MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Robyn L. Hunter,

Appellant-Respondent,

v.

Mary J. Hoeller,

Appellee-Court Appointed Guardian of the Estate and Court Appointed Trustee of the Trust,

August 21, 2023

Court of Appeals Case No. 22A-GU-908

Appeal from the Marion Superior Court

The Honorable Steven R. Eichholtz, Judge

Trial Court Cause Nos. 49D08-1906-GU-22867 49D08-1906-TR-22881

and

Rebecca Anderson,
Appellee-Petitioner.

Memorandum Decision by Judge Kenworthy
Judge Crone and Senior Judge Robb concur.

Kenworthy, Judge.

Case Summary

[1] Sharon Edmonds' two daughters, Robyn L. Hunter and Rebecca Anderson, could not agree on whether Sharon's cognitive functions had declined to the point where she could no longer manage her finances or her person. In addition, Rebecca thought Robyn had unduly influenced Sharon to use her finances for Robyn's benefit. Rebecca thus petitioned the trial court to appoint a guardian for Sharon and a successor trustee for a trust Sharon had created. Sharon and Robyn separately opposed Rebecca's petitions.

[2] The trial court held a three-day bench trial and granted Rebecca's petition for guardianship, limited to governing Sharon's finances. The court further directed Rebecca and Robyn to agree on a neutral person to administer Sharon's finances and to serve as successor trustee of Sharon's trust. Rebecca and Robyn ultimately selected Mary J. Hoeller, and the trial court approved

their choice. But Robyn and Sharon also filed a motion to correct error as to the trial court's grant of Rebecca's petition for guardianship and petition for a successor trustee. The court denied the motion.

[3] In this consolidated appeal, Robyn raises several arguments but primarily claims the trial court erred in determining Sharon is incapacitated and in ordering the parties to select a neutral guardian and trustee. We find no reversible error and affirm.

Facts and Procedural History

[4] Sharon is a widow and a veteran. She has two daughters, Rebecca and Robyn. Both Rebecca and Robyn are married with children. Sharon spent money on her grandsons Matt (through Rebecca) and Ryan (through Robyn), trying to treat them equally.[1]

[5] In February 2005, Sharon executed a General Durable Power of Attorney ("POA"), naming Rebecca and Robyn as co-attorneys in fact. Rebecca and Robyn's powers under the POA were to take effect if Sharon became unable to manage her financial affairs and personal needs. In the POA, Sharon further nominated Rebecca and Robyn to serve as her co-guardians, if "a judicial proceeding is brought to establish a guardianship over [her] person or property." *Appellant's App. Vol. 2* at 44.

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[1] Rebecca has three other children, but they are not directly involved in this case.

[6] On the same date, Sharon executed a Health Care Representative Designation, selecting Rebecca and Robyn as co-health care representatives. Sharon also executed a Revocable Trust Agreement and transferred assets to the trust. She named herself as trustee, with Rebecca and Robyn to serve as successor co-trustees in case of Sharon's death or incapacity.

[7] In 2016, Robyn, her husband Randy, and Ryan began taking Sharon to an Indiana casino to gamble with them. Sharon did not frequent casinos before 2016. In 2016, Robyn lost $4,346 while gambling, while Sharon won fourteen dollars. In 2017, Robyn lost $5,355, while Sharon lost $978.

[8] Meanwhile, Rebecca's son Matt lived with Sharon from December 2016 to December 2018, and they had a close relationship. Sharon paid for Matt's college textbooks, contact lenses, and other expenses while he lived with her, but she also bought groceries for Robyn's family.

[9] Robyn complained about Matt's presence in Sharon's house "from day one." *Trial Tr. Vol. 3* at 54.[2] According to Matt, Sharon "was afraid to overstep Robyn," *Trial Tr. Vol. 2* at 79, and expressed fear of her. Later in 2018, Robyn told Matt to move out of Sharon's house and threatened to evict him, even though Sharon opposed Robyn's attempts to make Matt leave.

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[2] The record on appeal includes a transcript of the trial and a separate transcript of the hearing on the motion to correct error. The transcript volumes are not consecutively numbered or paginated, so we refer to the trial transcript as "Trial Tr."

[10] In 2013, a cognitive screening revealed Sharon had delayed memory issues and "mild cognitive impairment." *Trial Tr. Vol. 3* at 112. In 2018, Matt, Rebecca, and Robyn noticed Sharon's memory was failing. Sharon's medical records document Rebecca and Robyn's concerns. For example, during Sharon's March 26, 2018, appointment with a nurse practitioner ("NP"), Robyn reported Sharon mixed up her medications and had memory problems. Next, during a follow-up appointment on April 9, 2018, Rebecca told the NP Sharon has "memory impairment" and also noted Sharon needed help managing her medications. *Tr. Ex. Vol. 3* at 188. And during Sharon's August 15, 2018, appointment with the NP, Robyn was worried about Sharon being home alone and noted her memory problems had gotten worse.

[11] In October 2018, Rebecca and Robyn took eighty-four-year-old Sharon to a Veterans' Administration ("VA") medical facility for evaluation. Among other issues, Rebecca and Robyn reported: (1) Sharon repeatedly forgot her appointments, even when reminded and when they were written on her calendar; (2) she repeatedly forgot whether she had fed her cats; and (3) she had lost over $5,000 in various scams in the past year because she gave money away to anyone she perceived as being in need, despite formerly being frugal with her money. Dr. Cathy Schubert, a geriatrician, referred Sharon for neuropsychological testing.

[12] A VA neuropsychologist diagnosed Sharon with "probable Alzheimer's dementia" and recommended she should "allow family to oversee her finances[.]" *Tr. Ex. Vol. 1* at 78–79. Alzheimer's dementia is characterized by a

progressive and irreversible worsening of cognitive function. With medication, the loss of cognitive function can be slowed for a time but not stopped. Sharon angrily rejected the diagnosis and was "in complete denial." *Trial Tr. Vol. 3* at 60. People with Alzheimer's dementia generally lack insight into their own condition and typically display denial.

