

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re: The Estate of
Louise Lucitte, Deceased

Court of Appeals No. L-10-1136

Trial Court No. 2008 ADV 1751

Earnest Lucitte

Appellee

v.

Kenneth Lucitte, et al.

DECISION AND JUDGMENT

Appellants

Decided: February 3, 2012

* * * * *

Richard Kolb, for appellee.

William T. Maloney, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the November 25, 2009 judgment of the Lucas County Court of Common Pleas, Probate Division, which granted judgment to appellee, Earnest Lucitte, following a jury trial on all of his claims. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellants, Kenneth Lucitte, Steven Lucitte, and Patricia Lucitte, assert the following assignments of error on appeal:

Assignment of Error #1: The Lower Court Erred In Admitting The Opinion Testimony Of Plaintiff's Expert.

Assignment of Error #2: The Lower Court Erred In Failing To Grant The Defendants' Motions For Dismissal (Or A Directed Verdict On The Claims Of Incompetency And Undue Influence.)

Assignment of Error #3: The Lower Court Erred In Admitting Plaintiff's Exhibit 1 Into Evidence Over Defense Counsel's Objections.

Assignment of Error #4: The Lower Court Erred In Its Instructions To The Jury On Presumptions And Undue Influence.

Assignment of Error #5: The Judgment Of The Trial Court Is Against The Manifest Weight Of The Evidence.

Assignment of Error #6: The Probate Court Lacked Subject Matter Jurisdiction To Impose A Constructive Trust On, Reform, Or Otherwise Invalidate The Title To Real Estate Acquired By And From The Decedent In An Inter Vivos Transaction. The Common Pleas Court Is The Appropriate Forum For Adjudication Of Such Claims.

{¶ 2} Louise Lucitte died intestate on May 24, 2007, and the final account of her estate was approved by the probate court in 2007. On August 6, 2008, appellee, Earnest Lucitte, one of decedent's brothers, filed a complaint against appellants, Kenneth Lucitte (decedent's other brother), Steven Lucitte (Kenneth Lucitte's son), Patricia Lucitte (Steven's spouse), and the administrator of the estate. Earnest asserted that Louise was

incompetent and under undue influence at the time she entered into certain inter vivos transactions. Earnest Lucitte alleged that Kenneth Lucitte had undue influence over Louise and breached the fiduciary relationship he had with her. Earnest also alleged appellants have been unjustly enriched by the improper transfers of Louise's funds to Kenneth. Appellee sought to have the probate court declare the inter vivos transfers invalid, set aside the transfers, and impose a constructive trust on Louise's home at Northbrook Drive, Sylvania, Ohio, and other assets held in the names of appellants.

{¶ 3} Appellants counterclaimed that Earnest had withdrawn funds from the joint accounts and wrongfully converted these funds to his own use in an amount not yet determined. They also asserted that Earnest made the allegations in the complaint without reasonable investigation. They sought declaratory and injunctive relief as well.

{¶ 4} At trial, the following evidence was presented. The case involves three siblings: Earnest Lucitte, the oldest, Kenneth Lucitte, and Louise Lucitte, the youngest who was born deaf. While she was college-educated, Louise worked only for a short time in a bank, and lived with her parents in the family home during their lifetimes. Earnest, who was married to Doris, was unable to testify to great length about the matters in dispute because at the time of trial he had begun to suffer from short term memory loss and confusion. Doris testified to great length about the matters at issue.

{¶ 5} Both Kenneth and Earnest testified that they had a close relationship with Louise and celebrated holidays and birthdays with her as well as other family events. Kenneth testified that he and his family visited his mother almost every Sunday, which

was a 120 mile drive. However, after his mother passed away, he did not visit Louise as often, but he recalled seeing her about once or twice a month and always for family celebrations and holidays. His wife, Dolores, testified that her relationship with Louise grew stronger over the years after the mother's death. Submitted into evidence were pictures and video clips of Louise at gatherings with Kenneth's family from the time Kenneth and Dolores were married in 1960 through 2007. Kenneth knew that Louise spent more time with his family because she was always with him for family events and when he asked her if she had heard from Earnest, she would rarely say that she had. Patricia Lucitte testified that she became close to Louise when she started dating Steven in 1987. They saw each other throughout the years at family gatherings and Patricia mailed pictures and letters to Louise.

{¶ 6} Doris testified that she and Earnest also exchanged gifts and kept in contact with Louise. Doris believed that Earnest was very protective of Louise. It was Earnest and his daughter, Lisa, who were with Ernest and Kenneth's mother when she died and not Kenneth. Doris also testified that Earnest had kept in contact with Louise over the years through a special TTD machine he was able to take with him while he traveled for work. Doris and Earnest both testified that they would go out to dinner with Louise occasionally. When Louise lived in the nursing home, Earnest was able to visit Louise several times a day.

{¶ 7} For about two years prior to the death of Ernest and Kenneth's mother, Earnest's daughter, Lisa, lived with her grandmother and Louise. Kenneth testified that

his mother did not get along with Lisa because of her lifestyle and Louise did not like Lisa because her behavior affected Louise's mother. Lisa, however, testified that she got along well with her grandmother despite her strict rules. Lisa also recalled having conversations with Louise about art, which had been her major in college. Louise taught Lisa some sign language. Lisa described Louise as quiet and creative. She seldom left the home and Lisa never saw her drive anywhere. At her grandmother's funeral, Kenneth informed Lisa that Louise did not want Lisa living with her any longer and that her things would be packed up. When Lisa returned to the home after the funeral, she found that her belongings had been packed and were on the porch. Lisa did not talk to Louise about the matter again because Lisa believed it was true. After that time, Lisa generally lost contact with Louise, except for updates from her father. They spoke once at the funeral of Lisa's husband in 1995 and Louise seemed happy to see Lisa. Later when Lisa visited Louise at the nursing home in Adrian, she was happy to see Lisa and her children.

{¶ 8} Louise was favored in her mother's will because of her disability and subsequent medical issues. Louise inherited the family home and substantial assets. Both brothers were asked to care for Louise following their mother's death in 1987. Earnest believed that Kenneth told him that he was doing Louise's taxes after their mother died. Before her death, their mother had begun to transfer half of her stock holdings into Louise's name (20 or 30 shares of stock) with one-quarter of that stock held jointly with one brother and one-quarter being held jointly with the other brother as their father had planned. When she became too ill to continue, Kenneth testified, the brothers

completed their mother's plan. Earnest testified, however, that he did not know about the estate plan at that time. Kenneth testified that it was his mother's desire to put the stock in joint names so that no one would be able to trick Louise out of her money. However, all of the money was intended for her benefit. With her social security income and the dividend income from the stocks, her net income in 2004 was \$47,000 and in 2005 was \$37,400.

{¶ 9} Louise remained in the family home for the next 17 years. During that time, Doris and Earnest lived about 90 miles away and only visited Louise a few times. Sometimes when Earnest and Doris attempted to visit, Louise did not answer the door. They presumed that it was because she could not hear the doorbell and kept the curtains closed. Earnest would send Louise messages on a special machine for the first five years but Louise did not respond as well. When they learned that her machine was broken in 1992, Earnest left messages in Louise's mailbox. He did not discuss her ability to take care of herself because he did not want to pry.

