2011 WL 11543123 (Me.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Maine.
Penobscot County

Michael P. WEATHERBEE, et al., Plaintiffs,
v.
Peggy MCPIKE, et al., Defendants.

No. CV2007318.
July 28, 2011.

Closing Argument of Defendant Peggy McPike

Peggy McPike, by her attorneys, submits her Closing Argument and post-hearing brief in this matter as follows. In summary, Peggy McPike asks the Court to enter judgment for her on each of Counts I through VII of the First Amended Complaint, and to award her her costs.

I. INTRODUCTION AND SUMMARY OF FACTS

Peggy McPike, her husband Alden, and their sons Noah and Michael McPike, lived close to Clarence and Helen Weatherbee in Lincoln, Maine, in the years from 1977 to about 1997. Michael Weatherbee, Peggy's brother, went to college and law school and moved to Virginia.

Clarence Weatherbee was a strong personality, a “strong and opinionated man.” He worked in probation and parole, and as a court mediator. Helen Weatherbee, a public health nurse, was a lively personality. They were generous with both of their children as they grew up. They developed close ties to and affection for Peggy McPike's son Noah McPike as he grew up near them. They often talked to Noah about going to college and succeeding in life. They babysat for him, attended his sports games, and were active and interested as his grandparents. They encouraged him to do well in school and reviewed his report cards. They emphasized the importance of going to college every time report cards came out. Clarence and Helen Weatherbee had provided college educations for both of their children, Michael and Peggy, and wanted the same for their grandson.

In 1997 the McPikes moved to Bangor. They bought a house in Bangor in 2000. Their son Noah McPike attended Bangor High School for his freshman and sophomore years, and then transferred to Penobscot Valley High School for his junior and senior years, the school years 1999-2000 and 2000-2001.

In late 1999, Helen Weatherbee became acutely ill, and went to Virginia for several months, where she received needed medical treatment. She regained her health in early 2000 and flew back to Maine from Virginia, and resumed life in Lincoln with her husband Clarence. They lived together in their home in Lincoln until July, 2002, when both entered Westgate Manor nursing home in Bangor.

At the urging of Michael Weatherbee, Helen Weatherbee gave both Peggy McPike and Michael Weatherbee powers of attorney on forms prepared by Michael Weatherbee, who is a Virginia attorney. On December 25, 1999, Helen Weatherbee, then mentally competent, signed these powers of attorney before Attorney Patricia Locke, who notarized them. Among other things the Power of Attorney to Peggy (broadly authorized Peggy to “withdraw from or close my accounts or deposits in banks” (POA¶2), “to make gifts to beneficiaries named in my will” (POA 19), and authorized Peggy “to do all such other acts, matters and things in relation to all or any part of, or interest in, my property, affairs, or business of any kind or description in the State of Maine, or elsewhere, that I could do if acting personally, it being my intent that the enumeration of the specific powers above shall

not act to limit my agent in the exercise of this general agency, as I wish hereby to confer upon my agent the broadest possible power and discretion." (POA 112)

While Helen Weatherbee was in Virginia she signed additional powers of attorney to Michael and Peggy, including a second Power of Attorney to Peggy McPike, dated February 11, 2000, witnessed by Janet Weatherbee. (P. Ex. 40, Peggy McPike's deposition, at pp. 38-40, 4749, and Dep. Exs. 5 and 6.) In addition to other broad powers, each of these second powers of attorney "also explicitly authorizes the attorney-in-fact to make gifts to the attorney-in-fact or to others." (Dep. Exs. 5 and 6 to P. Ex. 40).

In Noah McPike's senior year of high school, 2000-2001, the Weatherbees continued to take active interest in Noah's college plans. They asked him what he wanted to do and were pleased he had chosen to apply to Holy Cross. In the spring and summer of 2001, after Noah McPike was accepted at Holy Cross, both Helen and Clarence Weatherbee continued to take great interest in seeing that Noah McPike had money to pay for his attendance at Holy Cross. This was the culmination of their longstanding interest in Noah's college education. They both got dressed up and attended Noah's high school graduation.

Clarence and Helen Weatherbee brought up to Peggy McPike repeatedly the question of what financial arrangements Peggy had made to pay for college for Noah, from about the time he was in sixth grade going forward. They asked her about what money she had saved for Noah's college. They were dissatisfied that Noah was going to be burdened with college loans, which Peggy and Michael had not had to carry. Peggy told them it was uncomfortable subject, and said they were putting her in an awkward position. Clarence in particular was very persistent. They directed Peggy McPike to take them to the bank, where Peggy withdrew funds on several occasions on their behalf at their specific request, using starter checks. She did not keep the cash she withdrew. On each occasion, she delivered the funds to Helen and Clarence Weatherbee. Helen and Clarence Weatherbee later delivered these funds to Peggy McPike as a gift for Noah's college education.

Peggy McPike did not initiate any of the discussions that led to these transfers, or the trips to the bank, or the transfers themselves. To the contrary, she expressed concern to her parents over equal treatment of Michael's children, and the possibility of hurt feelings. She told them they had done enough. Clarence and Helen Weatherbee themselves initiated each of these gifts. They talked to her at length about it. They told Peggy that what they did with their money was their business, and that Noah was their firstborn grandson. They passed her the envelopes with cash and said, "This is our donation." She requested that any gifts be made in cash, and she did not inform Michael of these gifts, because she feared (accurately) they would lead to hurt feelings. (See transcript of Peggy McPike's trial testimony at pp. 58-82.)

Clarence and Helen Weatherbee were entirely capable of knowing the natural objects of their bounty and the extent of their resources at the time they made these gifts. Clarence Weatherbee had obsessive aspects to his personality, which were of long standing, but which did not mean he lacked mental capacity. (See, e.g., P. Ex. 40, Peggy McPike's deposition testimony, at pp. 80-81, 100-102.) Helen Weatherbee and Clarence Weatherbee, who maintained separate checking accounts, were each writing out and signing their own checks, both for cash and to pay bills, in the spring and summer of 2001, including in June, July, and August, 2001. (See P. Ex. 3-A, Helen Weatherbee bank statements on Bangor Savings Bank checking account 2010010702 with images of cancelled checks, and P. Ex. 4-A, Clarence Weatherbee bank statements on Bangor Savings Bank checking account 9393580616 with images of cancelled checks).

Clarence's now-deceased brother, John Weatherbee, who testified earlier by deposition (Defendant's Ex. 36), noted that Noah "was Clarence's favorite," D. Ex. 36, p. 26), that Clarence was proud of his grandsons Noah and Michael McPike, and that he talked quite a bit about Noah going to college, because Clarence himself had come up the hard way. (D. Ex. 36, pp. 26-27, 28-29). John Weatherbee also noted that although Clarence liked people to think he was tight with money, actually he was generous. (D. Ex. 36, pp. 27-28). It was natural for Clarence to want to support Noah in trying to get to college. (D. Ex. 36, p. 29)

These gifts were completed in the time period of late June to early August 2001. Specifically, Plaintiff's Ex . 9 and Defendant's Ex. 37 show deposits in the Key Bank account of Peggy and Alden McPike on June 22, 2001 of $7,063.90 (which may have included $7,000 from the Weatherbees plus additional money of Ms. McPike's); July 12, 2001 of $15,335.00 (which may have

included $15,000 from the Weatherbees and the rest from the McPikes); July 30, 2001 of $4,900 (which Ms. McPike was not certain was from her parents but thinks it was); and $14,500 on August 10, 2001, in two deposits of $4,500 and $10,000 respectively.