[13] In November 2018, Rebecca and Robyn took Sharon to see Sharon's longtime primary care physician, Dr. Mary Yoder, to follow up on the VA visit. Dr. Yoder has experience treating elderly patients with dementia. Rebecca and Robyn both reported Sharon's memory problems were becoming more severe. Rebecca and Robyn also stated Sharon used to be a frugal person, but she had become "easily influenced" and had been the victim of financial scams. *Trial Tr. Vol. 2* at 40.

[14] Dr. Yoder tested Sharon to rule out brain tumors, stroke, and other possible causes for Sharon's cognitive decline, and found no evidence of those conditions. She noted the VA's Alzheimer's dementia diagnosis and determined Sharon "seemed more confused, agitated, and depressed," with failing memory. *Id.* at 15. Dr. Yoder diagnosed Sharon with depression and prescribed medication for it, as well as medication to treat the symptoms of Alzheimer's dementia.

[15] While Sharon's daughters addressed these medical issues, Robyn, Randy, and Ryan continued to take Sharon to the casino to gamble. In 2018, Robyn lost

$14,662, even though she and her husband had reported less than $17,000 in gross income for 2018 on their federal taxes. Sharon lost $642 in the same year.

[16] In January 2019, Sharon reluctantly moved out of her own house and into Robyn's home. Rebecca at first visited Sharon there three times a week.

[17] Robyn and her husband had activated online banking for Sharon's accounts, and both daughters had access. In May 2019, Sharon obtained a debit card for the first time. Previously, Sharon had "hated" debit cards and thought they were "ridiculous" when her children obtained them. *Trial Tr. Vol. 3* at 54. No one told Rebecca about the debit card.

[18] Meanwhile, Robyn, Randy, Ryan, and Sharon continued their casino trips in 2019. According to the casino's records, in 2019 Robyn lost a total of $16,826 gambling. Ryan, who did not have a steady job, lost $12,827. And Sharon lost $6,796 in 2019, a ten-fold increase from the previous year. From April through June 2019, Sharon's debit card was used to withdraw $2,433.45 from her bank account at the casino.

[19] In May 2019, Sharon's bank notified Rebecca someone was using Sharon's debit card to make withdrawals at a casino. At least one was for "a substantial amount." *Id.* at 62. This was the first time Rebecca learned Sharon had obtained a debit card. Rebecca called Robyn, who at first claimed to be unaware of the situation. Rebecca obtained a bank statement and noticed several recent large cash withdrawals of up to $6,000.

[20] Next, Rebecca went to Robyn's house to visit her mother and follow up on the financial issues. Sharon appeared to not recognize Rebecca. When Rebecca asked about Sharon's finances, Robyn and Randy yelled at her. Rebecca became upset and left. Several days later, Robyn took Sharon to the bank, where Sharon closed her existing bank account and opened a new one, excluding Rebecca from access. And Rebecca saw Sharon less often after the incident at Robyn's house.

[21] Dr. Yoder examined Sharon several times through June 2019. In June 2019, Dr. Yoder issued a letter at Rebecca's request, stating Sharon was not competent to manage her finances. After Dr. Yoder issued her letter, Robyn and Randy brought Sharon to see her again. Robyn was upset about the letter. Dr. Yoder gave Sharon a "mini mental status" examination, *Trial Tr. Vol 2* at 20, and determined Sharon had scored poorly for a person of her age. Dr. Yoder further concluded Sharon lacked "good insight into her diagnosis." *Id.* at 21. The doctor saw improvement in Sharon's mood, which could help Sharon's cognitive functioning. But Dr. Yoder refused Robyn's request to withdraw her opinion on Sharon's inability to manage her finances. Dr. Yoder further concluded Sharon's ability to execute a valid will or trust document was questionable. And, in her opinion, Sharon would have trouble making good financial decisions even if she managed to perform activities of daily living, such as dressing herself and preparing food.

[22] Robyn also asked Dr. Yoder to "rescind [Rebecca's] rights" involving Sharon's person and estate. *Tr. Ex. Vol. 1* at 16. Dr. Yoder refused because "Sharon is

no longer competent and [Rebecca] is on the forms[.]" *Id.* Dr. Yoder was willing to refer Sharon for more neuropsychological testing but did not think it would change her opinion on Sharon's competency to manage her finances.

[23] Also in June 2019, Rebecca filed a Petition for Appointment of Guardian Over Person and Estate of Incapacitated Person, alleging Sharon could not care for herself and her financial affairs. She also alleged Robyn had improperly taken Sharon's money for her own use. For these reasons, Rebecca asked the trial court to appoint a guardian to manage Sharon's person and financial affairs. Rebecca requested a neutral guardian, asserting she and Robyn were unable to work together in their mother's best interest. Rebecca separately filed a Petition to Docket the Trust, asking the trial court to remove Robyn as successor co-trustee because Robyn was allegedly using the trust's financial accounts for her own benefit. The trial court clerk opened separate guardianship and trust cases.

[24] Robyn objected to Rebecca's guardianship petition and Rebecca's request to remove her as successor co-trustee, claiming Sharon was competent to manage her own affairs. Sharon hired her own attorney, after Robyn "asked around" on Sharon's behalf. *Trial Tr. Vol. 2* at 153. Sharon then joined Robyn in opposing Rebecca's guardianship petition and Rebecca's request to remove Robyn as a successor co-trustee.

[25] On August 29, 2019, Robyn took Sharon to see Dr. Matthew Wolenski, a specialist in geriatrics. Sharon's attorney had set up the appointment. Dr. Wolenski had access to Dr. Yoder's records, but he did not have the VA's

neuropsychological test results. After an examination, he confirmed the diagnosis of Alzheimer's dementia, noting Sharon had memory loss. Dr. Wolenski concluded Sharon was of sound mind and could manage her affairs despite her diagnosis, but he also referred Sharon to neuropsychologist Dr. Quratulain Khan for an assessment.

[26] Before an October 22, 2019, appointment with Dr. Khan, the doctor sent Sharon a questionnaire asking about her medical history. Robyn filled out the questionnaire and accompanied Sharon to her appointment. Dr. Khan interviewed Sharon and conducted several tests. During the interview, Sharon denied having cognitive difficulties, but Dr. Khan considered her an "unreliable historian" because she could not answer basic questions such as how long she had been married or when she had moved in with Robyn. *Tr. Ex. Vol. 9* at 7. Further, Sharon frequently turned to Robyn for assistance with questions about her history.