{¶ 10} Kenneth testified that in the summer of 2004, Louise wanted to purchase a new home in Temperance to be closer to Kenneth and his family. When they went to pick her up, she met them in the garage and they were suspicious why she did not invite them into her home as before. While Kenneth and Dolores went with Louise to look at a home, she limped and stumbled. They convinced her to see a doctor and she made an appointment. Kenneth called Earnest and they went to the doctor appointment together. They learned that Louise had an ulcer that was so severe that the doctor feared it had

infected the bone. Louise was also suffering from macular degeneration and took medicine for high cholesterol and depression. Afterward, they discussed who would take her home for the night. Earnest agreed at first and then stated that he could not do it, so Kenneth took her home with him. That night she became very ill from the oral antibiotics and they had to hospitalize her to give her intravenous drugs.

{¶ 11} When Kenneth and Dolores had gone to Louise's home to take her home with them, they discovered that her home had deteriorated so badly that the kitchen and bathroom sinks were rusted and leaking and the roof was leaking. He recalled that there had been a water pipe that burst in 1988 and it took a year to fix up the home. Kenneth had moved some boxes of things into the living room to keep them dry and figured that they had just remained there ever since. In his opinion, she never was a great housekeeper. Kenneth and Steven testified that in 1994, Steven had cleaned up Louise's backyard over a month's time because it had become overgrown. During that time, a new roof was also installed. In 2004, however, the home was cluttered and filled with debris. Kenneth assumed that the mess had accumulated over the prior six months. Louise told him that the house had gotten in bad shape because she was getting too weak and her heel hurt. Louise told Dolores that she was too embarrassed to tell them about it. Kenneth called Earnest, who came over to see the home as well. The two brothers spent many hours cleaning out the home. Earnest testified that he had never discovered the condition of the home earlier because Louise would always meet him outside when he came to take her places.

{¶ 12} Doris testified that either brother would have helped Louise had she asked for help, but she had never requested any assistance. After the doctor appointment, Kenneth took Louise to his home for one night and then she was admitted into the hospital. After she left the hospital, she was moved for three months into a nursing home near Earnest's home in Adrian, Michigan, because she was not able to care for herself at home. Kenneth testified that only two nursing homes were available to choose from so the one which was closest to both brothers was chosen. Earnest testified that they chose the nursing home near him because he was retired and could visit Louise every day and he often visited three times each day. Earnest testified that Louise was concerned about being in the nursing home because she was afraid that it would become permanent and she did not like being with the older residents. Dolores testified that Louise was upset by a roommate dying and did not like sharing a bathroom.

{¶ 13} While she was in the nursing home, Earnest attended her doctor appointments but Kenneth testified that he was at every appointment as well. Kenneth and Dolores spent Thanksgiving with Louise at Earnest's home that year. Kenneth testified that Louise spent Christmas Eve with him and did not want to go to Earnest's home on Christmas Day. Kenneth convinced her to go but when they arrived they discovered that Earnest's wife, Doris, was ill. Kenneth offered to take Louise back home with him, but Earnest said she could stay. Kenneth later found out that Earnest took Louise back to the nursing home an hour later without feeding her and all she could get at the nursing home was a cold sandwich.

{¶ 14} While Louise was in the nursing home, Kenneth began to assist her with her finances and consolidated all of Louise's money from several Michigan bank accounts and a credit union. Doris testified that Earnest was aware that Kenneth had taken over Louise's finances, but had no reason to suspect that he would be dishonest. On her own, Louise had her dividend checks mailed to her and had collected up a number of checks that needed to be deposited. Otherwise, Kenneth testified, Louise had been taking care of her own banking and filing her own tax returns.

{¶ 15} Her bank accounts were in her name alone, but the credit union account was a joint and survivorship account with Kenneth (\$36,000). Kenneth testified that Louise had told him that she had added his name to that account because of their relationship and because she trusted him more than Earnest. Kenneth talked to a banker at his sister's bank to determine what he could do to provide for direct deposit of the dividend checks. To make it easier for Kenneth to take care of the banking, he talked to Louise about consolidating everything at his own bank and she agreed. So, Kenneth opened two joint and survivor bank accounts at Fifth Third Bank. Following the banker's advice, he opened two accounts in the names of Louise, Earnest, and Kenneth so that the dividend checks, which were issued in the names of Louise and one brother, could be direct deposited. He opened a checking account, depositing \$4,875.58, and a savings account, depositing \$362,079.78. Kenneth also opened another savings account, a joint and survivorship account for Louise and Kenneth, depositing \$36,175 from the closed credit union account. Kenneth also opened a credit card account in his and Louise's

names. The total assets in those accounts at that time amounted to about \$397,000. After Louise's home was sold, the money was deposited into the joint savings account with all three names on it. While he maintained a ledger for the checking account, he did not do so for the savings accounts. He kept detailed notes about the monies that were spent and reimbursements paid to Earnest or himself. In the beginning, he asked Louise about reimbursing the brothers for gas because driving up to her home to clean it out was getting to be expensive. She agreed. But, after she moved to West Park Place, Kenneth no longer kept track of the gas expense. In 2006 he told Louise that keeping track of her expenses was becoming a burden and she agreed that he did not have to do it any longer. Dolores testified that before that Louise reviewed Kenneth's records line by line and questioned things.

{¶ 16} Earnest recalled that Kenneth had estimated that Louise had enough money to last until she was 83 years old. Kenneth believed that Louise was always capable of taking care of her own affairs, but that she liked his assistance. Kenneth wrote the majority of the checks and balanced her checkbook. He kept an account on the computer and she kept the check register with her. When they were together, he would reconcile the two registries and he would leave the bank statements with her. After she passed away, he threw the paper register away. The bank statements were sent to Kenneth because he had used his home address on the checks since he did not know where she would be living long term.

{¶ 17} After Louise no longer needed nursing care, both brothers searched for a place for her to live and helped to clean out the family home. The home was sold for \$135,000. Louise was moved to West Park Place in Toledo, Ohio, on February 25, 2005, which was closer to where Kenneth lived. Kenneth signed the deposit check and the occupancy agreement on February 8, 2005. Earnest and Doris both testified that they were surprised to find Louise missing one day when they went to visit her in the nursing home. They later learned that Kenneth had moved her to West Park Place Retirement Community. However, the executive director at West Park Place testified that her records indicated that Earnest visited the facility on February 7, 2005, prior to Louise's move on February 25, 2005. Earnest and Doris visited again on February 18, 2005.

{¶ 18} Earnest and Doris believed that Louise was happy at West Park Place. They took her shopping early on for things she needed and were reimbursed for the expenses. Over the two years that she stayed there, she never told Earnest that she was unhappy or wanted to move to a home. She seemed very happy and participated in some of the activities, especially the weekly trip out for lunch. However, they noted over time that she would spend more time in her bed clothes during the day. He tried to talk to her about communicating through a computer but she could not understand. Louise remained at West Park Place for two years, paying \$2,745 a month for her apartment.

{¶ 19} Kirsten Pickle, the executive director at West Park Place testified that the business provides an independent living arrangement but also provides two daily meals, housekeeping, transportation, security, and activities as part of the rent. The business

also partners with home care services organizations to provide health care if needed. The meals that are provided are generic and individual residents must select appropriate foods from the menu to meet their dietary requirements. She recalled Louise and testified that she was the only deaf resident. Louise was a very pleasant and happy lady and the staff got along with her very well. She seemed capable of understanding where she was and there was no problem with communication. She did not appear to Pickle to be a passive person. Louise ate the meals provided and faithfully joined the Friday outing to a restaurant for lunch. She also participated in the activities provided. She never expressed any dissatisfaction to the director. The director also never heard Louise state that she wanted to live in her own home.

