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Estates and Trusts - Inter Vivos Gifts - Mental Competence - Undue Influence - Confidential Relationship

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ESTATES AND TRUSTS—INTER VIVOS GIFTS—MENTAL COMPETENCE—UNDUE INFLUENCE—CONFIDENTIAL RELATIONSHIP—The burden of proof is initially on the donor to overcome the presumption of mental competence of the donor.

Moser v DeSetta, 589 A2d 679, 527 Pa 157 (1991).

John, Jr. and Ann Moser had been married for thirty-seven years and were living together when, in March of 1985, Mr. Moser was diagnosed by his personal physician as being afflicted with cerebral arteriosclerosis.¹ The physician who diagnosed Mr. Moser stated that the disease had manifested itself through confusion, memory loss and other symptoms of senility.²

Helen DeSetta, Mr. Moser's sister, was visiting the family in early August of 1985.³ During DeSetta's visit, Mr. Moser expressed to her that he wanted to use his joint marital savings to start a new business.⁴ In late August, DeSetta accompanied Mr. Moser on a visit to DeSetta's attorney to discuss divorce laws and powers of attorney.⁵ On a subsequent visit in late August, Mr. Moser, again accompanied by DeSetta, executed a power of attorney giving DeSetta authority to manage her brother's affairs.⁶

On September 4, 1985, DeSetta took Mr. Moser to his bank and assisted in placing Mr. and Mrs. Moser's joint marital funds into treasury bills registered jointly in the name of Mr. and Mrs.

1. *Moser v DeSetta*, 527 Pa 157, 589 A2d 679, 680 (1991). Cerebral arteriosclerosis is a thickening and loss of elasticity of the arterial walls (hardening of the arteries) of the brain. *The Sloan-Dorland Annotated Medical-Legal Dictionary* 60 (West, 1987).

2. *Moser*, 589 A2d at 680. The other symptoms of senility manifested themselves through Mr. Moser's failure to recognize his wife and his surroundings. *Id.* He also did not know his name, age, nor the time or date. *Id.*

3. *Id.*

4. *Id.* Mr. and Mrs. Moser had life-time savings of approximately \$115,000. *Id.* DeSetta testified that she discouraged Mr. Moser from pursuing a new business venture with his savings. *Id.*

5. *Id.* Although divorce was discussed, Mr. Moser concluded that he did not have grounds to pursue that action. *Id.* "Power of attorney" constitutes "an instrument authorizing another to act as one's agent or attorney." *Black's Law Dictionary* 1055 (West, 5th ed 1979).

6. *Moser*, 589 A2d at 680. The attorney was of the opinion that on the day Mr. Moser signed this document, he had no difficulty understanding what was said about the divorce laws and power of attorney. *Id.* The record also indicated that Mr. Moser was developing an increasing trust in his sister, DeSetta. *Id.*

Moser.⁷ Several days later, DeSetta assisted Mr. Moser to move into the home of Mr. Moser's other sister, Ethel Moser.⁸

On September 16, 1985, DeSetta took Mr. Moser to the bank to meet Mrs. Moser.⁹ Mr. Moser and his wife executed certain documents which transferred their funds, approximately \$115,000, into a checking account bearing the names of Mr. Moser and his sister Ethel Moser.¹⁰ Mr. Moser acted of his own accord.¹¹ The power of attorney was not exercised by DeSetta with respect to this transaction.¹²

On October 10, 1985, Mr. Moser was taken to the hospital emergency room where he was examined by the same physician who had previously diagnosed his cerebral arteriosclerosis.¹³ At the trial, this physician testified that he was of the opinion that Mr. Moser would not have been capable of overseeing his own money or property during the interval between the original diagnosis in March of 1985, and the emergency room visit in October of 1985.¹⁴ Mr. and Mrs. Moser entered into a consent order¹⁵ on November 1, 1985, requiring Mr. Moser, through his attorney-in-fact DeSetta, to pay Mrs. Moser one-half of the balance of the checking account valued as of the time it had been transferred into Mr. Moser and Ethel Moser's names.¹⁶ Subsequent to this action, Mr. Moser

7. *Id.*

8. *Id.* No reason was given for Mr. Moser's move. However, Justice Larsen intimated in his dissent that it appeared more than coincidental that the timing coincided with DeSetta's arrival. *Id.* at 685. This is the home where DeSetta also stayed during her visit. DeSetta was permanently domiciled in the state of Florida. *Id.*

9. *Id.* at 680. This meeting took place at the Gallatin Bank in the presence of bank employees. *Id.*

10. *Id.* There was contradictory evidence in the record with regard to Mrs. Moser's understanding of the personal consequence involved in this transaction. *Id.* at 683. Mr. Moser's mental competency on the date of this transaction becomes the focal point on review by the supreme court. *Id.*

11. *Id.* at 680.

12. *Id.*

13. *Id.* Mr. Moser was taken to the hospital because he was complaining of a stomach problem. *Id.*

14. *Id.* at 681. The physician examined Mr. Moser and based his opinion on the fact that Mr. Moser was disoriented and suffering from memory loss. *Id.* Mr. Moser did not remember his age or the nature of the problem for which he was taken to the hospital. *Id.* The medical opinion was further based on the irreversibility of cerebral arteriosclerosis. *Id.*

15. *Id.* A consent order is entered into by agreement of the parties through a court. The order can only be modified or vacated by an order of the court. 60 CJS Motions & Orders § 62(5) (1969). This consent order was entered into to provide Mrs. Moser with financial support due to Mr. Moser's desire to divorce her. Mr. Moser decided not to pursue a divorce action following a meeting with DeSetta's attorney. *Moser*, 589 A2d at 681.

16. *Moser*, 589 A2d at 681. The balance in the checking account at the time of the September 16, 1985, transfer was approximately \$116,000. *Id.* The amount transferred to

amended his pension benefits and his life insurance policies to designate DeSetta as beneficiary.¹⁷

Mr. Moser died on January 13, 1986.¹⁸ Ownership of the joint account held by Mr. Moser and his sister, Ethel, passed to her by operation of law.¹⁹ Shortly thereafter, the checking account was amended by Ethel, transferring ownership, jointly, to herself and DeSetta.²⁰ In 1986 Mrs. Moser instituted an action in equity,²¹ seeking to set aside the transfer of funds that had occurred at the bank on September 16, 1985.²² The court of common pleas upheld the validity of the transfer of the bank account.²³ The court found no evidence of undue influence,²⁴ nor had Mrs. Moser's claim of fraud²⁵ been established.²⁶ The trial court concluded that Mr. Moser was mentally competent²⁷ on the date that he had executed

Mrs. Moser in satisfaction of the consent decree was \$58,000. An additional provision of the consent order provided that Mrs. Moser would release Mr. Moser from all duties of maintenance and support. Id.

