No. 128867

IN THE SUPREME COURT OF ILLINOIS

IN RE THE ESTATE OF MARK A. COFFMAN, Deceased.	)	Rule 315 Appeal from the Second District Appellate Court, No. 2-21-0053
PEGGY LEMASTER and KATHLEEN MARTINEZ, Petitioners-Appellants, v. DOROTHY COFFMAN and COURTNEY CRENSHAW, Respondents-Appellees.	)	There Heard on Appeal from the Circuit Court of the Twenty-Third Judicial Circuit, Kendall County, Illinois, No. 18 P 065 The Honorable Melissa S. Barnhart, Judge Presiding

REPLY BRIEF OF PETITIONERS-APPELLANTS PEGGY LEMASTER AND KATHLEEN MARTINEZ

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ARGUMENT

Respondent Dorothy Coffman maintains this appeal presents "no legal question," only disputed fact-findings (Resp. at 16-17), but she cannot controvert the essential facts mandating a presumption of undue influence under the settled tests: Dorothy held Mark's power of attorney, creating a fiduciary relationship as a matter of law, and she participated in procuring preparation of a will for him under which she profits when he was "very, very sick," and "dying." (R.1895.)

The probate court erred in its application of the law to these uncontroverted facts, and beneath her claims of evidentiary disagreements, Dorothy's defense is a manifesto to change existing law to uphold that error. Dorothy asks this Court to:

- overturn settled precedent, disregarded below, that an individual entrusted with plenary power over a testator's property is a fiduciary subject to the presumption of undue influence;
- announce needless new requirements for the presumption, requiring the procuring beneficiary: (a) receive a substantial benefit *compared to others having an equal claim*; and (b) not only be a fiduciary, but otherwise occupy a dominant-dependent relationship with the testator; and
- overturn appellate court precedent uniformly recognizing, until this case, the debilitated-testator presumption.

The changes Dorothy urges are unfounded, contrary to law, and would frustrate Illinois public policy to presume undue influence where circumstances warrant so as to protect vulnerable testators from imposition by entrusted individuals.

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Dorothy's evidentiary claims are also unfounded. She contends petitioners "omit critical evidence," but identifies none, stressing only irrelevancies to the issue at hand, such as her rationalizations for procuring a new will for Mark and a speculative counterfactual scenario in which Dorothy had not terminated buy-sell agreements governing Mark's family business interests. (Resp. at 2.)

Dorothy erroneously contends the probate court implicitly applied "a two-step" analysis to her motion for directed finding, triggering deferential review. (Resp. at 16.) But that is not the analysis the probate court said it undertook. It expressly addressed only the first step, whether there was "a preponderance of evidence establishing [a] prima facie case of presumptive influence" (R.1881), then erroneously found there was not. There was no second step. *De novo* review applies.

Dorothy grossly misstates the law defining the evidence required to establish undue influence, repeatedly asserting petitioners had to prove she acted "illegally." (Resp. at 16, 18-19, 41, 48, 49, 50.) This Court defines the requisite conduct far more expansively, as "*any* improper urgency of persuasion." *DeHart v. DeHart*, 2013 IL 114137, ¶ 27. Dorothy's rhetoric aside, the legality of her conduct simply was not at issue. "The object of a will contest proceeding is not to secure a personal judgment against an individual defendant." *In re Est. of Ellis*, 236 Ill. 2d 45, 51 (2009). "The single issue [] is whether the writing produced is the will of the testator." *Id*

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Dorothy's evidentiary argument also stresses the probate court's failure to find "actual undue influence" (Resp. at 1, 15, 17, 50), but that misses the point. This appeal concerns an error in applying the presumption. Courts have long recognized that because efforts to influence testators occur largely in secret, and are litigated after the testator is dead, such proof of "specific conduct" constituting undue influence is "normally absent." *Schmidt v. Schwear*, 98 Ill. App. 3d 336, 345-46, 349 (5th Dist. 1981); *see* Pet'rs Br. at 27-29. This is why courts give special weight to "[p]roof of undue influence" that is "wholly inferential and circumstantial," *In re Est. of Hoover,* 155 Ill. 2d 402, 411-12 (1993), and why they presume undue influence when that evidence indicates it likely occurred.

The probate court's legal error analyzing the presumption denied Mark and his sisters the law's intended protections. The action should be remanded with direction to apply the presumption and to hold Dorothy to her heavy burden to rebut it.

I. CAUTIOUS APPLICATION OF THE PRESUMPTION DOES NOT JUSTIFY THE RESULT BELOW.

Dorothy's defense of the holdings below begins with a policy rationale unstated in the decisions themselves: a need for caution when applying the presumption of undue influence to a spouse. Dorothy elevates this commonsense intuition to a rule that "defeats the presumption here," (Resp. at 20), but no precedent applies a special rule to marriages, or holds such caution defeats the presumption when otherwise required under settled tests.

