

2011 IL App (2d) 100963-U
No. 2-10-0963
Order filed September 8, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> ESTATE OF CALVIN C. HEIDENREICH, Deceased)	Appeal from the Circuit Court of Winnebago County.
)	
)	No. 06—P—323
)	
(James C. Heidenreich, Petitioner-Appellant, v. Mary Sandona and Janice Rickelman, Respondents-Appellees.))	Honorable Lisa R. Fabiano, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: The trial court's decisions on the decedent's mental competency and whether the decedent had been unduly influenced by respondents were not against the manifest weight of the evidence. Likewise, the trial court's judgment regarding whether to credit the limited partnership interest certificates over a tax return was also not against the manifest weight of the evidence.

¶ 1 Petitioner, James C. Heidenreich, appeals the judgment of the circuit court of Winnebago County, denying his petition to set aside transfers of real property into the Heidenreich Family Limited Partnership (FLP). The FLP was comprised of decedent, Calvin C. Heidenreich, his wife, Naomi, his two daughters, respondents Mary Sandona and Janice Rickelman, and their children. Petitioner challenged the real property transfers on the grounds that the decedent was incompetent

and respondents had exercised undue influence over the decedent. In addition, at the evidentiary hearing on the petition, petitioner also provided evidence, namely the decedent's 1997 tax return, which petitioner argues is evidence rebutting some or all of the transfers of interest in the FLP from the decedent to the respondents and their children. The trial court denied the petition and petitioner appealed, raising issues of competency, undue influence, and the issue of whether the trial court should credit the decedent's tax return, where the tax return failed to show any transfers of ownership interest within the FLP, over the executed limited partnership interest certificates. We affirm.

¶ 2

BACKGROUND

¶ 3 During his life, the decedent had six children: the parties to this action plus three more sons, Lawrence, Michael, and Norman. In the early 1960s, the decedent started Tri-State Aluminum, a window and door company located in Loves Park. The decedent also purchased farms, apartments, self-storage units, and residential houses. In 1986, the decedent and Naomi transferred some of those assets into a partnership owned equally by each of the six children. The partnership was set up by his accountant, Charles Lindstrom (who also testified at the hearing). At the time the partnership was set up, both the decedent and his wife used up their lifetime tax exemption on making gifts of \$650,000. The partnership, however, is not at issue in this case.

¶ 4 The decedent had a lengthy relationship with a local accounting firm and, in particular, Charles and David Lindstrom. Charles Lindstrom testified that he had begun working with the decedent's finances in 1964. Based on this relationship, and according to both of the Lindstroms, they began worrying about decedent's mental state during the period of 1996 to decedent's death in 1998. Prior to that time, the decedent had been cautious and conservative, never seeking out exotic

vehicles to avoid paying taxes. In 1996, the decedent undertook some estate planning, and Herb Rosene, an investment and insurance counselor, referred him to the Heritage Assurance Group in Palos Hills. Heritage created three investment/estate planning instruments for the decedent: a living trust, a business trust known as the “Heritage Investment Trust,” and the FLP. John Stambulis, an attorney for Heritage, drafted the instruments. Subsequently, Stambulis was indicted for tax fraud conspiracy. Robert Hopper, another member of Heritage, was named as the trustee for the Heritage Investment Trust. Hopper, too, was indicted and later convicted of tax fraud conspiracy. Charles Lindstrom testified that the Heritage Investment Trust was a fraudulent trust. Lindstrom testified that he asked the decedent to let him see the trust instrument, and the decedent refused, noting that Herb Rosene told him not to let anyone see the instruments.

¶ 5 The FLP, which is the subject of this action, was also drafted by Heritage and Stambulis. The Lindstroms both testified that a family limited partnership allows a person to gift property to the other partners at a discount in order to fit it into the annual gift exclusion from income taxes. Typically, the IRS will approve discounts up to about 30%; greater discounts are usually disallowed.

¶ 6 The Lindstroms testified that, when it was set up, the FLP apportioned its assets to decedent, his wife, the respondents and their children. Decedent and his wife were the general partners, and each had a 30.75% ownership share of the FLP. The respondents and their children were limited partners, and each had a 5.5% of the FLP. The FLP valued each 5.5% share at \$38,170. In order for each 5.5% share to satisfy the \$10,000 annual gift exclusion, it had to be discounted by over 70%. Both Lindstroms testified that such a discount was unreasonable and the FLP violated the law. The Lindstroms refused to handle the decedent’s personal taxes for tax-year 1996 and after as a result of

what they believed to be illegal dealings in the FLP. Charles Lindstrom testified that, by placing his assets into the FLP, the decedent was risking severe tax penalties.