17. Id at 685. The validity of the amendments to these documents were not questioned at trial nor addressed by the court. Id.

18. Id at 681. Mr. Moser died of pneumonia approximately two months after being transferred to a nursing home. Id.

19. Id. Survivorship is the main characteristic of a joint tenancy. This means that the survivor, upon the death of one of the joint tenants, owns the entire property with nothing passing to the decedent's heirs. Ralph E. Boyer, *Survey of the Law of Property* 81 (West, 3d ed 1981).

20. *Moser*, 589 A2d at 685.

21. An equitable action seeks equitable remedy or relief. In most states, court actions in equity have been merged procedurally with civil actions. *Black's Law Dictionary* 482 (West, 5th ed 1979).

22. *Moser*, 589 A2d at 681. By setting aside the transfer, Mrs. Moser hoped to regain an interest in Mr. Moser's funds. Id.

23. *Moser v DeSetta*, No 105 (Pa Com Pl, Fayette Cty 1986).

24. Undue influence is:

Any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forebear an act which he would not do if left to act freely. . . . Misuse of position of confidence or taking advantage of a person's weakness, infirmity, or distress to change that person's actions or decisions. . . .

Black's Law Dictionary 1370 (West, 5th ed 1979).

25. Fraud is:

An intentional perversion of truth for the purpose of inducing another in reliance on it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, which by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. . . .

Black's Law Dictionary 594 (West, 5th ed 1979).

26. *Moser*, 589 A2d at 683.

27. Mental competence is defined as:

The ability to understand the nature and effect of the act in which a person is engaged and the business he or she is transacting. Such a measure of intelligence, un-

the power of attorney, but made no determination as to his mental competency on the date of the bank transaction in question.²⁸ On appeal, the superior court affirmed the lower court's decision.²⁹ Mrs. Moser appealed to the Pennsylvania Supreme Court which heard the appeal by allowance.³⁰

The supreme court stated that the scope of appellate review in a case such as this was quite limited.³¹ The court noted that in matters of equity, appellate review was limited to a determination of whether the trial judge had abused her discretion or committed an error of law.³² An appellate court will not disturb a final decree in equity unless the decree was unsubstantiated by the evidence or demonstrably capricious.³³ The test the supreme court used was not whether the appellate court would have reached the same result as the trial court, but whether, given due consideration of the evidence, a judicial mind could have reasonably reached the same conclusion as the trial judge.³⁴

The court concluded, despite Mrs. Moser's claim to the contrary, that DeSetta did not abuse an alleged confidential relationship

derstanding, memory, and judgment relative to a particular transaction as will enable the person to understand the nature of his act. . . .

Black's Law Dictionary 889 (West, 5th ed 1979).

28. *Moser*, 589 A2d at 684. On appeal, the supreme court concluded that the critical date for determining mental competency was September 16, 1985, the date of the bank transaction. *Id.*

29. *Moser v DeSetta*, 392 Pa Super 660, 564 A2d 267 (1989). This was a memorandum opinion. The appeal to the superior court was permitted pursuant to Judiciary and Judicial Proceeding, 42 Pa Cons Stat Ann § 742 (Purdon 1981).

30. *Moser*, 589 A2d at 679. The appeal to the supreme court was permitted pursuant to Judiciary and Judicial Proceeding, 42 Pa Cons Stat Ann § 501 (Purdon 1981). Appeals by allowance are governed by 42 Pa Cons Stat Ann § 1112 (Purdon 1976). An appeal by allowance is synonymous with allocatur, which is defined as "a word formerly used to denote that a writ or order was allowed. A word denoting the allowance by a master or prothonotary of a bill referred for his consideration. . . ." *Black's Law Dictionary* 75 (West, 6th ed 1990).

31. *Moser*, 589 A2d at 681. Final decrees in equity will not easily be disturbed. *Sack v Feinman*, 489 Pa 152, 413 A2d 1059, 1066 (1980).

32. *Sack*, 413 A2d at 1066. It has long been recognized that the trial judge has the power to shape and render a decree which fits with the equities of the case. *Id.*

33. *Id.*

34. *Moser*, 589 A2d at 681. The court cited *Masciantonio Will*, 392 Pa 362, 141 A2d 362, 365 (1958), in which the supreme court reversed a trial court's equitable decision, stating that the trial court erred by misapplication of a well-established legal principle. *Masciantonio*, 141 A2d at 375. In *Masciantonio*, the trial court refused to give due consideration to the testator's competence immediately prior to and subsequent to the execution of his will. *Id.* at 373. The testimony of the two physicians who treated the decedent within hours of the execution of his will was not given adequate weight. *Id.* at 372. The trial court failed to follow the well-recognized rule that attending physician's testimony be given weight as factual evidence, not solely as lightly weighted opinion testimony. *Id.* at 375.

with Mr. Moser by receiving from him a substantial benefit through undue influence.³⁵ DeSetta's receipt of an interest in the bank account was held not to be the result of undue influence.³⁶ DeSetta did not obtain any interest in Mr. Moser's bank account until after Mr. Moser's death, nor was there any evidence in the record that DeSetta acted pursuant to any understanding that the funds in the account would be transferred to her after Mr. Moser's death.³⁷ The court further stated that no evidence of undue influence was shown and that only mere speculation could lead to a finding of undue influence.³⁸

Mrs. Moser further claimed that she had been fraudulently induced by DeSetta to participate in the transfer of funds to Mr. Moser and Ethel Moser.³⁹ The court stated that this claim was also unsubstantiated.⁴⁰ The trial court correctly ruled that fraud had not been established.⁴¹ Based upon earlier cases, the court set forth the necessary elements for proof of fraud.⁴² In addition to the more apparent outward manifestations of direct falsehoods by speech or innuendo, citing earlier case law the court held that fraud can also consist of concealment of fact.⁴³ Continuing, the court referred to the trial court record of Mrs. Moser's own testimony, finding there was no indication that Mrs. Moser might have been deceived or misled.⁴⁴

35. *Moser*, 589 A2d at 681.

