.
- 7 The final two paragraphs of the deed read as follows:
"The Grantors are over age 60 and are entitled to the benefits and protections of [33 MRSA Sec. 1021, et seq.](#), The Improvident Transfer Statute."
"By their signatures below, the Grantors acknowledge that they have consulted with an attorney of their own choosing and further acknowledge that they are no [sic] dependent on the Grantees or in a 'fiduciary relationship' with the Grantees as the same is defined in the Statute." Deed, Pl.'s Ex. 9, App. at 37.
- 8 It should be noted that John and Cheryl do not concede, however, that Patricia provided sufficient evidence at trial of a "major transfer" of personal property. The issue of personal property is addressed later in this brief.
- 9 As a preliminary matter, the Superior Court's findings about Cheryl's involvement do not satisfy the statutory requirements under the ITTA. As such, John and Cheryl contend that no cause of action has been proven for violation of the ITTA against Cheryl.
- 10 The Judgment only refers to an improvident transfer of real estate. In the Order on Pending Motions, however, the Superior Court added a paragraph to the Judgment stating that "[t]he personal property taken by the Defendants from the real estate located at 7 Lawrence Street, Waterville, Maine will be returned to, and for the benefit of, the Estate of Frederick J. McCollor, Sr." Order on Pending Motions, App. at 25.
- 11 Evidence was presented, however, that Frederick signed a check for payment of services to Gateway Title on October 17, three days *before* the day of the transfer. Check, Plaintiff's Ex. 8, App. at 39.
- 12 The transcript only indicates that Kirk did not believe he had an attorney-client relationship with Patricia. Tr. 2/96. Trial counsel, however, referred to "them" throughout their examination of Kirk. For the sake of completeness, John and Cheryl address the issue respecting an attorney-client relationship with Frederick. John and Cheryl maintain, however, that no evidence has been presented showing that Kirk did not believe he had an attorney-client relationship with Frederick based on a review of the record.
- 13 [Rule 803\(6\)](#) provides in full:
Records of regularly conducted business. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [Rule 902\(11\)](#), [Rule 903\(12\)](#) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- 14 The order summary, which was marked as Defendants' Exhibit 34 for the purposes of identification would have shown the following entries: "Opened File" on October 3, 2008 by "Shannon," "Jenn sent deed to JMK for review" on October 8, 2008, and "Jenn parents spoke with John and deed Ok per John" on October 15, 2008. Order Summary, App. at 40.
- 15 The claim for Undue Influence was only pursued against John.
- 16 In this case, Patricia argues her Breach of Fiduciary Duty claim pursuant to [18-A M.R.S. § 5-914](#), but the Superior Court granted the claim under the legal theory set forth in Bryan R. As such, Cheryl and John only address the legal theory relied upon by the Court in its Judgment for Patricia. Judgment, App. at 22-23.
- 17 Plaintiff's Exhibit 19 is a detailed summary of the transfers from Frederick's savings and checking accounts into the POA account and expenses/withdrawals from the POA account. Plaintiffs Exhibit 20 is a condensed one page summary of the transfers in Exhibit 19.