¶ 7 Evidence showed that, on December 30, 1996, the decedent executed the FLP. Herb Rosene testified that it was executed at the decedent's house in the presence of respondents and their children. Rosene testified that he notarized the FLP instrument and, in his opinion, the decedent "knew what he was doing" when he signed the FLP. Respondents testified that they did not know about the FLP beforehand and only learned of it when they signed the instrument. The decedent's four sons did not participate in any manner in the FLP.

¶ 8 The Lindstroms both testified that the decedent's stated policy was to keep everything equal between the six children. For example, the four sons worked more hours at Tri-State Aluminum, but the decedent paid all six children equal bonuses even though the Lindstroms counseled that he should pay the children proportionately to the amount of work each child logged at Tri-State Aluminum. Nevertheless, the FLP excluded the four sons. There was varying testimony for the reasons that the sons were excluded from the FLP. Rosene testified that, at the time he and the decedent discussed setting up the FLP, the decedent was upset with the sons for forcing him to sell 100 acres of land. However, Bill Rogers, who purchased the 100 acres, testified that the decedent was eager to sell the 100 acres and negotiated a very good price for the land and was very pleased with the final price of \$1 million for the 100-acre parcel. Rogers admitted that, due to the decedent's strenuous bargaining, he may have paid more for the land than it was worth. Respondent Mary Sandona testified, by contrast, that the decedent included only his daughters in the FLP because of the work the daughters were performing and expected to perform taking care of the decedent and his

wife. This work included maintaining the decedent's home, preparing holiday meals, and driving the decedent and his wife to appointments and on errands.

¶ 9 Additionally, during the cross-examination of David Lindstrom, respondents established that the annual bonuses paid to the children for their work at Tri-States Aluminum often were not equal. In fact, over a 10-year period, the bonuses were equal in two years, while they were unequal in the remaining eight years. Petitioner generally received the largest bonus, amounting to as much as \$50,000, while respondents usually received the smallest bonuses, consistently in the \$10,000 to \$15,000 range. Further, following the sale of a Wisconsin company that the decedent was operating, only the sons who worked for that company received money from its sale.

¶ 10 Following the execution of the FLP, the decedent signed other documents transferring portions of his ownership interest in the FLP to other members. On January 23, 1997, the decedent executed a document to transfer 23.5 points of his ownership interest leaving him with 7.25% of the total assets in the FLP. Petitioner asserts that this transfer is belied by the decedent's 1997 tax return, which showed that the decedent continued to possess 30.75% of the assets, and the limited partners still had 5.5% shares. On May 9, 1998, the decedent executed another document transferring 4.5 points, leaving his estate with 2.75% of the total assets upon his June 10, 1998, death. Petitioner further argued that the decedent was not competent to make the asset transfers within the FLP.

¶ 11 Petitioner testified that, in 1991, the decedent experienced a stroke, from which he recovered, but his personality had changed. According to petitioner, the decedent became more impatient and prone to arguing with clients at the family business. Petitioner testified that, by 1995, the decedent could no longer make decisions as he had previously done. Petitioner testified that, in June 1997, the decedent stopped coming to work. John Horton, a witness for respondents, who had worked for

decedent's business since 1971, confirmed that, in 1997, the decedent stopped coming into work. Petitioner also testified that, around that time, when the decedent would come into work, he was not really involved in the business, but came in simply to pass the day. In contrast, Mary Sandona testified that she drove the decedent to work and he was still actively involved in the business as late as December 1997. Petitioner presented medical records that showed, at a May 7, 1998, visit, end-of-life counseling was discussed and the decedent was characterized as being "less clear mentally." Two days after the doctor visit, the decedent made his final transfer of his FLP ownership interest.

¶ 12 Petitioner testified that respondents turned their parents against petitioner and the other sons. Petitioner testified that, additionally, respondents sought to isolate the decedent from the four sons.

¶ 13 Mary Sandona testified that she paid or helped her mother pay decedent's bills. She was at decedent's home frequently, and she stayed for many days at a time. Mary testified about a recording of a phone call her father made to his mistress. She had placed a recording device on the phone her father used and her father apparently spoke to the woman. The decedent noticed wires at the desk and traced them back to the recorder. The decedent ripped the recording device off of the phone and placed it into the trunk of his car. Mary retrieved the recording from the trunk. Later, when her father asked for the recording, she refused to give it to him. According to petitioner, Mary used the recording to blackmail her father, and this also explains the creation of the FLP. According to Mary, she did not keep the recording and did nothing else improper with the recording. Further, she promptly told her mother about the decedent's conversation and the circumstances.