36. *Id.*

37. *Id.* Justice Larsen's dissent in this case disagrees with this finding. He bases his dissent, however, on other factors. *Id.* at 684-85.

38. *Id.* at 681.

39. *Id.* at 682. The court's opinion includes the partial testimony of Mrs. Moser and DeSetta. DeSetta testified, "The people at the bank explained to [Mrs. Moser], that she is signing over her share. . . . I even said to her, Ann, you don't have to do it." Mrs. Moser's convoluted testimony indicated a degree of confusion. *Id.*

40. *Id.* The court cited *Frown v Blank*, 493 Pa 137, 425 A2d 412, 415 (1981), and stated: "It is well established that fraud consists of anything calculated to deceive, which by a single act or combination or by suppression of truth or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth or look or gesture." *Moser*, 589 A2d at 682.

41. *Moser*, 589 A2d at 682.

42. *Id.* The court cited *Thomas v Seaman*, 451 Pa 347, 304 A2d 134, 137 (1973), in which the supreme court held that "fraud is composed of a misrepresentation fraudulently uttered with the intent to induce the action undertaken in reliance upon it, to the damage of its victim." *Moser*, 589 A2d at 682.

43. *Moser*, 589 A2d at 682. In citing *Commonwealth v Monumental Properties, Inc.*, 459 Pa 450, 329 A2d 812, 829 (1974), the court determined that the concealment of a material fact can constitute a culpable misrepresentation to the same extent as an intentional false statement. *Moser*, 589 A2d at 682.

44. *Moser*, 589 A2d at 682. The court concluded that Mrs. Moser may have been

On review, the court stated that, at most, Mrs. Moser may not have entirely understood the full effect of the transaction at the bank on September 16, 1985.⁴⁵ Evidence indicated that DeSetta had fully explained the transaction to Mrs. Moser.⁴⁶ The court noted that a party alleging fraud must bear the burden of proving fraud by clear and convincing evidence.⁴⁷ The court concluded that Mrs. Moser had failed to meet her burden of proof; therefore, the claim of fraud was unsubstantiated.⁴⁸

Mrs. Moser further alleged that her husband had lacked the mental capacity to make a gift of his savings to Ethel Moser on September 16, 1985.⁴⁹ Mrs. Moser alleged that the trial court erred in not determining whether Mr. Moser was mentally competent on the date he transferred the gift.⁵⁰ The trial court did, however, conclude that Mr. Moser was mentally competent on the date that he executed the power of attorney, August 30, 1985.⁵¹ On review, the Pennsylvania Supreme Court, however, declared that the trial court had made no determination concerning Mr. Moser's competency on the critical date of the transaction at the bank.⁵² This

confused. *Id.* Confusion on her part, however, was determined not to be fraudulently induced. *Id.*

45. *Id.*

46. *Id.* See note 39 and accompanying text for direct testimony of DeSetta indicating a degree of explanation to Mrs. Moser by the bank and by DeSetta. *Id.*

47. *Id.* The court cited *Estate of Bosico*, 488 Pa 274, 412 A2d 505, 506 (1980). *Id.* Black's Law Dictionary defines "clear and convincing" proof as "proof beyond a reasonable doubt, more than a preponderance but less than is required in a criminal case. . . . Proof which should leave no reasonable doubt in the mind of the trier of facts concerning the truth of the matters in issue." *Black's Law Dictionary* 227 (West, 5th 1979).

48. *Moser*, 589 A2d at 683. The court stated that it would be "unfortunate" if Mrs. Moser signed away her interest in her life-savings without full comprehension of the consequences attached to her actions. *Id.*

49. *Id.* The court relied on *Sobel v Sobel*, 435 Pa 80, 254 A2d 649, 651 (1969), where the court declared:

Where mental competency is at issue, the real question is the condition of the person at the very time he executed the instrument or made the gift in question [A] person's mental capacity is best determined by his spoken words and his conduct, and . . . the testimony of persons who observed such conduct on the date in question out-ranks testimony as to observation made prior to and subsequent to that date. *Sobel*, 254 A2d at 651.

50. *Moser*, 589 A2d at 683. The trial court focused solely on the date Mr. Moser signed the power of attorney when determining the competency issue. *Id.* The trial court gave considerable weight to the testimony of the attorney who assisted Mr. Moser in executing the power of attorney. *Id.* The attorney indicated that Mr. Moser appeared lucid and understanding on September 16, 1985. *Id.* The trial court gave less weight to the physician's testimony considering the physician examined Mr. Moser five months before and six weeks after the power of attorney was executed. *Id.*

51. *Id.*

52. *Id.* at 684. The court concluded that, although the validity of the power of attor-

transaction was contested by Mrs. Moser.⁵³ Because Mr. Moser was acting on his own behalf that day and not using his power of attorney, the supreme court remanded⁵⁴ the case to the court of common pleas to resolve the crucial factual issue of competency on the day in question.⁵⁵

In conclusion, the court agreed with the lower courts' opinions to the extent that Mrs. Moser was not entitled to invalidate the bank account transfer on the basis of undue influence or fraud.⁵⁶ It was determined, however, that the issue of Mr. Moser's competency on September 16, 1985, had yet to be resolved by the trial court.⁵⁷

Justice Larsen filed what he referred to as a "vigorous dissent."⁵⁸ The dissent stated that the issue raised on appeal was whether a valid gift had been made by Mr. Moser when he transferred his and his wife's life savings into a joint savings account bearing his and Ethel Moser's names.⁵⁹ Justice Larsen concluded that the evidence showed that Mr. Moser had been subjected to undue influence by DeSetta who stood in a confidential relationship⁶⁰ with

ney may have been necessary to resolve Mrs. Moser's other claims, it was not determinative of the savings account transfer because Mr. Moser was acting in his own behalf with regard to that transaction. Id.

53. Id at 683.

54. Black's Law Dictionary defines remand as: "The sending back by the appellate court of the cause back to the same court out of which it came, for purpose of having some further action taken on it there." *Black's Law Dictionary* 1162 (West, 5th ed 1979).

