Circuit Court for Montgomery County
Case No. 431493V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2271

September Term, 2018

ANGELA TRAETTINO

v.

JIMMY W. TRAETTINO, *et al.*

Beachley,
Wells,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: August 11, 2020

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After the 2016 death of her beloved husband of 56 years, Luigi Traettino, Appellant Angela Traettino's life has consisted of being pulled in different directions by those closest to her, her children.[1] Less than six months after Luigi's passing, the grieving octogenarian: ceded control of her and Luigi's restaurant of forty-plus years to her eldest son, Appellee Jimmy Traettino; and was convinced to sign away half of her estate (worth over $5 million)—through transferring one commercial property apiece to Jimmy and his brother John, and transferring her home to her daughter, Janet.[2] A little over two months after those transfers, Angela wanted her properties back, because of, according to the circuit court, "Janet's perceived inequity in the distribution." The fallout from these "gifts" continues today: Angela sued Jimmy when he would not return the property he received, and she is no longer welcome in the restaurant she founded and ran for over forty years.[3]

Angela, whose primary language is Italian,[4] appeals the decision validating that no-consideration transfer of her multi-million-dollar property to Jimmy. At the time of the transfer, Jimmy was Angela's attorney-in-fact, raising the presumption of a confidential

[1] Hereinafter we refer to the members of the Traettino family by their first names. We do so for clarity and mean no disrespect by this informality.

[2] Angela retained a life estate in the home.

[3] Angela has also had to deal with the tragic saga of her husband's remains, which includes: disinterment from their resting place in Italy, trans-continental travel, a screaming match between Jimmy and Janet in a crowded restaurant, and a court order.

[4] Angela's understanding of English is a matter of considerable dispute. She does not write English, but at no point during hours of testimony (in English) did she request a translator.

relationship, and putting the burden on Jimmy to prove that the transfer was fair and reasonable. *See Upman v. Clarke*, 359 Md. 32, 42 (2000) ("[T]he existence of a confidential relationship shifts the [heavy] burden to the donee to show the fairness and reasonableness of the transaction.").

FACTS AND LEGAL PROCEEDINGS

Angela and Luigi were married in 1960, two years after Angela moved to the United States from Italy. Jimmy is their eldest child, and has two siblings, Janet Woolschlager and John Traettino.

Angela and Luigi opened Positano Ristorante Italiano ("Positano") in 1977. Three years later, they purchased 4940 Fairmont Avenue in Bethesda, Maryland,[5] and moved the restaurant there. In 2009, they purchased the adjoining lot, 4948 Fairmont Avenue (with 4940 Fairmont Avenue, collectively, the "Fairmont") and expanded Positano.

Luigi, by all accounts, handled the couple's business affairs, while Angela was Positano's chef and creative influence. In 2001, Jimmy joined his parents full-time at Positano and began helping with the family business. He also assisted his parents with their finances and other business ventures. His name was on their joint bank accounts, he helped them buy and sell commercial property, and he began attending estate planning meetings with Luigi.

[5] Unless otherwise noted, all the properties discussed are located in Bethesda, Md.

On June 10, 2016, Luigi passed away somewhat suddenly in Italy. The couple had reciprocal wills, which provided that if one spouse survived the other, the entirety of the deceased's estate would go to the surviving spouse.[6] At the time of Luigi's death, Angela and Luigi owned: the Fairmont, a commercial property on Cordell Avenue, their residence on Del Ray Avenue, and property in Italy. They owned these as tenants-by-the-entirety, and therefore, once Luigi passed on, Angela became their sole owner by operation of law. After Luigi's death, the estimated value of Angela's estate increased to around $11 million.

Positano—which continues to be the lone tenant at the Fairmont—is owned by a shell company, Mangiare. Prior to Luigi's death, he and Angela owned a combined ninety-seven-percent of the company, with Jimmy, Janet, and John each owning one-percent. Three months after Luigi's death, in September 2016, Angela, Janet, and John all transferred their stakes to Jimmy, giving him complete ownership of Mangiare, and Positano. While Jimmy owned Positano, his mother maintained ownership of the Fairmont. Mangiare continued to pay Angela $14,000 per month in rent.

The Transfers

In the weeks after his father's death, Jimmy met with his parents' attorney, Jonathan Bromberg, and instructed him to draft a document removing Angela as the personal representative of Luigi's estate and naming Jimmy as her replacement. Angela also signed a Maryland Statutory Form Personal Financial Power of Attorney, naming Jimmy as her

[6] The wills also stipulated that upon the surviving spouse's death, the estate would be split equally between Jimmy, Janet, and John.

attorney-in-fact. Before signing the form, Angela met with Bromberg in private, and told him "Jimmy speaks for me."

After the documents were signed, around July 1, 2016, Jimmy commenced a plan to transfer his mother's real property to him and his siblings. He met with Bromberg and Barrett Penan, a certified public accountant, to discuss Angela's assets. Penan met Angela at an initial interview meeting, at which Angela stated, "Jimmy speaks for me." Penan took this to mean that he should deal directly with Jimmy regarding Angela's estate. The plan consisted of Angela transferring Fairmont to Jimmy, the Cordell property to John, and the Del Ray house to Janet. The Fairmont is worth at least four times the value of the other two, and is debt-free. Penan testified that Jimmy decided and instructed that the Fairmont should go to him.

Between July 2016, and January 2017, Jimmy and Angela spent almost every day together at Positano, during which they discussed Jimmy's plans. On January 3, 2017—at Angela's request—Jimmy, his siblings, and his mother held a family meeting to discuss Angela's estate. There, Jimmy presented his plan to his siblings, and distributed a print-out of it. During the meeting, Angela purportedly said, "this is what Daddy and I wanted to do." "Consulting fees" were part of Jimmy's plan, which he testified Angela agreed to. When Angela owned the Fairmont, Positano, its tenant, paid her $14,000 monthly, for rent. Jimmy decided that, after the transfers, Angela would continue to receive $14,000 monthly from Positano as a "consulting fee," and $7,000 monthly from John to replace the Cordell property rent.