These correlate, though not precisely, to withdrawals from the funds of the Weatherbees as follows:
• A $7,000 withdrawal from Helen's checking account No. XXXXXXX on June 22, 2001 (D. Ex. 21H);

• A $7,000 withdrawal from Clarence's checking account No. XXXXXXXXXX, by check dated July 9, 2001 (P. Ex. 4-A, with 8/7/01 statement);

• A $5,000 withdrawal from Helen's checking account No. XXXXXXXXXX on July 12, 2001 (D. Ex. 21G, also P. Ex. 3-A, see 7/18/01 statement);

• A $5,000 withdrawal from Helen's checking account on July 26, 2010 (P. Ex., also P. Ex. 8, p. 6 of 10,);

• A $4,500 withdrawal from Clarence's checking account on August 10, 2001 (P. Ex. 8, p. 9 of 10, also P. Ex. 28); and

• A $10,000 withdrawal from Helen's account No. XXXXXXXXXX on August 10, 2001 (P. Ex. 8, p. 10 of 10, also P. Ex. 3-A, see 8/17/01 statement).

In this time period, the bank deposit and investment assets of the Weatherbees, (in addition to the value of their home in Lincoln, their camp at Cold Stream in Enfield, any cash in safe deposit boxes, ski hats, or elsewhere, and guns, antiques, and other tangible personal property) included:
• A joint brokerage account at Means Investment with $200,800.50 on July 1, 2001, which was worth $187,057.50 on September 1, 2001 (D. Ex. 21A);

• Clarence's separate account at Means Investment with $98,959.50 on July 1, 2001, worth $94,115.20 on July 31, 2001 (D. Ex. 21B);

• Clarence's IRA at Means Investment with $16,068.95 on July 1, 2001, worth $17,216.00 on July 31, 2001 ID. Ex. 21C);

• Clarence's Bangor Savings Bank checking account No. XXXXXXXXXX, with $53,999.56 on June 8, 2001, and $54,444.05 on July 6, 2001 (D. Ex. 21D);

• Helen's separate account at Means Investment with $83,353,34 on July 1, 2001, worth $82,310.46 on July 31, 2001 (D. Ex. 21E);

• Helen's IRA at Means Investment with $13,255.28 on July 1, 2001, worth $14,158.24 on July 31, 2001 (D. Ex. 21F);

• Helen's BangorFirst Relationship 10 checking account at Bangor Savings Bank, with $49,028.98 on June 19, 2001, and $45,552.72 on July 18, 2001 (D. Ex. 21G);

• Helen's Bangor Savings Bank Market Rate Statement account at Bangor Savings Bank, with $45,961.42 on June 19, 2001, and $39,069.71 on July 18, 2001.

Thus, apart from real estate, adding these up and crediting half the joint Means Investment account to each, Clarence had cash and investment assets in this period of between $257,712.46 and $271,019.80. Helen likewise had cash and investment assets in this period of between $273,716.92 and $292,902.23.

In September 2001, Clarence Weatherbee purchased a vehicle, and was observed by the auto dealer, Paul Thornton, who had known Clarence for many years, to be perfectly capable of engaging in the transaction.

Beginning in about the late fall of 2001, it became apparent to Peggy McPike that Clarence and Helen Weatherbee needed some housekeeping assistance. She engaged a series of women to come in and help them, including Cindy Coombs, Dee Gagnon, and Jane Weatherbee Trott. Peggy McPike made cash withdrawals from the funds of Helen and Clarence Weatherbee and paid the caregivers in cash, “under the table” in an arrangement approved by Michael Weatherbee. She also used funds of Clarence and Helen Weatherbee to take them out to eat, to take them shopping, and to pay other expenses related to their needs. Peggy McPike kept Michael Weatherbee informed of what she was doing. She asked him to help her, and to help arrange for an accountant. Michael Weatherbee assured her that he knew she was up there on the firing line, and that he was in support of her efforts.

Clarence and Helen Weatherbee each entered Westgate Manor nursing home in July 2002. Peggy McPike made arrangements for cleaning of the house and camp of Clarence and Helen Weatherbee in the summer of 2002, and continue to pay caregiver Jane Weatherbee Trott for a period of time to maintain her availability in case the Weatherbees recovered and were able to return home with in-home care as they had done before. The cost of the nursing home was greater than the cost of the in-home care Peggy McPike had arranged.

In the summer of 2002, Peggy McPike, on advice from people at the nursing home, initiated guardianship and conservatorship proceedings. She engaged Attorney Jane Skelton, and requested that her brother Michael Weatherbee serve as co-guardian and co-conservator, which he agreed to do. In late 2002, before the appointments had been secured, Michael Weatherbee told Jane Skelton he was thinking of suing Peggy McPike for an accounting. This caused a conflict in Jane Skelton's representation, and she sought to withdraw. However, she completed the work needed to secure appointment of Peggy McPike and Michael Weatherbee as co-guardians and co-conservators in January and February 2003.

Peggy McPike was extremely attentive to both of her parents and spent many hours assisting them, both before and after they entered the nursing home. She visited her parents in the nursing home on almost a daily basis, and at times stayed there overnight. She spent a good deal of time driving them around for recreation, which was something they enjoyed, as well as taking her mother shopping. She decorated their nursing home rooms brightly, and made sure they had plenty of clothing. She devoted a lot of personal time and energy to their care, including advocating with health care providers at the nursing home, which resulted in more attention to their needs by the nursing home.

Peggy purchased a Volvo automobile in late 2002, in the name of Helen Weatherbee, over Michael Weatherbee's objection, after consulting with and receiving approval from Attorney Jane Skelton, because the Buick Helen Weatherbee had owned and the truck Clarence Weatherbee had owned were not suitable to transport Helen and Clarence Weatherbee, and a vehicle was needed to take them for rides. Peggy McPike continued to use this vehicle for the

benefit of Helen and Clarence Weatherbee until Helen was no longer able to manage trips outside the nursing home, at which point Peggy McPike parked the vehicle at Helen Weatherbee's camp. The vehicle was later sold by Mr. Griffin for the Estate of Helen Weatherbee.

Michael Weatherbee engaged in a blow-up with his sister in June 2003, around the time of the death of Clarence Weatherbee. He objected to sale by auction of tangible property of the parents, and instead secured two storage units in Lincoln Maine, and enlisted the help of friends and relatives to move tangible property to those two storage units and to the camp owned by the Weatherbees in Enfield at Cold Stream. Michael Weatherbee stopped talking to his sister at that point, and has not talked to her since except through attorneys. He did not engage with her in any of the activities required of him as guardian or conservator.