¶ 14 Petitioner's wife, Barbara Heidenreich, testified that the decedent begged Mary to give back the tape, but Mary refused, stating that she was going to keep it in case she ever needed it. Petitioner's wife also testified about an incident in which she and petitioner stopped by the

decedent's house. They were surprised to find respondents there. As petitioner's wife was speaking to the decedent's wife in the kitchen, the decedent's wife slammed her hands on the table and complained that, if respondents did not quit hounding her and the decedent, she was going to change her will and give everything to the church.

¶ 15 On June 10, 1998, decedent died. At the time of his death, his stated interest in the FLP totaled 2.75%. In August 2006, the decedent's will was admitted to probate, and on September 22, 2006, petitioner and his brother, Larry, received letters of office. On November 28, 2007, petitioner filed the petition to set aside transfer of real property, the subject of this action. In October and November 2009, the trial court conducted the above-summarized evidentiary hearing, and on December 15, 2009, the trial court heard closing arguments.

¶ 16 On April 15, 2010, the trial court issued its extensive memorandum of decision. The trial court first addressed the issue of the 1997 tax return:

“As a preliminary matter, because petitioner places great significance on the FLP's 1997 tax return and it created somewhat of a controversy at trial, I will briefly address it. Because the FLP's 1997 tax return signed by Naomi after [the decedent's] death designates that [the decedent] had a 30.75% interest in the FLP as of December 31, 1997, petitioner submitted it as evidence that [the decedent] did not transfer his interests in the FLP. Respondents, on the other hand, submitted FLP Certificates executed by [the decedent] and Naomi transferring all of their interests in the FLP on January 8, 1997, and May 9, 1998. Based upon these exhibits, it appears that [the decedent] transferred his interests in the FLP, and the question is not whether the 1997 tax return is proof that [the decedent] did not

transfer his interests, as Petitioner seems to allege in his Trial Brief, but rather whether [the decedent] lacked the mental capacity or was unduly influenced to transfer his interests.”

¶ 17 Next, the trial court proceeded to analyze the issue of mental capacity in detail:

“First, petitioner argues that the FLP was an abusive trust because of the discounts taken, and that this is evidence that [the decedent] lacked mental capacity. The parties agree that an FLP is a legitimate estate planning tool, but disagree whether the discounts taken were excessive. But assuming that the discounts were excessive, it does not follow that [the decedent] lacked mental capacity. The purpose of an FLP is to save estate taxes, and this was apparently [the decedent’s] motivation. The fact that he may have been overly aggressive in an effort to save more taxes doesn’t indicate that [the decedent] was incompetent. As respondent points out, what is at issue is whether [the decedent] understood the nature and effect of transferring his interest in the FLP to his daughters and their children. It is not necessary for [the decedent] to have understood all of the complexities of the plan, and the fact that the plan may not ultimately have been effective in saving taxes is not evidence of his incapacity to execute the deeds. The fact that excessive discounts were taken is not evidence that [the decedent] did understand that he was transferring ownership of his property and benefitting his daughters.

Petitioner contends that [the decedent] always treated his six children equally, and therefore, the fact that the FLP benefitted the daughters and not the sons is evidence that [the decedent] was incompetent. The evidence, however, showed that [the decedent] did not always treat his children the same. Contrary to petitioner’s assertions, the bonuses given from the family business, Tri-State Aluminum, were not always distributed equally between

decedent's four sons and two daughters. The sons received a substantial sum of money from the sale of a family business in Wisconsin, while the daughters received nothing from that sale. [The decedent] gave some of his sons \$50,000 toward the purchase of homes. The daughters received 20 acres of land near their parents' home.

Even if it were true that [the decedent] had always treated his children the same, the mere fact that he treated his children differently with the FLP is not evidence of incompetency. Moreover, [the decedent] gave a rational reason for treating his children differently in this transaction. In the document he signed on February 25, 1998, which is attached to the Petition as Exhibit D, [the decedent] stated that he was motivated to create the FLP in part because his daughters would be taking care of him and Naomi in their older years, and he felt they should be compensated accordingly.

