

Circuit Court for Howard County
Case No. 13-C-17-112945

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1194

September Term, 2019

DEANNA McELWEE, ET AL.

v.

DORIS WILLIAMS

Berger,
Arthur,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: November 17, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from a trial in the Circuit Court for Howard County in which the trial court, sitting as the finder of fact, found in favor of Doris Williams (“Doris”), Appellee, and against Deanna McElwee and David Williams (“Deanna and David”), Appellants.¹ Deanna and David are the adult children of Jerome Williams (“Jerry”), who passed away on November 1, 2016. Doris is the surviving spouse of Jerry. Jerry was a successful businessman who, throughout his lifetime, made many financial investments and decisions. Additionally, Jerry was a generous man and made many gifts to both his adult children and his wife. In 2012, Jerry suffered from a stroke, which left him dependent on Doris for almost all aspects of his life.

Prior to his stroke, Jerry had executed two powers of attorney in favor of Doris, giving her control of his assets and financial affairs. After the powers of attorney were executed, Doris wrote checks to herself from Jerry’s checking account totaling \$1,467,000.00. Additionally, Doris used the financial power of attorney to facilitate the sales of two commercial properties owned by Jerry.

On September 29, 2017, Deanna and David filed a complaint with the Circuit Court for Howard County in their capacity as the successor trustees of Jerry’s trust and the personal representatives of his estate. The complaint alleged causes of action against Doris for undue influence, breach of fiduciary duty, and a request for a constructive trust. The trial court found that no confidential relationship existed between Doris and Jerry. The

¹ This Court recognizes that the parties consented to the use of informal first names in the trial court proceedings. For the sake of clarity, and in no means of disrespect, this Court will do the same.

trial court further found that Doris had complied with her fiduciary duties and that none of her actions were the result of her exerting undue influence on Jerry after his stroke. Accordingly, the trial court found in favor of Doris on all three counts of the complaint.

Appellants present several issues on appeal, which we have reordered and rephrased as follows:²

1. Whether the trial court erred as a matter of law in finding a fiduciary relationship existed between Doris and Jerome Williams because two powers of attorney were executed.

² Appellants' questions presented are as follows:

1. Did the Trial Court commit reversible error by failing to find the existence of a confidential relationship between the Appellee and Jerry?
2. Was there sufficient evidence to support a finding by clear and convincing evidence that the "Inheritance" Checks were deliberate, free, and voluntary acts of Jerry, made by him after a full disclosure of all relevant facts and circumstances, and fair, proper, and reasonable under the circumstances?
3. Was there sufficient evidence to support a finding by clear and convincing evidence that the sales of Jerry's commercial real estate holdings were deliberate, free, and voluntary acts of Jerry, made by him after a full disclosure of all relevant facts and circumstances, and fair, proper, and reasonable under the circumstances?
4. Did the Trial Court commit reversible error by admitting and relying upon inadmissible hearsay and Dead Man's Statute Testimony?
5. Did the Trial Court commit reversible error by failing to find that the Appellee violated her fiduciary duties as Jerry's attorney-in-fact?

2. Whether the trial court erred as a matter of law in finding that no confidential relationship existed between Doris and Jerome Williams.
3. Whether the trial court erred in finding that Doris did not exert undue influence on Jerome Williams regarding the writing of multiple inheritance checks and the sale of two commercial properties.
4. Whether the trial court erred as a matter of law in admitting improper hearsay evidence and inadmissible evidence in violation of the Dead Man's Statute.
5. Whether the trial court properly considered Maryland's General and Limited Power of Attorney Act in finding there was no breach of fiduciary duty by Doris Williams.

For the reasons stated herein, we affirm the judgment of the Circuit Court for Howard County.

FACTS AND PROCEDURAL HISTORY

Jerry was an accomplished businessman and created a successful life for himself in the years leading up to his stroke. Jerry had founded both a successful model train business and a real estate business. In October 2007, Jerry made the decision to sell his model train business for an amount that he thought was significantly more than it was worth.