55. *Moser*, 589 A2d at 684.

56. Id. See notes 24-25 for definitions of undue influence and fraud.

57. *Moser*, 589 A2d at 684. Justice Papadakos concurred in the result, but filed no opinion. Id. On remand the trial court held that competency on the date of the transfer is to be presumed. The burden of proving otherwise is upon the person who seeks to invalidate the gift. If there is evidence showing the lack of mental competency for periods of time before and after the time of the transaction, then the burden shifts to the person who alleges that the transfer occurred when the donor was mentally competent. Mrs. Moser presented competent evidence from Mr. Moser's physician to establish that Mr. Moser was not mentally competent at times surrounding the transaction. Once this is established, the burden of proof shifts to DeSetta, the donee. The trial court held that DeSetta failed to meet this shifted burden of proof. Mr. Moser, therefore, was determined not to have sufficient mental capacity on the date of the transaction. The transfer of the bank account to DeSetta was not valid. *Moser*, No 105 (Pa Com Pl, Fayette Cty 1991).

58. *Moser*, 589 A2d at 684 (Larsen dissenting).

59. Id at 680. The elements for a valid gift of personal property are that: there must be a donative intent, delivery and acceptance. Mr. Moser's donative intent is questioned due to the unresolved issue of his mental competence on the date he made the transfer. Boyer, *Survey of the Law of Property* at 710 (cited in note 19).

60. *Moser*, 589 A2d at 684. Black's Law Dictionary describes confidential relation as: A fiduciary relation. It is a peculiar relationship which exists between . . . appointor and appointee under powers . . . In these and like cases, the law, in order to prevent undue advantage from the unlimited confidence or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between

him on the date of the questioned transaction. Therefore, the transaction was void.⁶¹ The dissent restated the established doctrine that the burden of proof normally rests upon the party asserting that the transfer of property was not a gift.⁶² Justice Larsen concluded that the general principle would not apply where the parties had a relationship to each other, or had a tainted interest in connection with the transaction.⁶³ Where a prior relationship between the parties was established, the recipient of the alleged gift was compelled to show that the gift was a free, voluntary, and intelligent act of the donor.⁶⁴ This would effectively shift the burden of proof in cases where a confidential relationship was proven to have existed.⁶⁵

The dissent referred to the record to determine that DeSetta did in fact have a confidential relationship with Mr. Moser, thus requiring a shift of the burden of proof to DeSetta.⁶⁶ Justice Larsen found evidence of a confidential relationship based upon the presence of several factors.⁶⁷ Foremost was the fact that DeSetta took

the parties.

Black's Law Dictionary 270 (West, 5th ed 1979).

61. *Moser*, 589 A2d at 684. The power of attorney was given by Mr. Moser to DeSetta on August 30, 1985. The bank transaction in question occurred September 16, 1985. *Id.* Due to facts later developed in the dissent, the creation of the power of attorney prior to the transaction becomes critical.

62. *Id.* The general rule in Pennsylvania places the burden of proof that a transfer of property was not a valid gift upon the party so asserting. The burden of proof must be met by a production of evidence of a clear, strong and compelling nature. *Dzierski Estate*, 449 Pa 285, 296 A2d 716, 718 (1972).

63. *Moser*, 589 A2d at 684. If circumstances are such that it is clear that the parties did not deal on equal terms, the burden of proof will shift to the donee. If an overmastering of influence, or the other party demonstrated weakness or justifiable dependence or trust, a burden shift would result. *Dzierski*, 296 A2d at 718.

64. *Moser*, 589 A2d at 685. The court determined that to establish a valid gift, the evidence must come from a competent witness and also be clear, direct, precise, and convincing evidence. *Donsavage Estate*, 420 Pa 587, 218 A2d 112, 118 (1985). For a discussion of the dissenting opinion's consideration of DeSetta's burden, see notes 59-62 and accompanying text.

65. *Moser*, 589 A2d at 685. See notes 62-63 and accompanying text.

66. *Moser*, 589 A2d at 685.

67. *Id.* at 684-85. Justice Larsen summarized DeSetta's machinations: When DeSetta returned to Pennsylvania from Florida she immediately assumed control of Mr. Moser's life and his financial affairs. DeSetta took Mr. Moser to her attorney to sign a power of attorney that appointed DeSetta as his attorney-in-fact. DeSetta directed Mr. Moser to buy treasury bills with the life-savings that he and his wife had amassed during thirty-seven years of marriage. DeSetta displaced Mr. Moser from his home where he had lived with his wife for their thirty-seven years together. Mr. Moser was moved into the family home of Ethel Moser and DeSetta. DeSetta arranged for the treasury bills to be transferred into a joint savings account bearing the names of Mr. Moser and their sister, Ethel Moser, for whom DeSetta also served as attorney-in-fact. When Mr. Moser became too ill to be cared for in

Mr. Moser to her own attorney to have him sign a power of attorney appointing her attorney-in-fact for Mr. Moser.⁶⁸ The fact that DeSetta was attorney-in-fact for Mr. Moser and Ethel Moser simultaneously was thought by the dissent to be evidence that DeSetta had received a benefit from the transfer.⁶⁹ Justice Larsen concluded that DeSetta assumed and exercised absolute and total control over Mr. Moser's personal and financial interests.⁷⁰ DeSetta, therefore, had the burden of proving that the gift was a free, voluntary, and intelligent act of Mr. Moser.⁷¹

The burden of proof rested upon DeSetta and she failed to present any evidence as to Mr. Moser's competency to make a gift on the transfer date.⁷² DeSetta further failed to prove that Mr. Moser was free from the exercise of undue influence at the time he made the gift to her in September of 1985.⁷³ Justice Larsen's dissent, therefore, concluded that the gift was not a valid transfer.⁷⁴

The concept of "gift" has long been an accepted part of Western culture and law.⁷⁵ At the beginning of the common law, protection of a purported donor's interest in his property was strictly upheld; inquiry into the transaction was maintained to ensure its "gift" nature.⁷⁶ This common law concern with one's property interest was introduced to the English legal system through its Roman legal

her home, DeSetta removed him to a nursing home. DeSetta arranged for Mr. Moser to change the beneficiary of his pension plan and life insurance from Mrs. Moser to DeSetta. Immediately after Mr. Moser passed away, DeSetta substituted her name for his on the joint savings account. *Id.*

68. *Id.* at 685.