One week later, on January 10, 2017, the Fairmont was transferred to Jimmy. According to Angela, Jimmy told her they needed to visit Bromberg that day, to "do some signature." Bromberg did not meet with Angela alone before she signed the transfer documents, nor did he communicate beforehand explaining the purpose of the meeting or what she would be signing that day. He never counseled her on whether he thought she should sign the documents. Angela testified that Jimmy told her she was signing estate planning and tax documents. She stated that she had neither read, nor understood, what she was signing, and that Jimmy did not tell her that she was signing her property away. Bromberg testified that he "explained to Angela that . . . she was conveying the restaurant building to Jimmy." Her response, according to him, was "she said, 'si, yes.'"[7] Angela signed the deed.

Two days later, Jimmy again took his mother to Bromberg's office, where she signed the Cordell and Del Ray properties over to his siblings. In his deposition read into trial, John stated that it was clear to him, even after the transfers, that his mother still thought she was the owner of the Cordell property. All the transfers took place within eight months of her husband's death. When asked how she was at the family meeting that occurred just six months after Luigi's death, Angela responded that she was "still shaken. I'm still shaken today."

[7] At trial, Bromberg acknowledged that when asked during his deposition about Angela's response, he stated, "It's not that she had a response; Jimmy actually had a response. He said, Mom, you remember at the meeting this is what we agreed to, and then she said si."

The issue came to a head two months later. According to Angela, when she realized she had given away her properties, she asked for them back. According to Jimmy, Angela changed her mind, claiming that she had "made a mistake." Either way, John and Janet transferred the Cordell and Del Ray properties back to their mother. Jimmy refused to return the Fairmont, and it was subsequently transferred by him to a shell corporation, 3JT. Angela then commenced this lawsuit. As soon as it began, Jimmy stopped paying his mother her $14,000 monthly "consulting fee."

Jimmy's Payment From Angela's Accounts

Jimmy estimated that he spent one-thousand hours working on Angela's finances and estate. He maintains that Angela told him to pay himself from her assets for his efforts. Jimmy paid himself $150,000 from Angela's assets as a one-time fee. He also transferred over $57,000 from Angela's account to his and his wife's accounts—which he claims were gifts. Moreover, Jimmy removed $250,000 from his mother's accounts to invest in an online brokerage account managed by him alone. Angela claims she did not authorize Jimmy to pay himself, did not know about the "gift" transfers, and was told only $50,000 was being invested by Jimmy.

Circuit Court Proceedings

Angela filed suit in the Circuit Court for Montgomery County, alleging "fraud, misappropriation, unjust enrichment, undue influence, concealment, constructive fraud, mistake, breach of fiduciary duty and breach of contract." She sought compensatory damages, rescission, and the return of the Fairmont.

After a bench trial, the circuit court ruled in favor of Jimmy for the counts related to: fraud, rescission, unjust enrichment as to the Fairmont, undue influence, concealment, constructive fraud, mistake, breach of fiduciary duty, and Maryland Securities Act[8] claims, as well as his counterclaim for *quantum meruit*.[9] It awarded Angela $221,220 for her misappropriation claim, and $150,000 for the unjust enrichment claim.[10]

In its verdict, read from the bench, the court found Jimmy's testimony credible, but not Angela's. It stated that Angela had "selective memory," and key parts of her testimony were contradicted by other witnesses or evidence. The court believed Jimmy's version of events—that Angela was aware of and agreed to the transfers, and only changed her mind months later at the behest of her daughter, Janet—rather than Angela's version that she did not understand she was signing away her property. Angela and Jimmy both appealed the decision.

[8] Angela alleged that Jimmy violated Maryland Code (1975, 2014 Repl. Vol.), § 11-703 of the Corporations and Associations Article—that he committed fraud as an investment advisor.

[9] The court also found for 3JT as to unjust enrichment, constructive fraud, and mistake. It found for Mangiare for breach of contract and unjust enrichment.

[10] Those amounts were reduced to $50,000.00 for misappropriation, and $147,500.00 for unjust enrichment after post-trial motions. Balanced with Jimmy's $50,000 *quantum meruit* award, Angela's final award was $147,500.

QUESTIONS PRESENTED

Angela's timely appeal presents us with the following questions:

1. Did the circuit court err by not upholding the presumption of invalidity and not invalidating the no-consideration transfer of a multi-million-dollar commercial property (Fairmont property) from Angela to her eldest son Jimmy despite a confidential relationship?

2. Did the circuit court err by finding Jimmy did not violate Md. Code (1975, 2014 Repl. Vol.), § 11-703 of the Corporations & Associations Article?

3. Did the circuit court err by awarding Jimmy a $50,000.00 judgment on his counterclaim?

Jimmy's cross-appeal presents us with the following questions:

4. Did Judge John M. Maloney commit error when he granted non-party witness Jeffrey Renner's Motion for Protective Order to preclude the taking of his deposition *duces tecum* prior to trial?

5. Did Judge Terrence J. McGann abuse his discretion when he denied Jimmy Traettino's Motion to Extend Discovery Deadline beyond the motions hearing date for Jeffrey Renner's Motion for Protective Order, thereby rendering Jimmy Traettino's Motion for Reconsideration of Judge Maloney's granting of Jeffrey Renner's Motion for Protective Order moot?

6. Did Judge Jill C. Cummins commit error when she quashed [Jimmy's] trial subpoena for Jeffrey Renner?

7. Did Judge Jill C. Cummins commit error when she refused to allow the admission of the March 15, 2012 signed directive of Luigi and Angela Traettino to Jonathan Bromberg?

8. Did Judge Ronald R. Rubin commit error when he granted in part Angela Traettino's Motion *in limine* as to certain testimony of Suzanne Medicus, CPA?

For the reasons discussed below, we shall reverse the circuit court's decision as to Question 1 and affirm as to Questions 2 and 3. Regarding Jimmy's cross-appeal, we affirm the decisions of the circuit court.