He made multiple demands on her for information and accountings through attorneys, but did nothing to assist her in the care of their parents. He did not take the trouble at any time between 2003 and 2011 to go through the tangible property he stored in the two storage units in Lincoln, or to go through the tangible property stored in the camp, to see what was there.

Clarence Weatherbee died intestate in June, 2003. Helen Weatherbee died intestate in July, 2008. Their sole co-equal heirs are Michael Weatherbee and Peggy McPike.

Based on Plaintiff's opening statement and the testimony of Michael Weatherbee, it appears that Plaintiff's concerns fall into nine categories, summarized as follows:
1. Summer, 2001, cash withdrawals by Peggy McPike, used by Clarence and Helen Weatherbee for gifts for college for Noah McPike;

2. Cash withdrawals made from late 2001 to late 2002 for caregivers and other expenses;

3. Cash in a Skidoo ski hat in the Weatherbees' Lincoln home, referred to by Helen as the “hide”;

4. A check to the “Ski Rack” in June, 2001;

5. Guns formerly possessed by Clarence Weatherbee at the Weatherbee home in Lincoln, held for safekeeping by the McPikes, including a gun claimed to be owned by Michael Weatherbee individually;

6. Cash formerly in the safe deposit box of the Weatherbees;

7. Season tickets to University of Maine mens' ice hockey games;

8. Items of furniture and/or other tangible property formerly in the Lincoln home or Enfield camp of the Weatherbees.

9. Purchase in the fall of 2002 of the Volvo in the name of Helen Weatherbee, funds for which were procured in part by trading Clarence's truck and selling Helen's Buick, and use of that vehicle for the Weatherbees before and after appointment of Peggy and Michael as co-guardians and co-conservators.

II. COUNTS AND CAUSES OF ACTION

The First Amended Complaint dated March 4, 2008 (amendment being granted by Order of September 12, 2008), was supplemented by an “Order Granting Consented-To Motion of Michael H. Griffin as Personal Representative of the Estate of Helen Weatherbee Under Rules 19 and 21, M.R.Civ.P, To Join Action As Plaintiff,” entered on December 29, 2008. Of the seven counts in the First Amended Complaint, Michael Weatherbee and Michael Griffin as Personal Representative of the Estate of *Helen* Weatherbee are plaintiffs on Counts I, II and III, and Peggy McPike is the sole defendant. Michael Weatherbee is the sole plaintiff on Counts IV through VII, and defendants in those counts are Peggy McPike and Michael Griffin in his capacity as Personal Representative of the Estate of *Clarence* Weatherbee.

In summary, Counts I, II, and III relate to the affairs of Helen Weatherbee. Count I asserts **abuse** of a confidential relationship through undue influence; Count II is under the Improvident Transfer statute; and Count III duplicates Count I and seeks imposition of a constructive trust. Counts IV, V, VI and VII relate to the affairs of Clarence Weatherbee. Count IV asserts **abuse** of a confidential relationship through undue influence; Count V duplicates Count IV and seeks imposition of a constructive trust; Count VI alleges tortious interference with expectation of a legacy from Clarence; and Count VII is under the Improvident Transfer statute.

It should be noted as a preliminary matter that no count in the First Amended Complaint alleges existence or use of a power of attorney, or any agency relationship between Peggy and Helen, and only passing reference to a power of attorney from Clarence to Peggy, even though Plaintiff introduced evidence of powers of attorney from Helen and Clarence to Peggy, and of use of powers of attorney by Peggy to withdraw money. Plaintiffs also made no attempt to invoke the recently-enacted Maine Uniform Power of Attorney Act, 18-A M.R.S. § 5-901 et seq. (effective as of July 1, 2010, pursuant to 18-A M.R.S. § 5-964). Several issues would have been raised by invocation of that statute in this case, but it was not invoked. No other statute on powers of attorney was invoked by Plaintiffs and no common law cause of action against an agent or attorney-in-fact as such was brought by Plaintiffs.

Defendant Peggy McPike does not consent to any post-trial amendment of the First Amended Complaint to conform to the evidence, if any should be advanced pursuant to Rule 15(b) of the Maine Rules of Civil Procedure. The miscellaneous collection of factual issues put forward by Plaintiff at trial must be understood as attempting to flesh out one or more of the existing seven counts. Defendant Peggy McPike has waived the defense of statute of limitations for the sake of enabling the court to deal as comprehensively as possible with the long-festering issues in this case. As described in more detail below, Defendant Peggy McPike is entitled to judgment on each of the seven counts.

A. COUNT I ABUSE OF A CONFIDENTIAL RELATIONSHIP BY UNDUE INFLUENCE AS TO HELEN WEATHERBEE

1. ELEMENTS OF THE CLAIM

In summary, Count I alleges:
1. Helen Weatherbee was a nursing home resident. For an unstated number of years before she became a nursing home resident she experienced mental and physical decline, memory loss and other conditions that made it impossible for her to manage her financial affairs appropriately.

2. Peggy McPike is and was a daughter of Helen Weatherbee and was her co-guardian.

3. “Defendant has, over the years, and using her relationship of trust and confidence, exercised power, control and dominion over thousands and perhaps even a hundred thousand dollars of Helen's money, and has used and applied said funds and property for her own benefit and the benefit of others, and not for Helen's care or benefit.”

4. Plaintiffs are “entitled to an accounting of Defendant of all funds received, handled and expended by Defendant which in truth and equity were funds of Helen Weatherbee.”

5. Plaintiffs have no adequate remedy at law.

The *ad damnum* clause seeks entry of an order requiring the Defendant to “render a true and just accounting of all funds and property belonging the Helen Weatherbee,” and an order requiring the Defendant “to restore and make restitution of such funds as she cannot property account for, and for costs, interest and such other and further relief as may be just and equitable.”

Count I appears to attempt to state a claim of **abuse** of a confidential relationship through undue influence, as set forth in *Ruebsamen v. Maddocks*, 340 A.2d 31, 34-37 (Me. 1975) and similar cases. [1] In general, the elements a plaintiff must prove, and the sequence of proof, are:

1. The existence of a confidential relationship. To prove this the Plaintiff must prove by preponderance of the evidence:
(a) The actual placing of trust and confidence in fact by one party in another, *and*

(b) A great disparity of position and influence between the parties to the relation.

2. A benefit (as from a transaction or transfer) to the superior party flowing from the relationship, at the expense of the other. *Ruebsamen,* 340 A.2d at 34-35.

3. When elements one and two are established, a presumption of undue influence arises.
4. The burden is then upon the benefitted party to "come forward with evidence tending to affirmatively show entire fairness on his part and freedom of the other from undue influence." If the fact finder is persuaded that the non-existence of undue influence is more probable than its existence, the effect of the presumption will disappear. *(Ruebsamen, 340 A.2d at 37,* which had required only equilibrium to dispel the presumption, was superseded by Rule 301(a) of the Maine Rules of Evidence on this point. *Theriault v Burnham,* 2010 ME 82, ¶¶ 9-10, 2 A.3d 324, 326-327.)

