



fraudulent. We affirm.

¶ 3

### FACTS

¶ 4 The deceased had three sons, Jesse Edward, Kenneth, and Roger. On February 19, 2008, prior to his death, the deceased signed an Illinois short form power of attorney for property in which he appointed Roger as his agent. On February 10, 2009, Anita drove the deceased to the State Bank of Whittington where they met with Jane Pinkham, a bank employee, and signed signature cards transferring two bank accounts and one certificate of deposit into joint tenancy accounts with right of survivorship with Roger. Roger went to the bank later in the day to sign the signature cards which made the accounts joint accounts with right of survivorship. As of December 31, 2009, the accounts were valued at over \$200,000, with one bank account worth \$83,189.10, the other worth \$2,198, and the certificate of deposit worth \$125,025.25.

¶ 5 On January 4, 2010, the deceased died intestate by committing suicide. Kenneth became the independent administrator of the deceased's estate. On April 23, 2010, plaintiff filed the instant complaint seeking, *inter alia*, the return of the three accounts at the Bank of Whittington back into the estate of the deceased. A bench trial was conducted during which evidence was presented that the deceased attempted to take his life on two prior occasions, once by overdosing on his medication and once by attempting to shoot himself.

¶ 6 Evidence was also presented that the deceased was illiterate. He could only write his name; however, the deceased did not have trouble with math and was aware of how much money was contained in his accounts. Jane Pinkham was unaware that the deceased was illiterate when she met with him about changing his accounts to joint accounts. She was also unaware that the deceased was on painkillers and antidepressants and that he had, on two occasions, tried to commit suicide. Ms. Pinkham met with the deceased 10 or 15 times during her career at the bank.

¶ 7 On the date of the transfer, Ms. Pinkham did not observe the deceased to be under the influence of drugs or alcohol and testified that he appeared coherent and of sound mind. She testified that she explained to the deceased that if he put Roger on the accounts, Roger could come in and withdraw all the funds in the accounts. She advised the deceased that he could make Roger an authorized signer or make it a payable-on-death account, but the deceased wanted to create a joint account with right of survivorship. She said that the deceased understood that if something happened to him, Roger would receive all the money in the accounts.

¶ 8 It is undisputed that Roger and Anita took care of the deceased prior to his death, with Anita helping him pay his monthly bills and taking him to doctor's appointments. Roger testified that he never asked the deceased to change his bank accounts and the deceased was not a man who was easily persuaded to something he did not want to do. Roger testified he did not remove any money from the accounts until after the deceased died, and then the only money he removed was used to pay the deceased's funeral expenses.

¶ 9 After hearing all the evidence, the trial court found that defendants did not meet their burden of proof that the transfers of the three bank accounts "were not fraudulent and not pursuant to the fiduciary relationship created between [Roger] and [the deceased]." The trial court ordered defendants provide an inventory and accounting of all expenditures from the bank accounts and return to plaintiff all money transferred from the bank accounts, along with all interest earned or accrued thereon until the date of said return. Defendants filed a motion to reconsider, which the trial court denied. Defendants now appeal.

¶ 10 ANALYSIS

¶ 11 The issue we are asked to address is whether the trial court erred in finding the transfer of the three accounts from the deceased to Roger in joint tenancy was fraudulent. Defendants contend that the transfer of the accounts from the deceased into joint tenancy

with Roger was not fraudulent because Roger did not actively use his power of attorney to create the joint tenancies. Instead, the deceased received competent, independent advice from Jane Pinkham about the consequences of transferring the accounts into joint tenancy and after receiving such advice made the decision to transfer the accounts into joint tenancy. Defendants insist Roger never used his power of attorney, nor did he ever exert any undue influence over the deceased, but rather the deceased wanted the accounts to become the property of Roger; therefore, defendants ask us to reverse the trial court's ruling and return the accounts to Roger. Plaintiff responds that under the circumstances presented here the trial court did not err in finding the transfers of the deceased's accounts into joint accounts with the right of survivorship were fraudulent. We agree with plaintiff.