Jerry purchased and developed five parcels of real estate, all located in Howard County, Maryland. Two of the parcels were used as residential condominiums which he later sold for a profit. One parcel was used for his model train business up until it was sold. Finally, the other two parcels, Columbia 100 and Woodside, were used by Jerry as income-producing commercial properties. Overall, the two commercial properties were generating over \$450,000.00 per year in profit for Jerry and the trust that he maintained.

In July 2007, Jerry married his former neighbor, Doris. At the time, Jerry had accumulated a large amount of assets but did not have a will or an estate plan. Doris urged him to meet with an attorney to create the necessary legal documents. At this meeting, Doris and Jerry also executed a pre-nuptial agreement effectively stating that what was Doris' was to remain hers and what was Jerry's was to remain his and then passed onto his children. Around the same time as this meeting, Jerry also executed two powers of attorney in favor of Doris: a Durable General Power of Attorney, dated July 23, 2007 ("financial power of attorney"), and a power of attorney, dated March 14, 2011, regarding an account at Columbia Bank ("banking power of attorney").

Thereafter, Jerry created the Jerome M. Williams Amended and Restated Living Trust Agreement, a revocable trust. Jerry was the trustee and during his lifetime he held the power to make payments to the settlor, himself, from both the principal and the income of the trust. After his death, the assets of the trust would be "poured out" into his estate to be distributed in accordance with his will. The beneficiaries of Jerry's will were his two adult children, Deanna and David.

Additionally, the guidelines of the trust provided for special management of the two commercial properties, Columbia 100 and Woodside. The trust document provided that the trustee would continue the trust as to both properties until December 31, 2025. After this time, the trust would be terminated, and its assets distributed. Jerry retained all the rights as trustee during his lifetime and Doris, Deanna, David, and his attorney were named as successor co-trustees in the event of his incapacity or death. Additionally, the trust

provided that every reasonable effort should be made to keep Jerry in his home and not in a nursing home except with his written consent or if it was clearly medically required.

On February 2, 2012, Jerry suffered a massive stroke. The stroke left Jerry with severe physical deficits such as difficulties walking, eating, going to the bathroom, writing, and speaking. For help with these day-to-day activities, Jerry relied on Doris to do everything for him. Despite the clear changes in Jerry's physical condition, his mental condition during this time is the subject of controversy among the parties and is debated.

At trial, Deanna and David contended that Jerry suffered global aphasia in that he lost the ability to both produce and understand written or spoken language. Contrarily, witnesses for the Doris testified at trial that Jerry possessed sufficient mental capacity to make decisions after his stroke. Additionally, notes from his doctor provided that he understood what was going on and improved well over time through rehabilitation. Despite his difficulties, Jerry was able to communicate using methods other than speech such as impaired language or physical gestures.

After Jerry's stroke, Doris took control of his finances and executed decisions on Jerry's behalf. On March 21, 2014, Doris wrote a check to herself from Jerry's bank account in the amount of \$267,000.00. Doris also wrote two checks of \$267,000.00 each to both Deanna and David. From May 14, 2014 until September 30, 2014, Doris signed a number of documents in connection with selling the Columbia 100 property as Jerry's attorney-in-fact pursuant to the financial power of attorney. Closing occurred for this sale

on December 8, 2014. The net proceeds were \$5,750,373.09 and were deposited into the investment account of the trust.

On January 13, 2015, Doris wrote a check to herself in the amount of \$200,000.00. From June 12, 2015 until July 20, 2015, Doris wrote additional checks to herself in the total amount of \$1,000,000.00. The memo line of these checks contained notations stating “Doris Inheritance” or “Bal of Doris Inheritance.”

On May 23, 2016, Jerry suffered another stroke that required hospitalization. On June 22, 2016, Doris admitted Jerry into Lorien Elkridge nursing home. On July 28, 2018, Doris signed an agreement to sell the other commercial property, Woodside, as Jerry’s attorney-in-fact. Two weeks later, on August 16, 2016, Jerry was admitted to Gilchrist Home Hospice due to his increasingly deteriorating health. The closing to sell Woodside occurred on September 30, 2016. That same day, Jerry was relocated to spend his last days in comfort at his home. One month later, Jerry died.