STANDARD OF REVIEW

For actions tried without a jury, we review the case on both the law and the evidence. Maryland Rule 8-131(c); *Cane v. EZ Rentals*, 450 Md. 597, 613 (2016) ("We accept the trial court's fact findings unless they are clearly erroneous . . . [but] review the trial court's conclusions of law and application of law to facts without deference to the trial court."). Thus, we review *de novo* the trial court's "relation of [] facts to the applicable law." *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 50 (2007) ("Applying a *de novo* standard, we must determine whether the trial judge correctly concluded that the facts, as [she] found them to be, legally constituted a breach of fiduciary duty and bad faith."). Here, applying a *de novo* standard, we determine whether the trial court correctly concluded that the facts, as it found them to be, legally constituted proof that the gifts from Angela to Jimmy were voluntary, and fair and reasonable to her.

DISCUSSION

1. Validity Of Gifts In Confidential Relationship

It is undisputed that Jimmy and Angela were in a confidential relationship in the months up to, and at the time of the Fairmont transfer. *See Figgins v. Cochrane*, 403 Md.

392, 410 (2008) ("[W]hen a parent on account of old age and infirmity relies heavily upon the child for care and protection or for guidance in business affairs, then there exists a confidential relationship where the child acts as a guardian for the parent.") (cleaned up); *Sanders v. Sanders*, 261 Md. 268, 271 (1971) (power-of-attorney is a fiduciary relationship where a confidential relationship is presumed by law). At trial, Jimmy's counsel conceded that a confidential relationship existed at the time of the transfer, and the circuit court agreed.

The existence of a confidential relationship gives rise to the presumption that any *inter vivos* gift from Angela to Jimmy is the product of undue influence, and therefore invalid. *See Upman*, 359 Md. at 35. The heavy burden of rebutting this presumption, by clear and convincing evidence, rests with Jimmy as the donee. *See Figgins*, 403 Md. at 411.

What precisely must be established by a donee to rebut the presumption is key to this case. A study of past Maryland decisions on the issue reveals an evolving standard that moved towards greater protection of the non-dominant person. In *Green v. Michael*, 183 Md. 76, 85 (1944), the Court of Appeals required that the donee simply provide "a full and fair explanation of the whole transaction." About thirteen years later, in *Masius v. Wilson*, 213 Md. 259, 265 (1957) the Court, clarifying that the focus would be on the donor's well-being, adopted the fair and reasonable standard, indicating that "the burden is on the grantee to show that the transfer was the deliberate and voluntary act of the grantor

and that the transaction was fair, proper and reasonable under the circumstances." *See also Rice v. Himmelrich*, 222 Md. 234, 239 (1960).

Six years after that, the Court held that the burden on the donee is to show "that there has been no abuse of the confidence, that she acted in good faith, and that the act by which she was benefited was the free, voluntary, and independent act of the other party to the relationship." *Wenger v. Rosinsky*, 232 Md. 43, 49 (1963). Relying on Justice Story, the Court also added consideration of the donee's motive to the mix: "[i]f influence is acquired, it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains." *Id.*; *see also* 1 Joseph Story, Equity Jurisprudence, 12th Edition, § 308.

Moving forward a few decades, the Court, in 2000, stated:

> In other words, once the relationship is proved, the plaintiff is relieved from the necessity of proving 'the actual exercise of overweening influence, misrepresentation, importunity, or fraud,' and the defendant has the burden of showing that a fair and reasonable use has been made of the confidence, 'that the transfer of the property was the deliberate and voluntary act of the grantor and that the transaction was fair, proper and reasonable under the circumstances.'

Upman, 359 Md. at 42–43 (quoting *Sanders*, 261 Md. at 276–77). The Court also explained why the rule is different from an attack on a will (where the burden of proving undue influence is on the one attacking the will):

> Persons ordinarily desire to retain possession and use of their property while they are alive. If someone who stands in a fiduciary or confidential relationship with another exerts *any* influence on that person to obtain an *inter vivos* transfer of the person's property, for less than full value, that influence is

> regarded, at least presumptively, as undue and requires an explanation. The exertion of influence for personal gain is, itself, a breach of the trust implicit in the confidential relationship, especially when it causes the person reposing trust to be deprived of his or her property. Thus, in *Vocci v. Ambrosetti*, 201 Md. 475, 485, 94 A.2d 437, 442 (1953), we stated the general rule to be that "he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence" and concluded that the relationship itself requires the dominant party "to abstain from all selfish projects."

Id. at 44 (emphasis in original). Even more recently, in 2008, the Court stated in *Figgins*: "to rebut the presumption, the party receiving the benefit . . . must show the fairness and reasonableness of the transaction, and demonstrate that the transfer was the free and uninfluenced act of the grantor, upon full knowledge of all the circumstances connected with it and of its contents." *Figgins*, 403 Md. at 411 (cleaned up).

Fair And Reasonable Transfer

The gravamen of Angela's appeal is that the circuit court failed to assess the fairness and reasonableness of the transfer because it failed to conduct the proper analysis. She asserts that the court must consider certain factors in determining fairness and reasonableness, specifically six outlined by this court in *Midler v. Shapiro*, 33 Md. App. 264, 273–74 (1976). According to Angela, the circuit court made erroneous findings as to two of those factors, and "made no findings as to the other required factors, nor did it find the transfer was fair and reasonable." Angela also contends that an analysis of the *Midler* factors *could not* lead to a finding that the transaction was fair and reasonable. Jimmy counters that he successfully rebutted the presumption, that he only was carrying out the

estate plan that his father had envisioned and his mother understood, and that the transfer was fair and reasonable under the circumstances. We address these arguments below.

The Circuit Court's Finding

First, we consider Angela's contention that the circuit court did not find that the transfer was fair and reasonable. A finding that the transfer was fair and reasonable is a mixed question of fact and law. But if the circuit court failed to make such a finding, then its conclusion that Jimmy had rebutted the presumption of undue influence would be an error of law.