¶ 12 A power of attorney, as was granted to Roger, establishes a fiduciary relationship as a matter of law. *In re Estate of Miller*, 334 Ill. App. 3d 692, 697, 778 N.E.2d 262, 266 (2002). In a case where the existence of a fiduciary relationship has been established, the law presumes that any transactions between the parties by which the dominant party profits are fraudulent. *Jones v. Washington*, 412 Ill. 436, 441, 107 N.E.2d 672, 674 (1952). However, the presumption of fraud "is not conclusive," and it "may be rebutted by clear and convincing proof that the dominant party has exercised good faith and has not betrayed the confidence reposed in him." *Jones*, 412 Ill. at 441, 107 N.E.2d at 674. The beneficiary of the transaction, which in the instant case is Roger, bears "the burden of proving by clear and convincing evidence that the transaction was fair and equitable and did not result from [Roger's] undue influence over [the deceased]." *In re Estate of Miller*, 334 Ill. App. 3d at 698, 778 N.E.2d at 267. Three significant factors to consider in determining whether a presumption of fraud has been overcome are: (1) whether the fiduciary made a frank disclosure, (2) whether the fiduciary proves that he or she paid fair value for the property obtained, and (3) whether the fiduciary proves the principal received competent and

independent advice. *In re Estate of Miller*, 334 Ill. App. 3d at 698, 778 N.E.2d at 267.

¶ 13 Here, the record reveals Roger was granted a power of attorney in 2008. On February 10, 2009, Anita, Roger's wife, drove the deceased to the bank in order to transfer three individual accounts into joint accounts with right of survivorship to Roger. No one disputes that the deceased was illiterate and could only sign his name. Jane Pinkham, a bank employee, explained to the deceased the effect of such transfer, including the fact that Roger could take out any and all funds in the accounts if such a transfer was made and should the deceased die, Roger would receive all the money in the accounts. Later that same day, Roger went to the bank and signed the signature accounts necessary to make the three accounts joint accounts with right of survivorship. Roger did not pay the deceased any consideration for such transfer, nor did he make any deposits into the account after the accounts were made into joint accounts.

¶ 14 Under these circumstances, we cannot say the trial court erred in finding that defendants did not meet their burden and overcome the presumption of fraud. Roger clearly benefitted from the transfer of the three accounts. The fact that the power of attorney was not necessary for the accounts to be transferred does not overcome the fact that a fiduciary relationship existed. See *In re Estate of Miller*, 334 Ill. App. 3d at 700, 778 N.E.2d at 269. Moreover, we cannot say that Jane Pinkham's testimony constituted clear and convincing evidence necessary to overcome the presumption of fraud. As the trier of fact, the trial court was in a better position to weigh and evaluate the evidence, and we must give deference to the trial court's findings "unless they are clearly contrary to the manifest weight of the evidence." *Klaskin v. Klepak*, 126 Ill. 2d 376, 389, 534 N.E.2d 971, 976 (1989). While Jane Pinkham testified that the deceased was of sound mind, appeared competent, and was aware of the effects of transferring his accounts from individual accounts to joint accounts with right of survivorship, we cannot ignore the fact that she admitted she was not aware the

deceased was illiterate, was not aware he was on medication, including OxyContin and medication for depression, and was not aware that he tried to kill himself on two occasions prior to her meeting with him about transferring the accounts to Roger.

¶ 15 While this case does not present us with an egregious factual pattern and the deceased's intent may very well have been to transfer the accounts to Roger upon his death, the trial court simply found the evidence insufficient to overcome the strong presumption of undue influence. After careful consideration, we find the record contains sufficient support for the trial court's conclusion that defendants failed to rebut the presumption of undue influence by clear and convincing evidence. We cannot say the trial court erred in finding that the funds in the three accounts belong to the deceased's estate.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Franklin County is hereby affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE STEWART, dissenting:

¶ 19 I respectfully dissent from the decision of the majority in this case. In my view, Roger presented sufficient evidence to rebut the presumption of fraud, and the trial court's contrary ruling is against the manifest weight of the evidence. Accordingly, I would reverse the trial court and remand this case for entry of judgment for the defendants.

¶ 20 The sole allegation of the plaintiff in this case is that the accounts in question were transferred into joint tenancy as a result of undue influence exercised by Roger over his father. The sole evidence offered in support of this allegation was that the deceased made Roger his attorney-in-fact through the execution of a power of attorney a year before the accounts were transferred and two years before his death. The plaintiff offered no evidence

whatsoever of actual undue influence, relying completely on the presumption of undue influence that arose from the execution of the power of attorney. In fact, all of the evidence in this case, which was mostly uncontradicted, reveals that Roger did not exercise undue influence over his father.

