MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Andrew B. Arnett
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Andrea E. Rahman
Hewitt Law & Mediation, LLC
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Eileen Davis,
Appellant-Plaintiff,

v.

Carolyn Scott, Louis Richards, Theresa Richards, and Robert Richards,
Appellees-Defendants

September 10, 2021

Court of Appeals Case No. 21A-PL-424

Appeal from the Shelby Circuit Court

The Honorable Trent Meltzer, Judge

Trial Court Cause No. 73C01-2004-PL-000012

May, Judge.

[1] Eileen Davis appeals following the trial court's grant of summary judgment in favor of Carolyn Scott, Louis Richards, Theresa Richards, and Robert Richards (collectively, "Defendants"). We affirm.

Facts and Procedural History

[2] In 1983, Helen and Clyde Richards – who were the parents of Eileen Davis, Carolyn Scott, Louis Richards, Theresa Richards, Robert Richards, and Dennis Richards – met with attorney Peter DePrez for estate planning purposes.[1] Helen and Clyde each executed a will in 1983, and Helen contacted DePrez over the years whenever she had additional estate planning questions. She consulted with DePrez after Clyde's death in 2002 regarding administration of Clyde's estate and updates to her estate plan. She also spoke with DePrez about updating her estate plan after her son Dennis passed away in 2010.

[3] In August and September of 2011, Helen and DePrez had at least three telephone conversations regarding her estate plan and the contents of her will. Helen's initial questions concerned the legalities of disinheriting one of her children. Helen then revealed that she wanted to disinherit Eileen and remove Eileen as the executor of her estate. DePrez prepared a revised draft of Helen's will.

[1] For the purpose of clarity, we will refer to members of the Richards family by their first names.

[4] On September 27, 2011, Carolyn drove Helen to DePrez's law firm because Carolyn was visiting from California at the time and Helen had never learned to drive. Louis met Helen and Carolyn in the law firm's parking lot, and the three then walked into the office's reception area. DePrez met with Helen privately in his office to the discuss the terms of her revised will. This meeting lasted for approximately a half hour, and DePrez observed that Helen "appeared to be physically well, alert, spoke without hesitation and fully engaged in our conversation, asking appropriate questions and providing appropriate answers to my questions." (App. Vol. II at 33-34.)

[5] Item Two of Helen's revised last will and testament provided:

> I further acknowledge my daughter Eileen Davis and for reasons sufficient unto myself, I give, devise and bequeath nothing to her under the terms of this my Last Will and Testament.

(*Id*. at 18.) Helen bequeathed the remainder of her estate in equal shares to the defendants. Helen signed the updated will and attached to the will a self-proving declaration. Helen asserted in the declaration that she "executed the Will as her free and voluntary act for the purposes expressed in it[.]" (*Id*. at 21.) She also affirmed in the declaration that she was of sound mind and over the age of eighteen when she signed the will. Two witnesses, DePrez's administrative assistant and a law partner, also signed the will and the self-proving declaration. Carolyn and Louis were present when Helen signed the will, but DePrez did not recite the terms of the will to them. DePrez's

administrative assistant then tore up Helen's will from 1983. DePrez retained the newly executed will in his safe.

[6] Helen passed away on January 9, 2020, and the will was probated. Eileen subsequently discovered that the will did not bequeath any assets to her, and she filed a verified complaint against her living siblings on April 8, 2020. The complaint alleged:

> The Will is a direct result of undue influence imposed on Helen Mary Richards by the Defendants. The defendants occupied a position of confidence with the decedent prior to the decedent's death. During the time that this confidential relationship existed between the decedent and the Defendants, the decedent's mental capabilities were weakened and easily subjected to the influence of the Defendants. The Defendants kept the decedent isolated and were verbally abusive to her. Because of the trust and confidence placed in the Defendants by the decedent, and the decedent's weakened mental state caused by advanced age, combined with physical and mental infirmities, the decedent complied with the directions and instructions of the Defendants and was susceptible to undue influence by the Defendants. The Defendants suggested the provisions of the purported Will to the decedent and caused the same to be drawn up by family members for the decedent's signature. The decedent was unduly influenced by the Defendants in the making of the purported Will, which was not made by the decedent as a voluntary, independent act and which, in the absence of the undue influence imposed on the decedent by the Defendants, the same would not have been executed by the decedent. The Defendants, under the purported Will, are the primary beneficiaries of the decedent's estate.