Deanna and David filed a complaint with the Circuit Court for Howard County on September 29, 2017, alleging undue influence and breach of fiduciary duty against Doris. The complaint also requested the imposition of a constructive trust. A bench trial was held in February and March, 2019. On July 15, 2019, the trial court issued an opinion finding in favor of Doris on all counts, holding that there was no undue influence on Jerry and that Doris had not violated her fiduciary duty.

DISCUSSION

I. The trial court did not err as a matter of law in finding a fiduciary relationship between Doris and Jerry as a result of two powers of attorney.

Normally, the determination of whether a fiduciary relationship exists between two individuals is a question of fact. *See Brass Metal Products, Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 355 (2009) (quoting *Hogan v. Md. State Dental Ass’n*, 155 Md. App. 556, 566 (2004) (stating that a fiduciary relationship has been equated to a confidential relationship and both are questions of fact)). Questions of fact in a bench trial are reviewed under the clearly erroneous standard. *Schade v. Md. State Bd. of Elections*, 401 Md. 1, 33 (2007). Nevertheless, there are instances when a fiduciary relationship is created as a matter of law and reviewed *de novo* as a question of law. *Latty v. St. Joseph’s Soc’y of Sacred Heart, Inc.*, 198 Md. App. 254, 268 (2011).

Fiduciary relationships can be created in several ways, including by common law, by statute, or by contract. *Plank v. Cherneski*, 469 Md. 548, 598 (2020). Each of these fiduciary relationships often have different characteristics from the others. *Id.* There are many examples of well-known fiduciary relationship categories such as those between trustees and beneficiaries, agents and principals, and lawyers and clients. *Id.* (internal citations omitted). Powers of attorney are one way to create principal-agent relationships resulting in a fiduciary relationship and fiduciaries duties on the part of the agent. *Figgins v. Cochrane*, 403 Md. 392, 415 (2008) (citing *King v. Bankerd*, 303 Md. 98, 105 (1985)). Once a fiduciary relationship is established, there is “a duty on the part of the fiduciary to

act for the benefit of the other party to the relation as to matters within the scope of the relation.” *Lasater v. Guttman*, 194 Md. App. 431, 456 (2010).

Here, Jerry executed two powers of attorney in favor of Doris, one for banking and one for financial decisions. Both of these documents created a fiduciary relationship between Doris and Jerry as that of a principal and an agent. *Figgins, supra*, 403 Md. at 415. The trial court recognized this relationship in its July 11, 2015 opinion. Indeed, the trial court acknowledged that “[Doris] would have breached her fiduciary duty had she *not* followed what [Jerry] wanted to do.” The powers of attorney executed by Jerry created this fiduciary relationship between himself and Doris by giving her the authority as his attorney-in-fact to perform certain acts on his behalf. *Id.* Accordingly, the trial court did not err in finding the existence of a fiduciary relationship, and the duties that come with it, between Jerry and Doris as principal and agent under the powers of attorney.

II. The trial court erred as a matter of law in finding that a confidential relationship did not exist between Doris and Jerry as a result of their fiduciary relationship.

Normally, the finding of a confidential relationship is a question of fact that we would review under a clearly erroneous standard. *Midler v. Shapiro*, 33 Md. App. 264, 268 (1976). Nevertheless, presumptions arise out of certain relationships that confidential relationships also exist. *Id.* One of those relationships is that of a principal and an agent. *Id.*

“A confidential relationship exists whenever confidence is placed by one person on another and accepted by that person.” *Id.* (internal citations omitted). When a party is

justified in believing that the other party will “not act in a manner adverse or inconsistent with the reposing party’s interest or welfare” a confidential relationship is created. *Id.* (citing *Bass v. Smith*, 189 Md. 461, 469 (1948)). A confidential relationship is not presumed between a husband and wife unless there is an agreement between the two that establishes one. *Lasater, supra*, 194 Md. App. at 456–57.

Here, not only were Jerry and Doris husband and wife, they were also principal and agent as established by the two powers of attorney executed by Jerry in favor of Doris. *See supra* Section I. Because Jerry executed these documents and gave Doris powers to act on his behalf as his agent, a confidential relationship between them was created as a matter of law. *See Sanders v. Sanders*, 261 Md. 268, 271 (1971) (“The designation of [an] . . . attorney in fact under the power of attorney established [a confidential relationship].”). As a result of the two powers of attorney executed by Jerry in favor of Doris, a confidential relationship was established between Jerry and Doris as a matter of law.