¶ 21 To be sure, "a power of attorney gives rise to a general fiduciary relationship between the grantor of the power and the grantee as a matter of law." *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 757, 525 N.E.2d 203, 205 (1988). Once the fiduciary relationship is proved, a presumption arises that any transaction between the parties which benefits the attorney-in-fact is fraudulent, and the presumption can only be overcome by clear and convincing evidence that the transaction was fair and equitable and was not the result of undue influence. *Lemp*, 170 Ill. App. 3d at 757, 525 N.E.2d at 206. A rebuttable presumption, however, does not shift the burden of proof, and is not evidence in itself, but arises as a rule of law or legal conclusion, which establishes a *prima facie* case of undue influence, in the absence of evidence to the contrary. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 461-62, 448 N.E.2d 872, 876 (1983). "Stated differently, the presence of a presumption in a case only has the effect of shifting to the party against whom it operates the burden of going forward and introducing evidence to meet the presumption. If evidence is introduced which is contrary to the presumption, the presumption will cease to operate." (Internal quotation marks omitted.) *Id.* at 462, 448 N.E.2d at 876. The amount of evidence necessary to meet the presumption is not determined by any fixed rule and depends on the circumstances of each case. *Id.* at 463, 448 N.E.2d at 877. "If a strong presumption arises, the weight of the evidence brought in to rebut it must be great." *Id.*

¶ 22 Here, the completely uncontradicted evidence revealed the following facts. Although the deceased had three sons who lived nearby, it was Roger and his wife who assumed nearly sole responsibility for his care during the last few years of his life. It was the desire of the

deceased to name Roger as his attorney-in-fact, and Roger was not present when the power of attorney was executed. Roger never used the power of attorney for any transaction including the transfer of the accounts in question. The transfer of the accounts into joint tenancy was initiated by the deceased, not Roger, and Roger was not present when the accounts were transferred. According to the bank employee who handled the transaction, at the time the deceased transferred the accounts into joint tenancy, he did not appear to be under the influence of alcohol or drugs, and did appear to be coherent and of sound mind. The bank employee explained the effect of transferring the accounts into joint tenancy, and offered the deceased alternatives, but the deceased insisted that he wanted Roger to have full access to the accounts and to receive them upon his death. Roger never withdrew any of the funds in the accounts until after his father's death. The plaintiff expressly admitted that he knew of no evidence that Roger had done anything to exercise improper influence over his father.

¶ 23 Undue influence is defined as " 'any improper \*\*\* urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely.' " *Franciscan Sisters*, 95 Ill. 2d at 460, 448 N.E.2d at 875 (quoting *Powell v. Bechtel*, 340 Ill. 330, 338, 172 N.E. 765, 768 (1930)). There is simply no evidence whatsoever of undue influence in this case—only the presumption. Roger presented all of the evidence that was available to defeat the presumption, but the trial court, and a majority of this court, have found that it was not enough. What other evidence could Roger have offered? Surely, when the only evidence presented is that there was no undue influence the presumption is defeated and the plaintiff must come forward with some actual evidence that a fiduciary engaged in some improper conduct to overpower the will of the deceased.

¶ 24 The trial court and the majority seem concerned about evidence that the deceased was illiterate. However, the only evidence that was presented was that an independent bank

employee fully explained the transfer of the accounts and believed that he fully understood what he was doing. The trial court and the majority also point to evidence that the deceased was taking pain medication and an antidepressant and that he had attempted suicide twice and ultimately killed himself. However, there was no allegation that the deceased was incompetent. In fact, all of the evidence was that he understood financial transactions and, on the day the accounts were transferred, was of sound mind and understood the effect of his actions.

¶ 25 All of the evidence in this case suggests a very common scenario. A parent chooses the child who is actively engaged in his care to act as his attorney-in-fact. The parent also decides to give that child the bulk of his estate to reward him for providing the care that was needed by the parent in old age. Under the majority decision, a child simply cannot be both attorney-in-fact and the recipient of funds transferred into a joint account. Even when there is no evidence that the child has done anything improper, he is found to have fraudulently obtained funds from his parent.

¶ 26 In my view, the intent of the deceased in this case is being frustrated. Roger presented clear and convincing evidence to rebut the presumption of undue influence; therefore, the trial court's decision is against the manifest weight of the evidence. Since the plaintiff offered no actual evidence of undue influence, I would reverse the trial court and remand this case for entry of judgment in favor of the defendants.