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Dorothy relies on *In re Estate of Glogovsek*, but misstates its holding as having "reversed a trial court for applying the presumption to a spousal relationship." (Resp. at 19.) *Glogovsek* actually abstained from deciding "whether the presumption applies to spouses." 248 Ill. App. 3d 784, 790 (5th Dist. 1993). *Glogovsek* "merely held" that the presumption "'must be applied with caution,'" not "that the presumption could never be applied" to a spouse. *DeHart*, 2013 IL 114137, ¶ 33 (quoting *Glogovsek*). Dorothy ignores that *Glogovsek* also sensibly cautioned that a rule refusing to apply the presumption to spouses may in some circumstances "cause an injustice." 248 Ill. App. 3d at 790. This case illustrates that danger.

Dorothy stresses instead *Glogovsek*'s unremarkable observation that "the law does not and should not presume a spouse to be guilty of undue influence simply by reason of the marital relationship alone." 248 Ill. App. 3d at 792. But nothing in that truism supports the rule Dorothy misattributes to *Glogovsek* that courts should not presume spousal undue influence where, as here, the presumption is mandated under settled tests.

DeHart confirms that exercising appropriate caution does not change or relax governing tests. *DeHart* agreed caution is warranted, but applied the presumption to a spouse, expressly following the test first announced in Illinois in *Weston v. Teufel*, 213 Ill. 291, 299 (1904). *DeHart*, 2013 IL 11437, ¶¶ 30, 31, 37. Considering marriage is nothing more than application of the maxim that "[w]hat

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constitutes undue influence . . . will depend upon the circumstances of each case." *Id.*, ¶ 27 (cleaned up).

Dorothy also overstates the need for special caution by misstating the law to require "illegal" conduct, *supra,* p.2, and by ignoring the substantial caution this Court has already engineered into the presumption by admonishing that it arises not "from the fact of a fiduciary relationship, or of the mental condition [] of the testator, but from the participation by the fiduciary in actually procuring the execution of the will." *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 572-73 (1960). By restricting the presumption to rare cases like this, where the spouse engaged the lawyer and instructed him to change the testator's will to enhance her own bequest, existing doctrine imposes due caution.

Dorothy's call for a new rule ignores variability among marriages, and identifies no reason for denying a vulnerable testator the presumption's protections where circumstances warrant just because the trusted fiduciary who acted to procure a self-serving will was his spouse.

II. DOROTHY CANNOT JUSTIFY THE CONCLUSIONS BELOW NOT TO APPLY THE FIDUCIARY-RELATIONSHIP PRESUMPTION.

A. A Property Power Creates a Fiduciary Relationship *Ab Initio.*

Dorothy presents no sound reason this Court should validate the new legal rule announced below and urged by Dorothy that "a fiduciary relationship for purposes of presuming undue influence" arises only when powers granted under a property power of attorney are "accepted" or "exercised." (Resp. at 22.) Dorothy

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contends the conclusion presents a disputed fact finding, but that Dorothy held Mark's power of attorney is undisputed. The question on appeal is one of law—whether executing a property power of attorney suffices to create a fiduciary relationship. It does, as the law has long recognized.

Dorothy's argument also rests on an incorrect premise. The evidence was conclusive that she did accept and exercise Mark's property and health care powers of attorney. (E.170; E.190; R.1431; E.333-334; R.841-843.)

1. Dorothy Asks This Court to Overturn Precedent.

Dorothy's proposed rule, applied below, flies in the face of settled precedent that the fiduciary relationship arising as a matter of law between an "individual holding a power of attorney" for property and its grantor "begins at the time the . . . document is signed." *In re Est. of Shelton*, 2017 IL 121199, ¶ 22. Manifestly, when the powerholder participates in procuring her principal's will, a presumption of undue influence is required. *DeHart*, 2013 IL 114137, ¶ 31. *Accord In re Est. of Elias*, 408 Ill. App. 3d 301, 320 (1st Dist. 2011) (fiduciary relationship arose when power of attorney "executed," supporting undue influence presumption whether or not "activate[d].").

Dorothy's proposed rule also contravenes settled law defining a fiduciary relationship:

> A fiduciary relation exists in all cases where trust and confidence are reposed on one side and there is a resulting superiority and influence on the other. The relationship may exist as a matter of law, as

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> between . . . principal and agent or the like, or it may be moral, social, domestic or even personal in its origin.