69. *Id.*

70. *Id.* See note 67 and accompanying text.

71. *Moser*, 589 A2d at 685; *Donsavage Estate*, 218 A2d at 112-18.

72. *Moser*, 589 A2d at 685; *Donsavage Estate*, 218 A2d at 118.

73. *Moser*, 589 A2d at 685. In his dissent, Justice Larsen also found that the facts clearly established that DeSetta concealed material facts from Mrs. Moser amounting to fraud. Justice Larsen continued by determining that the facts showed that Mrs. Moser was not aware that she was transferring her interest in the couple's life-savings to Ethel Moser until after the fact. In light of Mrs. Moser's advanced age, lack of financial savvy, and confusion, it was DeSetta's responsibility to explain to Mrs. Moser the transaction and its consequences in a full and complete manner. The dissent declared that DeSetta failed in that responsibility. *Id.*

74. *Id.* See note 59 for the elements of a valid gift.

75. W. F. Finlason, *Reeves' History of English Law* 86 (Murphy, 1879).

76. *Id.* In the Thirteenth Century, during the reign of Henry III, a writ was required mandating that the sheriff make an inquiry as to the capacity of the donor and donee to determine if they had been capable of managing their affairs. Another writ was required to validate the donor's seal on the charter. The law at this time also provided that all gifts should be made of free will and of the donor's own accord. If the donor was coerced or there existed undue compulsion, the gift was revoked. *Id.*

heritage.⁷⁷

Blackstone, in his influential commentaries, defined the parameters from which the claim of a gift was to be drawn.⁷⁸ To be a valid gift, the donor must have relinquished possession to the donee.⁷⁹ Blackstone further stated that a gift was not properly made where it was made to defraud creditors, or the donor was mentally incapacitated, or the donor was taken in by false pretenses to make the gift.⁸⁰ Protection of a transferor's interest was, therefore, strictly upheld.⁸¹

The history of the law as it pertains to gifts has been stable throughout the centuries.⁸² The courts have been quick and firm in their protection of the interests of transferors who have allegedly become donors.⁸³ During the infancy of Pennsylvania as a state of the Union, case law was decided which indicated that Pennsylvania would follow the common law tradition.⁸⁴

There are specific areas of concern expressed by the Pennsylvania Supreme Court when considering inter vivos gifts.⁸⁵ The court has focused primarily upon three factors: (1) the mental compe-

77. Sir William Holdsworth, II *A History of English Law* 204-05 (Methuen & Co. Ltd., 1st ed 1903, reprinted 1971).

78. William D. Lewis, 1 *Lewis's Blackstone* 895-97 (Bisel, 1922).

79. Lewis, *Lewis's Blackstone* at 896 (cited in note 78).

80. *Id.* at 896-97.

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately . . . and it is not in the donor's power to retract it, though he did it without any consideration or recompense; unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretenses, ebriety, or surprise.

Id.

81. *Id.*

82. *Greenfield's Estate*, 14 Pa St 489, 506-07 (1850). Where a gift is involved, the rule is more stringent than if the transfer were by a contract or other arm's length transaction. This area of law has been well-considered and well-settled. *Id.*

83. *Appeal of Darlington*, 147 Pa 624, 23 A 1046 (1892). An eighty-four year old bachelor moved into his nephew's home. The bachelor signed a note to his nephew for \$7,000 a few months after having moved in with him. The elderly bachelor died thirteen months later. The court held that the note was void based on constructive fraud springing from the confidential relationship between the bachelor and his nephew. The court stated: "To guard against the strong influences which these connections [elderly and caretaker] are so apt to originate, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void. . . ." *Darlington*, 23 A at 1048.

84. *Wistar's Appeal*, 54 Pa St 60 (1867); *Greenfield's Estate*, 14 Pa St 489 (1850); *Appeal of Darlington*, 23 A 1046 (1892).

85. An inter vivos gift has three requirements: (1) delivery, adequate to dispossess the donor, (2) intent on the part of the donor to make a gift, and (3) the donee must accept. Ray A. Brown, *The Law of Personal Property* 77-78 (Callaghan, 3d ed 1955).

tency of the donor at the time the gift was made, (2) whether a confidential relationship existed between the donor and the donee, and (3) who has the burden of proof.⁸⁶ This note will examine the approach the court has taken to each of these areas. A survey of Pennsylvania's case law reveals a considerably stable approach to the issue of mental competency. *Landis v Landis*⁸⁷ was one of the first opportunities which the Pennsylvania Supreme Court had to develop law on donative transfers.⁸⁸ The supreme court stated that once mental incapacity has been established and proved, the burden of proof shifts and those wishing to uphold the transaction must prove the sufficiency of mental capacity of the transferor at the time of the transaction in question.⁸⁹ This position was consistent with the English common law, having its roots in Roman Law.⁹⁰ In 1870, the Pennsylvania Supreme Court, in *Hardin v Hays*,⁹¹ indicated that once a "general imbecility of mind" was proved, the burden shifts to the party that had received the purported gift.⁹² The receiving party must prove that the transferor executed the transaction during a period in which he was lucid and that he also was capable of understanding the transaction.⁹³ Building upon the earlier decisions, the court subsequently held that having failing health and failing mental powers, coupled with a change in personal financial philosophy, is adequate evidence to conclude that the donor was mentally incompetent to make a gift transaction.⁹⁴ In *Stepp v Frampton*,⁹⁵ the supreme court upheld a

86. See *Landis v Landis*, 1 Grant Cas 248 (1885); *Hardin v Hayes*, 9 Pa 151 (1848); *Stepp v Frampton*, 179 Pa 284, 36 A 177 (1897); *In re Meyers*, 410 Pa 455, 189 A2d 852 (1963); *Sobel v Sobel*, 435 Pa 80, 254 A2d 649 (1969); *Girsh Trust*, 410 Pa 455, 189 A2d 852 (1963); *In re Estate of Clark*, 461 Pa 52, 334 A2d 628 (1975).

87. 1 Grant Cas 248 (1855).

88. *Landis*, 1 Grant Cas at 248.