5. If the presumption is outbalanced, the Plaintiff must carry a burden of persuasion as to undue influence, upon the whole evidence of the case without the aid of the presumption. *Ruebsamen, 340 A.2d at 37.*

These criteria can be applied separately to the nine groups of issues raised by Plaintiff.

2. STANDING ISSUE

As noted above, the plaintiffs in Count I are Michael Griffin as Personal Representative of the Estate of Helen Weatherbee and Michael Weatherbee in his capacity as "son and co-guardian" of Helen Weatherbee, and as "next friend" of Helen Weatherbee. Michael Griffin as Personal Representative of Helen Weatherbee has standing to bring this count, under 18-A M.R.S. § 3-715 (22).

Michael Weatherbee lacks standing to bring Count I. When the motion to amend was granted on 9/12/2008, Helen Weatherbee was dead. (See Suggestion of Death of Helen Weatherbee Filed By Defendant Peggy McPike, dated September 5, 2008.) Michael's status as "son" did not enable him to bring this action before her death or to maintain it after her death. Rule 17(b), Me. R. Civ. P. Likewise, under Rule 17(b) he may not serve as "next friend" of an incapacitated adult. His status as guardian did not empower him to bring this action, before or after Helen's death. *Compare* 18-A M.R.S. § 5-312 (general powers and duties of guardians) with § 5-424 (24) (powers of conservators to prosecute actions). (Though Michael Weatherbee was also appointed co-conservator of Helen Weatherbee, which would have enabled him to bring certain actions during her life, he did not rely on such authority in this action, possibly due to exclusive probate court jurisdiction over management of the estate of protected persons under 18-A M.R.S. §§ 1-302(a) and 5-402(2).)

3. PEGGY McPIKE DID NOT ABUSE HER RELATIONSHIPS WITH HELEN WEATHERBEE OR CLARENCE WEATHERBEE

The evidence shows a longstanding close relationship between Clarence and Helen Weatherbee and Peggy McPike and her family, and mutual affection. The evidence shows that Peggy McPike took good care of Helen Weatherbee. No evidence shows Peggy McPike **abused** her relationship with her mother or her father. There is no evidence she was a "superior party" in any particular transaction with her mother or father, or that she had any great disparity of position and influence (and particularly so when Clarence was alive, who remained a dominant force). Michael Weatherbee, not Peggy McPike, was the one who prepared and procured powers of attorney for Peggy McPike and for himself. Peggy did not initiate the creation of powers of attorney. Peggy accepted gifts from Helen Weatherbee and Clarence Weatherbee in the summer of 2001 to help pay for Noah's college, but she did not initiate or encourage these gifts, which were initiated by the Weatherbees themselves. She hired caregivers to help the Weatherbees stay in their home as long as they could. In the period from the fall of 2001 to the winter of 2002 she

used Helen Weatherbee's funds to pay caregivers in cash, to take Helen Weatherbee out shopping and to eat, to purchase a Volvo automobile titled in Helen Weatherbee's name to transport the Weatherbees, and to buy her clothes and other things for her room after Helen entered the nursing home in the summer of 2002. She compensated herself and another cleaner at the rate of $10.00 per hour for some cleaning work in the summer of 2002. On the advice of nursing home personnel she initiated guardianship and conservatorship proceedings for Helen Weatherbee, hired Attorney Jane Skelton, and involved her brother Michael to be co-guardian and co-conservator with her.

Through the evidence in this case Peggy McPike has demonstrated her proper use of Helen Weatherbee's funds. She did not keep detailed contemporaneous records of funds she used, and has not stated more detail than she can remember. She asked her brother Michael for help, including engaging an accountant or bookkeeper, and was assured by him that she was the one on the firing line, and that she should do her best. She did not demonstrate financial mastery, but she did do her best. There is no evidence that she lost or misappropriated any funds. The Estate of Helen Weatherbee has not suffered any loss or damage due to Peggy McPike's efforts. To the contrary, the evidence supports the conclusion that her efforts saved Helen Weatherbee money, as Peggy McPike devoted many hundreds of uncompensated hours to her mother's care and well being, and enabled her to live at home with caregivers longer than might otherwise have been the case.

4. CASE LAW SUPPORTS A FINDING OF NO UNDUE INFLUENCE HERE

Comparison to the facts in the line of cases applying this cause of action shows that Peggy McPike's conduct falls firmly in the range of conduct that does not amount to undue influence. For example:

(a) In Theriault v Burnham, a new acquaintance, Mr. Theriault caused the 91-year-old Helen Dingley to fire her long-time lawyer and hire his own lawyer, who prepared a new will leaving her property to Theriault, not to a man she had known for 30 years who was named in her prior will. Ms. Dingley became dependent on Theriault, who transported her, cooked her meals, and wrote all her checks. Theriault threatened to leave her unassisted if she did not leave the property to him, separated her from others who might influence her decision, would not let her see her new will after she signed it, and during her life began eviction proceedings against another devisee against her wishes. Undue influence was found and upheld. 2010 ME 82,¶¶ 7, 2 A.3d 325-326.

(b) In *Estate of Campbell,* John Campbell arranged to have his 85-year old mother transfer her two cottage properties in York, Maine, to him and not to his siblings. She was then in failing health and living in a nursing facility in Massachusetts. He had taken on responsibility for her finances. He initiated a plan to transfer title to the two properties to himself and he made all the arrangements to carry out the plan. His purpose was to remove the assets from her Medicaid eligibility calculation. He told his mother the plan would allow him to pay her nursing home bills. He did not tell his siblings about the transfers for several years, and acted as though he was holding them for the family, then changed his mind. **Abuse** of a confidential relationship was found and upheld. 1997 ME 212, slip op. pp. 3-8,704 A.2d 331-332.

(c) In *Ruebsamen,* Dale Maddocks was engaged to marry Emily Ruebsamen when Maddocks arranged for purchase of two parcels of real estate. The funds to buy the properties came from Emily and her father Otto. Emily and Otto were inexperienced in business and relied on Dale. Dale alone was familiar with the area and the properties, and Dale set the terms of the purchase. Dale actively brought about the purchases using Emily and Otto's funds. One parcel was titled in Emily's name, and one in Dale's name. After the purchase, Otto paid for a house to be built on one parcel, and paid Dale weekly wages to work as the builder. Emily and Dale married, and both parcels were put in joint tenancy owned by Emily, Dale, and Otto. Dale was the dominant figure in bringing about this transfer. Thereafter Dale abandoned work on the house and divorced Emily. His joint tenancy interest was found to be the product of a confidential relationship, and he did not prove the entire fairness and validity of his retention of the joint interest. The court imposed a constructive trust on Dale's interest. 340 A.2d 33-34.

