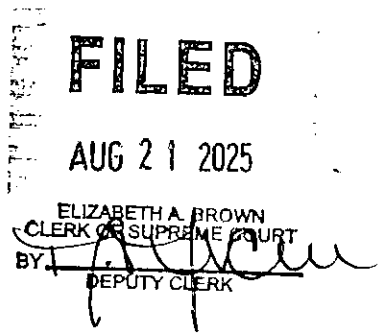
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MICHAEL A. GUTIERREZ, DECEASED

TODD ANTHONY GUTIERREZ; AND HEATHER KAY SELL,
Appellants,
vs.
TAMMY LYN GUTIERREZ,
Respondent.

No. 88504-COA



ORDER OF AFFIRMANCE

Todd Anthony Gutierrez (Todd) and Heather Kay Sell (Heather) appeal a district court order adopting a probate commissioner's report and recommendation following an evidentiary hearing challenging a will and real property transfer. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Days before dying at age 62, Michael Gutierrez (Michael) executed a will and quitclaim deed disinheriting his two adult children, Todd and Heather, and bequeathing the entirety of his estate to his long-term romantic partner, respondent Tammy Lyn Gutierrez (Tammy). Tammy maintains that Michael, aware that time was running short due to advanced cancer, gave her his debit card and instructed her to hire an attorney to draft a will and a quitclaim deed for his house. Tammy then contacted Theodore Medlyn, Esq., and Medlyn agreed to come to the hospital the next day to assist Michael with the dispositive provisions of each instrument.

Medlyn came with the will and quitclaim deed almost completely drafted, and Michael needed only to provide his assent to the dispositive provisions. Medlyn also brought a sheet along with him containing the letters of the alphabet and simple pictures to help him communicate with Michael, as the cancer had affected Michael's ability to speak audibly or intelligibly.

The appointment lasted approximately one hour, and during the meeting, Medlyn communicated with Michael to ascertain his testamentary goals, and he prevented Tammy and other family members from helping Michael communicate and from making suggestions about the documents. Michael expressed his desires and hand-signed the documents, which were notarized, and Medlyn filed the will and quitclaim deed with the district court clerk and county recorder, respectively.

Michael died within a week of executing the will and quitclaim deed. Years of litigation relating to the administration of Michael's estate ensued after Todd and Heather filed a contest to the will and quitclaim deed. They argued that both should be found void because Tammy and Medlyn materially assisted with the dispositive provisions of the will and quitclaim deed, and thus the documents were the product of fraud, duress, or undue influence pursuant to NRS 155.097(1)-(2).

Following motion practice and discovery, a two-day evidentiary hearing was held before the probate commissioner. Todd and Heather called Dr. Lisa Conners, a neurologist who observed Michael on the morning of the appointment with Medlyn. Dr. Conners testified that earlier that day, Michael was only able to answer two of the standard four orientation

questions, although hospital records did not indicate which two.[1] However, Dr. Conners was not retained as an expert and did not testify as to whether Michael had testamentary capacity at the time she examined him. Yet she opined that Michael lacked capacity to provide informed consent to medical treatment on that morning.

Tammy then called her retained expert, Dr. Gregory Brown, a forensic psychiatrist. Dr. Brown opined that testamentary capacity is a lower standard than capacity to provide medical consent, and that, in his opinion, Michael had testamentary capacity at the time the will and quitclaim deed were executed. He based this conclusion in part on his review of Michael's medical records, which went beyond the examination of Dr. Conners. For example, Michael had a perfect score on a cognitive test given by a nurse after Dr. Conners' exam but before Medlyn arrived. Dr. Brown also testified that he had reviewed Medlyn's deposition testimony regarding Michael's testamentary capacity which, when combined with the medical records, supported his conclusion that Michael possessed testamentary capacity.

Todd and Heather resumed their case-in-chief and called Tammy, who described how Michael provided her with his debit card and instructed her to hire a lawyer. She testified that she used his debit card to pay Medlyn's firm, Bowen Law Offices, but did not recall who provided Medlyn with the information needed to draft the operative provisions of the will and quitclaim deed.

Todd and Heather rested, and Tammy moved for relief pursuant to NRCP 52(c). The probate commissioner denied the motion and

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[1]The questions are name, name of hospital, date and month, and reason why the patient was in the hospital.

found that Todd and Heather's evidence had created a rebuttable presumption that the drafting of the will and quitclaim deed was the product of fraud, duress, or undue influence pursuant to NRS 155.097. However, the commissioner also informed the parties that Tammy could rebut this presumption by clear and convincing evidence.