(*Id*. at 12.)

[7] On August 10, 2020, Defendants filed a motion for summary judgment. In support of their motion, Defendants designated the pleadings, an affidavit from DePrez, and the parties' discovery responses. DePrez affirmed in his affidavit the history of his representation of Helen and the process he followed to update her will in 2011. Defendants argued in support of their motion that through discovery Eileen "provided no factual or legal basis supporting the Will Challenges . . . . On the other hand, Defendants have provided facts that refute and disprove the Will Challenges." (*Id.* at 102.) Defendants then went on to assert:

> the following facts are established by the Defendants:
>
> a) No undue influence;
>
> b) Will was drafted as Decedent requested;
>
> c) No family members involved in making the will;
>
> d) Will was executed voluntarily; and
>
> e) Will is a self-proved will.

(*Id.*) Eileen filed a response in opposition to Defendants' motion for summary judgment in which she argued "that the Defendants occupied a position of confidence and trust with the Decedent, and the Defendants benefited from the will offered to probated [sic]. This gives rise to a presumption of undue influence which shifts the burden to the Defendants to rebut the presumption by

clear and convincing evidence." (*Id*. at 107.) In reply to Eileen's response, Defendants argued that the self-proving clause of the will created a rebuttable presumption that the will was executed without undue influence and that Eileen offered "no evidence to contradict the Affidavit of the drafting attorney who oversaw the execution by the decedent of her will." (*Id*. at 201.)

[8] The trial court held a hearing on Defendants' motion for summary judgment on January 26, 2021. On February 11, 2021, the trial court issued an order granting Defendants' motion for summary judgment. The trial court issued findings of fact and conclusions of law in support of its order:

> 12. The Affidavit of attorney Peter DePrez refutes the vast majority of the allegations contained in Count I of Plaintiff's Complaint. Mr. DePrez was the attorney for the decedent. He consulted with her privately several times about the provisions of the 2011 will, he drafted the will and reviewed it with her alone. Further, Mr. DePrez testified that he had dealings with the decedent may times over 36 years and noted no decrease in her cognitive abilities.
>
> 13. Plaintiff, having failed to offer any contrary evidence, cannot rebut the presumption created by the self-proving clause of the will, that the will was properly executed.
>
> 14. Plaintiff presents no evidence that the Defendants and decedent had a confidential relationship as a matter of law other than as parent-child.
>
> 15. Plaintiff's allegation of a factual position of trust between Defendants and the decedent rests entirely on the claim that decedent relied on the Defendants for all transportation.

> 16. It is undisputed that the decedent did not drive, but the only evidence offered of any of the Defendants driving her was Carolyn Scott driving decedent to Mr. DePrez's office when the will was signed. However, Ms. Scott was only visiting from California.
>
> 17. Plaintiff designated no evidence that the decedent suffered from any type of mental infirmity.
>
> 18. Having failed to put forth any evidence of a confidential relationship with Defendants as the dominant parties, the issue of undue influence is moot. However, for the record it should be noted that neither party offered any substantive evidence as to whether or not Plaintiff took money from the decedent, but the only evidence as to the origin of the claim is that it came from the decedent, not the Defendants.

(*Id*. at 205-06.)

Discussion and Decision

[9] Our standard of review following a trial court's ruling on a motion for summary judgment is well-settled:

> Summary judgment shall be granted where "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Trial Rule 56(C). "We construe all evidence in favor of and resolve all doubts as to the existence of a material issue in favor of the non-moving party." *Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015).