[27] After Sharon completed the tests, Dr. Khan determined her general intellectual functioning was in slight decline, and she struggled with memory. In summary, Sharon was "likely transitioning from a minor to a major neurocognitive disorder[.]" *Id.* at 7. Under certain conditions, including absent undue influence from others, Dr. Khan thought Sharon could make decisions in her best interest. But Dr. Khan concluded, "[g]iven [Sharon's] very poor memory as well as her lack of awareness of any cognitive difficulties, she would be at risk for being taken advantage of and being influenced." *Id.*

[28] In December 2019, Sharon met with attorney Dennis Voelkel. Her attorney in this case, Curtis L. Shirley, arranged the meeting. Voelkel drafted a new POA, a new Health Care Power of Attorney, and an amendment to Sharon's revocable trust, revoking or amending the documents Sharon had executed in 2005. The new documents differed from the 2005 documents in three key ways: (1) Sharon removed Rebecca as her co-power of attorney, co-health care representative, and successor-co-trustee; (2) Sharon named Robyn as her sole attorney in fact, sole health care representative, and sole successor trustee; and (3) Sharon named Randy as Robyn's successor, if necessary. Sharon executed all three documents.

[29] Sharon next petitioned to sell real estate, requesting the trial court's permission to sell her former residence. Rebecca did not object to the sale, but she asked the court to order the proceeds to be placed in a restricted account, payable to Rebecca and Robyn equally upon Sharon's death. The trial court denied Sharon's petition to sell real estate. In December 2020, despite the trial court's order, Sharon executed a warranty deed conveying her home to Robyn for no consideration. Robyn's attorney had drafted the deed. Robyn sold the home and placed the proceeds in Attorney Shirley's trust account.

[30] The trial court presided over a consolidated three-day bench trial on September 15, 2020, March 30, 2021, and March 31, 2021. On the first day of the trial, the parties stipulated all evidence presented as to Sharon's mental state and potential incapacity would apply to both the guardianship and trust cases. Next, Rebecca testified Sharon's basic needs were being met in Robyn's home,

but she still wanted a guardian to manage Sharon's finances and to arrange visitation between her and Sharon. Sharon and Robyn mainly argued Sharon did not need a guardian because she could manage her personal and financial matters.

[31] On August 13, 2021, the trial court issued an order for the guardianship and trust cases, stating in relevant part:

> 1. Sharon Edmonds is an incapacitated person in that she is unable to manage her property due to mental deficiency and undue influence of others on her person.
>
> 2. The revocation of the prior health care powers of attorney and durable power of attorney are void due to lack of capacity and undue influence.
>
> 3. The daughters are unable to work together under the prior executed powers. The Court further determines that all the estate planning documents altering the Trustee designations and dispositive provisions of the Sharon Edmonds Revocable Living Trust since the Petition for Guardianship are presumptively fraudulent due to the confidential relationship between Robyn Hunter and Sharon Edmonds and were otherwise executed at a time that Sharon lacked the requisite mental capacity to execute them. The Court further finds that Robyn Hunter did not rebut the presumption and therefore, those instruments are invalid and of no further force and effect.
>
> 4. The Court determines that Sharon Edmonds is receiving appropriate care in her current living arrangement with Robyn Hunter and that Robyn and Randy Hunter are entitled to reasonable rent for their care of Sharon.
>
> 5. The Court further determines that to the extent there are assets outside of the Sharon Edmonds Revocable Trust, including

> proceeds from real estate previously titled in Sharon's name, a neutral Guardian of the Estate is necessary to protect those assets and the Court now gives [Rebecca] and Robyn ten days from this Order . . . for each to nominate a proposed Guardian. Otherwise, the Court shall select a Guardian.
>
> 6. With respect to the Sharon Edmonds Revocable Trust, the Court determines that Sharon Edmonds is no longer capable of serving as Trustee but that neither Robyn nor [Rebecca] are suitable persons to serve as Successor Trustee or Successor Co-Trustees. The Court now gives [Rebecca] and Robyn ten days from this Order to select a successor Trustee by agreement. Otherwise, the Court shall select a successor.

Appellant's App. Vol. 2 at 34. The court later directed the trial court clerk to enter the August 13, 2021, order as a final, appealable judgment.

[32] Next, Sharon moved the court to allow her attorney to continue to represent her in a planned appeal of the August 13 order. Rebecca objected. The trial court denied Sharon's motion and appointed a guardian ad litem ("GAL") "for the limited purpose of determining whether an appeal is in the protected person's best interest." *Appellant's App. Vol. 3* at 182. The GAL, an attorney, reviewed the trial court's decision and reported to the court an appeal would not be in Sharon's best interest.

[33] The parties informed the trial court they had selected Mary J. Hoeller to be the guardian of Sharon's estate and the successor trustee of the trust. The trial court appointed Hoeller as guardian and successor trustee.

[34] Next, Robyn and Sharon jointly moved to correct error as to the August 13, 2021, order and moved to allow Sharon to retain her attorney's representation. Rebecca and the GAL opposed both motions. On March 30, 2022, the trial court denied Sharon and Robyn's motion to correct error and motion to allow Sharon to continue to employ her own attorney.

[35] On March 29, 2022, Hoeller petitioned the trial court to appoint a guardian over Sharon's person. Sharon objected to Hoeller's petition and again requested permission to hire her own attorney to represent her. Hoeller objected to Sharon's request to hire her own attorney, stating the GAL could represent Sharon's interests. The record does not include the trial court's rulings on Hoeller's petition or on Sharon's request to retain her own attorney.