Tammy then called Medlyn, who testified about his time with Michael and his impression on Michael's capacity and mental state. He acknowledged that Michael had "diminished" capacity but was still able to communicate his desire to transfer all of his property to Tammy, leading him to believe he was capable of executing these documents. He further testified that he still considered Michael to be his client, as Michael repeatedly and adamantly communicated his desire to disinherit his children and leave everything to Tammy, his longtime partner. Medlyn also confirmed that Michael's mother and Tammy were in the room for the duration of the appointment, but that he did not let them assist Michael in any way, such as by spelling out words or helping him grasp the pen.

Tammy also recalled Dr. Brown, who testified that his conclusion as to Michael's testamentary capacity remained unchanged, and that Michael was able to assert his wishes. Dr. Brown acknowledged that someone with diminished capacity would be susceptible to undue influence, and acknowledged on cross-examination that someone in Michael's cognitive state would have a higher risk of being unduly influenced. Todd and Heather called Dr. Conners as a rebuttal witness, and she opined that Michael's perfect score on the cognitive test given by the nurse was of little value, as that test—the Glasgow Coma Scale—which tests eye-opening, verbal response, and motor response, is primarily used to determine if

someone is comatose as opposed to merely lethargic, so attaining a perfect score is relatively easy.

The parties each gave closing arguments, and the probate commissioner issued his report and recommendation (R&R) several weeks later. He found that Tammy rebutted the presumption of fraud, duress, or undue influence by clear and convincing evidence, thus the will and quitclaim deed should remain in effect and he accordingly recommended denial of Todd and Heather's contest. The district court affirmed and adopted the R&R in a written order. Todd and Heather appeal from that order, arguing that the probate commissioner erred in finding that Tammy rebutted the presumption of undue influence by clear and convincing evidence and in finding no attorney-client relationship between Tammy and Medlyn.

Undue influence

Todd and Heather argue that the probate commissioner made an erroneous finding because Tammy did not rebut the presumption of undue influence by clear and convincing evidence. Tammy responds that the probate commissioner properly weighed the evidence and made the appropriate conclusion. In probate matters, we defer to a district court's findings of fact and will not disturb them if they are supported by substantial evidence. *Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.3d 850, 856 (2008). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *In re Est. of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013). However, purely legal questions in probate matters are subject to de novo review. *Waldman*, 124 Nev. at 1129-30, 195 P.3d at 856.

NRS 155.097(1)-(2) creates a presumption that a transfer instrument, such as a will, is void due to fraud, duress, or undue influence if the transferee or a person who is "related to, affiliated with or subordinate to" the transferee materially assisted in drafting the dispositive provisions of the instrument. This presumption may be rebutted by proving that the transfer was not the product of fraud, duress, or undue influence by clear and convincing evidence. NRS 155.097(3). Clear and convincing evidence must produce proof that is

> so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.

In re Jane Tiffany Living Tr. 2001, 124 Nev. 74, 79, 177 P.3d 1060, 1063 (2008) (quoting *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995)). Whether a presumption has been rebutted is generally a question of fact. *See L. Offs. of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) (explaining that determining whether a presumption has been rebutted involves evaluating evidence and the facts and deciding whether the opposing party has met the applicable burden of proof); *see generally* NRS 47.180(1) ("A presumption . . . imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.").

Here, the probate commissioner heard two full days of testimony and issued an R&R with extensive findings of fact and conclusions of law. He addressed whether the transfer instruments were the product of fraud, duress, or undue influence under the applicable legal

standard for each. The commissioner found there was sufficient evidence in the record to raise the presumption of fraud, duress, or undue influence, yet it had been rebutted. He also determined, based on the facts and evidence, that Michael possessed testamentary capacity when he executed the will and quitclaim deed. In support of this conclusion, the probate commissioner found that Michael was able to identify his assets and express his clear intention to disinherit Todd and Heather.

Todd and Heather argue that they presented conflicting evidence with respect to fraud, duress, and undue influence and argue that a rebuttable presumption must remain in place when there is conflicting evidence in the record, citing *Todkill v. Todkill*, 88 Nev. 231, 237, 495 P.2d 629, 632 (1972). However, *Todkill* is inapposite, as that case involved a transfer of separate property from one spouse to another and held as a matter of common law that such transfers are presumed gifts that become the receiving spouse's separate property. *Id.* When there is conflicting evidence, the common law presumption of a gift remains. *Id.* at 237-38, 495 P.2d at 632. NRS 155.097(3), however, creates a statutory presumption of fraud, duress, or undue influence with respect to, for example, a will or quitclaim deed, that may be overcome by clear and convincing evidence.