St. Mary's Ohio Valley Heart Care, LLC v. Smith, 112 N.E.3d 1144, 1149 (Ind. Ct. App. 2018), *trans. denied*. "Although the trial court's specific findings of fact and conclusions of law assist our review, they are not binding upon us." *Est. of Williams v. BorgWarner Morse TEC Inc.*, 110 N.E.3d 1148, 1154 (Ind. Ct. App. 2018). We may affirm on any basis supported by the designated evidence. *Id.*

[10] Courts rarely resolve undue influence claims at summary judgment because the claims typically require fact-intensive inquires. *See Gast v. Hall*, 858 N.E.2d 154, 166 (Ind. Ct. App. 2006) ("Undue influence is essentially a question of fact that should rarely be disposed of via summary judgment."), *reh'g denied*, *trans. denied*. However, rarely does not mean never, and we have affirmed summary judgment on undue influence claims in the past. *See, e.g., Scribner v. Gibbs*, 953 N.E.2d 475, 484-85 (Ind. Ct. App. 2011) (affirming grant of summary judgment because no designated evidence suggested a confidential relationship between testator and beneficiary or that beneficiary enjoyed a dominant position or exercised undue influence over testator); *Carlson v. Warren*, 878 N.E.2d 844, 851-53 (Ind. Ct. App. 2007) (same); and *Kronmiller v. Wangberg*, 665 N.E.2d 624, 628 (Ind. Ct. App. 1996) (holding defendants were entitled to summary judgment because plaintiffs failed to produce any evidence from which an undue influence claim could be inferred), *trans. denied*.

[11] "Undue influence is the exercise of such control by one person over another person so as to destroy his or her free agency and compel him or her to do something he or she would not have done if such control had not been exercised." *Scribner*, 953 N.E.2d at 484. This includes "abuse of a relationship

in which confidence is reposed by one party in another with resulting superiority and influence exercised by the other." *Id.* Indiana law recognizes that certain relationships are confidential as a matter of law. *Id.* "Where a confidential relationship as a matter of law exists and the fiduciary (or dominant party) benefits from a questioned transaction, a presumption of undue influence arises and the fiduciary bears the burden of rebutting the presumption." *Id.* The fiduciary or dominant party is required to put forth clear and convincing evidence that the party acted in good faith to rebut the presumption of undue influence. *Id.* "[R]elationships such as attorney-at-law and client, attorney-in-fact and the one granting the power of attorney, guardian and ward, principal and agent, pastor and parishioner, and parent and child" are considered confidential relationships as a matter of law. *Id.* The parent is generally considered the dominant party in the parent-child confidential relationship with the fiduciary relationship running from the parent to the child. *Id.*

[12] Other relationships are confidential as a matter of fact. A confidential relationship as a matter of fact is "a relationship of trust and confidence that would have justified one in relying upon that relationship." *Id.* To succeed on an undue influence claim as the result of a confidential relationship in fact, the plaintiff must show that the parties "did not deal on terms of equality," that "'either the dominant party dealt with superior knowledge of the matter derived from a fiduciary relationship, or dealt from a position of overpowering influence as to the subordinate party.'" *Id.* (quoting *Carlson*, 878 N.E.2d at

851). Yet, even if the plaintiff is able to show a confidential relationship in fact, the transaction will still be considered valid if the dominant party can prove "no deception was practiced, no undue influence was used, and all was fair, open, voluntary, and well understood." *Id.* at 484-85.

[13] Eileen asserts that a genuine issue of material fact remains regarding whether a confidential relationship as a matter of fact existed between Helen and Defendants.[2] Eileen notes that Helen "never learned to drive and often relied on some of the Defendants for her transportation." (Appellant's Br. at 9.) However, Helen was not solely dependent upon Defendants for transportation. Carolyn stated in response to an interrogatory from Eileen that "[m]y aunt took [Helen] to the bank[.]" (App. Vol. II at 95.) Eileen also indicated that she sometimes drove Helen. (*Id.* at 57) ("After my dad passed, I would drive the 100-mile trip to pick mom up and bring her home with me for either a few days or a week at a time."). Further, as Defendants point out, "there is no evidence showing that the Defendants refused to provide transportation, or threatened to deny transportation to Helen, in order to influence her." (Appellee's Br. at 11.) Thus, we cannot say that a confidential relationship as a matter of fact arose because Defendants sometimes transported Helen. *See Matter of Est. of Neu*, 588 N.E.2d 567, 571 (Ind. Ct. App. 1992) (holding confidential relationship did not

[2] While Eileen also alleged fraud in Helen's execution of the will and insufficient capacity in her complaint, she has put forth no argument on appeal contesting judgment for Defendants on those theories. Therefore, any such claims are waived, and we limit our analysis to the issue of undue influence. *See Hays v. Harmon*, 809 N.E.2d 460, 463 n.1 (Ind. Ct. App. 2004) (holding issue was waived for failure to present a cogent argument on appeal), *trans. denied*.

exist even though beneficiary drove decedent to bank where decedent transferred money to her account).