Wiik v. Hagen, 410 Ill. 158, 163 (1951) (cleaned up). Contrary to Dorothy's rule, the law requires trust, confidence and resulting dominance and influence to establish a fiduciary relationship, not acceptance or exercise of the powers entrusted.

This Court confirmed in *Martin v. Heinold Commodities, Inc.*, that where, as here, creation of a relationship "'involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, it may be found that a fiduciary relation exists,'" without evidence the agent "accepted the trust and confidence [] placed in it." 163 Ill. 2d 33, 46-47 (1994) (quoting Restatement (Second) of Agency § 39 cmt. e (1958)). The law recognizes that executing a power that immediately grants all "rights, powers and discretions" over one's "interests in every type of property" necessarily involves such trust, confidence and reliance as a matter of law. *See* 755 ILCS 45/3-4; *Shelton*, 2017 IL 121199, ¶ 22.

This abiding trust inherent in the grant of such sweeping powers establishes the essential predicate to the presumption—the existence of a fiduciary relationship. Dorothy's contrary rule would frustrate the policy underlying the presumption to protect vulnerable testators from imposition by those in whom they repose great trust and confidence.

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2. Dorothy Misreads the Power of Attorney Act.

Dorothy erroneously merges two distinct legal constructs, fiduciary relationship and fiduciary duty, to misread the Power of Attorney Act and corresponding forms as authority that "*use* of the power"—"not its mere execution"—"creates the fiduciary relationship." (Resp. at 24.) Dorothy argues language stating that a powerholder owes no affirmative "duty to exercise" her powers, and no duty of care before powers "are exercised," somehow "speaks to the issue of when a fiduciary relationship arises." (*Id.* at 24-25.) But the quoted text refers strictly to fiduciary duties, not fiduciary relationships. It provides no basis to reverse settled law that the fiduciary relationship under a property power begins when the instrument is signed and, thus, "effective." 755 ILCS 45/3-3(d).

Shelton confirms this. The Court reviewed the same statutory language, but recognized the distinction Dorothy ignores, that the powerholder's *fiduciary duty* is "trigger[ed]" only by the "exercise of power pursuant to the authorizing document," while the "fiduciary relationship" nonetheless "begins" when the power "is signed." 2017 IL 121199, ¶¶ 22, 24. *Shelton* refutes Dorothy's arguments that the fiduciary relationship and duties arise simultaneously, or that existing law subjects "unwitting agents to fiduciary duties." (Resp. at 23.)[1]

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[1] Dorothy's argument that existing law also subjects "unwitting agents" to "presumptions of fraud and undue influence" is equally unfounded. (Resp. at 23.) A presumption never applies unless the powerholder participates in procuring "preparation of a will by which he profits." *Weston*, 213 Ill. at 299-300.

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3. *Estate of Stahling* Is Inapposite.

Dorothy is incorrect that *dicta* in *In re Estate of Stahling* support a new rule that "a fiduciary relationship for purposes of presuming undue influence" arises under a property power of attorney only when "accepted" or "exercised." (Resp. at 22) *Stahling* analyzed a different power and different legal presumption. It provides no basis to overturn the principles controlling here.

Ironically, *Stahling* expressly distinguished the very precedent Dorothy asks this Court to overturn, the holdings uniformly stating, until the decisions below, that a power over "property and financial" matters "creates a fiduciary relationship as a matter of law." 2013 IL App (4th) 120271, ¶ 19. *Stahling* correctly reasoned these decisions did not "address the issue" it decided, "whether a health care power of attorney results in a presumption of fraud or undue influence in property or financial transactions." *Id.*, ¶¶ 19, 25. Dorothy urges this Court to adopt the very premise *Stahling* rejected.

Dorothy argues for a new rule governing application of the presumption of undue influence to an agent under a *property* power based on *Stahling*'s *dicta* that an agent under a health care power must accept delegated powers to create a fiduciary relationship. (Resp. at 22.) Dorothy ignores that the appellate court squarely rejected this rule as not "legally . . . sound." *Elias*, 408 Ill. App. 3d at 320 (undue influence presumed based on conduct "after the [property] power of attorney was executed," which was when respondent "became [a] fiduciary," irrespective of claim he "did not 'activate'" power).

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The *Stahling dicta* Dorothy cites, moreover, were irrelevant to its holding, which turned entirely on the *scope* of any fiduciary relationship that existed, not whether one had been created. *See* 2013 IL App (4th) 120271, ¶¶ 20, 26 (health care power "may create a fiduciary relationship" but "limited solely to matters involving [] health care," thus established no presumption in "property or financial" transactions).