{¶ 20} The director met with Earnest once in January 2006 because he was concerned that Louise was not eating appropriately because the eye doctor opined that the problems with her eyes were due to her blood sugar not being controlled. Louise had developed retinopathy and kidney dysfunction as well. Although the retirement community does not ordinarily control meal choices, the director agreed to help out because of the special problems. Pickle believed that the home care service agreed to monitor Louise's blood sugar for approximately \$200 a week. Earnest testified that the cost was about \$35. Louise was not a part of this decision. The next day, the director was informed that Kenneth had cancelled the blood sugar monitoring stating that he had a power of attorney and did not authorize the service. Kenneth denied canceling the service. Kenneth testified that when his wife went to visit Louise the day after Earnest

had set the program up, Louise was very mad and did not want someone coming to check her blood for her. She had thrown the nurse out. Dolores talked to someone about it that day.

{¶ 21} While Louise was in West Park Place, Kenneth decided to sell his home and move into a smaller home that was in the area he and Louise had been looking for a home. He decided to borrow \$60,000 from Louise for a bridge loan and pay her the interest rather than the bank. He talked to her about the plan and she agreed. After the sale of his home, he told Louise that he was putting the loan money back into her account, but she told him to keep the money. He was not aware of the need to file a gift tax return and the gift was not memorialized in any document because it was a simple exchange between siblings. Dolores also testified that she talked to Louise about the gift not being necessary, but when Louise said that she wanted to give it, Dolores accepted the gift. Doris also testified that Louise tried to give Earnest a check for \$1,500 for Christmas, 2004, for all the help he had provided. He tried to give it back to her, but she would not allow him to do so. He kept it to avoid hard feelings between them. Louise also gave Kenneth \$1,500 that Christmas. He knew she wanted to give it to both brothers for helping her.

{¶ 22} Kenneth testified that at some point in the summer of 2006, Louise became unhappy with living at West Park Place and wanted to buy a home to be close to family. Dolores recalled that when she visited Louise one day she told Dolores how a neighbor had moved out to live with his family and she said she would like to do that too. They

then talked about other things. But, in later visits, Louise would return to the idea. She was younger than the other residents and could not communicate well with others. She had been talking about coming to live closer to Kenneth and his family in 2004 because Kenneth had told her that he was getting too old to make the long drive from his house to Louise's. Earnest also testified that Louise always dreamed about owning another home, but asserted that she eventually realized that it would never happen. Kenneth testified that Louise and he considered the move to West Park Place as a temporary transition while she was recovering.

{¶ 23} Louise first proposed living with Kenneth, but he did not believe such an arrangement would be agreeable to his wife in such a small home. Dolores did not know how they could modify their villa to give Louise what she wanted. So, Louise also proposed buying another home and living with Kenneth's son, Steven and his wife, Patricia, and their two children, a son, age 15, and a daughter, age 8. Kenneth and Dolores talked to them and they were agreeable. At first, they were going to pool their money, but when Steven tried to sell his home, he realized that the deal was going to cost him money because he did not have enough equity in the home. Steven was unable to sell his house until later in the year that Louise passed away.

{¶ 24} Louise proposed that she buy the home and have Steven and Patricia move in with her. They accepted because they wanted to be able to provide Louise with what she wanted and they would enjoy living with her. Steven and Patricia both testified that the house Louise selected was not one they would have chosen and that they loved the

home they had been living in for 18 years. Louise told them that she was going to arrange it so that if Steven and Patricia lived with her and watched out for her, they would be able to keep the home when she was gone. Dolores testified that Louise wanted to give the house because she knew that Steven would take care of the yard, drive her to the store, and take care of her.

{¶ 25} Kenneth, Dolores, and Patricia searched for possible houses and took Louise to three or four. She wanted a “mother-in-law” suite with a bedroom and a kitchen. They found it difficult to find a home for less than \$300,000 which would accommodate modifications to add the suite Louise wanted. Eventually, Louise purchased a home for \$242,175.04, which was titled in the names of Louise and Steven and Patricia Lucitte. Louise moved into the Sylvania home at the end of January 2007.

{¶ 26} Earnest and Doris testified that they had no knowledge of the plans to purchase the home. They discovered the move was pending when they went to visit Louise near Christmas time and found that she had moved to a smaller apartment in anticipation of the move to a home. She was not at home that day, so they just left gifts.

{¶ 27} Earnest went to visit Louise at the Sylvania home shortly after her move but did not discuss the move because he was there to visit his sister and there was no point in discussing the issue. He was unable to visit her in the new home again because of his own health issues. He testified that during this first visit he noticed that the backyard was very similar to the backyard at their family home and thought that this feature was nice for her. Steven recalled the visit and testified that Louise wanted him to

stay nearby while Earnest visited. As he left, Earnest expressed his appreciation to Steven and told him that it was a good thing he was doing for Louise because she was very happy. The realtor also testified that Louise had been very pleased with the backyard when she had first seen the home because it reminded her of a prior home. However, Earnest testified at trial that he had preferred that Louise would live at West Park Place where there was medical assistance and more control over her meals.

{¶ 28} Kenneth testified that he did not tell Earnest about the housing arrangement because it was not his place to do so. Louise told him that it was none of Earnest's business. She also told Kenneth that she did not trust Earnest. Kenneth testified that Louise was happy in her new home and enjoyed watching television and reading and being able to sit outside on the patio without have to go down an elevator. Dolores testified that she saw Louise at least once or twice a week when she moved in with Steven and Patricia. Louise told Dolores that she was very happy living there with family. Even Earnest had called Dolores after he visited Louise in the home and said that it was the best thing that ever happened to her and that she was very happy there.

{¶ 29} In addition to the cost of the home, an additional \$11,775 was spent renovating the home to add a "mother-in-law" apartment for Louise. Kenneth testified that Louise directed the entire renovation and selected items from the samples that Kenneth would supply. Kenneth also paid all of the utility bills, insurance costs, and the real estate taxes out of Louise's funds. Louise signed only one of the checks payable to Patricia Lucitte for a utility bill. Kenneth and Patricia testified that they had all sat down

and worked out a plan to pay these bills with a 50/50 split, except Louise wanted to pay the real estate taxes and insurance because she did not want to lose the house if the bill did not get paid. Patricia testified that she did pay half of the utilities. Patricia also testified that Louise gave them \$150 a month for groceries because she usually ate dinner with them.

{¶ 30} Steven said that he was always close to Louise and she was his godmother. He always saw Louise at family gatherings. Earnest also testified that Louise had a lot of contact with Steven. While Steven did not visit Louise in her home after 1994 and had not seen her while she was in the hospital and nursing home, he would see her at the family functions. Kenneth also testified that he did not believe Steven visited Louise at West Park Place, but Steven testified that he met her there to discuss living together. Furthermore, Steven recalled that Patricia sent pictures of the kids to Louise and kept her updated on their family. He further testified that Louise first suggested they live together in 1994 when he was fixing up her backyard, but she changed her mind. Later when it was brought up in 2005, he was still willing to do it. After she picked out the house, she told Steven that she wanted to make sure that if anything happened to her that he and his family would still have a home.