Further, the evidence presented at trial make it clear that such a relationship existed between the two. Parties are in a confidential relationship when one party relies and depends on the other. *Thompson v. UBS Fin. Servs., Inc.*, 443 Md. 47, 70 (2015). The depending party “repose[s] trust and confidence in the [other’s] good faith and integrity.” *Id.* There are many factors to be considered when determining if a confidential relationship exists between spouses, including: “the age, mental condition, education, business experience, state of health, and degree of dependence on the spouse in question.” *Lasater, supra*, 194 Md. App. at 458. Dependence is a “key factor,” but no one factor is “necessarily

conclusive.” *Figgins, supra*, 403 Md. at 410; *Upman v. Clarke*, 359 Md. 32, 41–42 (2000). Notably, “any one [factor] may have weight in determining whether the relationship as a fact existed.” *Figgins, supra*, 403 Md. at 410. The existence of such a relationship between family members must be shown by clear and convincing evidence. *Chassels v. Krepps*, 235 Md. App. 1, 17 (2017).

The record reflects that Doris did everything for Jerry. In addition to household tasks such as cooking, cleaning, bathing, and dressing, Doris also performed all of Jerry’s business and financial tasks for him as well. Clearly, there was heavy reliance by Jerry on Doris to continue running his business. *See Upman, supra*, 359 Md. at 41–42. Doris herself pointed out during the trial that she “had to become [Jerry’s] thinker and his words.” Indeed, Doris testified that Jerry “usually always wanted to do whatever I suggested.” Although Jerry had utmost business experience prior to his stroke, the debilitating stroke left in him in a condition where he undoubtedly relied on his wife for “virtually everything.” In light of Jerry’s mental condition, older age, poor state of health, and high degree of dependence on Doris, the record established at trial reflects that a confidential relationship existed between Jerry and Doris. Accordingly, the trial court erred in finding that a confidential relationship between Jerry and Doris did not exist under the circumstances of this case.

III. Although the trial court erred in failing to find a confidential relationship existed between Jerry and Doris, an abundance of evidence in the record shows that Doris met her burden of rebutting the presumption of undue influence on Jerry.

When there is a confidential relationship between two parties, a presumption of undue influence applies. *Figgins, supra*, 403 Md. at 411. Once this relationship has been established, the burden shifts to the defendant “to show the fairness and reasonableness of the transaction.” *Sanders, supra*, 261 Md. at 277. Additionally, the defendant is required to show that “the transfer [or sale] was the deliberate and voluntary act of the grantor and that the transaction was fair, proper and reasonable under the circumstances.” *Id.* at 276–77 (citing *Rice v. Himmelrich*, 222 Md. 234, 239 (1960)). This burden is a heavy one of “establishing by clear and convincing evidence that there has been no abuse of the confidence.” *Upman, supra*, 359 Md. at 43; *Sanders, supra*, 261 Md. at 277.

Although the burden to rebut the presumption of undue influence is a heavy one, Doris clearly rebutted the presumption based on an abundance of evidence presented to the trial court. Deanna and David presented testimony by a psychiatrist, Dr. Christiane Tellefsen, who never met Jerry, acknowledged that Jerry had suffered global aphasia and lost the ability to produce spoken or written language. Nevertheless, Dr. Tellefsen acknowledged that Jerry’s condition and cognitive recognition improved over time. *Cf. Conrad v. Gamble*, 183 Md. App. 539, 556–58 (2008) (holding that where parties only received control of the other’s assets after the mental incapacitation and where there was no evidence that the susceptible party’s cognitive judgment had improved the presumption of undue influence had not been rebutted).