The circuit court laid out the burden as it understood it:

> Per Maryland law, in [*Upman v Clarke*], . . . with a power of attorney in an agent-principal relationship, the confidential relationship is presumed as a matter of law. Where there has been a gift transfer, whether *inter vivos* or testamentary, and a confidential relationship exists, and the gift has been challenged, there is a presumption against the validity of the gift.
>
> The burden then shifts to the donee to establish by clear and convincing evidence that there was no abuse of confidence. In the *Traettino* case at hand, under Maryland law, the transfer of the Fairmont property from Angela to Jimmy is presumed to be invalid. Jimmy now has the burden to establish that there was no abuse or undue influence. Jimmy must establish that the transaction was fair and reasonable. Per [*Upman v. Clarke*], Jimmy as the donee must establish that the transaction was the deliberate and voluntary act of Angela.

Although worded slightly differently, the circuit court's explanation of the burden approximates our understanding. But we question whether that court fully applied the standard in a manner consistent with Maryland caselaw, or whether it stopped short of it.

The trial court found that "the gift transfer of the deed, the property, Fairmont property from Angela to Jimmy was [the] deliberate and voluntary act of Angela." It continued, "[u]pon review of the whole transaction, there was no evidence of undue influence by Jimmy Traettino on Angela Traettino in the transfer of the Fairmont property. [Jimmy] has provided a full and fair explanation of the transaction."

Angela argues that the circuit court did not determine whether the transaction was "fair and reasonable," and we agree that those important words do not appear in its opinion. Rather, it said that Jimmy provided "a full and fair explanation of the transaction," a standard which harkens back to the lesser burden pronounced by the *Green* court in 1944. The circuit court's description of the burden suggests its awareness of the necessity for a finding on fairness and reasonableness. Yet, as we review the trial transcript, we glean that the parties did not focus at all on the question of fair and reasonable—the controversy centered on whether Angela understood the legal meaning of a deed, i.e., that she was giving up all rights to Fairmont and transferring it to Jimmy. Naturally, the trial court also focused on resolving that controversy, an issue that logically precedes the question of whether the gift transaction was fair and reasonable to Angela. The error in that decision is that it leaves unresolved the question of whether the gifts were fair and reasonable to Angela. *See, e.g., Upman*, 359 Md. at 42–43.

Whether the Transfer Was Fair And Reasonable

The Court of Special Appeals decision in *Midler* is instructive because it synthesizes earlier Maryland cases to arrive at six factors—listed below—which help determine

whether Jimmy produced sufficient evidence to rebut the presumption against validity of the gift.

We pause, though, to address Jimmy's preliminary arguments—first, that gifts differ from financial transactions and "donative intent does not require that gifting be fair and reasonable to the donor," and second, that for influence to be undue, it must be unlawful. The nature of the transfer—a gift—in no way relieves it from the protections provided to the weaker party in a confidential relationship. Maryland courts have "always watch[ed] with a jealous scrutiny" transfers of property between parties in a confidential relationship, *Zimmerman v. Bitner*, 79 Md. 115, 125 (1894), and where "trust and confidence are reposed on one side and influence and control are exercised on the other, a court of equity will interpose on the ground of public policy to prevent the weaker party from stripping [her]self of [her] property." *Williams v. Robinson*, 183 Md. 117, 119 (1944). If anything, the fact that the grantor, as the weaker party, is getting nothing in return only heightens the need for these public policy protections.[11]

One of those protections is against undue influence, and—contrary to Jimmy's assertion—undue influence does not mean unlawful in regard to *inter vivos* gifts. Jimmy misses the distinction between *inter vivos* and testamentary transfers, as "the undue

[11] In recent years, Maryland has rightfully taken a greater interest in these protections. Maryland Code (2002, 2012 Repl. Vol.), § 8-801 of the Criminal Law Article, prohibits the financial exploitation of vulnerable adults, and was amended in 2009 to prohibit the financial exploitation of individuals who are at least 68 years old. *See Molina v. State*, 244 Md. App. 67, 84 (2019). As the sponsor of the House bill amending the statute wrote in 2009, "[t]he financial exploitation of the elderly is a significant problem and perhaps the fastest-growing crime in the nation." *Id.*

influence *which will avoid a will* must be an unlawful influence . . . ." *Zook v. Pesce*, 438 Md. 232, 249 (2014) (emphasis added). The Court of Appeals, in *Upman*, explained the reason for the different rules. *See supra* pp. 11–12.

Midler Analysis

In *Midler* we set forth six clear factors for a court determine whether a non-dominant donor's gift to the dominant person in a confidential relationship is fair and reasonable:

> Some of the factors the Court must consider in determining whether the 'heavy burden' of demonstrating 'fairness' and 'reasonableness' has been met are:
> (1) the voluntariness of the act, *Sanders*, 261 Md. at 277;
> (2) the stripping of the donor of his or her assets vis-à-vis the incidence of control retained by the donor, *id.*;
> (3) the motive of the person in whom the confidence was reposed, *Rice*, 222 Md. at 239;
> (4) the degree to which the donor heeded the advice of the person possessed of the donor's confidence, *id.*;
> (5) whether the donor acted upon independent advice, *id.* at 240; *Williams*, 183 Md. at 121–22; and
> (6) the comprehension of the donor of what he or she was doing. *Id.* at 122.

Midler, 33 Md. App. at 273–74 (cleaned up).

First Midler Factor—Voluntariness

The factor of whether the transaction was voluntary stems from *Sanders*, where the Court found that "there was not even a suggestion" that the weaker party's actions were not completely voluntary. *Sanders*, 261 Md. at 277. Here, the circuit court found that the transfer was the "deliberate and voluntary act of Angela." The court came to this conclusion largely because it found Jimmy—but not Angela—credible, noting that portions of Angela's testimony were contradicted "by almost every witness that testified."

As the record reveals no basis to believe that the court's credibility findings are clearly erroneous, we will not set them aside.[12] *Cane*, 450 Md. at 613. This factor must be viewed in favor of validating the gift.