89. *Id.*

90. Holdsworth, II *A History of English Law* at 204-05 (cited in note 77).

91. 9 Pa 151, 162 (1848).

92. *Hardin*, 9 Pa at 162.

93. *Id.*

94. *Stepp v Frampton*, 179 Pa 284, 36 A 177, 178-79 (1897). In this case a seventy-five year old man, who had been frugal throughout his years, began speculating wildly in the oil business by giving money and land to a friend for that purpose. The court stated:

The man who during his long life, when his mind was strong, shunned such operations, now, when weakened by disease and age, and leaning on one in whom he confided, made an absurdly disastrous bargain. All frauds perpetrated on the weak and confiding are successful only because they are susceptible to influences which the ordinarily strong and self-reliant resist.

Stepp, 36 A at 179.

95. 179 Pa 284, 36 A 177 (1897).

lower court decision which had canceled the transfer of land based, in part, on the donor's lack of mental competency.⁹⁶ The court determined that once evidence had been produced by the donor or his representative, which showed mental and physical infirmity and a confidential relationship between the donor and donee, the burden of proof then fell upon the donee.⁹⁷ The donee was then required to show that the transaction had been a voluntary act of the donor.⁹⁸ A further element which had to be proved by the donee was that the donor fully understood the ramifications of his actions.⁹⁹ If the donee failed in meeting his burden, the transaction would fail.¹⁰⁰

Other early cases indicated that Pennsylvania would protect a mentally incompetent person from disposing of his possessions without having a full understanding of the transaction.¹⁰¹ The transaction was also required to be a voluntary act of the transferor, thus protecting him from undue influence.¹⁰² This early protection was manifested primarily by imposing the burden of proof on the beneficiary of the transaction.¹⁰³ The beneficiary was forced to prove the proper mental capacity of the donor at the time of the gift.¹⁰⁴

The treatment of proof of mental capacity under Pennsylvania law remained quite stable as indicated by the 1963 supreme court case *In re Meyers*.¹⁰⁵ *Meyers* displays the consistency mental capacity law has maintained by stating that the initial burden of proof is on the donor or his representative to show that the donor lacked mental capacity in a general sense.¹⁰⁶ This practice was designed to overcome the presumption of mental competency of a

96. *Stepp*, 36 A at 179.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See *In re Meyers*, 410 Pa 455, 189 A2d 852, 859 (1963); *Hardin*, 9 Pa 151 (1848); *Landis*, 1 Grant Cas 248 (1885); *Henes v McGovern*, 317 Pa 302, 176 A 503 (1935); *Stepp*, 36 A 177 (1897).

102. *Stepp*, 36 A at 178.

103. *Id.*; *Harden*, 9 Pa 151 (1848); *Landis*, 1 Grant Cas 248 (1885).

104. *Stepp*, 36 A 177 (1897); *Harden*, 9 Pa 151 (1848); *Landis*, 1 Grant Cas 248 (1885).

105. 410 Pa 455, 189 A2d 852 (1963).

106. *Meyers*, 189 A2d at 858. In this case the donees were able to prove that the donor had been confined to mental institutions for twenty-one and one-half months out of thirty-two and one-half months prior to the transfer. The donees further showed that the donor was hospitalized in a mental institution for four years and three months beginning less than six months after the transfer was effectuated. This general showing transferred the burden of proof to the donor. *Id.*

person who has made a transfer.¹⁰⁷ Once the donor has proven lack of mental competence, the burden of proof shifts to the donee who must show, by clear and convincing evidence,¹⁰⁸ that the donor had been mentally competent at the time of the transaction.¹⁰⁹

The supreme court further developed mental capacity law in *Sobel v Sobel*.¹¹⁰ In *Sobel*, the Supreme Court of Pennsylvania upheld the lower court decision which had denied a father's attempt to revoke inter vivos gifts to his daughters.¹¹¹ The supreme court again held that mental competence at the time of the transaction was determinative.¹¹² Finding that the burden of proof was correctly placed upon the father first, the court held that he had failed to overcome the presumption of competency.¹¹³ The court further stated that even if the father had met his burden, the daughters had effectively rebutted his mental competency claim.¹¹⁴ The court relied heavily on the testimony of the attorney who had been present at the time of the transfer.¹¹⁵

The lone substantial development from the earliest Pennsylvania cases to the present is the specifically enumerated presumption in *Patterson v Snider*¹¹⁶ that a donor is mentally competent.¹¹⁷ Although this standard may have been reasonably inferred from the earlier cases, it was not until *Patterson* that the presumption had

107. *Id.*

108. See note 47 for a definition of clear and convincing evidence.

109. *Meyers*, 189 A2d at 858.

110. 435 Pa 80, 254 A2d 649 (1969).

111. *Sobel*, 254 A2d at 650. Sobel attempted to set aside gifts he had made to his three minor daughters from whose mother he was divorced. Sobel delivered three checks to an attorney and requested the attorney to set up irrevocable trusts for his daughters. The attorney complied with Sobel's wishes. *Id.*

112. *Id.* at 651. The court cited *Girsh Trust*, 410 Pa 455, 189 A2d 852 (1963): "Where mental competency is at issue, the real question is the condition of the person at the very time he executed the instrument or made the gift in question." *Sobel*, 254 A2d at 651.

113. *Sobel*, 254 A2d at 651. See also *Meyers*, 189 A2d at 858.

114. *Sobel*, 254 A2d at 651.

115. *Id.* The *Sobel* court determined that the mental capacity of a donor at the time of the transfer was more critical than periods of diminished capacity prior to and subsequent to the time of the transfer. The court relied heavily on testimony of the attorney who was present at the transfer, to the detriment of Sobel's psychiatrist's testimony. The psychiatrist did not see Sobel on the day of the transfer. The court also determined the psychiatrist's testimony to be equivocal and unconvincing with regard to Sobel's lack of capacity during the periods surrounding the transactions. Sobel was not shown to be incapable of operating his substantial business interests and no evidence was produced to overcome the presumption of his mental competence. *Id.*

116. 305 Pa 272, 157 A 612 (1931).