In the medical records from Dr. Suzan Abdo, the regular physician who saw Jerry, Doris indicated that Jerry was mentally acute. Dr. Damanhuri Alkaitis, an expert witness testifying for Doris, testified that Jerry still had the sufficient mental capacity to comprehend the transactions and information communicated to him. Despite his inability to speak, the evidence presented at trial demonstrates that Jerry was able to communicate through impaired language or gestures. Indeed, all of these improvements and methods of communications are repeatedly referenced in the medical records offered at trial by Doris. Although Deanna and David offered medical evidence as well, the trial court was not persuaded by that evidence. *See id.* at 563 (holding that the trial court was in the best position to weigh the evidence presented and could consider the medical evidence from one party as more credible than the other).

Additionally, Jerry's advisors who helped him with his legal, financial, and business issues, communicated with Jerry leading up the questioned transactions and made it clear that Jerry made informed choices. Despite his difficulties, Jerry was able to communicate his intentions throughout the time after he suffered from the stroke.

The record at trial further established that there was a continuity in the actions Jerry took before and after his stroke. Before his stroke, Jerry was a savvy businessman who participated in the stock market and took risks to increase his wealth. Jerry was also an extremely generous person and took pride in sharing his wealth with his family, including Deanna, David, and Doris. *See id.* at 561 (analyzing the effect of an unnatural disposition on the presumption of undue influence). Despite their pre-nuptial agreement, Jerry

continuously wrote checks to Doris for ten thousand dollars every month throughout their marriage. The checks written after Jerry's stroke were simply a continuation of the generosity he extended throughout his lifetime. Notably, both Deanna and David accepted post-stroke checks from Doris written on behalf of Jerry without question as to their father's mental capacity.

Critically, the trial court found that “[e]ven if a confidential relationship is conceded, however, clear and convincing evidence established that Ms. Williams neither exercised undue influence nor breached his fiduciary duties.” Our review of the record fully supports the trial judge's express finding that Doris Williams neither exercised undue influence nor breached her fiduciary duties.

Deanna and David contend that the trial court erred by not considering the presumption shift from themselves to Doris if a confidential relationship was established. We disagree. “Judges are presumed to know the law. Absent an indication to the contrary, we must assume judges apply the law correctly to the case before them.” *Hebb v. State*, 31 Md. App. 493, 499 (1976). There is no evidence to show that the trial court did not properly consider the shift of the presumption in this case. Accordingly, the evidence presented before the trial court supports the trial judge's finding that clear and convincing evidence established that Doris neither exercised undue influence nor breached her fiduciary duties in the decisions to write inheritance checks and to sell two of his properties.

IV. Although the trial court erred in admitting improper hearsay and Dead Man’s Statute testimony, it did not rely on such evidence in its opinion.

Ordinarily, trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2013). “Whether evidence is hearsay is an issue of law reviewed *de novo*.” *Bernadyn v. State*, 390 Md. 1, 8 (2005). In Maryland, the review of hearsay rulings is two-part: first, “whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal,” and second, “the factual findings underpinning this legal conclusion necessitate a more deferential standard of review.” *Gordon, supra*, 431 Md. at 653. “Accordingly, the trial court’s legal conclusions are reviewed *de novo*, but the trial court’s factual findings will not be disturbed absent clear error.” *Id.*

The standard of review is similar for admissibility of evidence under the Dead Man’s Statute. *See Brown v. Daniel Realty Co.*, 409 Md. 565, 583 (2009). An abuse of discretion standard is normally applied to trial court decisions regarding the admissibility of evidence. Nevertheless, “when the trial judge’s ruling involves a weighing [of relevance in relation to other factors], we apply the more deferential standard. On the other hand, when the trial judge’s ruling involves a legal question, we review the trial court’s ruling *de novo*.” *Id.* (quoting *Figgins, supra*, 403 Md. at 419). Accordingly, because testimony under the Dead Man’s Statute requires factual analysis and a legal ruling, we apply a mixed standard of review to the admissibility of the evidence in this case.

A. Although testimony from Deanna regarding a statement from Jerry’s doctor regarding his mental capacity was inadmissible hearsay, that evidence was cumulative to evidence that was otherwise admissible at trial.

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Md. Rule 5–801(c). Hearsay is inadmissible unless an exception or exemption applies. Md. Rule 5–802. Hearsay testimony is admissible if offered for a purpose other than to prove its truth, such as if it is offered for impeachment. *Stewart v. State*, 342 Md. 230, 236–37 (1996); *Nance v. State*, 331 Md. 549, 559–60 (1993).