Second Midler Factor—Stripping Of Assets And Control

The second factor is "the stripping of the donor of her assets vis-à-vis the incidence of control retained by the donor." *Midler*, 33 Md. App. at 273–74 (cleaned up). The *Midler* court again cited *Sanders*, where the weaker party made his son the joint owner of a savings account. The father did not completely strip himself of his assets, the court noted, because he "retained a considerable measure of control, including the right to revoke the arrangement." *Sanders*, 261 Md. at 277. Here, Angela was stripped of her most valuable asset, with no measure of control to revoke the transfer. Transferring the Fairmont, with an estimated value around $4 million dollars at the time of the transfer, in conjunction with the Cordell and Del Ray properties, reduced Angela's estate by at least $5.8 million dollars, over half of her $11 million estate. This contrasts sharply with *Rice*, 222 Md. at 241, in which the grantor "did not deprive herself of a penny of income during her life, and she retained a complete power of disposition over the property during her life." Angela lost

[12] Ironically, despite the trial court's finding regarding Jimmy's lack of undue influence, it also found that—in bringing this lawsuit—Angela was influenced by her daughter, Janet. As Angela has no doubt been susceptible to influence from two of her children, it is fair to say that more than a suggestion exists that her actions in signing the deed to Fairmont (and the deeds to her other children two days later) may not have truly been voluntary. *See Sanders*, 261 Md. at 277.

rental income of $252,000 annually from the Fairmont and Cordell properties, receiving instead an illusory promise of consulting fees.[13] But that is not all.

Of equal importance, this was not the last of the transfers to her children that Jimmy planned Angela would make. As Jimmy explained, he planned to purchase other properties, using her liquid assets, to give to his siblings to "level out" the gift of Fairmont to him.[14] These other transactions are material because, when assessing this factor, we do not just look at the assets involved in the transaction, but also the donor's entire estate. *See Midler*, 33 Md. App. at 275; *Sanders*, 261 Md. at 277; *Rice*, 222 Md. at 241. According to Jimmy and Penan, after the transaction Angela was left with about $5 million in assets. But under Jimmy's plan, Angela would not retain this amount—she needed to use it to purchase other properties for Jimmy's siblings "to level out" the gifts.[15] With Fairmont valued at $4 million (or more) (to Jimmy), Cordell valued at $1 million (to John), and Del Ray valued at less than $1 million (to Janet), Angela would need at least $6 million to level out the gifts—more than she possessed. Thus, it is fair to say that Jimmy's plan was

[13] We call these fees illusory because there was nothing in writing to establish either consulting fee. Angela's lack of control over the Fairmont consulting fee became clear when Jimmy refused to pay the consulting fee immediately after this lawsuit commenced. This followed John's failure to pay the Cordell fee, apparently because there were property expenses he had to pay, and the consulting fee was 100% of the rental he received from the third-party tenant of that property.

[14] Presumably, these future gifts were consistent with Angela's intent to divide her assets equally among her children as stated in the wills she and Luigi executed.

[15] In its opinion, the trial court recognized this, saying Jimmy "contends that he fully intended to use Angela's money to purchase additional commercial properties to be gifted to his siblings to level out the values of the properties gifted by Angela to each of them."

focused on securing his ownership of the Fairmont, and potential estate tax savings, with little or no consideration of Angela's financial well-being after the transfers were completed.

Indeed, Penan testified that he was never "asked to do an analysis of Angela's financial needs over time, before this plan was put in place." Nor was any such analysis done by Bromberg, the family attorney. Nor did Jimmy analyze Angela's financial needs except to plan that Positano would pay for costs of her Medicare supplemental insurance, and she would buy a condominium near the restaurant as her primary residence, so that she could walk to Positano every day. (Jimmy acknowledged that she was not welcome after the litigation began—saying, "it's better that she not enter the property.")

Angela's financial needs are material to an analysis of what is fair and reasonable in a transaction involving a gift to the dominant person in a confidential relationship. Analysis of this factor requires consideration of her standard of living before and after the transfers. It also requires analysis of what her needs will be as she gets older and can no longer live alone. She might decide to reside at an assisted-living facility, and given her pre-gift standard of living, she is entitled to expect a high-end residence.[16] Her loss of the $252,000 dollars of annual rental income will surely have a significant effect on her standard of living. Jimmy testified that Angela "started panicking" when she learned that John could not afford to pay her $7,000 per month from the Cordell property, and quoted her as saying "I need my rent money." Relying on Jimmy's testimony alone, it is fair to

[16] Or, she might need round-the-clock care in her home at some point.

say that Angela strongly felt that she needed the income from the real estate she gave away. Jimmy offered nothing, however, to show how Angela's financial position would be impacted by the further substantial gifts, and there is no indication in the court's opinion that it considered this important factor.

In all, the record shows that Jimmy's plan was to strip her of ownership and control over her assets without meaningful consideration of her financial welfare for the remainder of her life. This factor weighs strongly against validating the gift to Jimmy.

Third Midler Factor—Jimmy's Motive

The third *Midler* factor is Jimmy's motive. *See id.* at 273–74; *Rice*, 222 Md. at 239. A confidential relationship *requires the parties to abstain from all selfish projects*." *Vocci v. Ambrosetti*, 201 Md. 475, 485 (1953) (emphasis in original). Angela argues that her son was self-interested. It is probably evident from our discussion above that we agree.

Jimmy's defense and justification for his actions is three-fold. According to him, he was: fulfilling his father's wishes,[17] preparing the estate to avoid any eventual estate

[17] Jimmy relies on a 2012 letter as the blueprint for his actions. *See infra*, p. 32. He contends that his parents' subsequent 2013 wills do not contradict the letter. The contents of the letter, however, and the sale of the St. Elmo and Virginia properties, suggest otherwise. *Id.*

tax,[18] and completing a transaction his mother agreed to. During trial, however, Jimmy also admitted to self-interested motivations.

He wanted to ensure that Positano—the restaurant owned by him—would not be evicted. Jimmy expressed his fear that either his mother, or his siblings if they ended up co-owning the Fairmont with him, would sell the building, ending his restaurant's below-market-rate tenancy. No reasonable inference can be drawn that Jimmy's desire to own Fairmont and protect against its sale by his mother or siblings was not, by definition, a self-interested motive.