Petitioner offered the testimony of [the decedent's] former accountants, [Charles] and David Lindstrom, to establish that [the decedent] was incompetent. [Charles] Lindstrom, however, would venture only that [the decedent] exercised 'bad judgment,' which does not constitute incompetency. David Lindstrom testified that he thought [the decedent] was incompetent, but he based his opinion on the fact that the FLP deviated from the way [the decedent] always treated his children and the fact that the FLP took excessive discounts. As discussed above, neither of these factors establishes incompetency.

Likewise, the testimony of the other independent witnesses did not establish incompetency. On the contrary, Bill Rogers' testimony regarding his purchase of land from [the decedent] showed that [the decedent] was an astute businessman who probably got more for the land than it was worth. John Horton testified that he saw [the decedent] at work up

until about June of 1997, and that although they did not discuss business, they had cordial conversations and [the decedent] always recognized him. Herbert Rosene testified that [the decedent] knew what he was doing when he created the FLP, knew he was taking a chance, but knew that if he did nothing, he would surely pay substantial estate taxes.

Neither did the testimony of the interested witnesses establish incompetency. Petitioner's wife Barbara Heidenreich testified about an occasion in 1992 or 1993 when [the decedent] was having a stroke and could not remember petitioner's name. This was apparently a temporary condition, however, because the evidence showed that [the decedent] knew his children up until perhaps the last two weeks of his life. Petitioner testified that after his stroke, [the decedent] was argumentative with customers, had poor judgment and was not as decisive as he once had been, which doesn't establish incompetency. In contrast, Mary testified that in December of 1996, [the decedent] recognized all of his family members, knew what he owned and was very competent. Janice testified that [the decedent] knew what he was doing, even picking out his pallbearers, up until about the last two weeks of his life when he was put on morphine.

What's more, the medical records do not support a finding that [the decedent] lacked mental capacity. Petitioner relies on three entries in the medical records from May of 1998, about a month before [the decedent] died. Two entries indicate that [the decedent] possibly had two strokes at sometime in the years before his death, but the mere fact that [the decedent] may have had strokes is insufficient to establish a lack of mental capacity. There was no medical testimony to suggest that stroke damage of the kind found in [the decedent's]

brain would have rendered him mentally incapacitated. If the medical records were to have any significance, it was incumbent upon the petitioner to produce such evidence.

Petitioner also relies on a third entry from May 7, 1998, in which Dr. Sankaran records that [the decedent's] daughter reported he had been 'less clear mentally.' This can only have significance for the May 9, 1998, transfer of FLP interest, as the other transfers occurred over 15 months prior. But there is no indication from the entry 'less clear mentally' of what [the decedent] was and was not capable of. [The decedent] could be less clear mentally than he once was and still understand the significance of transferring his interest in the FLP to his daughters and their children.

It is clear from the medical records that [the decedent] was in very poor health. Notably, however, there is no entry in the records where a doctor records his or her observations of mental deterioration in [the decedent]. On May 13, 1998, approximately a month before he died, Dr. Radosevich lists seven 'problems' with [the decedent's] health, but, significantly, does not list any cognitive problems.

Finally, perhaps the most compelling evidence was the video of [the decedent] and Naomi's 50th anniversary party, which petitioner offered in support of his contention that [the decedent] was incompetent. In the court's view, this video from November of 1997 established just the opposite. [The decedent] is shown carrying on coherent conversations with many of his guests and does not seem to have any obvious mental impairment. Petitioner points to one instance in particular, when [the decedent] did not recognize Betty Carr, his former partner in a restaurant. But according to the testimony, [the decedent] had not seen her in a long time, and she had lost weight; when Betty introduced herself, he

remembered her. It cannot be seriously suggested that [the decedent] lacked mental capacity because he didn't recognize an old friend he had not seen in some time, particularly in the context of the entire video.

In sum, the evidence in this case, when considered as a whole, does not support a finding that [the decedent] lacked the mental capacity to execute the deeds in question or lacked the mental capacity to transfer his interests in the Heidenreich FLP.”

¶ 18 Next, the court considered the issue of undue influence. The court first noted that, to prevail on a claim of undue influence, the petitioner must prove that the undue influence was of such a nature as to dominate and control the will of the grantor causing the grantor to dispose of his property in a manner he otherwise would not have done. The court also noted that, if there is a fiduciary relationship, then undue influence may be presumed. The court then determined that petitioner neither pleaded nor proved the existence of a fiduciary relationship between the decedent and respondents.