(d) In *Small v. Nelson,* a 90-year old bachelor farmer went to live with a beloved niece for the end of his terminal illness. He was bedridden, on opiates, and dependent on her for care. With the help of the niece he withdrew $100 from his bank account

in April, and $300 in late June, and gave it to her to pay expenses. Then his condition worsened. On July 6, by his “legible but scrawly” signature on a withdrawal slip, she withdrew the rest of his funds, $938.80, from the bank. After his death four days later, she put the money in her own account. She claimed that when she had returned with the money on July 6, he told her, “take it, it is yours individually.” Testimony of her husband, who had been present, confirmed only that he had told her to go get the funds and put them in the bureau in his room. In light of the man's complete dependence on the niece, a jury verdict finding the gift to be void was upheld.

(e) In *Gerrish, Ex‘r v Chambers*, Mary Smith, an 82-year old widow with terminal cancer, was admitted in July to a private hospital owned and operated by nurse Marion Chambers. Ms. Smith paid a weekly rate of $35 for board and care. Ms. Smith's condition declined, she was mostly bedridden, and was placed on increasingly strong doses of opium. In October, Ms. Chambers took a withdrawal slip to Ms. Smith's bank, signed by Ms. Smith, to withdraw $3,500 by cashier's check (about one-third of her total wealth). Ms. Chambers brought the check to Ms. Smith, who endorsed it over to her. Ms. Chambers promptly deposited it in her own account, and promptly purchased real estate in the name of a third party. While Ms. Chambers's sister testified the gift was freely made, many other witnesses testified to Ms. Smith's dire health condition before and after the gift, and to Chambers's own statements she expected Ms. Smith's imminent death. A finding of undue influence was upheld. 135 Me. 72-78, 189 A. 188-192.

(f) In *Eldridge v. May*, Amos Eldridge, age 73, “broken in health and somewhat enfeebled in mind,” lived with his wife in Ossippee, New Hampshire, until his sister, Annie May, contrived to meet with him apart from his wife, and persuaded him to steal away and come live with her and her husband in Island Falls, Maine. Though he was seriously ill, and though his physician had told Ms. May that he might live a day or longer but was liable to “pass out any time,” Mr. Eldridge made the trip with her on Friday, October 26. By Sunday, October 28, Ms. May was talking to Mr. Eldridge trying to convince him to turn over all his property to her in consideration of her agreement to support him for life. On Monday, October 29, he turned over his five bank books to her and she wrote to the banks asking to withdraw all the funds. He signed the withdrawal orders with a mark. The banks refused the request. On Wednesday, October 31, she called in a notary public, who drew up and notarized bank signature cards. The notary found Mr. Eldridge “in a state of Nervous collapse,” unable to sign his name, so the notary witnessed his mark. On Thursday, November 1, the same notary drew up an order authorizing Ms. May to sign for Mr. Eldridge's mail and endorse his checks. On Monday, November 5, the Mays took Mr. Eldridge to Mr. May's attorney, who drew up a contract of life support in consideration of transfer of all his personal property to Mrs. May. Mrs. May received the document in the mail on Tuesday, November 6, and promptly called the notary back in. The notary found Mr. Eldridge in bed and uncommunicative. Mrs. May was present. Mr. Eldridge made his mark on the paper but said nothing. On Wednesday, November 7, Mrs. May called the notary back in to prepare a deed conveying all Mr. Eldridge's real estate to her. She provided the deed description and instructions for the document outside Mr. Eldridge's presence. When they went in to have him sign it, he was unable to understand it or carry on an intelligible conversation. Two or three days later, November 9 or 10, Mrs. May's stepson appeared at the notary's office with the document in hand, marked with an “X” in the place for Mr. Eldridge's signature, and made oath he had seen Mr. Eldridge put his mark on the paper. No word was sent to Mrs. Eldridge of her husband's whereabouts until after he died on November 11. A jury finding of undue influence was upheld. 129 Me. 117-122,150 A. 380-382.

By contrast:

(a) in *Estate of Sylvester v. Benjamin*, Mr. Sylvester, an 86-year man, added his sister as joint tenant of his bank accounts, to the exclusion of his three children, when he was being cared for by home health workers and suffered from a certain level of confusion. The sister assisted him frequently, helped him with shopping, getting to appointments, routine banking, and monitoring his home health care. However, Mr. Sylvester was independent minded, and refused a healthcare worker's suggestion that he needed a power of attorney. The court found the relationship with the sister, though it was a trusting, blood relationship, did not go beyond one sibling helping another. No undue influence was found. 2001 ME 48,¶¶ 4, 10,767 A.2d 299-300.

(b) In *DesMarais v Desjardins*, Louise DesMarais, an **elderly** single woman, placed title to her treasured beachfront home in joint names with a couple who had worked and cared for her for seven years. The husband had done repair work on the house,

and the wife helped Louise with shopping, shoveling snow, and rides to church. She spent holidays with them, and after she broke her hip they assisted her, which her large extended family did not do. When the couple learned of her intent to put their names on the property they discouraged her. She responded that she wanted them to have the house because they were the ones who cared for her and cared for the house. Louise asked the husband to suggest a lawyer, which he did. The couple attended meetings with the lawyer at Louise's request. After she signed the deed she made a new will leaving her remaining property to relatives. She did not tell her relatives of the transfer as she did not want them to know what she had done. Testimony indicated that prior to signing the deed she was forgetful, that her mental condition deteriorated after she broke her hip and before the transfer. The court found no evidence that the couple treated Louise unfairly, and that they acted fairly and honestly. Summary judgment for the couple was granted and upheld.

5. SPECIFIC ITEMS CLAIMED BY PLAINTIFF

In the present case, in specific terms, Plaintiff's concerns 3 and 5 through 9 (the “hide,” the guns, the safe deposit box cash, the hockey tickets, the furniture, and the Volvo) can be addressed summarily under Count I, while items 1 (college gifts), 2 (cash withdrawals), and 4 (check to the “Ski Rack”) require more discussion.

No evidence shows any benefit flowing to Peggy from the “hide,” (the money that at one point was in a ski hat in the Weatherbees' Lincoln home, the location and disposition of which remains unknown to all), the guns (which are held for the personal representative of the estate for safekeeping in the McPike home), or the safe deposit box cash (which Peggy dutifully deposited in the bank after being appointed co-conservator, as documented by Alice Leeman in the accountings provided for the conservatorship period to Michael Weatherbee; see P. Ex. 20, pp. 10, 12, entries of March and April, 2003, and transcript of Peggy McPike trial testimony, pp. 198-205). Peggy did not use the hockey tickets herself but gave to Don and June Smith in compensation for their doing Helen's laundry and tending to her while in the nursing home during the co-guardianship and co-conservatorship period. She did not take any furniture except a bedroom set she owned, which Michael Weatherbee helped load on to a trailer. She and her husband stored some items for safekeeping in their home, but later put them at the camp. The Volvo was owned by Helen Weatherbee, and used by Peggy McPike for to transport Clarence and Helen, and to attend to their business, including travel to the nursing home and to Lincoln to clean their house, get their mail at the Lincoln post office box, and similar uses. There is no evidence of personal use or benefit to Peggy from the Volvo. None of these items comes close to stating a claim under an “undue influence” theory.