[14] However, Eileen also averred in response to an interrogatory propounded by Defendants that one time when she presented Helen with a statement written by Eileen's attorney for Helen to sign, Louis directed Helen not to sign by yelling, "ARE YOU STUPID?! YOU B[E]TTER NOT SIGN ANYTHING!" (App. Vol. II at 50) (emphasis in original). Eileen's interrogatory response also included additional accounts of Defendants yelling at and bullying Helen.[3] Assuming arguendo this testimony raises a genuine issue of material fact regarding whether a confidential relationship as a matter of fact existed between Helen and Defendants, Eileen does not designate any evidence challenging DePrez's account of the execution of Helen's will.

[15] There is a presumption that a will with a self-proving clause was validly executed, and the challenging party must put forth more than simple assertions of undue influence to overcome the presumption. *Scribner*, 953 N.E.2d at 481. DePrez averred that Helen contacted him by phone at least three times in August and September of 2011, and Helen inquired about removing a child from her will in the initial phone conversation. Helen also stated that she had

[3] We agree with Defendants that Eileen's accounts of what she heard from her niece and others is hearsay, and hearsay is generally inadmissible upon proper objection. *See* Ind. R. Evid. 801 & 802. However, this objection is waived because Defendants did not raise it before the trial court. *See Webb v. City of Carmel*, 101 N.E.3d 850, 857 n.4 (Ind. Ct. App. 2018) ("Issues that are not raised before the trial court on summary judgment cannot be argued for the first on appeal and are therefore waived.").

not discussed potential changes to the will with any of her children before contacting DePrez. DePrez explained:

> When a client is considering to [sic] disinherit a child or otherwise remove a child from the terms of their will, I discuss the matter alone with the client to make sure the decision is voluntarily being made without influence by another person and further discuss such changes over several discussions since those types of changes should not be done without considerable thought.

(App. Vol. II at 32.) Helen told DePrez that she was alone in the room during each of these phone conversations, and DePrez met with Helen alone in his office for approximately one half-hour before she signed the will. DePrez did not detect any diminution of Helen's cognitive abilities from the time he met her in 1983 until she executed the will in 2011. These uncontradicted facts indicate that Helen's modification of her will was "fair, open, voluntary, and well understood." *Scribner*, 953 N.E.2d at 484-85.

[16] While Eileen contends that Defendants influenced Helen by falsely accusing Eileen of stealing from her, there is no designated evidence that Helen changed the terms of her will because of what Defendants said about Eileen. As the trial court explained in its order granting summary judgment, "neither party offered any substantive evidence as to whether or not Plaintiff took money from the decedent, but the only evidence as to the origin of the claim is that it came from the decedent, not the Defendants." (App. Vol. II at 206). In a letter Carolyn wrote to Eileen in November 2011, Carolyn indicated that she first learned

about the theft allegations when Helen told her in September 2011 that Eileen had taken all of Helen's money. Also, in one of the phone conversations with DePrez in the late summer of 2011, Helen told him, without specifically identifying Eileen, that Eileen "had already received part of or all of what her late husband and she had hoped to pass on to each child, that the child had not been honest with her in recent years and [Helen] felt she had been taken advantage of financially." (*Id.* at 31.) Thus, the uncontradicted evidence is that Helen changed her will of her own volition because Helen believed Eileen stole from her. *See Carlson*, 878 N.E.2d at 853 (holding designated evidence was insufficient to raise inference that caretakers exercised undue influence over testator).

Conclusion

[17] The trial court did not err in granting summary judgment for Defendants. Assuming without deciding that there was a confidential relationship in fact between Defendants and Helen, there is no designated evidence that Helen's modification of the terms of her will was anything other than a voluntary and well-understood decision, and therefore, there is no genuine issue of material fact that Helen's modification of her will was valid. Consequently, we affirm the trial court.

[18] Affirmed.

Kirsch, J., and Vaidik, J., concur.