[36] Next, Sharon and Robyn separately filed Notices of Appeal in both the guardianship and trust cases, and this consolidated appeal followed. Hoeller and Rebecca moved the Court to dismiss Sharon's Notice of Appeal, arguing the attorney who purported to represent Sharon lacked the authority to appeal on her behalf. The Court granted the motion. Sharon petitioned the Indiana Supreme Court to accept transfer over our dismissal of her Notice of Appeal. The Indiana Supreme Court denied the petition for transfer, ending Sharon's

participation in this appeal via her former counsel. Robyn is the sole remaining appellant.[3]

Issues

[37] Robyn raises several claims, some of which she did not preserve for appeal or are not properly before the Court. We address the following restated issues:

> 1. Whether the trial court erred by failing to issue findings of fact and conclusions of law in the judgment.
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> 2. Whether the trial court erred in addressing Sharon's trust in the judgment.
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> 3. Whether the judgment must be reversed because Rebecca failed to provide notice prior to trial she would ask the court to revoke or invalidate the 2019 POA.
>
> 4. Whether the trial court erred in admitting Sharon's medical records and testimony from Sharon's doctors.
>
> 5. Whether the trial court erred in determining a neutral guardian and a neutral successor trustee were necessary to manage Sharon's finances.
>
> 6. Whether reversal is necessary to address the relationship between the guardianship and the 2005 POA.

[3] Robyn moved to strike specific portions of Hoeller and Rebecca's joint Appellees' Brief. We previously granted Robyn's motion by separate order.

Discussion and Decision

Standard of Review

[38] Robyn appeals following the denial of her motion to correct error. We review the trial court's denial of a motion to correct error for an abuse of discretion. *Bruder v. Seneca Mortg. Servs., LLC*, 188 N.E.3d 469, 471 (Ind. 2022). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law." *Id.* In reviewing the trial court's decision, we may neither reweigh the evidence nor judge the credibility of witnesses. *Page v. Page*, 849 N.E.2d 769, 771 (Ind. Ct. App. 2005). But we review questions of law *de novo*. *Bruder*, 188 N.E.3d at 471.

[39] We also consider the standard of review for the underlying ruling. *See B.A. v. D.D.*, 189 N.E.3d 611, 614 (Ind. Ct. App. 2022), *trans. denied.* The trial court's August 13, 2021, judgment includes *sua sponte* statements of fact and law.[4] *Sua sponte* findings only control issues that they cover, while a general judgment standard applies to issues upon which there are no findings. *Eisenhut v. Eisenhut*, 994 N.E.2d 274, 276 (Ind. Ct. App. 2013). We may affirm a general judgment with findings on any legal theory supported by the evidence. *Id.* As for any findings that have been made, they will be set aside only if they are

[4] As we discuss in more detail below, none of the parties timely filed a request for findings and conclusions prior to trial.

clearly erroneous. *Id.* A finding is clearly erroneous if there are no facts in the record to support it, either directly or by inference. *Id.*

[40] As a related matter, Robyn argues for the first time on appeal there should be a higher standard of proof at trial and on appeal in guardianship cases. She claims a party seeking a guardianship over a person should be required to prove the need for a guardianship by "clear and convincing" evidence because a guardianship implicates a person's federal and state constitutional rights to care for themselves and their property. *Appellant's Br.* at 28. Because Robyn is making this argument for the first time on appeal, she has waived appellate review. *See Zavodnik v. Harper*, 17 N.E.3d 259, 264 (2013) (deeming appellant's claim the trial court refused to correct errors in the record waived when appellant did not first present the claim to the trial court). Despite waiver, Robyn asks the Court to address this claim in any event, alleging we may address unpreserved claims "where constitutional rights are at issue." *Reply Br.* at 13. We decline Robyn's request because the trial court should have had the opportunity to address this issue first.

1. The Lack of Findings of Fact

[41] Robyn argues the trial court's August 13, 2021, judgment must be reversed because the court did not enter findings of fact and conclusions. In response, Hoeller and Rebecca argue the trial court did not have to issue findings and conclusions. They point to Indiana Trial Rule 52, which provides a trial court "shall find the facts specially and state its conclusions thereon" upon "the written request of any party filed with the court prior to the admission of

evidence[.]" Ind. Trial Rule 52(A). Here, neither party filed a written request for findings and conclusions.

[42] Robyn does not dispute she failed to timely file a written request, but she asserts the court agreed at trial to issue findings and conclusions. We disagree. At the beginning of trial, Rebecca orally requested findings of fact and conclusions of law, and the trial court directed the parties to submit proposed findings "for the court's consideration." *Trial Tr. Vol. 2* at 9. On the last day of trial, Rebecca reminded the trial court of her oral request for findings and conclusions. Sharon joined Rebecca's request. The trial court stated the parties could submit proposed findings for the court's consideration but also noted Rebecca's request "was not timely made." *Trial Tr. Vol. 4* at 77. We do not read the trial court's discussion with the parties as binding the court to issue findings and conclusions. *See E.W.R. v. T.L.C.*, 528 N.E.2d 106, 108 (Ind. Ct. App. 1988) (determining the trial court did not err in failing to issue findings of fact and conclusions of law despite granting a party's oral request for findings during trial), *trans. denied*.

[43] Robyn further claims the trial court erred by essentially adopting Rebecca's proposed conclusions without issuing any findings of fact. The court's judgment largely mirrors Rebecca's proposed conclusions, with no findings. But a court's "failure to support its judgment with complete findings" mandates reversal only if one of the litigants has properly requested findings. *Moore v. Moore*, 695 N.E.2d 1004, 1008 (Ind. Ct. App. 1998).

2. Applicability of the Trial Court's Judgment to the Trust

[44] Robyn argues the trial court's determination to appoint a neutral successor trustee was erroneous because the court stated at trial it did not intend to address the trust. We disagree with Robyn's reading of the transcript.

[45] On the first day of trial, the following discussion occurred involving the trial court and counsel:

> [SHARON]: The bailiff announced the case at the beginning here, judge. And I think we are also here on a related cause number of the trust case. And that -
>
> THE COURT: - I am not really sure we are here on the trust case. What is pending in the trust case that we are going to resolve?
>
> [SHARON]: The trust case involved – Sharon Edmonds has a trust that contains a substantial amount of her property in the guardianship case. And she is the trustee. And then if she is not capable, then her two daughters are the trustee [sic]. And the petitioner in the guardianship case is asked to be appointed the sole trustee of the trust. And I was under the impression that that [sic] issue of her capacity to serve as trustee of her own trust is also an issue today.
>
> . . . .
>
> [REBECCA]: Your honor, I am in agreement that the trust matter is before the court.
>
> . . . .
>
> THE COURT: Well, the issue before the court is whether or not there is incapacity.