As to item 1, the summer, 2001, college gifts did benefit Peggy McPike. The evidence does not strongly support the two elements of a confidential relationship, but if a confidential relationship is found, the burden is upon Peggy to show the fairness of these transactions. The uncontradicted evidence shows she did not request or initiate these gifts, but instead expressed reservations about them in the face of her parents' repeated inquiries. She made cash withdrawals in the presence of her parents at their request and delivered the cash to them directly. They in turn gave envelopes of cash back to her as gifts to help pay for college for Noah. This was a natural product of their longstanding affection for Noah and longstanding interest in his college education. Peggy did not occupy a superior position relative to her parents in these matters. The evidence shows these gifts were free from any taint of undue influence on her part. Any presumption of undue influence is rebutted, and no evidence affirmatively shows any undue influence by Peggy. Even if a confidential relationship is found, as the Court noted in *Morrill v. Morrill*, 1998 ME 133,115, 712 A.2d 1041:

The law does not prohibit a party in a confidential relationship from transferring property to the superior party in the relationship, even by gift. Rather, the law seeks to ensure that transfers within these types of relationships are the true intent of the grantor and not the product of fraud or undue influence on the part of the grantee.

That standard is satisfied here.

As to item 2, the series of cash withdrawals made from the fall of 2001 through the fall of 2002, the evidence shows that these funds were withdrawn and used for the benefit of Helen and Clarence Weatherbee. Other than reimbursement to herself of

expenses she incurred, as for meals and similar items, and specific reimbursement to herself for time spent cleaning at a rate of $10.00 per hour in the summer of 2002, Peggy McPike received no personal benefit from these funds. She did not deposit or retain any of them. (See transcript of Peggy McPike trial testimony at pp. 137-139) The small benefits she received were fully earned, and were not paid under circumstances that amount to undue influence.

As to item 4, at the request and direction of the Weatherbees, from their funds, in June, 2001, a bicycle was purchased as a gift to Michael McPike, Peggy McPike's younger son. This was a gift freely given to Michael McPike, under circumstances free from undue influence. Peggy McPike did not ask for this purchase to be made, and expressed reservations about it. (See transcript of Peggy McPike trial testimony at pp. 108-111).

Judgment should be entered for Defendant Peggy McPike on Count I.

B. COUNT II IMPROVIDENT TRANSFER ACT CLAIM AS TO HELEN WEATHERBEE

1. ELEMENTS OF THE CLAIM

In summary, Count II alleges a claim under the Maine Improvident Transfer statute, 33 M.R.S. §§ 1021-1025. It alleges that Helen Weatherbee was an **elderly** dependent person, and that she made a "'major transfer of money or personal property' [sic] as defined in 33 M.R.S.A. §1021" to Peggy McPike without independent advice from an attorney.

The statute defines a "major transfer of personal property or money" at 33 M.R.S. §1021(5) to mean "a transfer of money or items of personal property which represent 10% or more of the **elderly** dependent person's estate." Note that the term "a transfer" is singular. The statute contemplates a single transfer, not the accumulation of many smaller transfers for purposes of calculating the 10% figure. Thus, though the complaint refers to "one or a series of transfer while **elderly** and dependent," the statute looks only at individual transfers equal to the 10% figure. A claim involving a series of transfers of less than 10% of the **elderly** dependent person's estate does not state a claim under this statute.

2. THE EVIDENCE SHOWS NO "MAJOR TRANSFER OF MONEY OR PERSONAL PROPERTY" WITHIN THE MEANING OF THE STATUTE

The Court should enter judgment for Peggy McPike under Count II because the evidence shows no transfer to her by Helen Weatherbee at any time that was of a value equal to or greater than ten percent of her estate.

The Court has pending before it Defendant Peggy McPike's Motion For Order To Confirm Admissions By Plaintiff Michael Weatherbee, dated June 29, 2009, based on Michael Weatherbee's failure to respond sufficiently to requests for admission directed to the 10% issue. This motion should be granted at this time. Facts sufficient to enter judgment for Peggy McPike on Count II and Count VII—that at all times in 2001 and 2002 each of Clarence and Helen Weatherbee had assets in excess of $250,000-- are set forth in the request for admissions which is the subject of that motion.

Apart from that motion, the evidence at trial shows that in the time period in question, when any transfers in question in this case were made, both Clarence Weatherbee and Helen Weatherbee had assets in excess of $250,000. As noted above, in the summer of 2001, Clarence had bank deposit and investment assets of at least $257,712.46, and Helen had such assets of at least $273,716.92.

Thus, any transfer would have had to exceed 10% of $250,000, or $25,000 in value to trigger possible application of the statute. No evidence shows any transfer of that magnitude. As noted above, the largest transfer of Helen Weatherbee funds shown is one of the summer, 2001 college gifts, in the amount of $10,000. The largest transfer of Clarence Weatherbee funds was $7,000. These fall far below the statutory threshold.

Plaintiff Michael Weatherbee may argue that transfers on different days should be aggregated to reach the 10% figure. The law does not support such a reading, with good reason. The Improvident Transfers statute, 33 M.R.S. § 1021 et seq., presumptively requires engagement of legal counsel by an **elderly** dependent person when he or she wishes to engage in one of two types of transfers for less than full consideration: (1) any transfer of real estate, or (2) any "major transfer of personal property or money". Again, the term "Major transfer of personal property or money" is defined in 33 M.R.S.A. §1021(5) as follows:

1. Major transfer of personal property or money. "Major transfer of personal property or money" means a transfer of money or items of personal property which represent 10% or more of the **elderly** dependent person's estate. [emphasis added]

Note that the term "a transfer" is singular. The wording does not include an aggregation of multiple small transfers over time. The reason is obvious from the structure of the statute: an **elderly** dependent person must be given notice by the law of the circumstances that will make his or her actions voidable after his death by his or her personal representative. An **elderly** dependent person must have a way to know when he or she must spend money on a lawyer to make his or her actions valid. The statute gives the **elderly** dependent person a bright-line way to know this: when he or she is engaging in a "major" transfer, that is, a transfer of more than ten percent of the value of all he or she owns, or when he or she is giving away any of his or her real estate. In other situations the **elderly** dependent person is free to make transfers without incurring the expense of a lawyer. In addition, the statute contemplates that the ten percent figure must be calculable at a specific moment in time.

The contrary theory, apparently advanced by Michael Weatherbee, is that a personal representative who is dissatisfied after the **elderly** dependent person dies, can reconstruct an indefinite number of small transfers over an indefinite period of time, which partly benefitted a caregiver, and add them together to show a single "major transfer" for which the **elderly** dependent person should have engaged a lawyer before making. This theory would require a lawyer to advise about every single small transfer made by a dependent person over age 60 to one who gives him or her care or support, especially one who is a family member such as a spouse or child. (This would apply to relations between spouses, where the dependent person was the breadwinner, as there is no spousal exception in the statute.) A lawyer would almost literally need to move in for the entire period in question, assuming anyone could guess in advance what that period would be. Such a reading of the statute would drastically curtail the freedom of persons over age 60 to manage their own affairs. The statute gives no evidence the Legislature intended to restrict the rights of **elder** persons to live their lives in such a dramatic manner.