{¶ 31} Steven testified that he never saw a decline in Louise's ability to communicate or think properly. She was very involved in the remodeling of the home. She even designed a special flower pattern with the tile for her shower. After they began living together, Louise would join Steven and his family for dinner sometimes. He would

use a white board to write down the dinner menu and Louise would write whether she would join them or not. During the day while he and his wife were working, Louise could move throughout the house. She would prepare her own breakfast and monitor her own dietary needs. Little by little, Steven was taking on running errands for her to take some of the burden off of his father. He would take Louise shopping and wait for her to read labels and make her selection of groceries she kept in her area of the home. He purchased the food for the main section of the house to which Louise also had access. Steven's daughter would play games with Louise and Louise would win. She was an avid reader of the newspaper and Steven had developed a routine to get the paper to her each morning and she would bundle them and leave them for him to take to the recycling center. Steven was preparing an area where she could paint, but she died before it was finished. He believed that living in the home made her extremely happy. The day she died, Steven noticed that she had not gotten up or taken the newspaper as she always did. He was totally shocked to find that she had died.

{¶ 32} It was only four months after moving into the home that Louise passed away unexpectedly at the age of 66, and Steven and Patricia took full title to the home and possession of all of the furniture and additional items Louise had purchased for her apartment at West Park Place. When Louise passed away, Kenneth arranged for a graveside service, which Earnest believed was inappropriate because of her religious beliefs. Doris testified that after the service, Kenneth handed Earnest a list of the finances and stocks he would inherit. Nonetheless, both brothers and their wives went to

see a lawyer about probating the estate. Earnest and Doris had become suspicious of Kenneth's handling of the decedent's money after he purchased a home for her and were certain he had stolen money after the decedent's death when they checked the bank records. Doris and Earnest testified that they asked for an accounting, but Kenneth denies ever discussing this matter. He believed that was none of Earnest's business because Louise could do whatever she wanted prior to her death. Kenneth testified that the fact that he mailed them correspondence and reports of the expenditures showed that he was not trying to cheat his brother. Shortly after the visit to the attorney, Kenneth hired another attorney to handle the estate, but Earnest did not approve. Kenneth testified that he hired the second attorney because his fees were significantly less after discussing the matter with Earnest. Kenneth denied that the change was made to avoid making an accounting as the first attorney had stated was necessary.

{¶ 33} After her death, Kenneth paid the second half of the real estate tax bill for the home to which Steven and Patricia had then gained full title. Kenneth testified that since is said it was 2006 tax bill, he assumed that he had to pay it as her obligation. Earnest testified that Kenneth never acknowledged this to be an error and that the estate would be reimbursed. Kenneth also testified that he had not included the furniture and household items on the estate inventory because the attorney for the estate told him that these items did not needed to be included because they were nominal.

{¶ 34} Kenneth also testified that he transferred \$10,000 from Louise's savings account to his and her joint savings account after her death in order to have funds to pay

the probate costs. He also closed the joint savings account he held with Louise the same day he made the transfer. However, he explained that the transfer was an error and the money should have been deposited into her joint checking account. He made the transfer on-line where he has access to all of the accounts and had simply clicked on the wrong account number. He corrected the error five weeks later when he discovered it. In the interim, Earnest and Doris had discovered that they could view the bank records and began to check into the expenditures and transfers.

{¶ 35} Kenneth testified that when Earnest closed out one of the accounts, he had taken Kenneth's half of the account, which was \$400.

{¶ 36} Dr. Burke, a psychiatrist, testified that he had gained experience, while in the military, in making assessments of a person's competency to make independent judgments and decisions and their susceptibility to undue influence based only upon the statements of those who knew the person and the person's medical history. Appellees challenged the qualifications of the doctor to testify as an expert on the ground that there was an insufficient definition of competency to support the qualifications of an expert. The court offered to allow appellee to voir dire the doctor, but appellees sought to reserve that right during cross-examination. The court reconsidered the issue and overruled the objection. Before Dr. Burke gave his opinion, appellees objected again that his opinion was not admissible based upon issues of a lack of foundation, qualification, and relevancy, and because the opinion was not based upon a fact or data he perceived or was admitted into evidence. The court again overruled the objection.

{¶ 37} Dr. Burke testified that he reviewed exhibits in this case (certain medical records) and attorney letters, court documents, and letters and affidavits of the parties and other witnesses. He defined competency as the ability of a person to perceive his or her surroundings, care for oneself, recognize and relate appropriately to others, make proper, independent decisions and judgments, and the ability to know what property one possesses and how to dispose of it.

{¶ 38} Dr. Burke testified that, in his opinion, Louise was incompetent and her judgment was impaired in 2004 and that Louise was susceptible to undue influence from 2004 onward. He did not believe that she could have made any rational choices about her life. He based the opinion on the following facts: 1) she was cooperative with whomever was with her at the moment, which was reflected by a lifelong pattern of a passive personality which caused her to be overly cooperative, 2) her cognitive function was significantly compromised by her deafness and her vision issues, 3) she could not realize for herself that she was living in a dangerous environment and needed help, 4) there was no evidence in the medical records that she could communicate well because she was always accompanied by her family who provided pertinent information, 5) the medical records indicated that there was sometimes difficulty communicating with Louise, 6) there was no evidence that she knew American Sign Language, and 7) there were no samples of Louise's writing to determine her ability to communicate by writing.

{¶ 39} The doctor found the notes from a social worker who gave Louise a private psychiatric evaluation with her responses being provided in writing to be the most

reliable. However, we were unable to locate this medical record in the exhibits submitted to the jury.

{¶ 40} The doctor did not agree with the opinion of Dr. Wenzke, a board certified internist, who was Louise's physician from 2005 until her death. He attested that Louise communicated well with him because she could read lips and sign. Her brother would assist in their communications. On every visit, Dr. Wenzke found Louise able to intelligently and effectively communicate with him. He opined that she was fully capable of understanding and making intelligent decisions regarding her business, personal, and financial affairs. Dr. Wenzke indicated in his affidavit that he had not seen any sign of cognitive impairment and believed that Louise could make intelligent decisions. Dr. Burke discredited this opinion because he believed that anyone who had a sensory deficit (such as deafness) was lacking one aspect of a person's ability to perceive information and, therefore, would automatically have his or her cognitive ability compromised. Furthermore, Dr. Burke believed that the medical records contradicted Dr. Wenzke's opinion.

{¶ 41} Likewise, Dr. Burke gave little credence to the affidavits of the realtor and attorney who handled the real estate closing on the Sylvania home because the doctor believed that the statements that Louise was able to understand and converse very well by lip reading, writing, and speaking about the proceedings were not accurate. Dr. Burke believed that a mute person cannot engage in intelligent conversation. Even if someone believed that he or she was conversing with a deaf and mute person, that person could not

tell if the deaf and mute person understood the conversation and was responding appropriately.

{¶ 42} The realtor testified that she discussed all the details with Louise and was sure that she understood and that she wanted to purchase the home. Louise even signed the check to pay the earnest money for the transaction. While the realtor worked with Patricia to narrow down the house selection, Louise was brought along on the final view of three or four homes that met her specifications so that she could select the home she liked. The realtor remembered that Louise was excited to be buying the home and living with family. Patricia testified that she was not part of the negotiations to purchase the home and only learned of the title arrangement shortly before the closing. She never even considered the fact that she and her family could be without a home if Louise died within a short period of time.

{¶ 43} The attorney who handled the closing for Louise was also certain that she understood the transaction and was very excited about the purchase and move. She seemed healthy and capable. He communicated directly to her by spoken or written words. He believed that his experience in learning and speaking several foreign languages enhanced his ability to understand her and pick up on the verbal cues that go with language. He recalled specifically that she had some problem understanding the agreement that she needed to sign to correct any errors if one was later discovered regarding the closing documents, which he called the “oops” agreement. Kenneth had to assist the attorney in explaining the nature of the agreement to Louise. Otherwise, the

attorney recalled communicating primarily with Louise. As was his customary practice, he tried to make sure that she understood the nature of the documents and the transaction to ensure that she understood she was purchasing the home and it would be titled jointly with Steven and Patricia. He had met Louise at the closing and that was his only conversation with her. But, he considered her to be his client and ensured that she understood his explanations. Having dealt with elderly clients previously where capacity is an issue, he made note that she was alert and engaged in the transaction.