> [REBECCA]: Yes. And I think the outcome in the guardianship case is outcome determinative in the trust case.
>
> THE COURT: Do parties want to stipulate that all evidence in this matter with respect to capacity – and allow the court to make a determination on that issue alone in the trust – then I will do that.
>
> [REBECCA]: Having said that, your honor, my client has asserted the trust case only for the purpose of rendering two things – that Sharon Edmonds is not capable of serving as trustee and that her daughter Robyn is unsuitable to serve as trustee. As far as my client serving as trust-
>
> THE COURT: - Yeah, I am not going to get [into] whether or not there will be a successor trustee and who that will be in this proceeding *today*.
>
> [REBECCA]: My client does not want to serve as trustee. She wants an independent – just like this case.
>
> THE COURT: Everybody understand?
>
> [SHARON]: Yes, judge.

Trial Tr. Vol. 2 at 9–11 (emphasis added). Thus, the trial court did intend to address the trust case via the evidence the parties presented at trial. And although the court was not ready to discuss a potential successor trustee on the first day of trial, the case was in process, and the trial court was free to change its mind later. *See* Ind. Trial Rule 54(B) (stating a nonfinal order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"); *Gibson v. Evansville Vanderburgh Bldg. Comm'n*, 725 N.E.2d 949, 952 (Ind. Ct. App. 2000) (holding the trial court had

the authority to reconsider prior rulings before entry of final judgment), *trans. denied*.

[46] The second day of the trial was held over six months later. At the beginning of the second day, Rebecca's attorney asked, "Judge, for the record – is the trust case before the court today as well?" *Trial Tr. Vol. 3* at 4. The judge responded, "No." *Id.* Robyn argues this exchange demonstrates the evidence adduced at the guardianship hearing was not part of the trust case. We disagree. As stated on the first day of trial—without objection from Robyn—the court decided to consider evidence about Sharon's competency in both the guardianship and trust cases. And the court was free to reconsider the question of a successor trustee during the rest of the trial, and while reviewing the parties' proposed findings and conclusions. In any event, Robyn does not demonstrate she was prejudiced by the procedure the trial court used in the trust case. She has failed to demonstrate reversible error.

3. Notice of Rebecca's Challenge to the 2019 POA

[47] Robyn argues the trial court erred in invalidating the 2019 POA because Rebecca should have notified her before trial she was seeking such relief. The General Assembly has provided: "A court may not enter an order to revoke or amend a power of attorney without a hearing. Notice of a hearing held under this section shall be given to the attorney in fact." Ind. Code § 30-5-3-4(d) (2017). Indiana Code Section 30-5-3-4(d) does not specify the type of notice to be provided to the attorney in fact or the timing of such notice, but Rebecca did

not explicitly ask the court to revoke the 2019 POA in any documents she filed before trial.

[48] However, in her guardianship petition filed on June 6, 2019, Rebecca asked the trial court to appoint a neutral guardian for Sharon. As a result, when Sharon executed the 2019 POA, that document was in direct conflict with Rebecca's request for relief. And Robyn does not show how she was prejudiced by Rebecca's failure to expressly state prior to trial she was asking the trial court to invalidate the 2019 POA. Robyn fails to identify the evidence or arguments she would have presented to counter Rebecca's argument, in addition to the many witnesses and exhibits Robyn did present at trial. Although it would have been better practice to have notified other parties as early as possible about the intended scope of the hearing, we will not reverse where an error or defect's probable impact, "in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Ind. Appellate Rule 66(A). Robyn has failed to show reversible error. *See Winters v. Pike*, 171 N.E.3d 690, 701 (Ind. Ct. App. 2021) (rejecting appellants' claim the trial court wrongfully denied them an opportunity to rebut appellees' revised exhibit; any error in being denied the opportunity to address the revised exhibit was harmless because appellants failed to establish prejudice).[5]

[5] On a related note, Robyn claims the trial court could not invalidate the 2019 POA and related documents because Rebecca had not attached those documents "to the pleadings." *Appellant's Br.* at 49 (citing Ind. Trial Rule 9.2(A)). Robyn claims Rebecca's failure to attach the documents to her court filings deprived Robyn of

4. Sharon's Physician-Patient Privilege

[49] Robyn next argues the trial court erred in admitting into evidence Sharon's medical records and doctor testimony, claiming the evidence was shielded by physician-patient privilege. Hoeller and Rebecca claim Robyn may not raise physician-patient privilege on Sharon's behalf. We agree with Hoeller and Rebecca.[6]

[50] The General Assembly has stated physicians are not required to testify about "matters communicated to them by patients, in the course of their professional business, or advice given in such cases." I.C. § 34-46-3-1(2) (1998). "Most privileges were unknown at common law and, as a result, are to be strictly construed to limit their application." *Terre Haute Reg'l Hosp. Inc. v. Trueblood*, 600 N.E.2d 1358, 1360 (Ind. 1992). As to the physician-patient privilege, as the Indiana Supreme Court has explained, Indiana Code Section 34-46-3-1 does not completely bar physician testimony but creates a privilege for the benefit of the patient. *Id.* Only the patient (or the patient's heirs or personal representatives, after the patient's death) may waive it. *Canfield v. Sandock*, 563 N.E.2d 526, 529 (Ind. 1990).

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notice. But Sharon did not sign the 2019 POA and other documents until after Rebecca had filed her Petition for Appointment of Guardian Over Person and Estate of Incapacitated Person. And Robyn does not identify any other pretrial pleadings to which Rebecca should have attached the documents. Robyn has not shown reversible error on this issue.

[6] Sharon and Rebecca stipulated to the admission of Sharon's medical records, so Robyn asks us to allow her to assert a right for Sharon that Sharon affirmatively waived at trial. Because we hold Robyn lacks standing on this issue, we need not address whether Robyn properly objected at trial to the admission of Sharon's medical records.