While other terms of the statute, such as what constitutes "less than full consideration", are very broadly worded [2], the "major transfer of personal property or money" is more narrowly worded, to limit the universe of transfers that may be scrutinized to the single most important ones.

3. STANDING ISSUE

As noted above, the plaintiffs in Count II are Michael Griffin as Personal Representative of the Estate of Helen Weatherbee and Michael Weatherbee in his capacity as "son and co-guardian" of Helen Weatherbee, and as "next friend" of Helen Weatherbee. Under 33 M.R.S. § 1023 (1), a civil action under this statute may be brought by "an **elderly** dependent person, that person's legal representative, or the personal representative of the estate of an **elderly** dependent person." Michael Griffin as Personal Representative of Helen Weatherbee has standing to bring this count, under 18-A M.R.S. § 1023 (1) and § 3-715 (22).

Michael Weatherbee lacks standing to bring Count I. When the motion to amend was granted on 9/12/2008, Helen Weatherbee was dead. (See Suggestion of Death of Helen Weatherbee Filed By Defendant Peggy McPike, dated September 5, 2008.) Michael Weatherbee is not her "legal representative" after her death, and before death had no standing as son, guardian, or "next friend", for the reasons stated above as to Count I.

4. EVEN IF A MAJOR TRANSFER HAD OCCURRED, NO LIABILITY UNDER THE IMPROVIDENT TRANSFER STATUTE EXISTS

The effect of 33 M.R.S. § 1022 is to establish essentially the same presumption of undue influence, in the event of a "major transfer," as is established under the *Ruebsamen* line of cases. For the reasons discussed above, Peggy McPike has rebutted that presumption. She did not engage in undue influence.

The Court should enter judgment for Peggy McPike on Count II for the reasons stated above.

C. COUNT III ABUSE OF A CONFIDENTIAL RELATIONSHIP BY UNDUE INFLUENCE AS TO HELEN WEATHERBEE

1. ELEMENTS OF THE CLAIM

In summary, Count I alleges:
1. Peggy McPike had a close confidential relationship with Helen Weatherbee.

2. Peggy McPike was in a position to, and did, take advantage of this relationship to exercise undue influence over Helen's financial affairs.

3. Peggy allowed and influenced Helen to accumulate large sums of cash in socks, drawers, and other places, which funds were "gifted" to Peggy for reasons such as to fix her teeth.

4. Helen Weatherbee gave away, lost or misplaced large sums of funds during the time Peggy McPike had access to her accounts.

5. At least some of these funds were received and used by Peggy McPike for her own use and the use of others in her family.

The *ad damnum* clause seeks imposition of a constructive or resulting trust upon property rightfully belonging to Helen in Peggy's possession.

Count III appears to reiterate the claim of **abuse** of a confidential relationship through undue influence set forth in Count I. For the same reasons as discussed above, Michael Weatherbee lacks standing to bring Count III. The other matters discussed above in relation to Count I are incorporated here by reference. Count III adds only the request for the remedy of constructive trust.

In principle, imposition of a constructive trust is the proper remedy for **abuse** of a confidential relationship by undue influence, to prevent unjust enrichment where has been a wrongful transfer of an identifiable asset held by the wrongdoer. *See, e.g., Baizley v. Baizley,* 1999 ME 115, ¶ 6, 734 A.2d 1117, 1118, *and authorities cited therein.* Here, however, no such remedy is appropriate. There has been no exercise of undue influence, as discussed above. There is no asset wrongfully received or held by Peggy McPike.

Judgment should be entered for Peggy McPike on Count III.

D. COUNT IV ABUSE OF A CONFIDENTIAL RELATIONSHIP BY UNDUE INFLUENCE AS TO CLARENCE WEATHERBEE

1. ELEMENTS OF THE CLAIM

In summary, Count IV, brought by Michael Weatherbee alone against Peggy McPike and Michael Griffin as Personal Representative of the Estate of Clarence, alleges:
1. For an unstated number of years before Clarence Weatherbee died, he experienced mental and judgmental decline, such that he was unable to properly manage his affairs, and he was unable to form, and lacked, the requisite capacity and donative intent to make gifts of his property.

2. Peggy McPike and Michael Weatherbee are the children of Clarence Weatherbee.

3. Clarence Weatherbee died on June 22, 203, leaving a widow, Helen Weatherbee, and Michael Weatherbee and Peggy McPike as his heirs. There would have been funds in his estate to pay allowances and an inheritance to Helen and Michael, absent diversion and misappropriation by Peggy McPike.

4. Defendant has reduced Clarence's estate by diverting and misappropriating property, damaging Plaintiff.

The *ad damnum* clause seeks entry of an order requiring the Defendant to disgorge, and deliver to Clarence Weatherbee's personal representative, money and property of his that she improperly diverted or misappropriated, and that Michael Weatherbee be awarded damages offset against Peggy McPike's share of Clarence Weatherbee's estate.

Count IV appears, like Count I, to attempt to state a claim of **abuse** of a confidential relationship through undue influence. The arguments set forth as to Count I are incorporated here by reference, including as to Michael Weatherbee's standing.

2. PEGGY McPIKE DID NOT ABUSE HER RELATIONSHIPS WITH HELEN WEATHERBEE OR CLARENCE WEATHERBEE

As described above, the evidence shows a longstanding close relationship between Clarence and Helen Weatherbee and Peggy McPike and her family, and mutual affection. The evidence shows that Peggy McPike took good care of Clarence Weatherbee. No evidence shows Peggy McPike **abused** her relationship with her father. There is no evidence she was a “superior party” in any particular transaction with her mother or father, or that she had any great disparity of position and influence. By all accounts Clarence was an independent, dominant individual. Peggy tried to do what her father wanted. Michael Weatherbee, not Peggy McPike, prepared a power of attorney from Clarence Weatherbee to Peggy McPike. Peggy did not initiate the creation of powers of attorney. Peggy accepted gifts from Helen Weatherbee and Clarence Weatherbee in the summer of 2001 to help pay for Noah's college, but she did not initiate or encourage these gifts, which were initiated by the Weatherbees themselves, and in particular by Clarence Weatherbee. She hired caregivers to help the Weatherbees stay in their home as long as they could. In the period from the fall of 2001 to the winter of 2002 she used Clarence Weatherbee's funds to pay caregivers in cash, to take her parents out to eat and to pay their expenses, and to buy clothes and other things for him after Clarence entered the nursing home in the summer of 2002. She compensated herself and another cleaner at the rate of $10.00 per hour for some cleaning work in the summer of 2002. On the advice of nursing home personnel she initiated guardianship and conservatorship proceedings for Clarence Weatherbee, hired Attorney Jane Skelton, and involved her brother Michael to be co-guardian and co-conservator with her.

