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Filo v. Filo: An Illustration Of The Mechanics Of The Rebuttable Presumption Of Undue Influence And Jury Instructions

Introduction

The presumption of undue influence arising out of confidential and fiduciary relationships is a nonconclusive presumption of fact. Establishing the presumption does not relieve the challenger of the burden to prove that the Will or Will substitute was the product of the exercise of undue influence by clear and convincing evidence. Similarly, the same evidence that is used to rebut the presumption is also pertinent to the Jury's determination of whether undue influence has been exercised. Importantly, whether a presumption of undue influence is rebutted is a question of law for the judge to decide. If the presumption is rebutted, the presumption becomes a nullity and the jury is not given an instruction on the subject. This article explores the mechanics of the presumption through the case recently decided by the 12th District Court of Appeals in *Filo v. Filo.* [1]

Facts of Filo v. Filo [2]

Elmer Filo was a farmer who wanted nothing more than to live out his days farming the land. He lived independently until the summer of 2015. Beginning in July of that year, Elmer had repeat admissions to the hospital and was reported to suffer from delirium associated with delusions and hallucinations. He had, on multiple occasions, doubled up on his medicine, and there was concern that he was unable to manage his medications. Elmer's treating physician recommended that he be placed in a nursing home, but ultimately, he found himself placed in an assisted living facility two hours away from his farm.

On January 19, 2016, Elmer's doctor executed a statement of expert evaluation, opining that he had suffered from dementia and required both a guardian of person and estate. However, guardianship proceedings were not initiated. While guardianship proceedings were never pursued, Elmer did undergo a neuropsychological evaluation in February of 2016. The neuropsychologist opined that Elmer did not "have the capacity to accurately mange his medications and also to maintain adequate nutrition and hydration if he was to live independently in the community." Elmer, at that time, was not permitted to return home which greatly upset him.

While in the assisted living facility, Elmer expressed frustration of being in the facility and told anyone that would listen that he wanted to go home. He also felt that his daughter, Tammy, had abandoned him in the facility. He went about searching for someone to support him in his effort to return home: writing letters and speaking to his care and support staff at the facility, for instance.

Family history is frequently relevant to inheritance claims. In this case, it was demonstrated that Elmer had a falling out with his son, Terry, many years prior. Evidence was presented that Terry and Elmer had not spoken with each other for several years before Elmer's health decline. One day, after Elmer had been placed in the facility, and after Elmer had shared with medical providers that he was unhappy with his daughter and wanted her removed as his power of attorney, Terry drove past the farm and found it to be in disorder. Worried, Terry went in search for his father and finally found Elmer living in the assisted living facility.

Terry, at Elmer's request, called a lawyer who visited with Elmer on multiple occasions. Elmer and the lawyer discussed, not only a plan to get Elmer out of the facility, but also the details behind a new estate plan; one which Elmer had expressed a desire to remove his daughter as beneficiary because he felt she abandoned him. The estate planner spent multiple hours with Elmer, discussing and charting what the estate plan would look like. Prior to finalizing documents, which included a will, trust, LLC, and various related business and funding documents, the estate planner convinced Elmer that he should include his daughter as a beneficiary, reserving, instead, the right to remove her as a beneficiary at a later date. The original documents were executed on June 13, 2016 and the Power of Appointment, removing his daughter as a beneficiary, was executed on July 22, 2016. Elmer died approximately one month later. After his death, Elmer's daughter learned of the new estate planning documents. She subsequently brought suit against Elmer's son, Terry, alleging that Elmer's documents were the product of undue influence.

Following a five-day trial, the trial judge determined that Terry was a fiduciary, which therefore created the rebuttable presumption of undue influence. The Plaintiff argued that whether the presumption had been rebutted is a question for the Jury. Conversely, the Defense argued that the presumption is evidentiary in nature: whether the presumption has been rebutted is a question of law for the judge to answer. In commenting on the question as to whether the presumption was rebutted, the trial judge noted:

> THE COURT: The testimony of Attorney [] in my view was highly credible. He went through a myriad of circumstances, was very detailed in his testimony with regards to guarding against undue influence, the duration of the meetings that he had, the modality of the meetings, that being he met with Mr. Elmer Filo I believe in the afternoon one day. The very next day he did a surprise visit in the morning. Quite frankly, I believe the Defendant has met that burden set forth to keep that presumption from being part of the jury instruction in this case.

The Jury concluded that undue influence had not been exercised and the challenged documents were left intact. On appeal, "Tammy argue[d] that the jury, not the probate court, should have made the decision as to whether the presumption was overcome by Terry's evidence and whether the evidence submitted was credible. However, the trial court is the gatekeeper of how a jury is to be instructed, and what law is properly included in the instructions based upon the evidence produced at trial. Once Terry produced sufficient credible evidence to overcome the presumption, such presumption became a legal nullity and any jury instruction on it could have mislead the jury. Thus, the probate court correctly excluded a jury instruction on the presumption." [3]

The Mechanics of the Rebuttable Presumption:

The *Filo* court was clear in its holding: whether to include the factual presumption of undue influence within jury instructions falls under the purview of the court's gatekeeping authority. A trial court is therefore proper in its exclusion of the presumption, if it finds the defense has presented substantial credible evidence to rebut the existence of undue influence. Additionally illustrative, in *Rheinscheld v. McKinley,* [4] the court directly addressed the appropriate role of the trial court in evaluating the rebuttable evidentiary presumption that may arise when a confidential relationship is established in an undue influence claim. In discussing the effect of a presumption and the ensuing protocol that should take place, the *Rheinscheld* court stated as follows: [5]

> With respect to appellees' assertion that there was no evidence to support any confidential relationship in the case at bar, Ohio case law provides that if the party opposing the presumption fails to come forward with sufficient credible evidence, as determined by the court, the presumption is crystallized, and the jury is instructed to find the presumed fact if they believe the base facts to be true. I Weissenberger, Ohio Evidence (1987), Sec. 301.5. If, however, the party against whom the presumption is directed produces rebuttal evidence of sufficient quality, the presumption never takes effect and is not mentioned to the jury. Weissenberger, supra; Pandrich v Blair (1979), 65 Ohio App. 2d 65; Bd. of Education v Pendleton (1947), 80 Ohio App. 249; Ayers v Woodard (1957), 166 Ohio St. 138.