117. *Patterson*, 157 A at 613.

been definitively stated.¹¹⁸ The position enunciated in *Patterson* effectively placed the burden of proof on the donor to produce general evidence sufficient to overcome the presumption of mental competence.¹¹⁹ Once established, the burden shifted to the donee to show by clear and convincing evidence that the donor was mentally competent at the time of the transfer.¹²⁰ It appears, therefore, that the donor or his representative was not required to prove the donor's lack of mental competency at the time of the transfer.¹²¹ The donor need only produce evidence sufficient to indicate that he had been mentally incompetent during periods prior to, and/or subsequent to, the transaction.¹²² It is then the donee's burden to show competency at the specific time of the transfer.¹²³

The second focus of analysis regarding a donor's capacity to make a valid gift centered around the existence and impact of a confidential relationship.¹²⁴ Pennsylvania has a long history of case law considering confidential relationships and their impact on transactions between the parties so situated.¹²⁵ In *Worrall's Appeal*,¹²⁶ the Supreme Court of Pennsylvania was called upon to decide the validity of a gift from a recently of-age, adult orphan to his nurse of many years.¹²⁷ It was determined in *Worrall* that the nurse had dominion¹²⁸ over the young man akin to that of a mother over her son.¹²⁹ The court explained that where dominion

118. *Id.*

119. *Id.* *Meyers*, 189 A2d at 858.

120. *Meyers*, 189 A2d at 858.

121. *Sobel*, 254 A2d at 651.

122. *Id.*

123. *Id.*

124. See note 60 and accompanying text.

125. See *Worrall's Appeal*, 1 A 380 (1885); *Darlington*, 147 Pa 624, 23 A 1046 (1892); *Henes v McGovern*, 317 Pa 302, 176 A 503 (1935); *In re Estate of Clark*, 461 Pa 52, 334 A2d 628 (1975); *Stepp*, 36 A at 179 ("But when the relations existing between the contracting parties appear to be of such a character as to render it certain that they do not deal on equal terms, but that on the one side . . . from overmastering influence, or on the other side, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted, and the transaction is presumed void; and it is incumbent upon the party in whom such confidence is reposed to show affirmatively that no deception was used, and that all was fair, open, voluntary, and well understood. This principle is of very general application, . . . and the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise").

126. 1 A 380 (1885).

127. *Worrall's Appeal*, 1 A at 380.

128. Dominion is defined as "a supremacy in determining and directing the actions of others or in governing politically, socially, or personally." *Webster's Third New International Dictionary* 672 (Merriam-Webster, 1986).

129. In *Worrall's Appeal*, a twenty-one year old young man gave his nurse real estate

is found to exist, there is a presumption against the validity of a gift between the parties and if the exercised dominion is complete, the law would prohibit a gift during the continuance of dominion.¹³⁰

The court in *Worrall* further explained the concept of undue influence in the garnering of a gift.¹³¹ The case reinforced the principle that the courts presumed undue influence where a confidential relationship existed.¹³² The burden of proof was then placed upon the person claiming the gift.¹³³

An influential early Pennsylvania Supreme Court case, *Boyd v Boyd*,¹³⁴ established a six-pronged test to determine if sufficient evidence existed to give rise to a presumption of undue influence by the donee on the donor.¹³⁵ The test, which was used for almost eighty years, required that the evidence demonstrate: (1) bodily infirmity, (2) the donor's substantially weakened mental capacity, (3) that the donee was a stranger to the blood of the donor, (4) that the donee was standing in a confidential relationship with the donor, and (5) the donee was benefitted by a will (6) which he had

worth \$15,000 for the nominal consideration of \$15. The nurse had cared for the young man since his mother had died when he was five years old. The boy's father died when the boy turned nineteen and the nurse was thereafter his closest "family member." The lad had always been quite sickly and did not anticipate a long life. When the young man reached the age of twenty-one he wanted to compensate his nurse for all the years she had been in his service. He consulted the executor of his father's estate who approved of the gift. The trial court found that the young man and nurse stood in relation of a parent and child, thus creating a prima facie case of constructive fraud or undue influence. The prima facie undue influence placed the burden of proof on the donee to show that the transaction was fair and well thought out. *Worrall's Appeal*, 1 A at 381-85.

130. *Id.* at 388. Confidential relationships, with respect to dominion, have been found to exist in the relation of parent and child when the child has recently reached majority, between the child and parent when the parent is subject to the will of the child due to old age or feebleness, and to various similar relationships like uncle and niece. *Id.*

131. *Id.* at 386. In *Worrall's Appeal*, the court concluded that the nurse failed to produce sufficient evidence to show that the transaction was fair and that the real estate was transferred without benefit of undue influence. *Id.*

132. *Id.*

133. *Id.* at 386-87. In an informational summary of citations, the *Worrall's Appeal* court stated that, "As a general rule the burden of proof is on the person alleging the undue influence. . . . It may be shown by circumstantial evidence, and the relation of the parties." *Id.* at 387. Direct proof of undue influence is not required; it may be shown by circumstantial evidence. Once a confidential relationship is shown, however, undue influence is presumed and the burden is placed upon the donee. *Id.*

134. 66 Pa 283 (1870).

135. *Boyd*, 66 Pa at 293-94. See also *Wilson v Mitchell*, 101 Pa 495 (1882). The six-pronged test is not specifically enumerated. However, it can be deduced through the cases that the courts are using this type of test. *Id.*

been instrumental in writing.¹³⁶

Simultaneously with the *Boyd* test, a three-pronged test designed to demonstrate the existence of a confidential relationship was affirmatively stated in *Cuthbertson's Appeal*.¹³⁷ The *Cuthbertson* test was considered to be more attuned to the times than the six-pronged *Boyd* test.¹³⁸ A confidential relationship was of a degree substantial enough to be considered unduly influential if: (1) a person stands in a confidential relationship and (2) receives the bulk of the donor's property (3) from a donor of weakened intellect.¹³⁹ The burden of proof would then be placed upon the donee who occupies the confidential relation to prove affirmatively the absence of undue influence."¹⁴⁰

In 1975, the Pennsylvania Supreme Court, in *In re Estate of Clark*,¹⁴¹ outlined the test that would be utilized under modern Pennsylvania law.¹⁴² The court also specified the presumptions which would be created by fulfillment of the test factors.¹⁴³ Pennsylvania was to favor the three-pronged test of *Cuthbertson*.¹⁴⁴ The consequence of establishing the test factors would be to shift the burden of proof to the donee to affirmatively disprove undue influence.¹⁴⁵ Once the donor has established the presumption and shifted the burden to the donee, the donee is compelled to produce clear and convincing evidence which affirmatively demonstrates the absence of undue influence.¹⁴⁶

136. *Clark*, 334 A2d at 632. Although the *Boyd* test is designed to determine undue influence as it pertains to wills, subsequent courts have used the test to determine whether undue influence was a factor in other types of transactions including gifts. *Id.*

137. 97 Pa 163 (1881).