Through the evidence in this case Peggy McPike has demonstrated her proper use of Clarence Weatherbee's funds. She did not keep detailed contemporaneous records of funds she used, and has not stated more detail than she can remember. She asked her brother Michael for help, including engaging an accountant or bookkeeper, and was assured by him that she was the one on the firing line, and that she should do her best. She did not demonstrate financial mastery, but she did do her best. There is no evidence that she lost or misappropriated any funds. The Estate of Clarence Weatherbee has not suffered any loss or damage due to Peggy McPike's efforts. To the contrary, the evidence supports the conclusion that her efforts saved Clarence Weatherbee money, as Peggy McPike devoted many uncompensated hours to his care and well being, and enabled him to live at home with caregivers longer than might otherwise have been the case.

3. CAPACITY TO FORM DONATIVE INTENT

This Count also challenges Clarence Weatherbee's capacity to make gifts. This particularly pertains to the gifts made in June, July and August, 2001. However, in that time period and throughout 2001, Clarence Weatherbee was fully competent to make gifts. He continued to write checks, pay bills, make purchases, purchase and drive a motor vehicle, and run the Weatherbee household, albeit with some assistance later in 2001. Dr. Atkins related that even after Clarence entered the nursing home in July, 2002, he was interacting with Peggy, and giving her "direction and instruction on a regular basis." (Dr. Henry Atkins Depo., p. 4-5.) Dr. Atkins saw Clarence as having the ability to give direction and instruction early in his nursing home stay. In that time period Clarence was "bossy, controlling, demanding, felt very much in charge, and had lost some of the ability to make subtle decisions, so he would make up his mind and not hear any redirection." *(Id.)* "Peggy struggled very hard to do what her father wanted her to do, what she thought her father wanted her to do, and felt that her role was to ensure that what he wanted to happen, what he wanted to have done was his." *(Id.)*

The intent to make a gift is one of the three elements of a gift. *Brackett v. Larrivee,* 562 A.2d 138, 139 (Me. 1989)(citing to *Restatement (Second) of Property § 31.1, comment d).* The standard for capacity to make a gift appears to be the same as the capacity to make a will. *Restatement (Second) of Property § 34.5(1), and comment a.* "To be mentally competent to make a gift, one must know and understand the extent of his or her property, comprehend to whom he or she is giving his or her property, and know the natural objects of his or her bounty." *Id.* "A person who is mentally incompetent part of the time but who has lucid intervals during which he or she comprehends fully the significance of a donative transfer can, in the absence of an adjudication or statute that has contrary effect, make a valid will or a valid inter vivos donative transfer, provided such will or transfer is made during a lucid interval." *Id.*

In Maine the standard has been expressed as follows:

> If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient.

Estate of Haley, 147 Me. 173, 179-180, 84 A. 2d 808, 812 (1951), *quoting Chandler Will case,* 102 Me. 72, 89 (1906), *in turn quoting Randall & Randall,* 99 Me. 396, 59 A. 552 (1904). Clarence Weatherbee clearly met and exceeded this standard at the times in question.

As the quote from *Morrill v Morrill,* above, indicates, the law does not prohibit gifts within a confidential relationship, even where one exists, but looks to ensure they represent the true intent of the grantor. That is firmly the case here. For the same or similar reasons as are discussed above as to Count I, Peggy McPike is also entitled to judgment on Count IV as to Clarence Weatherbee. No undue influence was exercised, and no money or property was improperly diverted or misappropriated. No damages are due.

For all the reasons set forth above, judgment should be entered for Peggy McPike on Count IV.

E. COUNT V IMPOSITION OF A CONSTRUCTIVE TRUST AS TO CLARENCE WEATHERBEE PROPERTY

1. ELEMENTS OF THE CLAIM

Count V reiterates Count IV, and Michael Weatherbee individually and as co-guardian and next friend of Helen Weatherbee seeks imposition of a constructive trust on property of Peggy McPike that was acquired from, or is traceable to, funds diverted or misappropriated from Clarence Weatherbee.

2. PROCEDURAL ISSUES

Michael Weatherbee lacks standing to bring this claim for the reasons set forth above. In addition, imposition of a constructive trust is not a separate cause of action, but a remedy. *Burdzel v Sobus,* 2000 ME 84, ¶ 5, n. 3, 750 A.2d 573, 575. Thus this count duplicates Count IV. For the same reasons stated above, judgment should be entered for Peggy McPike on Count V.

F. COUNT VI TORTIOUS INTERFERENCE WITH THE EXPECTATION OF A LEGACY

1. ELEMENTS OF THE CLAIM

In summary, Count VI alleges that Peggy McPike tortiously interfered with legacies expected by Helen Weatherbee and himself from Clarence Weatherbee.

The elements of a claim of tortious interference with expectation of a legacy are:
1. The existence of an expectancy of inheritance;

2. An intentional interference by a defendant through tortious conduct, such as fraud, duress, or undue influence;

3. A reasonable certainty that the expectancy of inheritance would have been realized but for the defendant's interference; and

4. Damage resulting from that interference.

Morrill v Morrill, 1998 ME 133, ¶7, 712 A.2d 1039, 1041-1042. [3]

The "tortious conduct" alleged against Peggy McPike is the same alleged **abuse** of a confidential relationship by undue influence as is alleged in Counts IV and V, above. Thus, a failure to prevail on the issue raised in those counts will preclude recovery on Count VI. *See DesMarais v. Desjardins,* 664 A. 2d 840, 845 (Me. 1995). For the same reasons set forth above, judgment should be entered for Peggy McPike on Count VI.

Footnotes

1 Other cases in this line generally include *Theriault v. Burnham,* 2010 ME 82, 2 A.3d 324, *Estate of Sylvester v. Benjamin,* 2001 ME 48,¶¶6-10, 767 A.2d 297, *Morrill v Morrill,* 1998 ME 133, 712 A.2d 1039, *Estate of Campbell,* 1997 ME 212,704 A.2d 329, *DesMarais v Desjardins,* 664 A.2d 840 (Me. 1995), *Small v. Nelson,* 137 Me. 178, 16 A.2d 473 (1940), *Gerrish, Ex'r v. Chambers,* 135 Me. 70, 189 A. 187 (1937), *Mallett v Hall,* 129 Me. 148, 150 A. 531 (1930), and *Eldridge v. May,* 129 Me. 112, 150 A. 378 (1930). In *Theriault, Morrill,* and *Desmarais* this claim is discussed as an element of a claim of tortious interference with expectation of a legacy.

2 "Less than full consideration," with respect to a transfer of property, means the transferee pays less than fair market value for the property or the transfer is supported by past consideration. 33 M.R.S.A. § 1021(4).

3 Other such cases include *Theriault v. Burnham, supra; DesMarais v Desjardins, supra; Burdzel v Sobus,* 2000 ME 84, 750 A.2d 573, and *Cyr v. Cote,* 396 A.2d 1013 (Me. 1979).

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