Dorothy is also incorrect that *Stahling* addressed "the first prong of the presumption" applicable here. (Resp. at 23.) *Stahling* concerned "the presumption of undue influence in property and financial transactions" involving fiduciary and principal. 2013 IL App (4th) 120271, ¶ 18; *see also Shelton*, 2017 IL 121199, ¶ 23. This case concerns the fundamentally different presumption applied where a fiduciary "procure[s] the preparation of [a] will by which he profits." *Weston*, 213 Ill. at 299-300.

Dorothy erroneously conflates these distinct presumptions, as did the courts below, but they are rooted in different doctrines, arise in different circumstances and require altogether different proof to rebut. *Compare In re Est. of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (4th Dist. 1997) (transacting fiduciary must prove "good faith," "frank disclosure," "adequate consideration," and principal had competent, independent advice) *with DeHart*, 2013 IL 114137, ¶ 30 (fiduciary procuring will must prove testator acted freely, exercising deliberate judgment and reason).

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Dorothy relies on inapposite precedent and principles concerning fiduciary transactions to argue that no presumption of undue influence applies "beyond the scope of the fiduciary relationship," and that she did act "within the context" of Mark's power of attorney when she asked Hynds to rewrite Mark's will. (Resp. at 22, 25.) That principle has no application to the presumption applied when a fiduciary participates in procuring a will.

The lower courts erroneously conflated these different presumptions, too. The probate court found no fiduciary relationship because Dorothy did not exercise Mark's power to "materially benefit[] herself" or to make a "fraudulent transfer," matters irrelevant to the presumption applicable here in a will contest. (R.1884-1886.) The appellate court made essentially the same error, concluding Dorothy was not a fiduciary based on the fact that Mark's power of attorney did not authorize her to make a will, a factor not relevant to the presumption at issue. (Op. ¶ 94.)

Dorothy presents no basis to uphold their manifest legal error in disregarding settled law under which Mark's granting Dorothy plenary power over his property established the trust and confidence establishing a fiduciary relationship as a matter of law and an essential predicate to the presumption of undue influence applied to this will contest.

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B. Dorothy Cannot Defend the Lower Courts' Failure to Find She Participated in Procuring Preparation and Execution.

Dorothy misstates the record and relies on irrelevancies in defending the probate court's erroneous analysis of the other essential predicate to the presumption, "participation in procuring" the will's execution. *Anthony v. Anthony*, 20 Ill. 2d 584, 586 (1960).

1. Dorothy Misstates the Finding and Evidence.

Dorothy is incorrect that the probate court found she "did not procure preparation." (Resp. at 34; *id.* at 41 (same).) Dorothy identifies no such finding. As shown, the court erred in its analysis by framing the correct question—whether Dorothy was "instrumental or participated"—but then failed to answer it, instead skipping ahead to the wholly separate question whether the will was one Mark would have made if left to act freely. *DeHart*, 2013 IL 114137, ¶ 30; R.1890-1894; s*ee* Pet'rs Br. at 36-38. The court thus failed to analyze or find a critical element establishing the presumption here and then to put Dorothy to her burden to rebut it.

Dorothy is also incorrect that the evidence could support any finding she did not participate in procuring preparation or execution. (Resp. at 34.) The opposite conclusion is clearly evident. Any such finding, if made, was against the manifest weight of the evidence.

Dorothy claims she merely "telephoned Hynds's firm for Mark to initiate the changes in the will," "arranged for Mark's attorney to come to the hospital to

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work on revising his will," and was "present" when Hynds visited Mark. (Resp. at 35-36, 41.) Dorothy's spin, however, is refuted by the evidence, detailed in petitioners' brief, pp. 12-21 and 39-42, which Dorothy largely ignores but leaves unrebutted:

- Dorothy not only telephoned Hynds, she asked him to prepare a new will to bring to Mark's hospital room for next day execution, and specified changes to Mark's longstanding will to disinherit Mark's sisters and grant Dorothy "total control over all assets." (R.629-630, 633; E.617.)

- Hynds drafted the will based solely on Dorothy's instructions, treating her as joint client in the engagement. (R.629, 633, 643-646; R.1554-1555.)

- Dorothy was not "in and out of" Mark's room (Resp. at 36); she never left him alone with Hynds, joined their discussions over final will terms while reiterating Mark's purported wishes and insisting she obtain power to control ultimate distributions. (R.618-620, 623-624, 633-637; R.997.)

- When discussions concluded, Dorothy rolled the table across Mark's bed, then stood above with Barkley and Hynds as Mark signed. (R.916-917, 924, 945.)

- Dorothy handled matters thereafter, speaking to Hynds concerning possible "other changes" and paying his fee. (R.965-700; E.645-646; R.1411-1412.)