During cross-examination of Deanna, Doris’s counsel elicited testimony that Deanna had spoken with Jerry’s doctor, Dr. Susan Abdo, after his death. Deanna testified that during that phone call, Dr. Abdo stated that she believed that Jerry “was perfectly competent, he understood.” Deanna and David’s counsel lodged a hearsay objection and the trial court denied the objection and, instead, allowed the statement into evidence for the limited purpose of impeaching Deanna. Notably, a statement admitted for the sole purpose of impeachment cannot be used as substantive evidence. *Foble v. Knefely*, 176 Md. 474, 485 (1939).

Indeed, “[i]t has long been the policy in [Maryland] that this Court will not reverse a lower court judgment if the error is harmless.” *Barksdale v. Wilkowsky*, 419 Md. 649, 657 (2011). This rule “embod[ies] the principle that courts should exercise judgment in preference to the automatic reversal for ‘error’ and ignore errors that do not affect the essential fairness of the trial.” *Id.* at 657–58. The test for harmless error depends on the

type of case and the type of error. *Id.* In most issues in civil cases, including that of the admission of evidence, the burden to show error “is on the appealing party to show that an error caused prejudice.” *Id.* at 660 (internal citations omitted). The test is not one of “precise standards,” but at minimum the appealing party must show the prejudice was “likely” or “substantial.” *Crane v. Dunn*, 382 Md. 83, 91 (2004); *Beahm v. Shortall*, 279 Md. 321, 331 (1977); *Barksdale, supra*, 419 Md. at 661–62. “Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice.” *Hance v. State Roads Comm.*, 221 Md. 164, 176 (1959).

“In considering whether an error was harmless, we also consider whether the evidence presented in error was cumulative evidence.” *Dove v. State*, 415 Md. 727, 743 (2010). When there was sufficient evidence independent of the evidence complained of to support the trial court’s ruling, the evidence is cumulative. *Richardson v. State*, 7 Md. App. 334, 343 (1969). The evidence that Dr. Abdo stated that Jerry was “perfectly competent” was cumulative to other evidence admitted at the trial. Indeed, the medical records admitted into evidence supported Deanna’s observations. Additionally, testimony from other witnesses, including various doctors, supported the conclusion reached by the trial court. Accordingly, we hold that the trial court’s admission of this hearsay evidence was harmless error and did not prejudice Deanna and David.

B. Although the trial court erred in admitting testimony precluded by the Dead Man’s Statute, the error was harmless and did not affect the outcome of the case.

The Dead Man’s Statute provides that:

A party to a proceeding by or against a personal representative . . . may not testify concerning any transaction with or statement made by the dead or incompetent person . . . unless called to testify by the opposite party, or unless the [same] testimony . . . has been given already in evidence in the same proceeding concerning the same transaction or statement.

Md. Code (1973, 2013 Repl. Vol.), § 9–116 of the Courts & Judicial Proceedings Article.

The general purpose of the Dead Man’s Statute is to put the parties in an equal position by “sealing the lips” of survivors as to statements by or transactions with the decedent that could only be disputed by the deceased. *Farah v. Stout*, 112 Md. App. 106, 114 (1996); *Ortel v. Gettig*, 207 Md. 594, 604 (1955). For purposes of the Dead Man’s Statute, a “party” is “one who has an interest in the property sought or a person having a direct pecuniary and proprietary interest in the outcome of the case.” *Reddy v. Mody*, 39 Md. App. 675, 682 (1978).

The Dead Man’s Statute is to be construed narrowly. *Midler, supra*, 33 Md. App. at 276. Nevertheless, the language or purpose of the statute cannot be ignored and testimony which would tend to increase or diminish the estate of the decedent by establishing or defeating a cause of action must be excluded. *Reddy, supra*, 39 Md. App. at 679–80.