While clear and convincing evidence is a high bar, it does not necessarily follow that there can never be conflicting evidence; rather, the mere presence of suspicions and doubts based on conflicting evidence are not grounds for disturbing a district court's findings when they are otherwise supported by substantial evidence. *Allen v. Webb*, 87 Nev. 261, 266, 485 P.2d 677, 679 (1971); *see also Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (noting that a district court abuses its discretion when it reaches a decision no reasonable judge would make under the same

circumstances). As the probate commissioner's factual findings were supported by the evidence produced at the evidentiary hearing, we defer to the district court and conclude that the commissioner did not abuse his discretion by recommending that Todd and Heather's contest to the will and quitclaim deed be denied. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

Attorney-client relationship

Todd and Heather argue that the probate commissioner erred in finding no attorney-client relationship between Tammy and Medlyn, as it was Tammy who signed the contract with Bowen Law Offices and it was Tammy who supplied Medlyn with the dispositive provisions of the will. They argue that the probate commissioner further erred by relying solely on Tammy's and Medlyn's testimony to conclude that Tammy rebutted the presumption of fraud, duress, or undue influence, as NRS 155.0975 prohibits the court from relying solely on the testimony of the transferee or a person "related to, affiliated with, or subordinate to" the transferee. If Medlyn was found to be Tammy's attorney, they argue that Medlyn's testimony could thus not be the basis for the commissioner's finding that the presumption was rebutted, as an attorney is one "related to, affiliated with, or subordinate to" Tammy.

The existence of an attorney-client relationship is a fact-specific inquiry. *Waid v. Eighth Jud. Dist. Ct.*, 121 Nev. 605, 611, 119 P.3d 1219, 1223 (2005). An attorney-client relationship may be implied when

> (1) a person seeks advice or assistance from an attorney,
> (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and

(3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.

Todd v. State, 113 Nev. 18, 24, 931 P.2d 721, 725 (1997) (quoting *DeVaux v. Am. Home Assurance Co.*, 444 N.E.2d 355, 357 (Mass. 1983)).

In finding that Medlyn represented Michael rather than Tammy, the probate commissioner made several factual findings relevant to each of the *Todd* factors. For example, he found that it was Michael who directed Tammy to find a lawyer to draft the transfer instruments, rather than Tammy seeking out an attorney of her own accord. *See Todd*, 113 Nev. at 24, 931 P.2d at 725 (explaining that the first step of forming in implied attorney-client relationship is the seeking of advice or assistance from an attorney).

The commissioner also found that Medlyn was hired specifically for the purpose of preparing a will and quitclaim deed. *See id.* (explaining that the second step of forming in implied attorney-client relationship is whether the advice or assistance being sought is within the realm of the attorney's professional competence).

It also appears that the commissioner found, at least implicitly, that Medlyn agreed to and actually provided the services sought by Michael. *See id.* (explaining that the final step in forming an implied attorney-client relationship is satisfied when the attorney provides the services or assistance requested by the client). For example, he found that Medlyn gave uncontroverted testimony that he considered Michael to be his client, and that there was no evidence presented that Bowen Law Offices or Medlyn represented Tammy in any capacity.

Given that these findings are supported by substantial evidence, *see Ogawa*, 125 Nev. at 668, 221 P.3d at 704, we accordingly defer

to the probate commissioner's finding that Medlyn was not Tammy's attorney. Thus, he did not violate the prohibition of NRS 155.0975 by relying solely on the testimony of Tammy or Tammy's attorney, as he acted within his discretion in finding no attorney-client relationship between her and Medlyn.[2] Thus, the district court did not err in adopting the probate commissioner's R&R. We conclude Todd and Heather's arguments are unpersuasive and decline to grant them relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Gloria Sturman, District Judge
Andersen & Broyles, LLP
Bowen Law Offices
Barron & Pruitt, LLP
Eighth District Court Clerk

[2]We note that the probate commissioner demonstrated that he did not rely solely on Medlyn's and Tammy's testimony in reaching his conclusion that Tammy successfully rebutted the presumption of fraud, duress, or undue influence by explaining that he considered the expert testimony of Dr. Brown as well in reaching this decision.