Dorothy argues *Glogovsek* and *In re Estate of Lemke* show these conclusive facts are "not enough" (Resp. at 35-36), but *Glogovsek* found less compelling facts "sufficient to meet the [test] as to participation in procuring the will." 248 Ill. App. 3d at 798. And *Lemke* made no determination whether the respondent participated in preparation, finding only she had not "caused" it. 203 Ill. App. 3d 999, 1006-07 (5th Dist. 1999); *see* Pet'rs Br. at 38, 44. Her conduct, moreover, differed

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markedly from Dorothy's. She offered no advice or comment, nor "suggested or persuaded" the testator "to revise her will." 203 Ill. App. 3d at 1005-06. Here, Mark told a doctor the day Hynds visited Dorothy "is unhappy with me because I've been dragging my feet on this." (E.327.)

The undisputed facts amply supported the presumption to shift the burden to Dorothy. No case holds otherwise on similar facts.

2. Dorothy's Justifications Are Irrelevant and Unfounded.

Dorothy also tries to justify her participation based on her supposed testimony she merely called Hynds as "Mark requested" to relay "what Mark told Dorothy he wanted." (Resp. at 7.) But any such testimony provides no basis to withhold the presumption. On the contrary, courts fashioned the presumption to counterbalance precisely such self-serving testimony, recognizing, as detailed in petitioners' brief, pp. 27-29, that "the best witness is dead by the time the issue is litigated," unable to testify to what transpired. Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates, at 271 (Wolters Kluwer 11th ed. 2022).

Dorothy decries petitioners' omission of her rationalizations (Resp. at 2), but they were irrelevant to the threshold analysis whether the presumption applies, which is where the probate court erred. *See* Pet'rs Br. at 45-47; *DeHart*, 2013 IL 114137, ¶ 30. Once the presumption is applied, as the uncontroverted facts require, Dorothy can try on remand to overcome it by presenting "strong enough evidence in contradiction," *DeHart*, 2013 IL 114137, ¶ 30, including, if admissible, her justifications. They "should be carefully scrutinized," however,

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because courts recognize the "questionable credibility" inherent in such testimony by a donee "as to what was done or said to him by a deceased donor." *In re Est. of Trampenau*, 88 Ill. App. 3d 690, 695 (2d Dist. 1980).

The record, moreover, does not support Dorothy's rationalizations. She contends Mark asked her "to call his attorneys and ask them to draft a new will for him that would address an unresolved estate tax issue and leave his estate to Dorothy without restricting her control over the assets." (Resp. at 6.) But the pages she cites contain only: (i) Dorothy's stricken, non-responsive testimony "Mark asked" her to telephone Hynds; (ii) her admission she told Hynds what changes she and, purportedly Mark, wanted; and (iii) Hynds' irrelevant testimony, over objection, to his "understanding" Dorothy telephoned at Mark's direction. (*See* R.1342-1343, 1348-1349; R.1470-1472.) The cited pages contain no evidence Mark mentioned a tax issue or desire to give Dorothy control, or characterized Hynds as *his* lawyer, a characterization Hynds refuted, testifying he could not recall ever representing Mark and they last had contact decades ago. (R.618-620, 627, 633; C.2485 ¶ 12. *See also* Resp. at 41 (mischaracterizing Hynds as "Mark's attorney").)

C. The Presumption Is Subject to No Comparative-Benefit Requirement.

Dorothy also defends the probate court's failure to apply the fiduciary-relationship presumption by urging this Court add a requirement that the procuring fiduciary receive not just "a substantial benefit under the will," but one substantial

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"*compared to other persons who have an equal claim to the testator's bounty*." (Resp. at 28 (emphasis in original).)

Since *Weston* first announced the presumption, this Court has always conditioned it on the fiduciary's receipt of "a substantial benefit from the will," without comparison to other bequests. 213 Ill. at 299. Dorothy is incorrect that *DeHart* holds otherwise. *DeHart* cites *Weston* expressly to reaffirm its "well settled" rule mandating the presumption where the procuring fiduciary "receives a substantial benefit from the will," without further qualification. 2013 IL 114137, ¶ 30. What Dorothy misstates as *DeHart*'s holding is its summary of the appellate court's analysis in *Glogovsek.* (*See* Resp. at 28 (quoting *DeHart*, 2013 IL 114137, ¶ 34).) *Glogovsek* itself acknowledged a comparative-benefit requirement "has not been included in any supreme court cases." 248 Ill. App. 3d at 794. *DeHart* did not change that. Dorothy identifies no reason the Court should do so here. Public policy and settled law call for a robust, protective presumption, not one needlessly narrowed by conditions serving no purpose.