¶ 19 The court turned to the issue of undue influence in the absence of a fiduciary relationship:

“Absent a fiduciary relationship, there is no presumption [of undue influence], and the party seeking relief has the burden of proving undue influence. [Citation.] In support of his claim, petitioner alleges that [respondents] isolated [the decedent] from his sons, but this was not borne out by the evidence. Rather, the testimony at trial established that [the decedent] went to work regularly, both before and after the FLP was created, and that at least some of his sons worked at the family business and saw their father frequently. Furthermore, petitioner testified that he visited his father at his home.

Petitioner also alleges that the undue influence was in the form of blackmail by Mary. The only evidence offered of blackmail is petitioner's testimony that Mary taped a telephone conversation between [the decedent] and his mistress, and Barbara Heidenreich's testimony that Mary told her that she was going to keep the tape in case she ever needed it. Mary, on the other hand, testified that she told her mother about the telephone conversation, and thus would have no basis to blackmail her father. The evidence of blackmail is weak at best, and is not sufficient to establish by a preponderance of the evidence that Mary coerced her father into creating the FLP to buy her silence.

Finally, petitioner offered testimony regarding an incident that occurred in 1995 or 1996 as evidence of undue influence. He testified that on that occasion, [respondents] were talking to their parents in the living room of their home when Naomi came into the kitchen, slammed her hands on the counter and said, 'If they don't leave me alone, I'm just going to leave everything to the church.' Although this statement may be evidence that [respondents] talked to their parents about the distribution of the estate, it doesn't establish that they dominated and controlled their father's will to such an extent that it caused him to make a disposition of his property which he otherwise would not have made. According to [respondents], they did not know about the FLP before they were asked to sign the document creating it, and there was no evidence presented to the contrary.

In sum, the evidence in this case, when considered as a whole, does not support a finding that [respondents] unduly influenced [the decedent] to execute the deeds in question or to transfer his interests in the Heidenreich FLP."

The court denied the petition to set aside transfer of real property and ordered the parties to prepare an order consistent with its memorandum of decision.

¶ 20 On May 28, 2010, the order denying the petition was entered. On June 25, 2010, petitioner filed a motion to reconsider. The trial court denied the motion and petitioner timely appeals.

¶ 21 ANALYSIS

¶ 22 Initially, petitioner seeks to set aside the transfers of the decedent's property into the FLP, arguing that the decedent lacked the mental capacity needed to make the transfers. Generally, a grantor of a deed is presumed to have been of sound mind and the party seeking to set aside the deed must prove otherwise. *In re Estate of Cunningham*, 207 Ill. App. 3d 72, 77 (1990). A person capable of transacting ordinary business has the mental capacity to execute a deed. *Estate of Cunningham*, 207 Ill. App. 3d at 77. Specifically, a person who (1) is capable of understanding the nature and effect of his actions and is capable of comprehending his interests, and (2) is exercising his will, is capable of executing a valid deed. *Estate of Cunningham*, 207 Ill. App. 3d at 77-78. With these principles in mind, we consider petitioner's specific arguments.

¶ 23 Petitioner attacks the transfer of property into the FLP as well as the transfers of the decedent's interest in the FLP to the other members. Petitioner first points to the fact that the decedent ignored the Lindstroms' advice in creating the FLP and transferring his interests within the FLP. Petitioner also notes that the Lindstroms both testified that the particular FLP set up in this case was illegal and that the persons who drafted the documents had been indicted and convicted of tax fraud. Petitioner reasons that, because the decedent acted conservatively regarding his investments until about 1995 or 1996, his subsequent risk-taking with the FLP demonstrates that he lacked the mental capacity to take care of his assets, because he was exposing them to significant tax

penalties. Petitioner concludes that these actions demonstrate that the decedent was incapable of protecting his own interests and lacked the mental capacity necessary to validly execute the deed transferring the property into the FLP. We disagree.

¶ 24 Petitioner is raising a factual issue here. Factual issues are generally reviewed under the manifest-weight-of-the-evidence standard. *Kulchawik v. Durabla Manufacturing Co.*, 371 Ill. App. 3d 964, 969 (2007). A factual finding is against the manifest weight of the evidence if the opposite conclusion is clearly apparent or if the fact-finder's determination "is palpably erroneous and wholly unwarranted." *Kulchawik*, 371 Ill. App. 3d at 969. We have carefully reviewed the evidence in the record and hold that the trial court's holding in its memorandum of decision is not against the manifest weight of the evidence.

