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By Adam M. Fried, Esq., Adriann S. McGee, Esq. and Mary Kraft, Esq. [a0]

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

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The presumption of undue influence arising out of confidential and fiduciary relationships is the presumption is also pertinent to the Jury's

whether a presumption of undue influence is rebutted is a question of law for the judge to decide. If the presumption is rebutted, the presumption becomes a nullity and the jury is not given an instruction on the subject. This article explores the mechanics of the presumption through the case recently decided by the 12th District Court of Appeals in *Filo v. Filo.* [1]

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

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

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

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

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

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

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

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

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

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

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

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