We are not persuaded by Jimmy's argument that he was fulfilling his father's wishes. Whatever Luigi's desire for the Fairmont was, it no longer controlled after his death. By operation of law, the building became Angela's, and so the gifting of it was subject to the rules governing confidential relationships. Jimmy's feeling that the largesse to him was justified because of his father's wishes may shed some positive light on his character, but does not change the legal analysis of the transaction. Even assuming that Jimmy's motives were mixed—part self-interest and part carrying out his father's wishes, the same analysis applies in evaluating gifts in a confidential relationship.

[18] Jimmy contends that the transfers were to reduce any potential estate tax burden on his mother's eventual estate. When Luigi died, Angela inherited an estate with a total value near $11 million, which—according to Jimmy—was the ceiling for estate tax exemption. He claims that the transfers needed to happen soon after Luigi's death because Montgomery County was going to re-assess the properties' values in January 2017, and by transferring them before February 2017, the family could use the lower 2016 valuation in determining "the extent to which the transfers used up Angela's $11 million lifetime federal estate tax exemption."

The third *Midler* factor weighs against validating the gifts.

Fourth Midler Factor—Angela's Reliance

There is no dispute that Angela heeded Jimmy's advice. Jimmy testified that he talked to her about this plan during their daily lunches over the six months after his father's death. The circuit court found that Jimmy was executing "his estate plan which resulted in his ownership of the most valuable asset in Angela's estate." The evidence is clear that had Jimmy not influenced his mother to execute this plan, Fairmont would still be hers today. A weighty consideration for us is that the Fairmont and other transfers all occurred within seven months of Luigi's death—certainly well within a normal mourning period, and that Angela had relied heavily on Luigi for all things financial. Thus, the fourth *Midler* factor, "the degree to which the donor heeded the advice of the person possessed of the donor's confidence," clearly weighs towards invalidation of the gift. *Id.* at 273–74.

Fifth Midler Factor—Independent Advice

A review of Maryland caselaw illustrates that although independent advice is not a prerequisite to rebutting the presumption, its presence or lack thereof weighs heavily in the determination. In *Colburn v. Ellers*, 160 Md. 104 (1931), a father who retained a life estate in his home deeded the remainder to one of his children, with whom he was in a confidential relationship. His other children challenged the transfer. The Court of Appeals held that the donee child had rebutted the presumption of undue influence because the deed was drafted by an attorney and was executed after independent advice. *Id.* at 113. Similarly, in *Belote v. Brown*, 193 Md. 114 (1949), a mother who retained a life estate in her home

transferred the remainder to her tenants in the basement apartment. The Court assumed that a confidential relationship existed between the parties, and again concluded that the donee had rebutted the presumption because the donor had the benefit of independent advice. *Id.* at 129. Likewise, in *Rice*, a sister gifted a property to her brother, with whom the Court assumed she was in a confidential relationship. After the sister's death, her nephew and two grand-nephews challenged the transfer. *Rice*, 222 Md. at 236. The Court held that the brother rebutted the presumption of undue influence:

> There is no evidence to indicate that she sought the advice of [the family lawyer] at [the brother's] suggestion. She went to him on several occasions by herself, and never mentioned that she had even discussed the matter with [her brother].

Id. at 239–40.

Conversely, in *Gaggers v. Gibson*, 180 Md. 609 (1942), after a daughter had assumed control of his finances, an 87-year-old father deeded the family home to his daughter's husband in return for payment of an existing bank debt in an amount less than one-fourth of the property's value. The father's other children challenged the deed. The Court determined that a confidential relationship existed between the father and daughter, and that the daughter had not rebutted the presumption in part because the father did not receive competent and independent advice. *Id.* at 614.

Other states have similarly determined that the presence of independent advice is a critical factor. *See, e.g., Gaeth v. Newman*, 199 N.W.2d 396, 402 (Neb. 1972) ("One of the most important elements considered by the courts in determining whether a presumption of undue influence has been rebutted is whether the grantor has received

independent advice . . . ."). While not a prerequisite for rebutting the presumption— it is prime among evidence to consider in the factual determination. *See Matter of Estate of Carano*, 868 P.2d 699, 707 (Okla. 1994) ("A primary consideration on the validity of a gift made under a confidential relationship is whether the donor had the benefit of independent advice before making the gift."); *Richmond v. Christian*, 555 S.W.2d 105, 107 (Tenn. 1977) (holding that independent advice is not essential in every case, but in this case the presumption could not be rebutted without it); *Brown v. Canadian Industrial Alcohol Co.*, 289 P. 613, 614 (Cal. 1930) ("The absence of independent advice is a circumstance to be considered . . . ."); *Cleary v. Cleary*, 692 N.E.2d 955, 959 (Mass. 1998) ("This burden is generally met if the fiduciary shows that his principal made the bequest with full knowledge and intent, or with the advice of independent legal counsel." (cleaned up)).

Proper independent advice "means that the alleged victim had the benefit of a full and private conference with someone who could give competent advice and was disassociated from any gain or loss by the transaction." 28 *Williston on Contracts* § 71:59 (4th ed., 2020 Update). Independent advice includes an evaluation of how the proposed transaction would affect the donor's estate, and therefore standard of living, after the transaction. *See Gaggers*, 180 Md. at 614 (no one advised donor that there were alternatives to conveying his home to his daughter's fiancé); *Colburn*, 160 Md. at 108–09 (father transferring his only substantial asset, his house, to his daughter was properly advised by the attorney preparing the deed to retain a life estate so he had somewhere to live).

Here, the family attorney, Bromberg, could not testify with certainty that he met with Angela privately before the Fairmont transfer.[19] Moreover, his testimony makes clear that—in his scant discussions with Angela regarding the transfer—he simply explained she was deeding the Fairmont, rather than giving her any alternative scenarios, or suggesting that she consult a financial advisor, or even consider her income and expenses after that and other gifts were completed.[20]

Penan did not advise Angela either. He testified that the only time he met Angela was at their initial interview meeting, where Angela told him, "Jimmy speaks for me." Penan took that to mean he should deal directly with Jimmy, and not Angela. We could find no evidence in the record that he gave Angela advice regarding the transactions. Even if he had, Penan's ongoing relationship with Jimmy and Positano, and the lack of any relationship with Angela, would render any advice inadequate to satisfy *Midler's* independent advice criteria.