¶ 25 Petitioner's argument on this point is founded on a seriously truncated view of the evidence. Petitioner points to the Lindstroms' testimony, but overlooks the fact that, when Charles Lindstrom was asked his opinion about the decedent's mental capacity, he backtracked and stated that the decedent had exercised bad judgment, not that he demonstrated a lack of mental capacity to manage his affairs. There was also testimony that the decedent signed a note regarding his rationale for the property transfer in which he stated that he made the transfer because he expected respondents would be taking care of him and his wife during the final years of his life and he wanted to compensate them for their efforts. The Lindstroms also introduced the idea that the decedent strictly adhered to a philosophy of sharing evenly among his children. That evidence was rebutted, however, by testimony that in only 2 years out of 10 reviewed did the children receive equal bonuses from Tri-States Aluminum, the family business. In the other years, the bonuses were decidedly unequal. While petitioner testified that the decedent lacked mental capacity, Herb Rosene testified that he

understood what he was doing. Indeed, the evidence showed that the decedent was faced with substantial amount of taxes upon his death; his choice to adopt a high-risk strategy that might save those taxes appears to be a rational act because if successful, the decedent could avoid the taxes, and if unsuccessful, the decedent would pay the taxes, just as he would have done if he had not created the FLP. A further bit of evidence upon which the trial court relied was the testimony of Bill Rogers. Rogers related that he wanted to purchase 100 acres from the decedent and the decedent bargained a price for the land which Rogers admitted was probably more than the land was worth. Viewing this evidence, as well as the record as a whole, we cannot say that the trial court's determination was against the manifest weight of the evidence.

¶ 26 Petitioner next points to evidence, namely his own testimony, that the decedent stopped coming to work about a year before his death, to support a conclusion that the decedent lacked the mental capacity to make the transfers. Petitioner further notes that the fact that Mary paid or assisted in paying the decedent's bills was a further quantum of evidence supporting the conclusion that the decedent lacked competence. Petitioner also claims that respondents failed to adduce evidence that the decedent had the capacity to conduct his ordinary business affairs. We do not accept petitioner's argument.

¶ 27 We note first that if the decedent stopped coming to work about a year before his death, then he stopped going to work six months after he created the FLP and made the initial transfer of property into it. Thus, the decedent's decision to stop going to work would have no bearing on his capacity at the time he created the FLP and made the initial transfer of property into it. Next, petitioner misconceives the burden of proof when he points out that respondents did not present affirmative evidence demonstrating the decedent's ability to carry on his ordinary business affairs.

It is *petitioner's* burden to show that the decedent was incapable of transacting business, not the respondents' burden to show that he could. See *Estate of Cunningham*, 207 Ill. App. 3d at 77 (party challenging the decedent's mental capacity must prove the decedent's incapacity). Additionally, the evidence showed that the decedent was growing older and increasingly ill around the time he stopped going to work. This suggests reasons why the decedent would give up his duties in the family business, but it does not show that the decedent was incapable of carrying them out. Likewise the evidence that Mary assisted with the bills, as well as decedent's withdrawal from an active role at work to simply passing the time there does not show incapacity in light of all of the evidence. Again, we cannot determine that the trial court's factual findings were against the manifest weight of the evidence on this issue.

¶ 28 Petitioner also argues that he presented medical evidence demonstrating that the decedent's mental capabilities had declined. Petitioner points particularly to a record in which the doctor related that the decedent had been declining and was "less clear mentally." Petitioner also points to a shaky signature made by decedent as additional evidence of mental incapacity. Petitioner further argues that the final transfer of the decedent's interest in the FLP occurred around the time of the "less clear mentally" doctor visit, and that this taints all of the previous transfers as well as the final one. According to petitioner, this is further evidence of the decedent's mental incapacity. We disagree.

¶ 29 Petitioner appears to attach the most weight to the medical record in which the doctor noted that the decedent was "less clear mentally." We note, however, that the doctor related one of the respondents' observations, and did not himself determine that the decedent's mental processes were deteriorating. Even if the doctor had made such a determination of deterioration, such a finding would be ambiguous at best because the medical records do not provide a baseline from which to

judge the deterioration. We also note that petitioner did not present any medical testimony containing a doctor's conclusion (or anyone's) that the decedent was not capable of conducting his affairs at any time. Petitioner also presented evidence that the decedent had experienced a stroke, but there was no evidence that showed the stroke diminished the decedent's mental capacity to the point that he was no longer able to conduct his affairs. Rather, the evidence showed that the decedent fully recovered from the stroke and also underwent a personality change after the stroke. We note that the sale of property to Bill Rogers apparently occurred after the stroke, and this indicates that the decedent was still able to attend to his interests, as he was able to obtain more for the land than it might have been worth, according to Rogers. Finally, petitioner's claim that the decedent's signature showed mental incompetence is wholly speculative. Further, petitioner does not undertake to relate it to others of the decedent's signatures, although any lay conclusion to be derived from a progression in signatures is uncertain; in any event, petitioner does not present any authority to support his position that a lay opinion about mental capacity based on the deterioration of a signature carries any weight whatsoever.