{¶ 44} The medical records also revealed that Louise was very cooperative and pleasant. Dr. Burke believed that is how Louise was able to get along in the world and make others willing to work with her. He also pointed to the fact that Louise apparently did not even object when her brothers removed her from her home and forced her to seek medical care. The doctor also believed that it was not a sign of competency that Louise had someone else prepare for her a detailed list of her doctors, which also delineated their specific role and what medication they prescribed. However, he believed that having someone help her with her finances was not necessarily a sign of incompetency because one can elect to delegate those matters. Kenneth, however, testified that he had prepared the list of doctors because West Park Place required an emergency list to be kept in the refrigerator so he prepared this list for her. He also used the list for his benefit to keep track of all of her doctors.

{¶ 45} On cross-examination, Dr. Burke testified that he did not see any cognitive improvement in Louise after 2004. He believed even if she had been living

independently at West Park Place that would not have changed his opinion that Louise was incompetent because of her cognitive impairment. He believed that the findings in the medical records by Dr. Kuhlman that Louise could not sign, was mute, relied heavily on family members, and was consistently overly cooperative would mean that she would have a difficult time living independently in the world. His opinion would not have been changed even if Louise had actually written an article for the West Park Place newsletter by her introducing herself to the residents. While the article was admitted into evidence, no one was able to testify as to whether Louise had written the article or not.

{¶ 46} Doris Lucitte testified that she had worked as an occupational therapist for 17 years and was experienced with mental health issues. She described Louise as a happy but somewhat passive person who never objected to anything. While Louise seemed to communicate with her family very well, Doris and Louise never had a conversation of more than a few sentences. Communication with others was very limited unless they were able to understand her. However, Doris recalled that Louise had mentioned communicating with friends. Doris also believed that Louise was not a lavish person and never made large purchases, but she did enjoy buying magazines and craft items. Steven, however, testified that while Louise was careful with money, she always bought top of the line goods. All of her apartment furnishings she picked were expensive and of good quality.

{¶ 47} Kenneth testified that Louise was always aware of her family and able to understand and communicate. When he went through her finances, he found that she had

kept everything in order. Even after she moved to West Park Place, she kept her own calendar for appointments and reviewed the finances. When she needed furniture for her apartment, Kenneth and Dolores would go out and shop for the items Louise described and provide her with pictures from which she made her selections. Louise also monitored and recorded her blood sugar readings, took her medicine, and cooked for herself. Kenneth had many conversations with Louise about sports, politics, and television shows. Kenneth also prepared video clips of Louise showing her interactions with his family from 1989 through late 2005.

{¶ 48} Patricia Lucitte's aunt, Beverly Nevers, testified that she met Louise through various family functions over the years. She did not consider Louise a passive person and believed that she did exactly as she wanted. When they first met, Nevers bought an American Sign Language recording, but Louise told her that this was not necessary as she could read lips. In 2007, Nevers stayed at Patricia's home to watch her dog for a few days while they went away. During the stay, Nevers spent a considerable amount of time talking to Louise by writing back and forth and by talking. Nevers had no trouble understanding Louise. Louise wanted a lot of advice about her diet. Louise told her that she was happy to have a home and a family. While West Park Place was a nice place, Louise said she did not want to have to live there. She talked about making some more changes to the home. Nevers, who had been a dietary manager for a nursing home, also testified that she did not believe that Louise suffered from any mental

confusion based upon her experience with the elderly. Nevers did not have any knowledge of Louise's personal affairs.

{¶ 49} Following a jury trial, the jury found as follows 1) a \$60,000 gift Louise made to Kenneth and his wife, Dolores, was the result of undue influence exercised upon the decedent by Kenneth and that Louise was susceptible to undue influence and was incompetent at the time, 2) the transfer of funds from Louise's Michigan bank accounts in October or November of 2004 to new accounts at Fifth Third Bank was the result of undue influence upon Louise by one or more of appellants at a time when Louise was incompetent, and 3) the purchase of the home at 5310 Northbrook, Sylvania, Ohio, and the joint title created by Louise was due to undue influence exercised upon her by Kenneth at a time when she was incompetent and susceptible to undue influence.

{¶ 50} The trial court entered judgment on November 25, 2009, in favor of Earnest with regard to the Sylvania home, the transfer of the Michigan bank account, and the \$60,000 transfer to Kenneth and Dolores Lucitte. Following the filing of post-trial motions, the court modified its judgment on April 30, 2010, to order that all of the expended monies from the Michigan bank account be returned to the estate of the decedent, that the \$60,000 gift from the decedent to Kenneth and Delores Lucitte be returned to the estate of the decedent, and that the sum of \$252,461.04 (representing the money expended to purchase and renovate the home in Sylvania) be returned to the estate of the decedent. The court denied various motions of appellants filed during and after trial. Appellants then sought an appeal to this court.

{¶ 51} In their first assignment of error, appellants argue that the trial court erred when it admitted into evidence the opinion testimony of appellee's expert, Dr. Burke. Appellants set forth four arguments: (1) appellee failed to lay the proper foundation for the expert's opinion testimony, (2) the expert's opinion was not based upon facts or data either perceived by the expert or admitted into evidence, (3) the expert's opinion was premised upon an improper concept of competency, and (4) the expert's opinion is too broad and, therefore, unreliable.

{¶ 52} The admission of expert testimony is a matter within the sound discretion of the trial court. *Scott v. Yates*, 71 Ohio St.3d 219, 221, 1994-Ohio-462, 643 N.E.2d 105 (1994). Such a decision will not be reversed on appeal absent a showing that the trial court abused its discretion. *Id.* The abuse of discretion standard requires a showing of "more than an error of law or judgment; it implies that the trial court's attitude, in reaching its decision, was arbitrary, unreasonable, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 53} First, appellants argue that appellee failed to lay the proper foundation for the opinion testimony that Louise was incompetent and susceptible to undue influence every moment from 2004 until her death. Second, they argue that Dr. Burke did not base his opinion on facts or data perceived by him or admitted into evidence. Evid.R. 705 provides that: "The expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise." The purpose of requiring

the expert to inform the jury of the factual basis for his or her opinion is to ensure that the trier of fact can determine the validity of the expert's opinion. *Estate of Raymond v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 19701, 2000 WL 1197020, *2 (Aug. 23, 2000), citing 1 Weissenberger *Ohio Evidence*, Section 705.2 (footnotes omitted) (1993), as quoted in *Wells v. Miami Valley Hosp.*, 90 Ohio App.3d 840, 857, 631 N.E.2d 642 (2d Dist.1993).

{¶ 54} Evid.R. 703 provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.” The expert may review other material, but his opinion must be based upon only his own perception or facts and evidence in the record. *State v. Solomon*, 59 Ohio St.3d 124, 126, 570 N.E.2d 1118. (1991).

{¶ 55} Upon a review of the record, we find that Dr. Burke specifically testified that he primarily relied upon the medical records to form his opinion, but he also reviewed non-medical record evidence, some of which was not part of exhibit No. 29 (attorney letters, court documents, and letters and affidavits of the parties and other witnesses). Since these additional documents were not all identified or authenticated, we agree that they could not form the basis for his opinion. However, since all of the references to the evidence that Dr. Burke made were facts in the medical records, we find that this error was harmless.