Penan testified that the distribution of the Fairmont to Jimmy was decided and instructed by Jimmy. Jimmy points to no evidence that Angela met with any professional besides Bromberg and Penan. The situation is akin to *Gaggers*, as Angela had "no advice

[19] Angela testified that Bromberg did not privately meet with her before the Fairmont transfer. But given the trial court's ruling, we do not rely on this testimony in our decision.

[20] We do not address whether Bromberg could have given Angela "independent advice" within the meaning of *Midler,* considering his multiple roles as attorney for Jimmy, Positano and Angela.

from any source which would enable [her] to understand the full force and effect of [her] act." *Gaggers*, 180 Md. at 613–14.

For these reasons we conclude that the fifth and heavily weighted *Midler* factor weighs against rebutting the presumption of undue influence.

Sixth Midler Factor—Angela's Comprehension

The final factor to consider is Angela's comprehension of what she was doing. *See Midler*, 33 Md. App. at 274. This factor overlaps with the first factor. The circuit court found that the transfer was the "deliberate and voluntary act of Angela." We accept that finding and interpret it to mean that at the time she signed the deed to Fairmont, and the deeds to Cordell, and Del Ray, Angela knew that a deed meant she was giving the properties to her respective children, and she wanted to do so. It does not mean, however, that she understood the full financial ramifications for her personally. *See Gaggers*, 180 Md. at 614 (deed rescinded when father "had no advice from any source which would enable him to understand the full force and effect of his act.").

Integrated Assessment of Factors

Angela's lack of independent advice weighs heavily, although it may not alone be the deciding factor. *See* 28 *Williston on Contracts* § 71:59. The disproportionately large benefit to Jimmy from receiving Fairmont free of debt renders not feasible the plan to "level out" gifts to John and Janet, without stripping Angela of her assets. Jimmy simply did not present enough evidence about what her costs of living were, or what they would reasonably be expected to be, and how she could pay those costs after the other gifts to

"level out" what the other children received. The evidence indisputably shows that Jimmy was focused first and foremost on gaining control of the Fairmont so that his restaurant business would be protected, and then on estate tax planning. Consideration of his mother's financial circumstances after the execution of his overall plan was just not part of his thinking. He said that he would pay his mother consulting fees, but never put that in writing, and immediately repudiated that promise when she challenged the transaction.

Midler factors two, three, and four—combined with the weighty fifth factor, independent advice—convince us that Jimmy failed to produce sufficient evidence to meet his burden to show that this transaction was fair and reasonable. We shall hold, therefore, that Jimmy did not rebut the presumption of undue influence, and so we reverse as to Question 1. We decline to remand for further hearings on the issue. Normally a litigant does not receive an inequitable second bite of the apple to prove his or her case.

2. Maryland Securities Act Claim

Angela next asks us to review whether the court erred in finding that Jimmy did not violate the Maryland Securities Act. Angela alleged that Jimmy violated Maryland Code (1975, Repl. Vol. 2014), § 11-703 of the Corporations and Associations Article[21]—that he committed fraud as an investment advisor. The court granted Jimmy's motion for judgment, finding that he was not an investment advisor under § 11-101(i)(1), and therefore

[21] All statutes in this section come from the Corporations and Associations Article.

§ 11-703 was not applicable. Angela contends that the court erred in interpreting § 11-101(i)(1), and based on its plain language, Jimmy was acting as an investment advisor.

In reviewing a Rule 2-519 motion for judgment, we assume "the truth of all credible evidence on the issue, and all fairly deducible inferences therefrom, in the light most favorable to the party against whom the motion is made." *Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 235 (2005). We will affirm the grant of the motion for judgment only if we "conclude that there was insufficient evidence to create a jury question." *Wilbur v. Suter*, 126 Md. App. 518, 528 (1999).

Section 11-703 "creates a cause of action against persons acting as investment advisors or investment representatives for . . . fraud."[22] *Mathews v. Cassidy Turley Maryland, Inc.*, 435 Md. 584, 601 (2013). Section 11-101(i)(1)(ii) defines an "investment advisor" as a person who, for compensation:

> 1. Provides or offers to provide, directly or indirectly, financial and investment counseling or advice, on a group or individual basis;
>
> 2. Gathers information relating to investments, establishes financial goals and objectives, processes and analyzes the information gathered, and recommends a financial plan; or
>
> 3. Holds out as an investment adviser in any way, including indicating by advertisement, card, or letterhead, or in any other manner indicates that the person is, a financial or investment "planner", "counselor", "consultant", or any other similar type of adviser or consultant.

[22] Angela does not argue that Jimmy was acting as an investment representative.

Jimmy invested a quarter-million dollars of his mother's money into the stock market without telling her, and paid himself a fee to do so. Viewing that evidence in a light most favorable to Angela, Jimmy's actions still do not make him an investment advisor under § 11-101(i)(1). Jimmy did not: 'provide or offer' any advice, 'recommend a financial plan, or hold himself out as a financial adviser. Angela has assailed Jimmy's *lack of communication* regarding his investing of her money, rather than claim he gave her bad investment advice. She presents no caselaw supporting her contradictory interpretation of the statute, and we are unable to find any. We therefore conclude that there was insufficient evidence to create a jury question, and affirm the trial court's grant of judgment on Count 13.

3. Quantum Meruit

Next, we come to Jimmy's counter-claim award in *quantum meruit* of $50,000. Jimmy filed this claim contingent on Angela prevailing on Counts 3 or 4 of her complaint: misappropriation and unjust enrichment, respectively. Angela prevailed on both counts.[23] The trial court—after hearing testimony from Jimmy and Angela about Jimmy's work on behalf of his mother—found that Jimmy's work merited compensation of $50,000.[24]

Angela argues that this award was in error because: (1) she did not authorize Jimmy to perform the work he claims he performed, nor to pay himself for it; (2) Jimmy did not keep records of his time spent on the work; and (3) Jimmy paid himself $147,500 without the authorization of his mother while in a confidential relationship. Jimmy counters that the award was supported by the evidence.