138. *Clark*, 334 A2d at 632.

139. *Id.*

140. *Id.*

141. 461 Pa 52, 334 A2d 628 (1975).

142. *Id.* Mrs. Clark, seventy-seven years old, was diagnosed as suffering from cerebral arteriosclerosis ten months prior to effecting the transfer of stocks valued at \$21,500 to a friend. The *Clark* court invalidated the gift, basing its decision on undue influence rather than lack of mental competence, stating:

Weakened mentality . . . need not amount to testamentary incapacity. Undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind. The 'fruits' of the undue influence may not appear until long after the weakened intellect has been played upon. In other words, the particular mental condition of the testatrix on the date she executed the will is not as significant when reflecting upon undue influence as it is when reflecting upon testamentary capacity.

Id. at 633-34.

143. *Id.* at 632.

144. *Id.*

145. *Id.*

146. *Id.*

In *Clark*, the supreme court has clearly and decisively set forth the standard to be used in Pennsylvania for cases dealing with confidential relationships and the corresponding consequence of undue influence.¹⁴⁷ Pennsylvania now requires a showing of a confidential relationship between the donor and the donee coupled with the weakened intellect of the donor.¹⁴⁸ There is one additional requirement for a donor to prove his prima facie case of undue influence: the donor must show that the donee substantially benefitted from the transaction.¹⁴⁹

When viewed in conjunction with established Pennsylvania case law, the *Moser* decision further entrenched a long-standing tradition in Pennsylvania case law. The earlier cases of *Meyers* and *Sobel* had established the initial principle that one who had made an inter vivos gift was mentally competent to do so. *Moser* maintained the consistency this area of law had embraced by following earlier decisions which held that the burden was initially placed upon the donor. The donor or his representative was required to prove by clear and convincing evidence that the donor was not mentally competent either at the time of the transaction, or during periods prior to and/or subsequent to the transaction.¹⁵⁰ Once this had been established by the donor, the burden shifted to the donee to prove by clear and convincing evidence that the donor was mentally competent at the time of the transfer.¹⁵¹ *Moser* does not attack this principle. By allowing the donor to shift the burden to the donee, the supreme court reinforced centuries of case law that had vigorously protected the property rights of a donor.

Although the majority's decision in *Moser* did not specifically delineate either the six-pronged test or the three-pronged test, the majority used an integral factor of both tests to determine that DeSetta was not in a confidential relationship with Mr. Moser. The majority, therefore, concluded that there was no valid basis for a claim of undue influence.¹⁵² This determination was based upon two factors. First, DeSetta did not obtain an interest in Mr. Moser's bank account until after his death.¹⁵³ Second, there was no evidence presented that she had acted pursuant to a belief that the

147. *Id.* at 631-34.

148. *Id.* at 632.

149. *Id.*

150. *Worrall's Appeal*, 1 A at 386-87. See also note 27.

151. *Worrall's Appeal*, 1 A at 386-87. See also *Clark*, 334 A2d at 632.

152. *Moser*, 589 A2d at 681.

153. *Id.*

funds would be transferred to her after Mr. Moser's death.¹⁵⁴ The majority placed great importance upon the fact that DeSetta did not directly benefit from the transfer of Mr. Moser's savings account to Ethel Moser. Justice Larsen's dissent emphasized all of the surrounding factors and coupled those with DeSetta's indirect access to the savings to determine that a confidential relationship had existed. By so concluding, Justice Larsen would have held that the transfer to Ethel Moser was invalid because DeSetta, who had an interest in the transfer, maintained a confidential relationship with Mr. Moser, the donor.¹⁵⁵ This conclusion would have, in effect, returned the funds to Mrs. Moser.

Justice Larsen's dissent in *Moser* focused upon what he determined to have been a confidential relationship between Mr. Moser and DeSetta, his sister.¹⁵⁶ Justice Larsen believed that this confidential relationship resulted in DeSetta having exerted undue influence on Mr. Moser.¹⁵⁷ Justice Larsen did not directly use the six-pronged test of *Boyd* or the three-pronged test of *Cuthbertson*. He did, however, base his decision upon controlling factors of those tests: (1) DeSetta took Mr. Moser to her own attorney to have Mr. Moser appoint her as his attorney-in-fact, (2) Mr. Moser and his sister, Ethel Moser, had both appointed DeSetta as their attorney-in-fact, (3) Mr. Moser transferred his savings to a joint account with Ethel, allowing DeSetta indirect access to the account, thus benefitting DeSetta, (4) There was unrebutted evidence that Mr. Moser had a weakened mental capacity at the time surrounding the transfer, and (5) DeSetta assumed and exercised absolute and total control over Mr. Moser's personal and financial interests.¹⁵⁸ Once Justice Larsen reached the conclusion that a confidential relationship had existed, he followed the well-established precedent of earlier Pennsylvania cases by shifting the burden of proof to the donee, DeSetta. DeSetta was then burdened with proving that the gift was a "free, voluntary and intelligent act" of Mr. Moser.¹⁵⁹

Although the majority decision, focusing on mental competency, was sound, it does not dispose of the conflict as expeditiously as does the dissenting opinion. The majority opted for the more cer-

154. *Id.*

155. *Id.* at 685.

156. *Id.*

157. *Id.*

158. *Id.* at 684-85. For a discussion of the three- and six-pronged tests, see notes 134-40 and accompanying text.

159. *Moser*, 589 A2d at 685.

tain standard of mental competency on the date of the transaction. Justice Larsen, in his dissent, assumed a somewhat more activist role and opted for the less-defined test of confidential relationship and undue influence. The failure of the majority to have concluded that a confidential relationship existed appears to be unfounded, or at least too narrowly focused, when compared to the overwhelming circumstances of the *Moser* case.

Kelly Cottrill