{¶ 56} Dr. Burke did make reference to a psychiatric evaluation by R. Schersten, a social worker, which we were not able to find in exhibit No. 29 and the doctor was not

able to locate while testifying. Dr. Burke testified that the psychiatric evaluation was significant because it was the only interview ever done when Louise was by herself. Since the doctor did not identify any specific information from that report that influenced his opinion, we find the absence of this document was also harmless error.

{¶ 57} Dr. Burke based his opinion of Louise's incompetence from 2004 until her death upon notations in the medical records. First, he noted that Louise was born deaf and, therefore, the doctor opined that throughout her life she would have had a cognitive impairment. Dr. Burke relied upon an entry by Dr. Kuhlman that Louise was unable to use American Sign Language and was mute. Dr. Burke noted that others said that Louise did sign, but there was nothing indicating that she knew American Sign Language. He also noted that in many entries it was noted that her family had accompanied her and communicated for her. From these entries, Dr. Burke opined that Louise could not sign and could not communicate well with others. Dr. Burke also noted an entry in the St. Mary Mercy Hospital records that Louise had not been taking care of herself for several years as reported by her family. Her brother also reported to a physician that her home was very filthy and not in good working order.

{¶ 58} Dr. Burke based his opinion that Louise was subject to influence from 2004 until her death upon the fact that she never opposed anyone and was always pleasant in order to get along in the world. He believed it was significant that she did not fight removal from her home. The doctor believed that Louise's perceptions were significantly compromised by her deafness as well as her vision and other health problems.

{¶ 59} We find that the expert’s testimony was sufficiently supported by references to the evidence in the record to enable a jury to determine whether Dr. Burke’s opinion was valid, which satisfied the requirements of Evid.R. 705. The arguments set forth by appellants that this evidence did not establish incompetency or susceptibility to undue influence were considerations for the jury to weigh. Furthermore, the specific facts or data relied upon by Dr. Burke were all admitted into evidence as required by Evid.R. 703. The medical records were admitted into evidence over appellants’ objection and appellants did not assign as error the court’s admission of the records. Furthermore, appellants stipulated to the authenticity and admissibility of certain medical records prior to trial, some of which were part of exhibit No. 29 and some of which were not.

{¶ 60} Third, appellants argue under this assignment of error that the opinions expressed by the expert were based upon an immaterial and misleading concept of competency. Appellee’s expert defined competency as “the ability to be aware of your surroundings, is [sic] the ability to make decisions, the ability to recognize who other people are and what their relationship to you is, the ability to take care of yourself physically, [and] the ability to handle your affairs.”

{¶ 61} We find that this statement is not significantly different from the legal definition of competency of a donor to make an inter vivos gift. “An inter vivos gift is an immediate, voluntary, gratuitous and irrevocable transfer of property by a competent donor to another.” (Citation omitted.) *Smith v. Shafer*, 89 Ohio App.3d 181, 183, 623 N.E.2d 1261 (3d Dist.1993). Competency in this sense means that the donor has the

mental capacity to understand the nature of making a gift and the intent to do so. Because inter vivos gifts are similar in nature to the process of disposing of one's property at death, the test for testamentary capacity can be used.

Testamentary capacity exists when the testator has sufficient mind and memory: First, to understand the nature of the business in which he is engaged; second, to comprehend generally the nature and extent of his property; third, to hold in his mind the names and identity of those who have natural claims upon his bounty; fourth, to be able to appreciate his relation to the members of his family. *Niemes v. Niemes*, 97 Ohio St. 145, 119 N.E. 503 (1917) paragraph four of the syllabus.

{¶ 62} The doctor's definition was essentially the same test. We find that all of the examples he gave were related to the donor's mental capacity to care for herself and not her declining health or any physical disability to care for her needs.

{¶ 63} Fourth, appellants argue that the opinion testimony (with regard to the decedent's transactions from late 2004 until the end of her life) fails to meet the requirement of reliability. Appellants correctly state that the trial court must assess both the reliability of an expert's methodology as a scientific tool rather than subjective belief and the relevance of the testimony before admitting it in evidence. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 24-25. However, in their argument, appellants contend that Dr. Burke relied upon allegedly faulty assumptions (Louise was removed from her home, she resided in an assisted living facility, she did not cook and

care for herself, she was a passive person, and she was unable to communicate effectively with others) and his own misleading concept of competency. Furthermore, they argue that Dr. Burke extended his opinion of Louise's competency to her entire life without any basis other than the fact that she was born deaf. This argument questions the evidentiary foundation for Dr. Burke's opinion and not whether his method of analysis was reliable.

{¶ 64} Dr. Burke testified that Louise was subject to undue influence from 2004 onward, and implicitly throughout her entire life, due to the facts that he surmised from the evidence: her deafness, her inability to communicate with others, and her passive personality she developed to get along in the world with her physical limitations. Dr. Burke appears to also reference her inability to physically care for herself throughout this time period. We agree that Dr. Burke's testimony was very confusing even to this court, but ultimately, we believe that his opinion was that after 2004 Louise was never mentally capable to care for herself again whether she had actually been physically caring for herself or not. There was evidence from which the jury could find support for Dr. Burke's opinion.

{¶ 65} Therefore, we find appellants' first assignment of error not well-taken.

{¶ 66} In their second assignment of error, appellants argue that the trial court erred by failing to grant their motion for a directed verdict or dismissal on the claims of incompetency and undue influence. Appellants moved for a dismissal of the claims under Civ.R. 41(B) and, alternatively, under Civ.R. 50(A). The trial court considered the motion only under Civ.R. 50(B) and denied the motion. Appellants first assert that the

trial court erred by not applying Civ.R. 41(B) since the jury acted in only an advisory position.

{¶ 67} In the case before us, appellants assert that the complaint sought equitable relief (a constructive trust) and a jury could not provide such relief. Therefore, the jury served only as an advisory jury. We disagree. Appellees sought a declaratory judgment that the inter vivos transfers were invalid. Appellees also sought as a remedy to impose a constructive trust for the real estate in order to preserve the property for the estate, but the court did not grant such relief. The probate court has the discretionary power in a declaratory judgment action to empanel a jury to make the factual determinations. *Renee v. Sanders*, 160 Ohio St 279, 116 N.E.2d 420 (1953), paragraph five of the syllabus. Such a jury does not serve in an advisory position. Civ.R. 41(B) was not applicable to this case.

{¶ 68} Appellants also argue that under either standard, the evidence admitted at trial was insufficient to sustain appellee's claims. That issue will be discussed in connection with appellants' fifth assignment of error.

{¶ 69} Appellants' second assignment of error is not well-taken.

{¶ 70} In their third assignment of error, appellants argue that the trial court erred in admitting appellee's exhibit No. 1 over their objection. Exhibit No. 1 was a one-page document prepared by counsel summarizing the pertinent times and facts in this case allegedly as an aid for the jury. Appellants contend, however, that the document contains a subjective selection of dates and descriptions of the objective facts, with a primary

objection being made regarding the following chronological events: “Oct. 2004 Louise found living in squalor. * * * Nov. 5, 2004 POA to Ken.” Appellants argue that Louise was not found, but had invited Kenneth to come to her home to help her. They also argue that Kenneth had been given a limited power of attorney to consolidate and move the bank accounts.