Dorothy makes a related waiver argument predicated on the false premise that the probate court found that Dorothy "was not a comparatively disproportionate beneficiary." (Resp. at 29; *see also id.* at 28.) It made no such finding, stating instead it would reach that question if it found "Dorothy was a fiduciary." (R.1883.) But, finding otherwise, the probate court did not decide whether Dorothy's bequest was "comparatively disproportionate." (R.1885-1886.) It did not even determine whether comparative benefit is relevant, noting only the

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inconsistency among decisions. (R.1882-1883.) There is no waiver in failing to appeal findings the probate court did not make.

Even were comparative-benefit relevant, moreover, the uncontroverted evidence established Dorothy received a substantial benefit compared to Mark's daughter, Courtney, who held "*an equal or superior* claim." *DeHart*, 2013 IL 114137, ¶ 35 (emphasis in original). Courtney received $100,000. (R.1889-1890.) Dorothy received everything else in Mark's sizeable estate. (*Id*.) Dorothy stresses Dorothy's and Courtney's relative "increase in benefits" from Mark's prior will (Resp. at 30), but that is irrelevant, and, even so, the changes Dorothy asked Hynds to make enhanced only her own bequest.

D. A Will Contestant Need Not Separately Prove Dominance and Dependence.

Dorothy urges this Court to narrow the presumption still further by announcing another new rule that would make the presumption dependent not only on a fiduciary relationship, but the beneficiary's dominance and the testator's dependence on facts *independent of* their fiduciary relationship. (Resp. at 30-33.) The proposed rule rests on a misreading of precedent, and makes no sense, since dominance and dependence are essential defining characteristics of a fiduciary relationship. *See Wiik*, 410 Ill. at 163 (quoted *supra,* pp.6-7); *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21 (2d Dist. 1995) ("essence of" fiduciary relationship is "one party is dominated by the other."); *Glogovsek*, 248 Ill. App. 3d at 796 ("fiduciary

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relationship" and "dependence" "are interrelated, so that in order to establish a fiduciary relationship one needs to find a dependent situation.").

1. Dorothy's Argument Misreads Precedent.

This Court's seminal application of the presumption in *Weston* makes clear that dependence, dominance, trust and confidence are what define the requisite fiduciary relationship, not, as Dorothy argues, separate requirements for the presumption that must be found in addition to the fiduciary relation:

> [w]here a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will, *and where* the testator is *the dependent* and the devisee *the dominant party*, *and* the testator *therefore* reposes trust and confidence in the devisee, as in the ordinary relation of attorney and client.

213 Ill. at 299 (emphases added).

Weston's specific references to dependence, dominance, trust and confidence identify elements of the requisite fiduciary relationship, not factors required to exist outside of it. They also identify the direction the requisite fiduciary relationship must run. The procuring devisee is the dominant party; the testator is the dependent. *Accord Anthony*, 20 Ill. 2d at 586 (presumption applies where "fiduciary relationship . . . is shown in which the beneficiary is the dominant party"); *Peters v. Catt*, 15 Ill. 2d 255, 264 (1958) (presumption where "confidential or fiduciary relationship" between devisee and testator and devisee[] was the dominant party and the testator the dependent party.").

As the courts recognize, where the fiduciary relationship arises as a matter of law, as under a property power of attorney, separate proof of these elements is

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not needed because they inhere in the recognized fiduciary relationship by definition. Dorothy contends this principle is "novel," lacking "support in Illinois law" (Resp. at 31), but even the very precedent she features in her brief refutes this, noting that a fiduciary relationship may be found "from the relationship of the parties" as a matter of law, or from particular facts, but in the latter circumstance the will contestant must prove "one party was in fact 'servient' and that other party was 'dominant.'" *In re Est. of Henke,* 203 Ill. App. 3d 975, 981-82 (5th Dist. 1990). *Accord Glogovsek*, 248 Ill. App. 3d at 793, 796 (where no fiduciary relationship exists "as a matter of law," the court must "find a dependent situation.") Pattern jury instructions are consistent, explaining: "If a fiduciary relationship does not exist as a matter of law, then there must be clear and convincing evidence establishing a dominant-subservient relationship." IPI Jury Instruction 200.03 cmt.

Weston's focus on two factors, (1) fiduciary relations and (2) participation in procurement, further refutes Dorothy's argument that an "original four-factor test" requires trial courts to find dominance and dependence outside the fiduciary relationship. (Resp. at 32.) Pattern instructions are again consistent. IPI Jury Instruction 200.03 cmt. (proof of "a fiduciary relation" and of "preparation procured by" the fiduciary-beneficiary "establishes *prima facie* the charge that the will resulted from undue influence") (citation omitted). This is widely understood, not "novel." Restatement (Third) of Property: Wills and Other Donative Transfers

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§ 8.3 cmt. f (1999) (presumption requires "confidential relationship" and "suspicious circumstances" in preparation or execution.).