"*Quantum meruit* is "a measure of recovery available in an action for contract implied-in-fact or for unjust enrichment." *Dolan v. McQuaide*, 215 Md. App. 24, 37–38 (2013). Dobbs' Law of Remedies explains:

> [*Quantum meruit* is a] count used where plaintiff has performed services for defendant. As in many common count cases, the services may be performed at defendant's request, so that an implied in fact contract might be found. However, services might be performed without the request of defendant, but which nevertheless benefitted him in some way.

[23] Angela was awarded a combined $371,000 for prevailing on Counts 3 and 4. That amount was subsequently lowered to $197,500 based on post-trial motions.

[24] The court reached this number after hearing testimony regarding comparable charges for professional brokers and property managers, and valuing 1,000 hours of Jimmy's work at $50 per hour.

1 Dan B. Dobbs, *Law of Remedies* § 4.2, at 394 (3rd. ed. 2018).

Jimmy put in many hours managing his mother's affairs. He testified that his mother told him to pay himself for those efforts, while Angela testified that she did not. This is a question of fact, and we are mindful that the trial court, who observed both parties on the witness stand, found Jimmy's testimony—but not Angela's—credible. The record, therefore, does not reflect that this award was clearly erroneous. We affirm Jimmy's *quantum meruit* award.

4. – 8. Jimmy's Cross-Appeal

The heart of Jimmy's cross-appeal is intent. He asserts that the motivation behind all of his actions was to carry out his parents' donative intent.[25] To that end, Jimmy presents us with three issues (in five questions), all surrounding potential evidence of intent, whether it be his, Angela's, or Luigi's. This evidence was not allowed at trial for various reasons that Jimmy contends were either errors or abuses of discretion.

Jimmy's first three questions relate to the trial court's refusal to allow testimony by Jeffrey R. Renner, Esq., an attorney with whom Luigi met once—on September 15, 2015—to discuss estate planning. Jimmy attended the meeting; Angela did not. Jimmy sought to use evidence about this meeting, including Renner's notes, to corroborate his testimony that Luigi's plan was that he would receive Fairmont via an *inter vivos* gift. His first two questions relate to a discovery deposition of Renner, and his third is about a trial subpoena.

[25] This contention is at odds with Jimmy's refusal to return Fairmont to Angela when she requested it.

A motions judge and the trial judge refused to allow discovery of or testimony by Renner—or use of his notes about the meeting—on the grounds that they were protected by the attorney-client privilege. Jimmy challenges these rulings, claiming that any privilege was waived because the Traettinos' financial advisor attended the meeting. We do not reach the question about attorney-client privilege because we conclude that neither the outcome of the trial or this appeal would have been different had the Renner evidence been admitted. We explain.

The trial court found, and we defer to its finding that, at time Angela signed the Fairmont and other deeds, it was her intent to do so. The court also, in accepting John and Jimmy's testimony about the January 3 meeting, implicitly found that Jimmy intended to carry out Luigi's plan, and we defer to that finding. This means, that even without Renner's corroborating testimony that Luigi planned to give Jimmy Fairmont to achieve estate tax savings, the trial court adopted Jimmy's testimony to the same effect. Even taking that into account, however, does not mean that the gift to Jimmy, which is presumed invalid because of his confidential relationship, should be sustained. As explained above, when all is said and done, the gift to Jimmy, followed by the initial gifts to Janet and John, and the future intended gifts to "level out" Fairmont, leaves Angela in a vulnerable financial position. Jimmy failed to prove that the conveyances were fair and reasonable to Angela.

Jimmy's fourth question in his cross-appeal relates to a letter signed by Luigi and Angela in 2012, discussed at length but not admitted at trial. In said letter, Angela and Luigi signaled that, when they passed away, it was their wish that: Fairmont go to Jimmy;

the Del Ray home, and a commercial property they owned on St. Elmo Avenue go to Janet; and the Cordell, plus a farm they owned in Virginia go to John. The St. Elmo and Virginia properties, however, were sold in 2013 and 2015, respectively. (The proceeds of those sales were used to pay off the mortgage on the Fairmont and for loans to the children.) Jimmy contends that the trial court erred in refusing to admit this letter because there was "a direct link between the [letter] and the [2017 gifts]," in that the letter clarified Angela's intent in making the gifts. Jimmy acknowledges in his brief, however, that during trial, the letter was "the subject of extensive oral testimony," and that "it would appear that the trial court's refusal to admit the 2012 document did not prejudice the defense, and was therefore harmless error." We do not see error, and also agree that any error would be harmless for Jimmy's reason as well as the reasons explained above regarding his other cross-appeal points.

In Jimmy's last cross-appeal question, he complains that the trial court granted Angela's motion *in limine* precluding testimony of Suzanne Medicus, CPA, on grounds of the accountant-client privilege. *See* Md. Code (1974, 2013 Repl. Vol.), § 9-110 of the Courts & Judicial Proceedings Article. The anticipated testimony of Medicus was that: Jimmy was to receive Fairmont, Jimmy and Luigi were looking to acquire Bethesda property after the Virginia farm was sold, and Angela seemed to understand what she was signing. Jimmy argues that the statutory privilege should be limited to matters the CPA was told in confidence, not all communications. We hold that granting this motion was within the discretion of the trial court because the subject matter of these communications

was clearly confidential in nature. We also hold that any error was harmless for the same grounds explained above with respect to Mr. Renner's testimony.

CONCLUSION

Regarding Question 1, we hold that the circuit court erred by upholding the no-consideration transfer of the Fairmont from Angela Traettino to Jimmy Traettino. We reverse and remand with instructions to the circuit court that it afford equitable relief to Angela consistent with our holding herein, such as an order rescinding the transaction and constructive trust. As to Questions 2 and 3, as well as the Cross-Appeal, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS REVERSED IN PART AND AFFIRMED IN PART, AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID ¾ BY APPELLEE AND ¼ BY APPELLANT.