¶ 30 As a final note, petitioner ignores the recording of the decedent's 50th wedding anniversary party. The trial court held that it was perhaps the best evidence of the decedent's competency, as it showed him interacting with the guests in a coherent way, and it demonstrated that, with one exception, the decedent's memory and intellect were adequately functioning. The exception arose over the petitioner's former business partner, but the decedent's failure to recognize her was explained because she had lost a lot of weight. Further, it was noted by the trial court that, once she had reminded the decedent of her name, the decedent knew her and recalled their relationship as well as her identity.

¶ 31 Having carefully reviewed the evidence, we conclude that the trial court's determination regarding the decedent's mental capacity was not against the manifest weight of the evidence. In every instance in which petitioner raised a specific argument, there was evidence supporting the trial court's decision in the record, even as there was evidence to support petitioner's argument. Because there was evidence on both sides of the issue, it was up to the trial court, as the finder of fact, to make a determination. Accordingly, we cannot say that the trial court's determination was against the manifest weight of the evidence, and we therefore do not accept petitioner's arguments on the issue of the decedent's mental capacity.

¶ 32 In his second issue on appeal, petitioner argues that the real property transfers were made as a result of the undue influence of the respondents as well as the financial advisors and planners who drew up the FLP documents. The party attempting to set aside the deed has the burden to prove that the deed was procured through undue influence. *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 77 (2003). In order to prove the existence of undue influence, the petitioner must demonstrate that the influencing party so dominated and controlled the will of the grantor that it caused the grantor to make a disposition of the property he otherwise would not have made. *Estate of Bontkowski*, 337 Ill. App. 3d at 78. Where a fiduciary relationship exists between the grantor and the benefitting party, undue influence will be presumed to have procured the transaction and the benefitting party must prove by clear and convincing evidence that the transaction was fair and equitable and did not result from the party's undue influence over the grantor. *In re Estate of Elias*, 408 Ill. App. 3d 301, 319 (2011). We review the trial court's determination on the issue of undue influence to see whether it was against the manifest weight of the evidence. *In re Estate of Kline*, 245 Ill. App. 3d 413, 426 (1993). With these principles in mind, we turn to petitioner's specific contentions.

¶ 33 Petitioner first argues that the requirements to prove undue influence are lessened where it is shown that the grantor is of diminished mental capacity, citing *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1018 (1997). Petitioner contends that, because the decedent lacked the mental capacity to transfer the property into the FLP and to transfer his interest in the FLP, he need not present as much evidence of undue influence as where the grantor's mental capacity is undiminished. We reject this contention. We have determined above that petitioner failed to prove that the decedent possessed a diminished mental capacity, and thus, this argument is without a basis.

¶ 34 We also note that the evidence in the record does not support the existence of a fiduciary relationship between the decedent and respondents. The best evidence to which petitioner can point is that Mary paid or assisted in paying the bills. There is, however, no other evidence that Mary took over running the decedent's financial affairs. In the absence of evidence other than Mary assisting in paying bills, we cannot conclude that a fiduciary relationship between the decedent and respondents was created. The upshot from this determination is that we will not presume undue influence, and the burden remains on petitioner to establish, by clear and convincing evidence, that respondents so dominated and controlled the decedent's will that he disposed of the property into the FLP where he otherwise would not have done so.

¶ 35 Petitioner argues that respondents isolated the decedent in their scheme to overbear the decedent's will. We disagree. The evidence, as given by petitioner himself, shows that the decedent usually went into work. At work, petitioner and the other sons all had access to the decedent. This evidence belies the contention that respondents isolated the decedent. Importantly, the decedent was still going into work for about six months after he set up the FLP, so he had not been isolated before

the FLP was created. We cannot conclude that the trial court's determination on this point was against the manifest weight of the evidence.