2. *DeHart* Imposes No Additional Requirements.

Weston remains current and was expressly cited in *DeHart* in stating the same requirements for the presumption to arise, as follows:

> where (1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will, (2) the testator is the dependent and the beneficiary the dominant party, (3) the testator reposes trust and confidence in the beneficiary, and (4) the will is prepared by or its preparation procured by such beneficiary.

2013 IL 114137, ¶ 30 (citing *Weston*, 213 Ill. at 299 and *Herbolsheimer v. Herbolsheimer*, 60 Ill. 2d 574, 577 (1975)).

DeHart's formulation, however, by adding numbering and omitting from *Weston*'s formulation the key clarifying words "and where," and "and . . . therefore," as italicized in the *Weston* excerpt, *supra*, p.18, has unfortunately lent itself to Dorothy's misinterpretation that items (2) (dependence and dominance), and (3) (trust and confidence)—the characteristics defining the fiduciary relationship—must also be shown independent of it. (Resp. at 30-31.)

But *DeHart*'s insertion of numbering and the omission of *Weston*'s clarifying phrases over time were surely happenstance. Numbering appears to originate in *Herbolsheimer*, 46 Ill. App. 3d 563, 566 (3d Dist. 1977), which inserted numbers without explanation, and contrary to this Court's formulation earlier in the same proceedings. *Compare Herbolsheimer*, 60 Ill. 2d 574, 577

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(1975). *DeHart* then perpetuated this convention without comment, saying nothing to indicate any intent to impose new requirements so severely narrowing the presumption, much less explaining why they might be warranted, all while citing *Weston*'s original formulation. Dorothy is incorrect that *DeHart* applied, "by implication" (Resp. at 30), the restrictions she urges.

Nonetheless, as she stresses, one unpublished decision has now misconstrued *DeHart* as Dorothy does. *In re Est. of Reynolds*, 2022 IL App (4th) 210039-U, ¶ 32. The Court should eliminate further confusion by reaffirming the presumption requirements applied since *Weston*, consistent with pattern jury instructions, confirming that dominance and dependence are not independent requirements, but elements of the requisite fiduciary relationship requiring specific proof only when the relationship does not arise as a matter of law.

3. The Record Established Mark's Dependence.

While Dorothy's fiduciary relationship with Mark as a matter of law is by itself dispositive, Dorothy is also incorrect that the evidence did not otherwise establish Mark's dependence and her dominance. It was conclusive.

As detailed in petitioners' brief, pp. 11-12, 15-16: Mark's uncontroverted medical record showed he could not perform basic activities of daily living (E.321); his oncologist confirmed Mark was severely compromised both "physically and mentally" (R.1029-1030; R.830, 835-836; *see also* R.1014-1016), had lost "virtually [any] vigor," and was "nearly completely dependent on others" for "help eating, dressing, using the bathroom, and getting from place to place in a

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single room." (R.411-412, 416-417, 531, 560.) Mark depended on Dorothy, his "primary caregiver" (E.308), to handle his telephone calls and text messages, and to sign documents for him. (E.333-334; R.672-673; R.1162-1163; R.1640-1643.)

III. DOROTHY PRESENTS NO REASON TO ABANDON THE DEBILITATED-TESTATOR PRESUMPTION.

This appeal presents the important policy question whether Illinois courts should continue to apply a presumption of undue influence where a principal beneficiary, irrespective of whether a fiduciary, participates in procuring preparation or execution of a will of a testator debilitated by age or illness.

A. Dorothy Fails to Address Reasons For or Against This Presumption.

Dorothy ignores the reasons for this presumption. She argues only the precise state of case law, which is immaterial, since it is undisputed the appellate decision below created a new conflict.

Initially, Dorothy attacks an argument petitioners never made, that *Greathouse* "resurrected" the debilitated-testator presumption by "overrul[ing]" *Belfield.* (Resp. at 43-45.) Petitioners correctly argue only that *Greathouse* "reaffirm[ed] the essential premises of the debilitated-testator presumption," namely, this Court's recognition that debilitated testators are "susceptible to undue influence" and that it is "probable" a beneficiary who actively participated in procuring the will of such a vulnerable testator exercised undue influence. (*See* Pet'rs Br. at 49-51.) These truisms are the very reasons the debilitated-testator

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presumption comports with Illinois law and public policy and should be affirmed. Dorothy offers no rebuttal to the critical point.