According to the definition of “party” under the Dead Man’s Statute, Deanna, David, and Doris were all precluded at trial from testifying as to statements made by the deceased, Jerry. On many occasions during the trial, during her direct examination, Doris testified to statements Jerry made to her in contravention of the Dead Man’s Statute. On most of those occasions, Deanna and David’s counsel objected to such testimony on the

basis of the Dead Man’s Statute and the trial court sustained the objection. Nevertheless, there were instances where the trial court overruled the objection and admitted such testimony. For example, Doris’s counsel asked her, “And did you believe that Jerry wanted you to write those checks?” The record reflects that Doris replied, “I did.” Deanna and David’s counsel objected on based on the Dead Man’s Statute, but the objection was overruled. In another instance, Doris’s counsel asked Doris, “Those checks that you wrote to yourself, who first brought up the issue of writing those checks or the idea of writing those checks, you or Jerry?” Doris replied, “Jerry did.” Deanna and David’s counsel also objected to this testimony under the Dead Man’s Statute, but the objection was overruled.

The trial court permitted Doris’s testimony as to what Jerry told her because the testimony addressed her state of mind based on Jerry’s representations to her. In our view, this characterization misunderstands the purpose of the Dead Man’s Statute. Doris’s testimony on these instances still included statements from the deceased that would “tend to increase or diminish the estate of the decedent,” which could only be disputed by him. *Id.* Therefore, such testimony should have been excluded under the Dead Man’s Statute.

Simply put, a party to a suit may not testify as to any statement or transaction with the decedent, particularly the transaction or statement that is the subject of the lawsuit. *Giering v. Sauer*, 120 Md. 295, 296 (1913). The test to determine if something is a transaction under the meaning of the Dead Man’s Statute is: “[w]hether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge.” *Schifanelli v. Wallace*, 271 Md. 177, 184 (1974) (quoting *Ridgley, Exec. v. Beatty*, 222 Md.

76, 83 (1960)). In her direct examination, Doris testified regarding the transactions and conversations with Jerry that gave rise to her belief that his estate plan was being “orally modified.” Jerry, if living, would be able to contradict these statements and assertions if they were untrue. Accordingly, this testimony should have been excluded under the Dead Man’s Statute as statements or transactions with the deceased.

Although this admitted evidence should have been excluded under the Dead Man’s Statute, the trial court did not rely on such evidence in its opinion. The error was, therefore, harmless. *See supra* Section IV.A. Additionally, as we expressed in Section III, there was extensive testimony presented by Doris which proved by clear and convincing evidence that she did not exert any undue influence over Jerry. Such testimony and other evidence presented to the trial court was cumulative of this otherwise improperly admitted evidence and further supports that the trial court’s error was harmless. *Richardson, supra*, 7 Md. App. at 343. Therefore, we hold that the trial court’s improper admission of testimony against the Dead Man’s Statute was otherwise harmless and did not prejudice Deanna and David.

V. The trial court did not err by not expressly including that it considered the Maryland General and Limited Power of Attorney Act in its opinion.

Lastly, Deanna and David contend that by following Jerry’s “orally modified estate plan,” Doris breached her fiduciary duty under the Maryland General and Limited Power of Attorney Act. The Maryland General and Limited Power of Attorney Act provides in pertinent part:

Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

- (i) The value and nature of the principal's property;
- (ii) The principal's foreseeable obligations and need for maintenance;
- (iii) The extent to which the principal's liability for taxes . . . can be minimized; and
- (iv) The principal's eligibility for a benefit, a program, or assistance under a statute or regulation.

Md. Code (2010, 2017 Repl. Vol., § 17–113(b)(5) of the Estates & Trusts Article. Judges are presumed to know the law. *Hebb, supra*, 31 Md. App. at 499. Indeed, a trial judge does not need to articulate his express reasons and what he did or did not consider. *Id.* “Absent an indication to the contrary, we must assume that judges apply the law correctly to the case before them.” *Id.* Here, there is no indication that the trial court improperly applied the law or otherwise did not consider the Maryland General and Limited Power of Attorney Act. Accordingly, we hold that the trial court did not err by not expressly indicating that it considered the Maryland General and Limited Power of Attorney Act in rendering its opinion.

**JUDGMENT OF THE CIRCUIT COURT
FOR HOWARD COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**