{¶ 71} Evid.R. 1006 provides: “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.” Fed.R. 1006 is similar to the Ohio rule. *State v. Marshall*, 11th Dist. No. 89-L-14-159, 1991 WL 54149, *3 (Apr. 5, 1991). The purpose of Evid.R. 1006 is to permit summary documents prepared by witnesses, not lawyers, to enhance or clarify their testimony and aid the jury in understanding complicated or voluminous data. *U.S. v. Grajales-Motoya*, 117 F.3d 356, 361, (8th Cir.1997). These types of summaries of the evidence constitute evidence and should be submitted to the jury. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir.1985). Summaries used merely as pedagogical devices are not evidence and, therefore, the court does not err when it refuses to submit them to the jury’s review. *Id.*

{¶ 72} Evid.R. 1006 summaries must be necessary because of voluminous writings and recordings; a proper foundation must be established for the introduction of the summary; the summary must be based upon evidence in the record or the absence of such evidence must be explained; the original documents must be available to the opposing party; and the summary cannot be misleading or prejudicial. *All-Pak, Inc. v.*

Snyder, 8th Dist. No. 86696, 2006-Ohio-2892, ¶ 23; *Parsons v. Parsons*, 10th Dist. No. 07AP-541, 2008-Ohio-1904, ¶ 25; *Dellenbach v. Robinson*, 95 Ohio App.3d 358, 375, 642 N.E.2d 638 (10th Dist.1993) quoting Weissenberger, *Ohio Evidence*, Courtroom Manual, Chapter 1006 (1993); and *Gomez v. Great Lakes Steel Div., Nat. Steel Corp.*, 803 F.2d 250, 257 (6th Cir.1986). The summary in this case clearly does not fit within the category of an Evid.R. 1006 summary.

{¶ 73} However, the trial court has the discretion to allow pedagogical summaries to be viewed by the jury during deliberations with limiting instructions to explain their nature and the fact that they are not evidence. *Gomez, supra*. The test for admissibility of these type of summaries under the judge’s discretion is whether “(1) the charts are based on competent evidence before the jury; (2) the primary evidence used to construct the charts is available to the other side for comparison in order that the correctness of the summary may be tested; (3) the person who prepared the charts is available for cross-examination; and (4) the jury is properly instructed concerning their consideration of the charts.” (Citations omitted.) *U.S. v. Winn*, 948 F.2d 145, 159, (5th Cir.1991).

{¶ 74} While there were a number of documents admitted in this case, the evidence was not so overwhelming that a summary was really necessary. Furthermore, the summary in this case summarized documentary and testimonial evidence, contained a prejudicial argument, and made a misleading factual statement. Further, the jury was not given a limiting instruction explaining the nature of the chronology. We find that giving the summary to the jury was error. However, we find that the error was harmless since

the prejudicial and erroneous statements were minimal. Furthermore, the issues and evidence in this case were simple and straightforward. We have no doubt that the jury could understand the nature of the summary. Appellants' third assignment of error is not well-taken.

{¶ 75} In their fourth assignment of error, appellants argue that the trial court erred in giving instructions to the jury regarding the family gift presumption and undue influence. Appellants proposed a jury instruction on the family gift presumption but the court refused to give it. The proposed instruction was: "There is a presumption that a transfer of assets to a family member is intended as a gift. The law presumes that transactions between family members are appropriate and, if consideration is lacking, a gift is presumed."

{¶ 76} Appellants also object to the court's following instruction that a confidential relationship creates a presumption of undue influence:

If you find a confidential relationship existed between Defendants and Louise Lucitte, a presumption of undue influence arises and the burden of going forward with evidence shifts to Defendants to show their conduct was free of undue influence and Louise Lucitte acted voluntarily and with full understanding of her act and its consequences and that the transaction was fair as between the parties. If a confidential relationship existed between Defendants and Louise Lucitte, there's a presumption that any transaction between them is invalid.

The court further instructed that:

A confidential relationship is one in which special confidence and trust is placed in the integrity and fidelity of another who acquires a resulting position of superiority or influence by virtue of this special trust. Such relationship can be created through formal processes, such as the grant of power of attorney, or by informal means such as allowing another to care for personal matters of finance or health.

{¶ 77} Appellants argue that the court’s instructions, without their proposed instruction, effectively directed the jury to find that the transactions at issue were invalid. Appellants argue that the confidential relationship presumption must be tempered by the family gift presumption. Furthermore, the confidential relationship presumption cannot be extended to contractual transactions where there was consideration. Appellants contend that it is an impossible burden to require the recipient of a gift to prove that the gift was “fair” to the donor. Rather, the burden shifts only in certain relationships, i.e., attorney-client relationships or fiduciary relationships or caretaker relationships with non-family members. We disagree.

{¶ 78} The existence of a family relationship automatically gives rise to a presumption that any inter vivos transfer between family members was a gift. *Kovacs v. Kovacs*, 6th Dist. No. S-09-039, 2011-Ohio-154, ¶ 12. However, that presumption must yield to the confidential relationship presumption that arises when the family member/donor is in a confidential or fiduciary relationship with the donee, and the donee

is in a superior position. *In re Estate of Lilley*, 12th Dist. Nos. CA2005-08-091, CA2005-08-092, CA2005-08-095, CA2005-08-096, 2006-Ohio-5510, ¶ 29, *Lah v. Rogers*, 125 Ohio App.3d 164, 171-172, 707 N.E.2d 1208 (11th Dist.1998), and *Estate of Przybylek v. Gwozdz*, 6th Dist. No. L-88-107, 1989 WL 25536, *4 (Mar. 17, 1989).

{¶ 79} In this case, there was evidence that Louise placed her trust in Kenneth to carry out her financial affairs for her benefit and that she gave him a limited power of attorney to transfer her bank accounts to another bank. There was also evidence that she was very close to Steven and Patricia and that they lived with her and looked after her. There was also evidence presented that Louise was either incompetent or at least susceptible to undue influence. Therefore, the court correctly instructed the jury that they were to presume that any transfers that benefited appellants were invalid unless they could present evidence to rebut this presumption. Therefore, we find that the trial court properly instructed the jury. Appellants' fourth assignment of error is not well-taken.

{¶ 80} In their fifth assignment of error, appellants argue that the findings of the jury were contrary to the manifest weight of the evidence. In their second assignment of error, appellants argued that there was insufficient evidence presented in this case to submit the case to the jury.

{¶ 81} Weighing conflicting evidence and making credibility determinations are matters solely within the province of the trier of fact. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Therefore, a reviewing court

will not disturb factual findings of the trial court unless those findings are against the manifest weight of the evidence. *State ex rel. Shady Acres Nursing Home v. Rhodes*, 7 Ohio St.3d 7, 8-9, 455 N.E.2d 489 (1983). However, the Ohio Supreme Court has held that reviewing courts should not review the manifest weight of the evidence in a civil case, but treat such an assignment of error as a challenge to the sufficiency of the evidence. *Wilson, supra*. Judgments supported by competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence in a civil action. *Id.* Compare *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997) and *Huntington Natl. Bank v. Chappell*, 183 Ohio App.3d 1, 2007-Ohio-4344, 915 N.E.2d 665 ¶ 58 (9th Dist.). If the evidence is susceptible to more than one interpretation, we must give it the interpretation consistent with the trial court's judgment. *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988).

{¶ 82} Before we can examine the evidence, we must clarify the burdens of proof and production in this case. Appellee ultimately bore the burden of proving undue influence or Louise's incompetency in order to set aside the inter vivos transactions. To establish incompetency, appellee was required to prove that Louise did not have the mental capacity to (1) understand the nature of the business in which she was engaged, (2) comprehend generally the nature and extent of her property, (3) to hold in her mind the names and identity of those who have natural claims upon her bounty, and (4) be able to appreciate her relation to the members of her family. *Niemes v. Niemes, supra*.