[51] Robyn accompanied Sharon to some of her doctor's appointments and helped her organize her medications. But the physician-patient privilege belonged to Sharon, who appeared by counsel at trial. Robyn may not assert Sharon's privilege to challenge evidence related to Sharon's medical treatment. *See, e.g., Lomax v. State*, 510 N.E.2d 215, 219 (Ind. Ct. App. 1987) (rejecting defendant's challenge to admission of adult son's medical records at trial; although defendant accompanied her son to appointments, the physician-patient privilege was for her son's benefit).[7]

5. The Appointment of a Guardianship and Successor Trustee

a. Guardianship and Undue Influence in General

[52] "Any person may file a petition for the appointment of a person to serve as guardian for an incapacitated person[.]" I.C. § 29-3-5-1(a) (2019). The General Assembly defines an "incapacitated person" as someone who "is unable . . . to manage in whole or in part the individual's property . . . to provide self-care . . . or both . . . because of . . . mental deficiency, . . . undue influence of others on the individual, or other incapacity[.] I.C. § 29-3-1-7.5 (1992).

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[7] Under Sharon's 2005 POA, Robyn had the right to manage Sharon's affairs and control access to Sharon's medical records if Sharon became unable to manage her person and finances. But, as we discuss below, the trial court implicitly revoked the 2005 POA. Further, Robyn never argued Sharon was incapacitated for purposes of the 2005 POA.

Also, to the extent Robyn objected to the admission of medical evidence arising from Sharon's medical examinations when Robyn or Rebecca was present, any physician-patient privilege was waived as to those examinations. The presence of a third party such as Robyn or Rebecca prevented the physician-patient privilege from applying to those consultations. *See Doss v. State*, 256 Ind. 174, 181, 267 N.E.2d 385, 390 (1971) ("The patient-physician privilege . . . does not extend to third parties who overhear conversations unless such persons are necessary for the purpose of transmitting information and aiding the physician.").

[53] Title 29, Article 1 of the Indiana Code does not define the terms "mental deficiency" or "undue influence" for purposes of Indiana Code Section 29-3-1-7.5. Undue influence is generally defined as "the exercise of sufficient control over the person, the validity of whose act is brought into question, to destroy [the person's] free agency and constrain [the person] to do what [the person] would not have done if such control had not been exercised." *In re Estate of Wade*, 768 N.E.2d 957, 962 (Ind. Ct. App. 2002) (quoting *Crider v. Crider*, 635 N.E.2d 204, 210 (Ind. Ct. App. 1994), *trans. denied*), *trans. denied*.

[54] A trial court shall schedule a hearing to address issues raised in a guardianship petition. I.C. § 29-3-5-1(c). After the hearing:

> [I]f it is alleged and the court finds that:
>
> > (1) the individual for whom the guardian is sought is an incapacitated person or a minor; and
> >
> > (2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person or minor;
>
> the court shall appoint a guardian[.]

I.C. § 29-3-5-3(a) (1989).

[55] If a trial court determines it is necessary to appoint a guardian, the court:

> shall appoint as guardian a qualified person or persons most suitable and willing to serve, having due regard to the following:

> (1) Any request made by a person alleged to be an incapacitated person, including designations in a durable power of attorney under IC 30-5-3-4(a).
>
> . . . .
>
> (3) Any request contained in a will or other written instrument.
>
> . . . .
>
> (7) The relationship of the proposed guardian to the individual for whom guardianship is sought.
>
> (8) Any person acting for the incapacitated person under a durable power of attorney.
>
> (9) The best interest of the incapacitated person or minor and the property of the incapacitated person or minor.

I.C. § 29-3-5-4 (2021). And the following persons are entitled to consideration for appointment as a guardian, in the order listed:

> (1) A person designated in a durable power of attorney.
>
> (2) A person designated as a standby guardian under IC 29-3-3-7.
>
> (3) The spouse of an incapacitated person.
>
> (4) An adult child of an incapacitated person.
>
> . . . .
>
> (7) Any person related to an incapacitated person by blood or marriage with whom the incapacitated person has resided for more than six (6) months before the filing of the petition.
>
> (8) A person nominated by the incapacitated person who is caring for or paying for the care of the incapacitated person.

I.C. 29-3-5-5(a) (2021). Even so, a trial court may pass over a person having priority under this list and appoint a person who has a lower priority or no priority, if the decision is "in the best interest of the incapacitated person[.]" I.C. 29-3-5-5(b).

b. The Trial Court's Incapacity Determination and Invalidation of 2019 POA and Related Documents

[56] Robyn argues the trial court erred in concluding Sharon needs a neutral guardian and successor trustee because the court's determination is based "purely upon inference upon inference or conjecture and speculation." *Appellant's Br.* at 30. The court implicitly denied Rebecca's request to appoint a guardian over Sharon's person. As a result, we focus on whether the evidence shows Sharon could not manage her finances and her trust, rather than her daily life activities.

[57] There is no dispute Sharon was diagnosed with Alzheimer's dementia in 2018. Matt, who had lived with Sharon for two years, noted his grandmother had memory problems. Before taking Sharon to the VA in 2018, Rebecca and Robyn repeatedly told Sharon's NP about Sharon's memory problems. They also informed Sharon's doctors she had been the victim of several financial scams despite previously being a frugal person. The VA neuropsychologist and

Dr. Yoder both considered Sharon incapable of managing her financial affairs.[8] And Dr. Khan determined Sharon was susceptible to undue influence, which would hinder her ability to manage her finances.

[58] In addition, psychologist Sanford Pederson reviewed Sharon's medical records from the VA, Dr. Yoder, Dr. Wolenski, and Dr. Khan. In his opinion, as of the date of Sharon's Alzheimer's dementia diagnosis in 2018, Sharon was incompetent to manage her finances, even though she could still perform activities of daily living such as bathing and dressing herself.

[59] Robyn points to testimony by Dr. Wolenski and various lay witnesses, including herself, to support her claim Sharon can manage her finances. But we must consider facts and circumstances in the light most favorable to the judgment, and there is sufficient evidence to support the trial court's conclusion Sharon was an incapacitated person due to mental deficiency. *See* I.C. § 29-3-5-1(a) (citing mental deficiency as one of the grounds upon which a court may determine a person is incapacitated); *In re Guardianship of Morris*, 56 N.E.3d 719, 724 (affirming the trial court's determination of incapacity; the person had dementia with worsening memory, and could not manage her property or care for herself without substantial assistance); *cf. Duncan v. Yocum*, 179 N.E.3d 988, 1000–01 (Ind. Ct. App. 2021) (affirming the trial court's denial of a

[8] In her reply brief, Robyn argues the doctors' opinions about Sharon's ability to manage her finances are impermissible "legal conclusions." *Reply Br.* at 20 (citing Indiana Evidence Rule 704(b)). A party may not raise an argument in the reply brief for the first time. *See* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief").

guardianship petition; the evidence most favorable to the judgment showed the subject of the petition, although elderly and diagnosed with mild dementia, lived alone, was able to take care of his daily needs, and understood the nature of his financial investments).