¶ 36 Petitioner also notes that Mary paid the bills and was present at the decedent's house for "days and days and days." While this is true, we do not believe that it supports a conclusion of undue influence. The decedent himself noted that he was expecting respondents to assist in taking care of him and his wife in their final years. This caretaking explains Mary's presence and assistance in household chores, like paying the bills. Further, the extended presence of Mary at the decedent's house does not establish the existence of a fiduciary relationship. While such a persistent presence may be a factor in establishing undue influence, we believe that the evidence falls short based on our review of the record as a whole.

¶ 37 Petitioner notes that Mary possessed a recording of a call from the decedent to his mistress, which, as petitioner states, was retained "to presumably blackmail the decedent." We note, however, that Mary testified that she informed the decedent's wife about the conversation. Because his wife was apprised of the conversation, Mary could not use the recording of the tape to blackmail the decedent. The trial court's determination on this point was not against the manifest weight of the evidence.

¶ 38 Petitioner mentions the incident in which the decedent's wife pounded her fists on the table and threatened to leave her estate to the church if the daughters did not stop hounding her. While this might be suggestive of overreaching on respondents' part, it is insufficient to constitute undue influence. In addition, it shows that Naomi was frustrated with respondents, but it does not shed light on the decedent's thoughts, or even if he considered respondents' actions to be "hounding," let alone overbearing. Petitioner does not otherwise relate this incident to respondent, and we do not

conclude that it constitutes an example of undue influence (or even incipient undue influence.) More importantly, the evidence showed that respondents were unaware of the FLP until they executed the FLP documents. Even if respondents were hounding the decedent and his wife about their estates, the evidence is uncontroverted that the creation of the FLP was solely the decedent's responsibility; respondents were unaware of the FLP until after the decedent had initiated measures to create it.

¶ 39 Petitioner also argues that the financial advisors contributed to the coercion in disposing of his assets. This is a confusing argument. Petitioner seems to be claiming that the advisors, led by Herb Rosene, both contributed to respondents' undue influence, as well as evidenced respondents' undue influence. Petitioner attempts to insinuate that, because the advisors who participated in creating the FLP were charged with and convicted for tax fraud, the entire transaction was tainted. The evidence was silent, however, on whether the advisors got into any trouble over the decedent's particular FLP and property transfers. Neither the decedent nor his estate were convicted of tax fraud. Further, there is no evidence that Rosene and his cohorts were in a fiduciary position over the decedent. Thus, even if they pressured the decedent, there is no actual evidence of such pressure and petitioner's argument falls short.

¶ 40 Petitioner also argues that the departure from the decedent's practice of equal sharing among his children supports a finding of undue influence. Petitioner overlooks the evidence in the record that the decedent did not always adhere to that philosophy. For instance, the decedent sold a Wisconsin business and divided the proceeds among the sons who worked in that business. That was not an equal distribution among the children. Likewise, the evidence showed that the decedent did not pay bonuses equally to the children from Tri-States Aluminum. Equally important, petitioner overlooks the evidence that the decedent justified the unequal treatment of the daughters in the FLP

versus the sons in a note he wrote about four months before he died. In the note, the decedent stated he did not want the properties that he placed into the FLP to be sold for estate taxes, which he believed would happen had he done nothing, and that the disproportionate treatment of respondents versus the sons was because they would be taking most of the caretaking responsibilities for the decedent and his wife, so he wanted to compensate them for their efforts. Based on all of the evidence, then, we cannot conclude that the trial court's determination that respondents did not unduly influence the decedent was against the manifest weight of the evidence.

¶ 41 Last, respondent argues that the 1997 tax return shows that respondent did not make any further transfers of his interest in the FLP. Respondent argues that the trial court erred in ignoring the tax return evidence, even though it contradicted the other evidence. We note that, in making this argument, petitioner wholly ignores the evidence of the limited partnership interest certificates executed by the decedent. Petitioner did not produce any evidence regarding the creation of the 1997 tax return, which could have been in error in listing the decedent's interest in the FLP as undiminished from its creation. Additionally, petitioner did not provide later tax returns to show how the interest in the FLP was treated. It is possible that the error was corrected in the 1998 tax return (or not—but it was petitioner's burden to present a complete record supporting his claim of error (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984))). Petitioner also never challenged the authenticity or veracity of the certificates. There was conflicting evidence regarding the transfer of the decedent's interest in the FLP (the tax return versus the executed certificates). It was the trial court's province, as finder of fact, to decide what the evidence showed. We cannot say that the trial court's determination that the decedent did make the transfers, which is supported by evidence in the record, was against the manifest weight of the evidence.

¶ 42

CONCLUSION

¶ 43 Accordingly, for the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 44 Affirmed.