{¶ 83} Alternatively, Earnest had to show that Kenneth, Steven, and Patricia exerted undue influence over Louise at a time when she was susceptible to undue influence so that their wishes and judgment were substituted for her wishes and judgment. *West v. Henry*, 173 Ohio St. 498, 501, 184 N.E.2d 200 (1962); *Logan v. Williams*, 8th Dist. No. 62748, 1993 WL 204581, *2 (June 10, 1993); and *Grimes v. Grimes*, 4th Dist. No. 08CA35, 2009-Ohio-3126, ¶ 36. The donee of an inter vivos gift always bears the burden of establishing that the donor made a gift. *Eoff v. Eoff*, 6th Dist. No. L-09-1306, 2011-Ohio-151, ¶ 8. But, the party attacking the gift carries the burden of establishing by clear and convincing evidence that the gift was the result of undue influence. *Willis v. Baker*, 75 Ohio St. 291, 79 N.E. 466 (1906), syllabus, and *Matter of Estate of Wirebaugh*, 6th Dist. No. WD-90-18, 1991 WL 154060, *7 (Aug. 9, 1991).

{¶ 84} Because of the confidential relationship Kenneth, Steven, and Patricia had with Louise, a presumption exists that any transfers of Louise's funds to themselves that benefited themselves was the result of Louise's incompetence or their undue influence upon her. Therefore, they had the burden of coming forward with evidence to rebut the presumption. Ultimately, however, the burden of establishing undue influence remains upon Earnest to be proven by clear and convincing evidence.

{¶ 85} Earnest presented evidence to show that Louise placed her financial affairs in Kenneth's control, which he does not deny. Kenneth, however, testified that the transfer of Louise's accounts to a bank near his home was for convenience purposes only, that the \$60,000 transfer to him was a gift, and that the expenditure of funds for the

purchase of the Sylvania home and its improvement was for the benefit of Louise and was at her request. His testimony was supported by the testimony of his family (Steven, Patricia, and Dolores) and the persons involved with the real estate transaction. Even Earnest testified that he also received a \$1,500 gift from Louise during this time period in appreciation for what he had done for her. Appellants presented evidence that their side of the family was very close to Louise and spent a considerable amount of time with her and also helping her.

{¶ 86} Earnest presented evidence of additional transfers of funds that Kenneth made that were later corrected such as the payment of the real estate taxes after Louise's death and a transfer of \$10,000 out of her savings account and into the account Kenneth held in joint and survivorship with Louise alone. Kenneth rebutted this evidence with his own testimony explaining how each of these transfers was made in error and that he corrected his error when it was discovered.

{¶ 87} With respect to Louise's mental capacity, Kenneth and his family testified that she was of sound mind and participated in all decisions regarding her life. Even Earnest, as well as his wife and daughter, testified that they conversed with Louise during this time period and did not testify that she was unable to understand them or know their relationship to her. Doris only testified that she believed that it was difficult for Louise to communicate with non-family, that they had very short conversations, and that Louise was very passive.

{¶ 88} Earnest presented an expert opinion from Dr. Burke that Louise was incompetent and susceptible to undue influence from the time she left her home in 2004 until her death. Evidence on this issue was also presented through the extensive list of medical doctors Kenneth prepared, the state of Louise's home in 2004, the fact that she had Kenneth take over her financial affairs, and her need to have a family member go with her to her doctor appointments. Earnest also produced evidence through the testimonies of Ernest and Doris and Kirsten Pickle to refute Kenneth's claims that Louise was not happy living at West Park Place and wanted to move to her own home. Louise presumptively even stated in an article about herself that she liked West Park Place. The testimonies of Earnest, Doris, Earnest's daughter, Lisa, and Kirsten Pickle, evidenced that Kenneth exerted control over Louise's affairs and that he intentionally kept Earnest from participating in any decisions. Earnest and Doris also testified that Kenneth changed attorneys once he was told to prepare an accounting of Louise's financial affairs while he was in control.

{¶ 89} Upon a review of the evidence, we find that appellee offered some direct evidence to establish his claims. Therefore, there was sufficient evidence to submit this case to the jury. Appellants' fifth assignment of error is not well-taken.

{¶ 90} In their sixth assignment of error, appellants argue that the trial court lacked subject matter jurisdiction to impose a constructive trust on or reform or otherwise invalidate the title to the real estate.

{¶ 91} Appellee sought in his complaint for declaratory judgment that the inter vivos transfers were invalid due to Louise's incompetency, the undue influence of Kenneth, Steven, and Patricia Lucitte, or Kenneth's breach of his fiduciary duty. They also alleged claims of unjust enrichment.

{¶ 92} As a remedy, appellee sought to have the monies wrongfully removed from Louise's accounts to be returned to the estate and a constructive trust imposed to safeguard the funds for the estate's benefit. "A constructive trust is a remedial device used to prevent fraud and unjust enrichment." *Goddard. v Goddard*, 192 Ohio App.3d 718, 2011-Ohio-680, 950 N.E.2d 567, ¶ 32 (4th Dist.), citing *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶ 19. Inherent in the constitutional grant of jurisdiction of the probate court is the plenary power of the court to dispose of any matter properly before it through legal or equitable remedies. *In re Thrush's Estate*, 76 Ohio App. 411, 423, 64 N.E.2d 839 (3d Dist.1945). Application of the equitable remedy of constructive trust does not involve the subject matter jurisdiction of the court. Furthermore, no constructive trust was imposed in this case. Appellants were only ordered to return Louise's money to her estate.

{¶ 93} A party may seek to have property included in the estate assets even after the final inventory has been approved and the estate settled. *Eger v. Eger*, 39 Ohio App.2d 14, 19, 314 N.E.2d 394 (8th Dist.1974), citing *Cole v. Savings Assn.*, 18 Ohio St.2d 1, 11-12, 246 N.E.2d 542 (1969). That party may file an action in the court of common pleas at any time to seek to recover his property from all but a bona fide

purchaser for value without knowledge of another's equitable interest in the property. *Service Transport Co. v. Matyas*, 159 Ohio St. 300, 112 N.E.2d 20 (1953), paragraphs one and two of the syllabus; and *Cook v. Crider*, 63 Ohio App. 12, 14-15, 24 N.E.2d 966 (3d Dist.1939). Furthermore, the probate court has jurisdiction to hear declaratory judgments. R.C. 2101.24(A)(1)(l). The probate court has exclusive jurisdiction to determine whether inter vivos transfers were valid when the funds would revert to the estate if the transfers are invalidated. *Corron v. Corron*, 40 Ohio St.3d 75, 79-80, 531 N.E.2d 708 (1988); *Grimes v. Grimes*, 173 Ohio App.3d 537, 2007-Ohio-5653, ¶ 18 (4th Dist.); *Mock v. Bowen*, 6th Dist. No. L-91-210, 1992 WL 163959, *3 (July 17, 1992); and *Bobko v. Sagen*, 61 Ohio App.3d 397, 406, 572 N.E.2d 823 (8th Dist.1989).

{¶ 94} In this case, the action was a declaratory action and if the inter vivos transactions were invalidated, the money would revert to Louise's estate. Therefore, we find that the probate court had subject matter jurisdiction over the matter. The court entered judgment on the claims to appellee and ordered appellants to return the assets wrongfully withdrawn to Louise's estate. We find appellants' sixth assignment of error not well-taken.

{¶ 95} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Appellants are ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