[60] As part of the incapacity determination, the trial court concluded Sharon's December 2019 POA, Health Care Power of Attorney, and amendment of her revocable trust document were void due to undue influence. In certain relationships, the law raises a presumption of undue influence upon the subordinate party by the dominant party. *Reiss v. Reiss*, 516 N.E.2d 7, 8 (Ind. 1987). Relationships in this category include parent and child. *Meyer v. Wright*, 854 N.E.2d 57, 60 (Ind. Ct. App. 2006), *trans. denied*. Generally, the parent is the dominant party in that confidential relationship, but the relationship may be reversed. *See id*. at 60–61 (determining an adult child was dominant party, and a parent was subordinate party, based on the child being the elderly parent's caretaker).

[61] When a confidential relationship exists and the fiduciary benefits from a questioned transaction, there is presumption of undue influence, and the burden shifts to the dominant party to rebut the presumption. *Guardianship of Hayes v. Hayes*, 10 N.E.3d 42, 50 (Ind. Ct. App. 2014). When the burden shifts, the dominant party must show by clear and unequivocal proof the questioned transaction was made at arm's length and was valid. *Supervised Est. of Allender v. Allender*, 833 N.E.2d 529, 533 (Ind. Ct. App. 2005), *trans. denied*. Proof of complete unsoundness of mind is unnecessary to support a finding of undue

influence. *Nichols v. Estate of Tyler*, 910 N.E.2d 221, 229 (Ind. Ct. App. 2009). Rather, weakness of mind together with other factors, such as interest or motive on the part of a beneficiary to unduly influence the subordinate party, is sufficient. *Id.*

[62] Before Sharon moved in with Robyn and Randy in January 2019, Rebecca and Robyn equally helped their mother with her finances. But Robyn and Randy became Sharon's primary caregivers when she moved in with them. As a result, Robyn and Sharon were in a confidential relationship, with Robyn being the dominant party. *See Allender*, 833 N.E.2d at 533–34 (determining an adult child was a fiduciary of his elderly parents and the dominant party in their relationship because he was their caretaker). Sharon's December 2019 execution of a new POA, new Health Care Power of Attorney, and an amendment to her revocable trust amendment, all of which named Robyn as Sharon's sole fiduciary and potential controller of her finances, gave rise to a presumption of undue influence. *See Meyer*, 854 N.E.2d at 60–61 (determining a presumption of undue influence applied to an elderly father's financial decisions from which the son benefitted financially).

[63] Robyn argues "Sharon's statements and conduct regarding the execution of her 2019 POA demonstrate" she is competent to make arm's-length decisions in her best interest. *Appellant's Br.* at 43. We disagree. Matt testified Sharon was afraid of Robyn and hesitated to overstep her. Rebecca also felt bullied by Robyn and saw Robyn yell at Sharon. Within months of moving in with Robyn and Randy, Sharon had obtained a debit card for her bank account,

despite previously expressing contempt for debit cards. Also, Robyn, Randy, and Ryan continued to take Sharon to the casino with them, where Sharon's 2019 gambling losses were ten times larger than in 2018. Meanwhile, Robyn and Ryan each sustained over $10,000 in gambling losses in 2019, and Ryan did not have a steady job. Rebecca also learned in May 2019 of unexplained withdrawals of $5,000 and $6,000 from Sharon's bank account. After Rebecca told Robyn she received notice someone was using Sharon's debit card at the casino, Robyn took Sharon to the bank, where Sharon opened new accounts to which Rebecca did not have access. And Robyn took over Sharon's home without paying her, and then sold the home to someone else, placing the proceeds with Sharon's attorney. This evidence reveals Sharon was susceptible to Robyn's influence on financial matters and was disposed to agree to new documents giving Robyn sole control over her finances, at Rebecca's expense and against Sharon's best interest.

[64] Robyn also argues Sharon obtained an independent attorney, Dennis Voelkel, who drafted the 2019 documents and considered Sharon to be competent and free of outside influence. We do not agree Sharon's interactions with Voelkel support a conclusion Sharon was acting without undue influence. Sharon's attorney contacted Voelkel to ask him to draft a new POA and related documents for Sharon. It is true Sharon met with Voelkel without Robyn. And Sharon's attorney gave Voelkel a letter from Dr. Wolenski stating Sharon was competent to manage her affairs. But Sharon's attorney had drafted the letter.

Further, Voelkel lacked access to the VA reports, Dr. Yoder's opinion of Sharon's cognitive functioning, or Dr. Khan's assessment.

[65] Voelkel stated he relied on a conversation with Sharon, as well as representations by Sharon's attorney, in determining whether Sharon was competent to execute a new POA and other documents. But Voelkel's testimony as to Sharon's competence was contradictory. He agreed Sharon was of sound mind when she signed the new documents, but he also said "she could not really have capacity to sign estate planning documents." *Trial Tr. Vol. 4* at 12. And Voelkel conceded he would have preferred to wait until the guardianship case was resolved "before assisting her" with amending her trust document. *Id.* at 13.

[66] Under these circumstances, the trial court did not err in determining Robyn failed to clearly and unequivocally rebut the presumption of undue influence. *See Crider*, 635 N.E.2d at 213 (affirming trial court's voiding of a land transaction between an elderly, infirm father and his son; the son failed to rebut the presumption of undue influence when the evidence showed the son hired an attorney to prepare a deed and did not notify siblings); *cf. Meyer*, 854 N.E.2d at 63–64 (determining child rebutted the presumption of undue influence arising from an elderly parent's financial transactions in favor of his son; the evidence favorable to the judgment showed the parent was of sound mind when he entered into the transactions).