> A party may attack a presumption either by offering evidence to disprove the base facts or by offering evidence supportive of a finding contrary to the presumed fact. Weissenberger, supra. In the instant case, appellees testified that the decedent had sufficient mental capacity to make the challenged transactions, intended to dispose of her money in such manner, and was not subjected to undue influence by any of appellees. Accordingly, in that there was evidence of a sufficient quality offered by appellees to rebut the presumption of undue influence arising as a result of an alleged confidential or fiduciary relationship, no jury instruction upon such presumption was required, and the trial court did not err in refusing appellants' requested instruction. Appellants' first assignment of error is overruled.

Ohio Rule of evidence 301 speaks to the role of the presumption. It provides in pertinent part that " … a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." The 1980 staff notes to this rule provides that "once a presumption is met with sufficient countervailing evidence it fails and the presumption serves no further function. If rebutted, the jury is not instructed that a presumption existed."

The procedure utilized by the trial court in *Filo* has been followed by numerous other courts when considering the continued existence of an evidentiary rebuttable presumption.[6] "A presumption of law is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance. A presumption of fact is a rule of law that a fact, otherwise doubtful, may be inferred from a fact which is proved."[7] The presumption of undue influence arising out of confidential and fiduciary relationships is a nonconclusive *presumption of fact.*[8] Thus, if the challenging party establishes the presence of such a relationship, it allows the jury to draw a mere inference of fact. However, the court may not instruct the jury to find undue influence as a matter of law.[9]

Notably, a jury *may* find undue influence from the fact that a confidential or fiduciary relationship existed—but the court cannot instruct a jury to find undue influence as a matter of law based on such relationship. "It is for the jury to determine what inferences of fact are properly to be drawn from the evidence adduced at trial."[10] "It is, therefore, not necessary and not proper to charge the jury that they must find undue influence unless the proponent has introduced evidence sufficient to rebut the presumption."[11]

Therefore, establishing a confidential relationship does not relieve the challenger of proving her claim. Instead, once a confidential relationship is established, a factual presumption allows the jury to infer undue influence based on such relationship. If the beneficiary introduces sufficient evidence that the testator executed the gift free from undue influence, the jury may no longer infer undue influence based on the fact that a confidential relationship existed. Regardless of whether the beneficiary ultimately produces sufficient evidence to prevent the factual inference, the burden is still on the challenger to establish her claim by clear and convincing evidence.

Conclusion

While the presumption exists to make it easier to prove undue influence claims, it should be remembered that the same facts used to rebut the presumption can also demonstrate to a jury that undue influence was not exercised. Estate planning lawyers are in a unique position to shed light on those facts. The extent of the effort the lawyer takes to protect the client and ensure decision making is not coerced, the more likely the existence of the fiduciary relationship and attendant presumption can be minimized in a subsequent challenge.

Footnotes

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Messrs. Fried and McGee were trial and appellate counsel for appellee.

1 Filo v. Filo, 2021-Ohio-413, 2021 WL 568453 (Ohio Ct. App. 12th Dist. Madison County 2021).

2 These facts are derived from the appellate opinion and the trial transcripts in order to give the reader context into the undue influence claims.

3 Filo v. Filo, 2021-Ohio-413, ¶ 24, 2021 WL 568453, *4 (Ohio Ct. App. 12th Dist. Madison County 2021).

4 Rheinscheld v. McKinley, 1988 WL 6553 (Ohio Ct. App. 4th Dist. Hocking County 1988), cause dismissed, 37 Ohio St. 3d 701, 531 N.E.2d 1316 (1988).

5 Rheinscheld v. McKinley, 1988 WL 6553, *5 (Ohio Ct. App. 4th Dist. Hocking County 1988), cause dismissed, 37 Ohio St. 3d 701, 531 N.E.2d 1316 (1988).

6 See Ayers v. Woodard, 166 Ohio St. 138, 1 Ohio Op. 2d 377, 140 N.E.2d 401, 406 (1957) ("when either party introduces substantial credible evidence tending to prove a fact which would otherwise be presumed, the presumption either never arises or it disappears"). More importantly, Ohio courts have held that a trial court may conclude that a rebuttable presumption has been overcome as a matter of law. See Downard v. Rumpke of Ohio, Inc., 2013-Ohio-4760, 3 N.E.3d 1270, 1287 (Ohio Ct. App. 12th Dist. Butler County 2013).

7 *Board of Ed. of Lynchburg Local School Dist. of Highland County v. Pendleton*, 80 Ohio App. 249, 255–56, 35 Ohio Op. 554, 49 Ohio L. Abs. 54, 75 N.E.2d 182, 185 (1st Dist. Clinton County 1947), citing Lawson on Presumptive Evidence (2 ed.), 639.

8 1 Ohio Probate § 10.07 (2020).

9 1 Ohio Probate § 10.07 (2020).

10 Board of Ed. of Lynchburg Local School Dist. of Highland County v. Pendleton, 80 Ohio App. 249, 35 Ohio Op. 554, 49 Ohio L. Abs. 54, 75 N.E.2d 182, 186 (1st Dist. Clinton County 1947).

11 Page on the Law of Wills (3 Ed.), 622.

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