Dorothy also quibbles over the extent to which appellate decisions continue to *apply* this presumption, or just state it as still current law, but she concedes the relevant point. The decision below creates a new conflict for this Court to resolve. (*See* Pet'rs Br. at 49-50.)

Dorothy has no answer to the sound reasons this Court should reaffirm the debilitated-testator presumption, long applied by Illinois courts. As detailed in petitioners' brief, pp. 50-53, other jurisdictions do not limit the presumption of undue influence to fiduciary relationships, and this presumption complements the fiduciary-relationship presumption to further protect vulnerable testators by mandating presumptions in circumstances indicating probable undue influence in litigation heard after the testators are gone and cannot speak to their true, testamentary intent.

B. Dorothy's Evidentiary Argument Is Unfounded and Irrelevant Here.

Dorothy also argues that that the record could not support application of the debilitated testator presumption, contending the probate court found "Dorothy did not procure the 2018 will" and she was not a "comparatively disproportionate beneficiary." (Resp. at 45-47.) As shown, however, comparative-benefit is irrelevant, the probate court made neither finding, and the record conclusively refutes both propositions anyway. (*See supra,* pp.12-13, 15-17.)

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Dorothy also denies that Mark's mind was "wearied or debilitated" (Resp. at 46), but this is a fact issue for adjudication on remand. The probate court disregarded this presumption and thus made no finding, although it recognized he was "very, very sick," and "dying" (R.1895). Indeed, as detailed in petitioners' brief, pp. 8-12, 15-21, the medical record was uncontradicted and conclusive that Mark was severely weakened and debilitated, bed-ridden, emerging from delirium, severely compromised physically and mentally, and "nearly completely dependent on others" for basic of daily living. (R.411-412, 416-417, 530-531, 560.)

Dorothy stresses Mark's text message about trying to meet a March 8 bid proposal deadline (Resp. at 46), but he sent the message March 2, two weeks before Dorothy called Hynds, and nine days before his March 11 hospitalization, delirium and rapid decline that week. (*See* Pet'rs Br. at 10-12.) Dorothy also ignores Mark's March 4 message that he was struggling with the deadline, "still trying too [sic] get done I'm not sure if I'll make it." (E.127.)

Dorothy also cites an attending physician's March 15 notation Mark was "still weak but mental status seems normal" (R.1005), but Dr. Showel testified that the note reflected the ongoing "concern about [Mark's] mental status" (R.1005-1006), and "call[ed] in question how well" its author "knew the patient." (R.854.) These are matters for remand.

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IV. DOROTHY IGNORES REASONS TO SPECIFY THE QUANTUM OF PROOF TO REBUT THE PRESUMPTION.

Dorothy has no answer to petitioners' argument that the Court should simplify and clarify the quantum of proof needed to overcome a presumption of undue influence in a will contest by making it in all cases the same "clear and convincing" standard mandated under the caregiver statute. 755 ILCS 5/4a-15(2). (*See* Pet'rs Br. at 57-59.) Dorothy only argues the evidence, contending any presumption here is "exceptionally weak" and that she could overcome even a strong presumption. (Resp. at 48.) These evidentiary issues are matters for remand. The probate court did not reach them, after determining no presumption applied.

Dorothy's invocation of precedent concerning the presumption of fraud or undue influence applied to fiduciary transactions, however, points to yet another reason to set a fixed standard requiring clear and convincing evidence. When that presumption arises, the fiduciary must in all cases prove that the transaction "did not result from his undue influence" by "clear and convincing evidence." *Shelton*, 2017 IL 121199, ¶ 23. The same standard should apply to fiduciaries profiting under wills they help procure. Dorothy urges an *ad hoc* standard dependent "on the circumstances of each case," employing Thayer's abstruse bubble-bursting model (Resp. at 47-48), but that provides insufficient guidance, clarity or consistency in application. The Court should eliminate complexity and uncertainty in adjudicating the presumption by declaring a straightforward,

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uniform "clear and convincing" standard, the same now applied to caregivers, transacting fiduciaries and in many will contests. A clear rule will better protect vulnerable testators against imposition by entrusted individuals.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this Court reverse the judgment below and remand the case for further proceedings.

Dated: June 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,994 words, including footnotes.

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NOTICE OF FILING / PROOF OF SERVICE

David E. Lieberman, an attorney, certifies that he caused the foregoing **Reply Brief of Petitioners-Appellants Peggy LeMaster and Kathleen Martinez** to be filed with the Clerk of the Supreme Court through the electronic filing service provider, Green Filing, on **June 28, 2023**. The undersigned attorney of record further certifies that he caused a true and correct copy of the filing to be served by electronic mail on the following counsel of record:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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