[67] As a related argument, Robyn argues the 2019 POA and related documents are valid even if Sharon is an incapacitated person for purposes of the guardianship statutes. Robyn cites *Est. of Prickett v. Womersley*, 905 N.E.2d 1008, 1010 (Ind. 2009), which states: "[I]t is well established that a guardianship does not preclude a ward from executing a will." But *Prickett* addressed a daughter's request to be compensated for services provided by the daughter to her incapacitated mother while the mother was under guardianship. A request for compensation is not part of this appeal. Robyn also cites *In re Guardianship of Hollenga*, 852 N.E.2d 933 (Ind. Ct. App. 2006), in support of her claim Sharon validly executed the 2019 POA and related documents. In *Hollenga*, the trial court declined to set aside a power of attorney but then ignored the nomination of a guardian in the power of attorney. *Hollenga* is distinguishable from Robyn's case because the trial court set aside the power of attorney here, as part of the guardianship determination.

[68] Robyn also argues the Court must reverse the trial court's guardianship determination because the court did not explicitly state: (1) a guardianship was in Sharon's best interest, *see Appellant's Br.* at 34; and (2) a "less restrictive alternative[ ]" than a guardianship would not have met her needs, *id.* at 35. Robyn cites Indiana Code Section 29-3-5-3 in support of her claim the trial court should have made an explicit "best interest" finding. Although Indiana Code Section 29-3-5-3 requires the trial court to consider the best interest of the person for whom guardianship is sought, the statute does not direct a trial court to make explicit, specific findings or conclusions in its judgment. Robyn also

cites *E.N. ex rel. Nesbitt v. Rising Sun-Ohio Cnty. Cmty. Sch. Corp.*, 720 N.E.2d 447 (Ind. Ct. App. 1999), *trans. denied*, to argue the trial court needed to specifically conclude a guardianship is in Sharon's best interest. *E.N.* is distinguishable because it involved a child rather than an adult.

[69] Robyn further cites Indiana Code Section 29-3-5-1(a)(11), which requires a person petitioning for guardianship to describe any less-restrictive alternatives they tried before filing the petition. But nothing in Indiana Code Section 29-3-5-1(a)(11) requires a trial court to issue an explicit finding or conclusion about less restrictive alternatives. Robyn has failed to show the trial court abused its discretion in determining Sharon's 2019 POA, Appointment of Health Care Representative, and trust amendment were void.

6. The Impact of the 2005 POA on the Guardianship

[70] As an alternative to appointing a guardian, Robyn argues the trial court should have given effect to Sharon's 2005 POA, under which Robyn and Rebecca would serve as co-attorneys in fact. Robyn states, "A valid POA precludes the imposition of a guardianship with regard to matters that are governed by the POA." *Appellant's Br.* at 35. We disagree. Indiana Code section 30-5-3-4(d) provides, "A guardian does not have power, duty, or liability with respect to property or personal health care decisions that are subject to a valid power of attorney." But nothing in Indiana Code Section 30-5-3-4, or in the authorities cited by Robyn, precludes a trial court from appointing a guardian despite the existence of a power of attorney.

[71] Robyn further claims Hoeller's powers as guardian over Sharon's finances are subject to the 2005 POA, in which case Hoeller would have to defer to Robyn and Rebecca's decisions. Indiana Code Section 30-5-3-4(d) limits a guardian's powers over property decisions when a valid power of attorney also governs those issues. But the trial court concluded implementing the 2005 POA would be unworkable due to conflict between the sisters. *Appellant's App. Vol. 2* at 34. Robyn points to no evidence she and Rebecca could work together harmoniously in their mother's best interest. To the contrary, the record shows substantial discord and hostility. Under these circumstances, the trial court implicitly invalidated the 2005 POA due to the daughters' inability to work together as co-attorneys in fact, and there is ample evidence to support the court's decision. Robyn has failed to demonstrate reversible error.

7. Choice of Guardian

[72] As an alternative argument, Robyn argues the trial court should have appointed her as guardian rather than Hoeller, claiming: (1) she had priority under the guardianship statutes; and (2) Sharon expressed a preference for Robyn to serve as guardian in the 2005 and 2019 POAs. During trial court proceedings, Robyn and Sharon claimed guardianship was unnecessary because Sharon was of sound mind. Robyn never argued she should serve as sole guardian if the trial court concluded one was needed.[9] We will not reverse the trial court's decision

[9] Robyn argues the trial court deprived her of the opportunity to present her argument as to who should serve as guardian. We disagree. During the three-day trial, Rebecca asked several times for a neutral guardian.

based on an argument Robyn did not present to the court. *See Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004) ("At a minimum, a party must show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.").

8. Constitutional Claims

[73] Robyn claims the trial court violated her rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of the Indiana Constitution. Robyn argues the trial court could not appoint a neutral guardian without first finding she was unfit to be a guardian. Robyn also challenges the constitutionality of the guardianship statute setting forth who has priority to serve as a guardian, claiming the statute "fail[s] to acknowledge the dignity and fundamental right of a parent-child relationship." *Appellant's Br.* at 37. Robyn did not raise any constitutional claims on her own behalf during the trial court proceedings. As a result, she has waived those claims for appellate review. *See Ryan v. Brown*, 827 N.E.2d 112, 118 (Ind. Ct. App. 2005) (concluding the appellants' claims under the Indiana Constitution were waived for failure to present them to the trial court).

Robyn was similarly free to ask the court to appoint her as guardian, but she never made such a request during trial or in proposed findings and conclusions.

9. Denial of Attorney for Sharon to Contest Petition for Guardianship Over Person

[74] As a final claim of error, Robyn contends the trial court should allow Sharon to select her own attorney to "defend against" Hoeller's petition for guardianship over Sharon's person. *Appellant's Br.* at 51.

[75] Even if we assume for the sake of discussion Robyn can raise such a claim on Sharon's behalf, the record on appeal does not include the trial court's final ruling on Hoeller's petition. Robyn concedes the petition is "pending." *Id.* And the record does not contain a ruling on Sharon's renewed request to select her own attorney to represent herself against Hoeller's petition. As a result, this issue is not properly before the Court.

Conclusion

[76] For the reasons stated above, we affirm the judgment of the trial court.

[77] Affirmed.

Crone, J., and Robb, Sr.J., concur.